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ARTICLE

A FOOL'S ERRAND? LEGAL LEGACIES OF RECONSTRUCTION IN TWO SOUTHERN STATES

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I. INTRODUCTION

In 1879, Judge Albion Tourgée of North Carolina wrote a requiem for Reconstruction in the form of a novel, *A Fool's Errand*, which

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became a bestseller.[1] Tourgée gave his judgment of Reconstruction's legal legacy through one of the novel's secondary characters. This character describes the central character, Tourgée's alter ego, as follows:

> He . . . went in with us . . . to try and make this a free country accordin' to Northern notions. It was a grand idee; but there wa'n't material enough to build of, on hand here at that time. There was a good foundation laid, and some time it may be finished off; but not in my day, son,—not in my day.[2]

Was Tourgée's judgment accurate? The question is important because the years encompassing the Civil War and Reconstruction (1865–1877) were pivotal in shaping the modern American legal system.[3] Reconstruction was nothing less than a revolution; it was targeted primarily at restructuring racial relationships in the wake of emancipation, but it also contributed to significant changes in the white social hierarchy and in the Southern economy.[4] Law and legal change played a central role in Reconstruction at both the federal and state levels. New constitutions, statutes, and case law had to be developed to accommodate emancipation and the numerous economic problems which followed the Civil War. These tasks left a permanent imprint on Southern legal history.[5]

What exactly was that imprint? Was it the same in each state or did it vary from state to state? This Article makes a start at answering these questions by comparing two states, Texas and North Carolina. In addition to being at opposite geographic ends of the Confederacy, Texas and North Carolina were at opposite ends politically and eco-

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1. *See* ALBION W. TOURGÉE, A FOOL'S ERRAND, at vii, xvi–xvii (John Hope Franklin, ed., Harvard Univ. Press 1971) (1879). Tourgée, an Ohioan, served in the Union army and settled in North Carolina after the war. OTTO H. OLSEN, CARPETBAGGER'S CRUSADE: THE LIFE OF ALBION WINEGAR TOURGÉE 2 (1965). He quickly became a Republican leader in the state; he was an influential member of the state's 1868 constitutional convention and served as a state district judge from 1869 to 1875. *Id.* at 53. After Reconstruction, he had a successful career as a writer and lecturer; in his works he created a vivid portrait of Southern resistance to Reconstruction and criticized the Northern public for failing to provide the continuing support necessary to Reconstruction's success. *See id.* at 223–64; C. Vann Woodward, *Introduction* to OLSEN, *supra* at xiii–xiv. Tourgée also spent the remainder of his life promoting equal rights for blacks; he was one of the plaintiffs' counsel in *Plessy v. Ferguson*, 163 U.S. 537, 540 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954). OLSEN, *supra* at 328.

2. TOURGÉE, *supra* note 1, at 403.

3. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960, at vii–viii (1992) (suggesting that American legal history can be divided into three periods: the years up to 1860, the decade of 1860–1870, and the years since 1870).

4. *See, e.g.*, W.E. BURGHARDT DU BOIS, BLACK RECONSTRUCTION: AN ESSAY TOWARD A HISTORY OF THE PAST WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–1880 *passim* (1935); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at xix (1988).

5. *See infra* notes 47–348 and accompanying text.

nomically as well. At the beginning of the Civil War, North Carolina had a relatively mature and diversified social and economic system. Political power in the state was more or less balanced between the western, Union-leaning hill counties and the planter-dominated east.[6] By contrast, Texas was a society in flux. It was still sorting out the competing influences it had absorbed as a Spanish colony, a Mexican province, an independent republic, and an American state.[7] Texas's population was small but was growing rapidly due to immigration. Its economy was almost exclusively agricultural and depended heavily on cotton; North Carolina had a more diversified agriculture and was well ahead of Texas in developing an industrial base.[8] If pre-war legal, economic, and social differences among the Confederate states triggered different legal responses to the problems of Reconstruction, they should appear from a comparison of Texas and North Carolina.

This Article examines several legal aspects of Reconstruction. It first looks at how the Texas and North Carolina supreme courts helped mediate the transition from a pre-war to a post-war society. Were the courts composed of unconditional Unionists, Conservatives, or a mix?[9] Did they try to help the people of their states accept slav-

6. *See* WILLIAM S. POWELL, NORTH CAROLINA THROUGH FOUR CENTURIES 270–81 (1989).

7. *See* T. R. FEHRENBACH, LONE STAR: A HISTORY OF TEXAS AND THE TEXANS 152–73, 247–78 (1968).

8. *Id.* at 307, 419–20. *See* POWELL, *supra* note 6, at 285–90, 311–17; *see also* ALWYN BARR, RECONSTRUCTION TO REFORM: TEXAS POLITICS, 1876–1906, at 13 (1971) (stating that Texas, unlike its Midwestern neighbors, was dominated by a rural, pre-industrial economy).

9. Southerners did not divide into neat political categories either during or after the war. An extensive reading of the literature on Reconstruction suggests that they ranged along a broad spectrum that included the following principal categories: (1) Unreconstructed Conservatives who mourned the demise of the Confederacy and opposed all attempts to change the pre-war social and economic order. (2) Pragmatic Conservatives who favored making only the minimum social changes necessary to placate Northern public opinion, but who, in many cases, welcomed the post-war era as an opportunity to reform the South's economic system. Most of the members of this group actively supported secession, but the group included some Unionists who supported the Confederacy after efforts to prevent secession failed. (3) Moderate Unionists, most of whom passively opposed the Confederacy during the war. They disliked many of the social changes the war brought but had a somewhat broader view than pragmatic Conservatives had of what social change was acceptable; they often sided with the pragmatic Conservatives during Reconstruction. (4) A small group of "unconditional Unionists" who actively supported the Civil War amendments to the United States Constitution and other Reconstruction-era reforms after the war, partly out of conviction and partly because they believed their best hope of political success lay in trying to win elections through the votes of blacks and disaffected whites or, failing that, by obtaining federal patronage. Many Southerners moved back and forth between these categories as Reconstruction progressed. Works which provide insight into the classifications as they operated in the states at issue here are PAUL D. ESCOTT, MANY EXCELLENT PEOPLE: POWER AND PRIVILEGE IN NORTH CAROLINA, 1850–1900 (1985); JAMES MARTEN, TEXAS DIVIDED: LOYALTY AND DISSENT IN THE LONE STAR STATE 1856–1874 (1990); CARL H. MONEYHON, REPUBLICANISM IN RECONSTRUCTION TEXAS (1980); HORACE W. RAPER, WILLIAM W. HOLDEN: NORTH

ery's demise or did they aggravate the sting of defeat? A closely related issue is how Reconstruction lawmakers adjusted the legal rights of blacks following the abolition of slavery. Did they leave a permanent imprint on civil rights law or did they confirm Tourgée's judgment that Reconstruction was ultimately a "fool's errand"?[10]

The Article next examines state constitutional history, which is also necessary for a full understanding of Reconstruction's legal legacy. North Carolina's Reconstruction constitution encompassed not only racial reforms but also a variety of attempts to catch up with social and economic reforms enacted in other parts of the nation before the war.[11] Texas's Reconstruction constitution did the same, albeit to a lesser extent, because Texas had already adopted some of the social and economic reforms in question before the war.[12] Texas enacted a new constitution at the end of Reconstruction and North Carolina added extensive amendments to its constitution at the end of Reconstruction, but both states stopped far short of eradicating all Reconstruction-era constitutional reforms.[13]

The Article next examines the evolution of economic law in Texas and North Carolina during the Reconstruction era. Reconstruction had profound economic as well as political consequences for the South. A new agricultural labor system had to be developed to replace slavery.[14] Lawmakers had to arrange an orderly transition from the Confederate financial system back to the federal system and respond to problems arising out of the widespread poverty and debt created by the war.[15] By 1865, the Industrial Revolution was well underway in the North, and the Southern states had to decide whether to shape their legal systems to follow suit or to preserve their rural, agricultural pre-war character.[16] Lastly, the Article examines changes in married women's property rights law during Reconstruction. Many Southern women gained an "experience of self-sufficiency during the war [that] opened the door a crack to the 'strong-minded' women."[17] This fact, together with a desire to alleviate post-war economic distress by protecting family assets from creditors, led several ex-Confederate states, including North Carolina, to expand married women's property rights during Reconstruction. Other Confederate states, including Texas, had been leaders in the married women's property

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CAROLINA'S POLITICAL ENIGMA (James Sprunt Studies in History & Political Sci., No. 85, 1985); and CARL N. DEGLER, THE OTHER SOUTH: SOUTHERN DISSENTERS IN THE NINETEENTH CENTURY (1974).

10. *See supra* note 1.
11. *See infra* notes 160–67 and accompanying text.
12. *See infra* notes 168–71 and accompanying text.
13. *See infra* notes 152–89 and accompanying text.
14. *See infra* notes 233–52 and accompanying text.
15. *See infra* notes 58–67, 73–77, 190–232 and accompanying text.
16. *See infra* notes 253–312 and accompanying text.
17. ANNE FIROR SCOTT, THE SOUTHERN LADY: FROM PEDESTAL TO POLITICS 1830–1930, at 101 (1970).

rights movement before the war and therefore experienced less change in this area during Reconstruction.[18]

II. Reconstruction Courts as Mediators of the Adjustment to Post-War Life

Texas and North Carolina's pre-war cultures and the extent of pre-war nationalist sentiment in each state played a crucial role in determining the composition of their post-war supreme courts and the role that each court played in mediating the adjustment to Reconstruction. The Unionists who served on the post-war Texas court were acutely aware that they came from a small, embattled minority within the state. As a result, they defended Unionist ideals strongly and defiantly in many of their opinions, but their legacy did not long survive Reconstruction.[19] By contrast, the North Carolina Supreme Court underwent surprisingly little change during Reconstruction. Due to the state's strong pre-war Unionist tradition, the court's Unionist justices were respected by most North Carolinians, and the justices were adept at finding ways to persuade their fellow citizens to accept inevitable post-war changes while convincing them that the court had the state's best interests at heart.[20]

A. *"True to the Union": The Texas Restoration, Military, and Semicolon Courts*

Texas's early history was one of frontier warfare and life oriented to simple survival; as its supreme court recognized on at least one occasion, early Texas was "a world where the consciousness of war and killing was ever present."[21] This led many Texans to view groups with opposing views not as adversaries to be debated, but as enemies to be driven from the state. During the Civil War, this attitude extended to Unionists who were given a simple choice: silence or exile. As a result, at the end of the war there was no established leadership group or constituency which could serve as a base of support for post-war legal change.[22]

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18. *See infra* notes 332–48 and accompanying text.

19. *See infra* notes 21–32 and accompanying text.

20. *See infra* notes 33–46 and accompanying text.

21. Fehrenbach, *supra* note 7, at 487; *see also* English v. State, 35 Tex. 473, 478–80 (1871–1872) (explaining Texans' historical desire to carry weapons).

22. Fehrenbach, *supra* note 7, at 487; *see* Marten, *supra* note 9, at 12–13, 18–19, 65–66. Some Unionists were not even given those choices. One of the war's most notorious incidents in Texas occurred in 1862, when the state militia massacred a group of Germans as they fled toward Mexico to try to escape Confederate conscription laws. A monument honoring the victims as "Treue der Union" (True to the Union) was later erected in Fredericksburg, and "throughout the nineteenth century a certain bitterness, on both sides, did not entirely die." Fehrenbach, *supra* note 7, at 363–64.

The Texas Supreme Court went through no less than four metamorphoses during Reconstruction. Shortly after the collapse of the Confederacy in the spring of 1865, President Andrew Johnson removed the court's Confederate-era justices along with all other state officials.[23] Pursuant to Johnson's reconstruction program, in early 1866, voters adopted a "Restoration" constitution and elected five new supreme court justices, only one of whom was a Unionist.[24] The Restoration court served until 1867 when Congress overrode Johnson's reconstruction program with a more thoroughgoing program of its own.[25] Congress required the ex-Confederate states to grant black suffrage and adopt civil rights laws as a condition of readmission to representation in Congress; in the interim, it put the states under military administration. General Philip Sheridan, Texas's military commander, removed the Restoration Court members and replaced them with an appointed Military Court consisting of five new judges, all Unionists.[26]

In early 1868, Sheridan called a new constitutional convention which Texas Unionists hoped would produce a constitution sufficient

23. The three justices removed were Oran Roberts, who had served on the court since 1856 and had spearheaded the secession movement in 1861, Reuben A. Reeves, and George F. Moore. *See* 4 THE NEW HANDBOOK OF TEXAS 611–12 (Ron Tyler et al. eds., 1996) (Oran Milo Roberts); 5 *id.* at 508 (Reuben A. Reeves); 4 *id.* at 819 (George Fleming Moore).

24. *See* James R. Norvell, *Oran M. Roberts and the Semicolon Court*, 37 TEX. L. REV. 279, 280–81 (1959). As used here, the term "Unionist" refers to judges who actively opposed secession before the war and in 1861. Justice Moore was reelected to the court and was joined by Richard Coke, Stockton P. Donley, Asa H. Willie, and George W. Smith. *See id.* at 281. All of the Restoration justices were born in the South and had resided in Texas for most of their lives; all except Smith had favored secession and had served in the Confederate army. Roberts, Moore, and Willie rejoined the court at various points after the end of Reconstruction; Coke's election as governor in 1873 brought an end to Reconstruction in Texas. 2 THE NEW HANDBOOK OF TEXAS, *supra* note 23, at 193 (Richard Coke), 676 (Stockton P. Donley); 4 *id.* at 819 (George Fleming Moore); 5 *id.* at 611 (Oran Milo Roberts), 1098 (George Washington Smith); 6 *id.* at 995 (Asa Hoxie Willie).

25. Act of Mar. 23, 1867, ch. 30, 15 Stat. 14, 14; S.J. Res. 31, 40th Cong., 15 Stat. 29, 29 (1867); An Act to Provide for the More Efficient Government of the Rebel States, ch. 153, 14 Stat. 428, 428 (1867); An Act to Provide for the More Efficient Government of the Rebel States, ch. 6, 15 Stat. 2, 2 (1867).

26. *See* Norvell, *supra* note 24, at 280–82. The court's members were Andrew J. Hamilton, Amos Morrill, Livingston Lindsay, Albert Latimer, and Colbert Caldwell. *See* 3 THE NEW HANDBOOK OF TEXAS, *supra* note 23, at 427–28 (Andrew Jackson Hamilton); 4 *id.* at 842 (Amos Morrill); 4 *id.* at 204 (Livingston Lindsay); 4 *id.* at 102 (Albert Hamilton Latimer); 1 *id.* at 894 (Colbert Caldwell). Morrill was born in the North but moved to Texas in 1838, *see* 4 *id.* at 842 (Amos Morrill); all of the others were born in the South and had moved to Texas well before the war, *see* 3 *id.* at 427 (Andrew Jackson Hamilton); 4 *id.* at 204 (Livingston Lindsay); 4 *id.* at 102 (Albert Hamilton Latimer); 1 *id.* at 894 (Colbert Caldwell). Hamilton had left the state after secession, served as a Union general and had briefly served as the state's provisional governor at the beginning of Reconstruction. *See* 3 *id.* at 427–28 (Andrew Jackson Hamilton). Morrill later served as a federal district judge in Texas. *See* 4 *id.* at 842 (Amos Morrill).

to restore the state's representation in Congress.[27] In early 1869, the convention produced a constitution which created a supreme court of three judges; for the first time since 1850, the court was made appointive.[28] Edmund Davis, who was elected governor under the new constitution by a narrow margin, appointed a mix of unconditional and moderate Unionists to the new court,[29] which became known as the "Semicolon Court."[30] In the early 1870s, a loose coalition of Confederate sympathizers and moderates took shape as an opposition party. The coalition grew quickly, due in large part to heavy migration from other southern states to Texas, and in lesser part to defections by Unionists who, for various reasons, became unhappy with the Davis administration. In 1873, the coalition's candidate, Richard Coke, defeated Davis for reelection.[31] One of Coke's first acts as governor was to replace the Semicolon Court with a Redeemer Court of his own. Coke completed a historical cycle by naming Oran Roberts, the leading Confederate sympathizer on the pre-war court, as chief justice.[32]

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27. *See* MONEYHON, *supra* note 9, at 74–79.

28. *Compare* TEX. CONST. of 1869, art. V, § 2, *with* TEX. CONST. of 1845, art. IV, § 1 (1850).

29. Lemuel Evans served as chief justice; the associate justices were Wesley Ogden and Moses Walker. *See* 2 THE NEW HANDBOOK OF TEXAS, *supra* note 23, at 906 (Lemuel Dale Evans); 4 *id.* at 1115 (Wesley B. Ogden); 6 *id.* at 797 (Moses B. Walker). Evans was replaced in 1872 by J.D. McAdoo. *See* 4 *id.* at 361 (John David McAdoo). Evans and Ogden had moved to Texas in the 1840s, Evans from Tennessee and Ogden from New York. *See* 2 *id.* at 906 (Lemuel Dale Evans); 4 *id.* at 1115 (Wesley B. Ogden). Both were prominent pre-war Unionists who had left the state after secession. *See* 2 *id.* at 906 (Lemuel Dale Evans); 4 *id.* at 1115 (Wesley B. Ogden). Walker was an Ohio soldier and politician who was on military duty in Texas when he was appointed to the court. *See* 6 *id.* at 797 (Moses B. Walker). McAdoo moved to Texas from Tennessee in the 1850s and served in the Confederate army during the war. *See* 4 *id.* at 361 (John David McAdoo).

30. The Semicolon Court earned its name and ended its existence in dramatic fashion with the case of *Ex parte Rodriguez*, 39 Tex. 705 (1873). In 1873, Davis was defeated for reelection by Richard Coke, a Conservative. The 1869 Texas Constitution provided that all state elections "shall be held at the county seats of the several counties, until otherwise provided by law; and the polls shall be opened for four days . . . ." TEX. CONST. of 1869, art. III, § 6. Rodriguez, a Houston voter charged with fraudulent repeat voting in the election, asserted as a defense that the election was invalid because the law authorizing it stated that the polls were to be open only one day. The court decided the case on a point of grammar: it held that because the constitution employed a semicolon rather than a comma to separate the phrases "until otherwise provided by law" and "four days," the four-day requirement could not be modified by the legislature, and as a result, the election was invalid. *Rodriguez*, 39 Tex. at 773–74. Davis then attempted to retain the governor's office but backed down after President Grant made clear that the federal government would not support him. MONEYHON, *supra* note 9, at 191–94.

31. FEHRENBACH, *supra* note 7, at 429–32.

32. In addition to Roberts, William Ballinger and Thomas Devine were appointed to the court. *See* 4 THE NEW HANDBOOK OF TEXAS, *supra* note 23, at 611–12 (Oran Milo Roberts); 1 *id.* at 360 (William Pitt Ballinger); 2 *id.* at 613 (Thomas Jefferson Devine). Ballinger resigned and was succeeded by Peter W. Gray, *see* 3 *id.* at 294–95 (Peter W. Gray); Gray soon died and was succeeded by Reuben Reeves, *see* 5 *id.* at 508 (Reuben A. Reeves). All of the Redeemer justices supported secession and

B. *Resisting the "Horrors of Anarchy": Reconstruction and the North Carolina Supreme Court*

Unlike Texas, North Carolina's population included a large number of Unionists, most of whom stayed in the state after secession and became increasingly vocal as the war progressed.[33] North Carolina Unionism had deep roots. It drew its support from two main sources: the western hill counties, which had few blacks and little enthusiasm for slavery and had competed with the planter-dominated eastern counties for control of the state since the late 1700s; and a strong pre-war tradition of support for economic nationalism.[34] Economic Nationalists and Unionists had a strong presence in the North Carolina judiciary before the war and as a result, the North Carolina Supreme Court had less turnover during Reconstruction than most Southern states. At the beginning of the war, the court was composed of three judges: Richmond Pearson, William Battle, and Matthias Manly. All three opposed secession, albeit not openly; during the war, they gained favor with North Carolina Unionists, led by William W. Holden, and lost ground with ardent secessionists by liberally using habeas corpus to free war protesters and draftees.[35]

In 1865, Andrew Johnson named Holden provisional governor of the state with power to appoint a new court. Holden felt that Pearson and Battle were sufficiently close to his beliefs to merit reappointment; he appointed a new Unionist justice, Edwin Reade, in place of Manly.[36] During the first years of Reconstruction, the justices diverged. Pearson and Reade became Republicans, and Pearson went so far as to publicly endorse Ulysses Grant for election in 1868, arguing that active resistance to Reconstruction was against the state's

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served the Confederacy in either military or government posts and were hostile to Reconstruction. *See, e.g.*, 1 *id.* at 360 (William Pitt Ballinger); 2 *id.* at 613 (Thomas Jefferson Devine); 3 *id.* at 294–95 (Peter W. Gray); 5 *id.* at 508 (Reuben A. Reeves).

33. *See* ESCOTT, *supra* note 9, at 36–46.

34. *See* POWELL, *supra* note 6, at 267–68, 270–72.

35. *See* ESCOTT, *supra* note 9, at 44 (examining Justice Pearson's holding that a conscript law was unconstitutional); 1 DICTIONARY OF NORTH CAROLINA BIOGRAPHY 118 (William S. Powell ed., 1979) (William Horn Battle); 4 *id.* at 211 (Matthias Evans Manly); 5 *id.* at 49 (Richmond Mumford Pearson); POWELL, *supra* note 6, at 366–70.

36. RAPER, *supra* note 9, at 65. However, another authority suggests that the new justices were appointed by the legislature in late 1865. *See* J.G. DE ROULHAC HAMILTON, RECONSTRUCTION IN NORTH CAROLINA 132 (1906). Pearson, Battle, and Reade were all nationalist Whigs before the war and opposed secession. Reade served in the Confederate Senate during the war and vigorously opposed the Richmond government's centralizing efforts. *See* 1 DICTIONARY OF NORTH CAROLINA BIOGRAPHY, *supra* note 35, at 118 (William Horn Battle); 5 *id.* at 50 (Richmond Mumford Pearson); 5 *id.* at 183–84 (Edwin Godwin Reade).

long-term interest.[37] Battle eventually sided with opponents of Reconstruction.[38]

Under Congressional Reconstruction, North Carolina enacted a new constitution that increased the size of the supreme court to five and made the judiciary elective for the first time in the state's history.[39] The 1868 constitution extended suffrage to all adult males regardless of race; as a result, North Carolina remained a Republican state for the time being.[40] Pearson and Reade were elected to the new court without opposition. Two of the three new justices, Robert P. Dick and Thomas Settle, were staunch Unionists and Republicans; the third, William Rodman, was a moderate Democrat.[41]

Reconstruction lasted longer in North Carolina than in Texas. Conservatives took control of the North Carolina Legislature in 1870 and removed Holden from the governorship primarily because of his vigorous use of the state militia to suppress Ku Klux Klan violence in the state's central counties.[42] Holden's Republican successor won reelection in 1872, but the enactment of a series of amendments in 1875, which substantially changed the 1868 constitution,[43] and the defeat of Thomas Settle, who resigned from the court to become the Republican candidate for governor in 1876, marked the end of Reconstruction

37. Pearson's endorsement neatly summarized the sentiments of many moderate Unionists:

> Some gentlemen have said to me, "Rather than permit free negroes to vote and hold office, we are ready for another war." I tell them, "No." Let us have peace, the war nearly ruined us—another war will finish the job. Let us try to make the most of a bad bargain, and not make bad worse.

RAPER, *supra* note 9, at 109 (citation omitted). Pearson's endorsement of Grant prompted a large portion of the North Carolina Bar to sign a manifesto criticizing his action. The supreme court then took the extraordinary step of striking all of the signers from its rolls. After a short but tense period of confrontation, most of the signers backed down and stated they had meant no disrespect to the court as an institution. Pearson and his colleagues then gave them a written reprimand and readmitted them to practice. *See In re* Moore, 63 N.C. 397, 397–409 (1869).

38. *See* 1 DICTIONARY OF NORTH CAROLINA BIOGRAPHY, *supra* note 35, at 118 (William Horn Battle).

39. *See* N.C. CONST. of 1868, art. IV, § 21.

40. *Id.* at art. VI, § 1.

41. Dick was a moderate Democrat before the war; he supported secession after the fall of Fort Sumter but came to side with Holden later in the war. After the war, he became one of the founders of the North Carolina Republican party and supported the Civil War amendments. 2 DICTIONARY OF NORTH CAROLINA BIOGRAPHY, *supra* note 35, at 63 (Robert Paine Dick). Settle followed a similar political path; he was a magnet for controversy throughout his career, and according to one biographer, "the major part of his life was passed in opposition to the prevailing current of opinion." 5 *id.* at 316 (Thomas Settle, Jr.). Rodman was not politically active prior to his appointment to the court; he viewed himself as a moderate whose primary mission was to restrain the excesses of Reconstruction. 5 *id.* at 243–44 (William Blount Rodman).

42. POWELL, *supra* note 6, at 396–403.

43. *See infra* notes 183–89 and accompanying text.

in North Carolina.[44] The court's membership remained relatively stable from 1868 until the end of Reconstruction, but the 1875 amendments again reduced the court to three members.[45] Pearson died in early 1878, and later that year William N.H. Smith, Thomas Ashe, and John Dillard, all conservative Democrats, were elected to make up the new court.[46]

C. *Confederate Laws and Confederate Debts: A Study in Contrasting Judicial Attitudes*

Most white Southerners accepted the loss of the war and the end of slavery as *faits accomplis* but fiercely resisted any suggestion that the Confederacy's cause had been less than noble or that emancipation would require major social changes.[47] Southern Reconstruction courts had a potentially important role to play in easing the sting of defeat and mediating the psychological as well as the legal transition to a new social order. The Texas and North Carolina courts took dramatically different approaches to the task. The North Carolina Supreme Court took a pragmatic view; it consistently suggested that although the transactions of the Confederate era could not be entirely approved, neither should they be completely ignored.[48] In so doing, it closely reflected the sentiments of North Carolinians as a whole. By contrast, the Texas Military and Semicolon Courts frequently went out of their way to condemn the Confederate cause.[49] This increased their isolation and contributed to the relatively rapid fading of their legal imprint after the end of Reconstruction. However, their imprint did not disappear completely; in some cases, Texas Redeemer justices de-

44. 5 DICTIONARY OF NORTH CAROLINA BIOGRAPHY, *supra* note 35, at 316 (Thomas Settle, Jr.); ESCOTT, *supra* note 9, at 166–70.

45. N.C. CONST. of 1868, art. IV, § 8 (1876); *see* JOHN V. ORTH, THE NORTH CAROLINA STATE CONSTITUTION WITH HISTORY AND COMMENTARY 16 (Univ. of N.C. Press 1995) (1993). The size of the court was again increased to four justices in 1888. *See* N.C. CONST. of 1868, art. IV, § 8 (1888); ORTH, *supra* at 18; Act of Mar. 7, 1887, ch. 212, § 1, 1887 N.C. Sess. Laws 449, 449.

46. Ashe was a pre-war Unionist, but actively supported the Confederacy after Fort Sumter fell; he ran against Holden as the Conservative candidate for governor in 1868 and opposed the 1868 constitution. 1 DICTIONARY OF NORTH CAROLINA BIOGRAPHY, *supra* note 35, at 56 (Thomas Samuel Ashe). Dillard opposed secession but served in the Confederate army; he sided with Conservatives after the war but was not active politically. *See* 2 *id.* at 69 (John Henry Dillard). Smith served in the Confederate Congress during the war; he supported Johnson's Reconstruction program and sided with the Conservatives in opposition to Congressional Reconstruction. *See* 5 *id.* at 391 (William Nathan Harrell Smith). He was educated in the North, and this influenced his thinking to some extent. *See id.*

47. *See* THEODORE BRANTNER WILSON, THE BLACK CODES OF THE SOUTH 42–45, 51–54 (S. Historical Publ'ns No. 6, 1965).

48. *See infra* notes 68–77 and accompanying text.

49. *See infra* notes 58–67 and accompanying text.

cided that *stare decisis* was more important than overturning the Reconstruction courts' decisions.[50]

The contrast between the Texas and North Carolina courts stands out most sharply in their treatment of the *ab initio* doctrine and Confederate-era contracts. Both issues had important implications for economic development and the post-war balance of political power in Southern states. The *ab initio* doctrine held that all acts of Confederate state governments should be treated as void; if adopted, it would have invalidated many wartime transactions and would have required that a large portion of each state's legal code be recreated from scratch.[51] To radical Unionists this was an unparalleled opportunity for reform; to other factions, it was an invitation to anarchy. Texas Unionists espoused *ab initio* energetically, and it failed in Texas only after a prolonged debate. North Carolina Unionists summarily rejected the doctrine in favor of a more pragmatic approach.[52]

Both the 1866 and 1868 Texas constitutional conventions seriously considered voiding all Confederate laws.[53] Unionists at the 1866 convention feared, in particular, that a recent law requiring tax payments to be made in specie would unfairly benefit Confederate sympathizers who had paid their taxes in depreciated currency during the war, at the expense of Unionist taxpayers who had been absent from the state.[54] Concerns about the potential for anarchy inherent in *ab initio* ultimately prevailed in both conventions.[55] In 1868, the debate over *ab initio* surfaced before the Military Court in *Luter v. Hunter*,[56] which involved a wartime sequestration statute under which the assets of exiled Unionists had been forcibly seized and sold. The Military Court had a ready-made opportunity to implant the *ab initio* doctrine in Texas law by striking down the statute as the enactment of an illegitimate government, but instead it followed a middle course. It refused to accept either *ab initio* or the Conservatives' argument that Texas's Confederate government was a *de facto* government for all purposes. Rather, it concluded that the Texas government occupied a higher legal ground than the central government at Richmond because it had existed as a legitimate entity before the war, and held that wartime laws were to "be maintained as valid and operative" except to the extent they conflicted with the United States and Texas constitutions.[57]

50. Norvell, *supra* note 24, at 287–93, 295–96; *see infra* note 63 and accompanying text.

51. *See infra* notes 54–55 and accompanying text.

52. *See infra* notes 73–77 and accompanying text.

53. MONEYHON, *supra* note 9, at 38–39, 82–90.

54. *See id.* at 87.

55. *See id.* at 39, 87–88.

56. 30 Tex. 688 (1868).

57. *See id.* at 695–96, 704, 705. The court also concluded that because the purpose of the law at issue in *Luter* was related to war aims rather than the general "public

The Texas Reconstruction courts were most militantly Unionist in their decisions as to the validity of Confederate-era contracts, particularly those to be paid in Confederate money. The 1866 convention passed an ordinance providing that parol evidence could be used in a suit on a wartime contract to show that Confederate money was intended, and the market value of the currency at the time the contract matured.[58] This effectively gave ex-Confederates and other Texans a way to salvage contracts made during the war, but in *Donley v. Tindall* (1869),[59] the Military Court struck down the ordinance.[60] Justice Hamilton, writing for the majority, took the view that all wartime contracts and obligations should be presumed void unless they indicated on their face that they were not payable in Confederate currency, a view very close to *ab initio.* Hamilton decried the 1866 convention's condonation of parol evidence and added some harsh words about the Confederacy:

> [T]he ordinance is in conflict with the constitution . . . because it seeks to give value to the promises of a confederation of states entered into in hostility to the national authority and for its final overthrow, which promises were illegal and treasonable in their character, and are not susceptible of being validated by any power in the government.[61]

One justice in *Donley* dissented, arguing that all contracts should be presumed valid unless they contained explicit language making them payable in Confederate currency.[62] Tellingly, no justice favored the middle ground of using parol evidence to determine validity on a case by case basis. The Military and Semicolon Courts later carved out limited exceptions to *Donley*, but they consistently refused to enforce

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interests and convenience," it was an invalid impairment of contract and was invalid. *See id.* at 698, 706–07. *See also* Jones v. McMahan, 30 Tex. 719, 736–37 (1868) (striking down a post-war stay law based on similar reasoning).

The *ab initio* debate took place in other states as well, but Texas precipitated the ultimate resolution of the controversy. In *Texas v. White,* 74 U.S. (7 Wall.) 700 (1868), *overruled by* Morgan v. U.S., 113 U.S. 476, 494–96 (1885), the state asked the United States Supreme Court to invalidate a sale of bonds made by the Confederate state government near the end of the war on terms that the first Reconstruction-era government suspected had improperly favored the broker. The Court held that although Texas's participation in the Confederacy had operated to suspend its rights as a state, Texas had never left the Union because the union of states was indissoluble. *See id.* at 702–09. The Court went on to hold that Confederate governmental acts "necessary to peace and good order" were not invalid, but that acts "in furtherance or support of [the] rebellion" were void. *Id.* at 726, 733. It concluded that the bond sale was in aid of the war effort, and was therefore invalid. *Id.* at 733–36.

58. TEX. ORD. no. 11, § 7 (Mar. 30, 1866), *reprinted in* 5 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 895, 897 (Austin, Gammel Book Co. 1898).

59. 32 Tex. 43 (1869).

60. *See id.* at 57–58.

61. *See id.* at 58.

62. *See id.* at 60–61 (Lindsay, J., dissenting).

contracts payable in Confederate money,[63] even after the United States Supreme Court held in *Thorington v. Smith* (1868),[64] that such contracts could be enforced unless they had aided the Confederate cause.[65] In 1872, the Semicolon Court took note of *Thorington* but stated emphatically: "We believe that no contract was ever made to be executed in Confederate money that does not come within the rule [of aiding the rebellion], and that no plea of force or necessity can be urged to justify the utterance of these Confederate notes, or contracts made to be executed in them."[66] The Redeemer Court overturned *Donley* and adopted the *Thorington* rule in one of its first decisions.[67]

Unlike the Texas courts, North Carolina took a middle approach to such issues at the beginning of Reconstruction and never deviated thereafter. The North Carolina Supreme Court introduced a distinctive blend of Unionist rhetoric and pragmatism in *In re Hughes* (1867),[68] its first important post-war decision.[69] In *Hughes*, the court considered a challenge to ordinances enacted by the 1865 Restoration convention on the ground that the convention was not called in the

63. *See* Chambers v. Bonner, 33 Tex. 511, 512 (1870) (creating a presumption that contracts were to be paid in lawful money in the absence of evidence to the contrary); Diltz v. Sadler, 37 Tex. 137, 140–41 (1872–1873) (agreeing with the *Chambers* court that there is a presumption that contracts were to be paid in lawful money in the absence of evidence to the contrary); Thompson v. Bohannon, 38 Tex. 241, 244 (1872–1873) (holding that contracts made by a fiduciary for a beneficiary could be enforced by the beneficiary, who could receive the value of the contract in current funds); Shearon v. Henderson, 38 Tex. 245, 249 (1872–1873) (following the holding in *Thompson*). One exception to the *Donley* rule operated to the benefit of Unionists. In *Van der Hoven v. Nette*, 32 Tex. 183 (1869), the plaintiff asserted he had been forced to accept Confederate money on a promissory note during the war because of martial law requiring acceptance of Confederate money, and that he was entitled to recover the difference in value between the payment he received and an equivalent payment in specie. The court rejected his duress argument. *Id.* at 184. But three years later, in *Olivari v. Menger*, 39 Tex. 76 (1873), the Semicolon Court overruled *Van der Hoven*, commenting that "it is a well known historical fact that every man who did not side in opinion with the dominant authority [during the war] was in great fear of summary punishment." *Id.* at 80.

64. 75 U.S. (8 Wall.) 1 (1868).

65. *See id.* at 12.

66. *See* Grant v. Ryan, 37 Tex. 37, 40 (1872–1873), *overruled by* Mathews v. Rucker, 41 Tex. 636 (1874).

67. *See* Cundiff v. Campbell, 40 Tex. 142, 145–46 (1874). The court did not directly attack the Reconstruction courts but made it quite clear that their currency decisions would be given no weight. *See id.* at 145–46; *see also* San Patricio County v. McClane, 44 Tex. 392, 396 (1876). During the ensuing decades, both the Texas Bar and public came to assume that no Reconstruction court decisions would be given precedential value, but in fact, the Redeemer Court handled that issue on a case-by-case basis: some Reconstruction-era decisions were followed and some were not. *See* Norvell, *supra* note 25, at 287–96. Only the decisions of the Military Court were held to be per se illegitimate on the ground that its justices were appointed by the military and were not selected under the aegis of Texas law. *Id.* at 287–96.

68. 61 N.C. (Phil. Law) 57 (1867).

69. *See id.* at 57–58.

manner prescribed by the state constitution.[70] The court rejected the challenge. Speaking through Chief Justice Pearson, it studiously avoided both condemnation of and sympathy for the Confederacy, and instead made clear that its paramount objective was peace and order for the post-war era.[71] Pearson explained:

> [The convention] was the creature of the emergency—the only mode by which it was possible to extricate the State from the condition of anarchy into which it had fallen, by the attempt to withdraw from the Union, which resulted in subjugation. . . .
>
> . . . .
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> . . . It is strange that heated feeling could, in so short a time, divest the mind of all impression of the stern fact, that after a bloody war, the State had surrendered . . . and lay prostrate with no further power of resistance, her people . . . asking in the name of humanity, and the principles recognized by the law of nations, to be saved from the horrors of anarchy.[72]

North Carolina never seriously considered either voiding Confederate-era debts or valuing them at par with United States currency; instead, the Restoration convention declared that all wartime contracts and debts were valid and instructed the legislature to create a statutory scale, possibly unique among ex-Confederate states, for converting depreciated Confederate debts into federal currency.[73] Unlike its Texas counterpart, the North Carolina Supreme Court did not view contracts payable in Confederate currency law as a threat to the ideals of Unionism; it upheld the currency law in several early Reconstruction cases, most notably in *Phillips v. Hooker* (1867).[74] In *Phillips*, Pearson reasoned that to invalidate all wartime contracts payable in Confederate currency would cause much post-war suffering with no compensating gain for Unionism.[75] He concluded that any attempt to

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70. *Id.* at 67–70. The convention was called by Holden as provisional governor. The 1835 state constitution permitted a convention only if two-thirds of each chamber of the legislature approved. N.C. CONST. of 1835, art. IV, § 1.

71. *See Hughes*, 61 N.C. at 67–70.

72. *Id.* at 67–70. Pearson reasoned that because the federal Constitution required state officers to swear to uphold it, and Confederate-era officials had violated that oath, the legislature was a non-entity for legal purposes; in any event, the people had conferred legitimacy on the convention by electing its delegates. *Id.* at 68–69.

73. *See* Act of Mar. 12, 1866, ch. 38, sec. 2, § 2, 1866 N.C. Sess. Laws 96, 97; Act of Mar. 12, 1866, ch. 39, 1866 N.C. Sess. Laws 97, 97. The scale provided a different value for every month of the war: for example, a $100 Confederate debt incurred at the beginning of the war, in November 1861, was decreed equivalent to $91 U.S., but a similar debt in April 1865 was worth only $1 U.S. *See* Act of Mar. 12, 1866, ch. 39, sec. 1, § 1, 1866 N.C. Sess. Laws at 98. Not surprisingly, the scale showed that the value of Confederate money was closely associated with the military fortunes of the Confederacy: money dropped sharply in value after defeats at Gettysburg and Vicksburg in July 1863, and after the loss of Atlanta in September 1864. *See id.*

74. 62 N.C. (Phil. Eq.) 193, 193–99 (1867). In addition to *Phillips*, see *State ex rel. Cummings v. Mebane*, 63 N.C. 315 (1869); *Turley v. Nowell*, 62 N.C. (Phil. Eq.) 301 (1868); *Woodfin v. Sluder*, 61 N.C. (Phil. Law) 200 (1867).

75. *See Phillips*, 62 N.C. at 200–04.

draw a line between situations in which Confederate money obligations should and should not be deemed enforceable would simply encourage deceit and would "demonstrate[ ] the impotence and absurdity of this action of the courts as a *means* of putting a stop to *civil wars*."[76] The court consistently sustained the currency laws thereafter.[77]

It is striking that the pragmatic arguments for currency conversion that were so obvious to the North Carolina court were never discussed by the Texas courts, and that the implications of the currency issue for Unionist ideals, which so concerned the Texas courts, were in turn brushed aside by the North Carolina court. As predicted by the North Carolina court,[78] the currency issue faded with time and had no lasting impact on Southern law, but it vividly illustrated the sharp differences in attitudes and approaches which lawmakers in each state brought to Reconstruction.

III. The Birth of Civil Rights Law: A State-Level View

Emancipation and the demise of the Confederacy gave rise to unprecedented legal issues concerning the status of blacks that had to be addressed quickly at both the state and national levels. The evolution of state civil rights law from the end of the Civil War to the end of the nineteenth century can be divided roughly into three periods: (1) the initial reaction to emancipation (1865–1868); (2) state reaction to Congressional Reconstruction (1868–1875); and (3) the subsequent rise of what one scholar has described as "the gray institution," an equilibrium between Southern whites' determination to preserve racial supremacy, and their recognition of the need to pay at least minimal formal deference to lingering Northern concerns about the plight of Southern blacks.[79]

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76. *See id.* at 197–99, 204. Justice Reade, concurring, commented that a rule against contracts couched in terms of Confederate money would in fact be "*an encouragement to rebels!* That they should be exonerated from a performance of their contracts, because of their participation in so great a mischief." *Id.* at 210 (Reade, J., concurring).

77. *See, e.g.*, King v. W. & W. R.R. Co., 66 N.C. 277, 283 (1872), *rev'd*, 91 U.S. 3 (1875); Haughton v. Merony, 65 N.C. 124, 125–26 (1871). In *King*, the court gave a parting benediction to the currency laws and a parting shot at the laws' opponents, stating that:

> The Legislature may not have regarded with critical accuracy and technical precision, the doctrine about "impairing the obligation of contracts" contained in a constitution which our people had repudiated, and had just made such strenuous efforts to destroy. . . . The statutes . . . have done much good, and will soon cease to have any vitality, and to declare them unconstitutional now, would be like speaking disrespectfully of the dead.

See King, 66 N.C. at 282–83.

78. *King*, 66 N.C. at 282–83.

79. *See* Wilson, *supra* note 47, at 23–26 (discussing the "gray institution"). This division is suggested by a general reading of literature on Reconstruction. See in

A. *Initial Reaction: The Texas and North Carolina Black Codes*

In 1865, most white Southerners accepted the basic fact of emancipation with little overt complaint; but it remained to be seen how much change in traditional social relations between the races they would tolerate, particularly in light of widespread fear at the end of the war that ex-slaves would refuse to work and would engage in armed reprisals against whites.[80] One of the major catalysts for Congressional Reconstruction was the enactment of state "black codes" throughout the South, which, in the eyes of many Northerners, amounted to an attempt to perpetuate slavery in all but name.[81] The North Carolina and Texas codes had many features common to all black codes.[82] Both codes gave blacks the right to sue and be sued and to enforce their rights in state courts; they also gave blacks the same procedural rights in court as whites, with the vital exception of testimonial rights.[83] North Carolina gave blacks the right to testify in all civil cases where personal or property rights of blacks were at issue and in all cases involving "violence, fraud, or injury" perpetrated by or on blacks.[84] The Texas Code was more restrictive, allowing blacks to testify only in civil cases in which a black was a victim, and in criminal cases in which either the defendant or the victim was black.[85] Both

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particular ROBERT M. GOLDMAN, "A FREE BALLOT AND A FAIR COUNT": THE DEPARTMENT OF JUSTICE AND THE ENFORCEMENT OF VOTING RIGHTS IN THE SOUTH, 1877–1893 (Paul A. Cimbala ed., 2d ed., Fordham Univ. Press 2001) (1990); ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866–1876 (1985); GILBERT THOMAS STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW (1910).

80. *See* WILSON, *supra* note 47, at 42–59; FONER, *supra* note 4, at 198–201.

81. *See* WILSON, *supra* note 47, at 61–80, 96–115.

82. North Carolina's code was part of a second wave of codes enacted in early 1866, at a time when both Northern revulsion over the early codes and Southern resistance to major changes in race relations were hardening. *See id.* at 61–80, 96–115. *See generally* ROBERTA SUE ALEXANDER, NORTH CAROLINA FACES THE FREEDMEN: RACE RELATIONS DURING PRESIDENTIAL RECONSTRUCTION, 1865–1867, at 41–50 (1985) (discussing the North Carolina legislative debates over the Black Codes). Texas was the last state to enact a black code in October and November 1866. *See generally* WILSON, *supra* note 47 at 108–09; Act approved Nov. 10, 1866, 11th Leg., ch. 128, 1866 Tex. Gen. Laws 131, 131, *reprinted in* 5 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1049, 1049 (Austin, Gammel Book Co. 1898).

83. *See* Act of Mar. 10, 1866, ch. 40, § 3, 1866 N.C. Sess. Laws 99, 99–100; Act approved Nov. 10, 1866, 11th Leg., ch. 128, 1866 Tex. Gen. Laws at 131, *reprinted in* 5 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1049 (Austin, Gammel Book Co. 1898). The North Carolina code recited that pre-war laws pertaining to free blacks would now apply to all blacks. Act of Mar. 10, 1866, ch. 40, § 2, 1866 N.C. Sess. Laws at 99. This was less of a concession than it might seem because most pre-war codes for free blacks were quite harsh. *See* IRA BERLIN, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH 90–99, 208–13 (1974).

84. Act of Mar. 10, 1866, ch. 40, § 9, 1866 N.C. Sess. Laws at 102.

85. *See* Act approved Oct. 26, 1866, 11th Leg., ch. 59, § 1, art. 143, 1866 Tex. Gen. Laws 59, 59, *reprinted in* 5 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 977, 977 (Austin, Gammel Book Co. 1898); Act approved Nov. 10, 1866, 11th Leg., ch. 128, 1866 Tex. Gen. Laws at 131, *reprinted in* 5 H.P.N. GAMMEL, THE LAWS OF TEXAS

codes denied blacks the right to vote, hold office, or serve on juries,[86] and both codes preserved pre-war, anti-miscegenation provisions.[87]

Both North Carolina and Texas regulated black labor through contract, anti-enticement, apprenticeship, and vagrancy laws, but they used these tools in strikingly different ways; North Carolina chose to focus on apprenticeship laws, and Texas focused on labor contract laws. In 1866, the North Carolina Legislature extended to blacks a pre-war law allowing apprenticeship of children whose parents "do not habitually employ their time in some honest, industrious occupation."[88] In a move that it surely must have known would draw Northern ire, the legislature gave former masters a right of first refusal over freed black children who were bound out under the apprenticeship law.[89]

Texas's labor contract law was one of the most detailed in the South. It provided that once a labor contract was made, the worker would forfeit all wages if he left before the end of his employment term unless the employer breached the contract or engaged in "harsh treatment."[90] Labor contracts were to be made with heads of families,

1822–1897, at 1049 (Austin, Gammel Book Co. 1898). The constitution provided that the legislature could extend testimonial rights in cases other than those in which blacks were defendants, TEX. CONST. of 1866, art. VIII, § 2; however, the 1866 legislature did not do so.

86. *See* Act of Mar. 10, 1866, ch. 40, §§ 2–3, 1866 N.C. Sess. Laws at 99–100; Act approved Nov. 10, 1866, 11th Leg., ch. 128, 1866 Tex. Gen. Laws at 131, *reprinted in* 5 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1049 (Austin, Gammel Book Co. 1898).

87. Act of Mar. 10, 1866, ch. 40, § 8, 1866 N.C. Sess. Laws at 101; Act approved Nov. 10, 1866, 11th Leg., ch. 128, 1866 Tex. Gen. Laws at 131, *reprinted in* 5 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1049 (Austin, Gammel Book Co. 1898). Such provisions were also common in the North at the time: Americans in all sections of the country viewed racial intermarriage with revulsion, and as a result southern anti-miscegenation laws "escaped the adverse criticism heaped upon other [statutory] race distinctions." *See* STEPHENSON, *supra* note 78, at 79; WILSON, *supra* note 47, at 20–22. Still, North Carolina and Texas case reports suggest a significant number of interracial couples risked marriage despite the laws. *See infra* note 135 and accompanying text.

88. *See* Act of Mar. 10, 1866, ch. 40, § 4, 1866 N.C. Sess. Laws at 100; ALEXANDER, *supra* note 82, at 45.

89. Act of Mar. 10, 1866, ch. 40, § 4, 1866 N.C. Sess. Laws at 100. ALEXANDER, *supra* note 82, at 38–53, contains a detailed discussion of the North Carolina code; she concludes that the code was designed to make the minimum concessions deemed necessary to avoid Northern scrutiny, but that it still passed only by a narrow margin because Conservatives considered even its minimal concessions too liberal. Texas's apprenticeship law provided that "indigent and vagrant minors" should be apprenticed to "some suitable and competent person"; it gave local courts broad powers to impose conditions of apprenticeship on the employer. *See* Act approved Oct. 27, 1866, 11th Leg., ch. 63, § 2, 1866 Tex. Gen. Laws 61, 61, *reprinted in* 5 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 979, 979 (Austin, Gammel Book Co. 1898).

90. Act approved Nov. 1, 1866, 11th Leg., ch. 80, § 2, 1866 Tex. Gen. Laws 76, 76–77, *reprinted in* 5 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 994, 994–95 (Austin, Gammel Book Co. 1898).

and once made, bound all members of the worker's family.[91] Employers were allowed to impose fines for a variety of offenses including "disobedience," "impudence," "sickness . . . feigned for purposes of idleness," and theft of the employer's property, all vices which were stereotypically associated with slaves.[92] Special regulations were added for house workers, continuing the pre-war distinction between field slaves and house slaves.[93] North Carolina's labor contract law was milder, stating only that contracts to which blacks were parties would be invalid unless put in writing.[94] Both Texas and North Carolina had anti-enticement laws which were used to check competition for black labor: Texas prescribed fines and imprisonment for white employers who offered jobs to workers in the middle of their contract term;[95] North Carolina prescribed only civil penalties.[96]

Relatively few cases involving the black codes came before the Texas and North Carolina supreme courts during Reconstruction. The North Carolina apprenticeship statute generated the most legal controversy, primarily in situations where competing white employers fought over the rights to an apprentice, or where due process was ignored so blatantly as to trigger qualms in the local white community. In *In re Ambrose* (1867),[97] the North Carolina Supreme Court, speaking through Justice Reade, observed that apprenticeships had been rare before the war but were now becoming common because "one-third of the whole population are indigent colored persons."[98] Accordingly, said Reade, it was imperative for reasons of both practicality and justice that freedmen facing such proceedings receive adequate notice and opportunities for hearings.[99] However, the court weakened the force of its holding by ruling that "the actual presence of the person [could] be dispensed with where he has intelligent friends present who can see that his interests are properly guarded."[100] Later the

91. *Id.* § 5, 1866 Tex. Gen. Laws at 77, *reprinted in* 5 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 995 (Austin, Gammel Book Co. 1898).

92. *See id.* §§ 8–9, 1866 Tex. Gen. Laws at 77–78, *reprinted in* 5 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 995–97 (Austin, Gammel Book Co. 1898).

93. *See id.* § 10, 1866 Tex. Gen. Laws at 79, *reprinted in* 5 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 997 (Austin, Gammel Book Co. 1898). The code gave the employers power to decide disputes over penalties, although black workers had a limited right of appeal to an arbitration panel. The worker and employer each could designate one member, with the local justice of the peace added as a tie-breaker. *Id.* § 9, 1866 Tex. Gen. Laws at 78–79, *reprinted in* 5 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 996–97 (Austin, Gammel Book Co. 1898).

94. *See* Act of Mar. 10, 1866, ch. 40, § 7, 1866 N.C. Sess. Laws at 101.

95. *See* Act approved Nov. 1, 1866, 11th Leg., ch. 82, § 2, 1866 Tex. Gen. Laws 80, 80, *reprinted in* 5 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 998, 998 (Austin, Gammel Book Co. 1898).

96. Act of Mar. 2, 1866, ch. 58, § 1, 1866 N.C. Sess. Laws 122, 122–23.

97. 61 N.C. (Phil. Law) 91 (1867).

98. *Id.* at 94–95.

99. *See id.* at 93–95.

100. *See id.* at 95.

same year, the court affirmed that employers had a legal right to use self-help to retrieve runaway apprentices as in slave times, though it recommended that they seek help from law enforcement authorities instead.[101] The court made clear that its holdings were based as much on practicality as on concerns about justice. Reade said:

> It is best that the colored population should be satisfied that they are liable to no unlawful impressments, and that they should see that what is required of them has the sanction of the law. It may then be hoped that they will be contented, and will cheerfully submit to what they might otherwise mischievously resist.[102]

The Texas Reconstruction courts decided only one apprenticeship case, which offered no occasion for broad policy pronouncements about the Texas apprenticeship law.[103] Despite the lack of legal challenge, Texas Unionists were defensive about the law; George W. Paschal, one of Texas's leading Unionists and legal figures of the Reconstruction era, argued that the law was simply a continuation of pre-war apprenticeship laws and was genuinely intended to address issues of economic need rather than racial control.[104]

B. *Reaction to Federal Civil Rights Laws and the Rise of the "Gray Institution"*

Federal judges and attorneys were primarily responsible for implementation of federal civil rights laws in the South during Reconstruction.[105] Federal authorities in North Carolina prosecuted more civil rights cases than their counterparts in Texas did.[106] Despite the relatively strong Unionist presence in North Carolina, the state witnessed some of the most extensive and violent Ku Klux Klan activity of the Reconstruction era,[107] and this triggered a sense of urgency among

101. *See* Beard v. Hudson, 61 N.C. (Phil. Law) 180, 182–83 (1867).

102. *Id.* at 183.

103. *See* Timmins v. Lacy, 30 Tex. 115, 134, 137–38 (1867). In *Timmins*, an ex-slave mother voluntarily apprenticed two of her children to a planter, and the father, who had abandoned the mother during slavery, but who had also been sold away and not returned to his family after the war, apprenticed the children to another. *Id.* at 126–28. The court, apparently feeling that the mother was a more sympathetic figure than the father, held that because the parents' original relationship was not recognized as a marriage the mother's rights were paramount. *See id.* at 134–36. The court suggested that if the father had returned to the family after emancipation or had shown a real interest in becoming a member of the family again, the result might have been different. *See id.* at 137–38.

104. *See id.* at 117–19.

105. *See* KACZOROWSKI, *supra* note 79, at 50–51, 79; EVERETTE SWINNEY, SUPPRESSING THE KU KLUX KLAN: THE ENFORCEMENT OF THE RECONSTRUCTION AMENDMENTS 1870–1877, at 181–88, 194–99 (1987) (discussing the Justice Department and the federal court system).

106. *See* KACZOROWSKI, *supra* note 79, at 87–88; SWINNEY, *supra* note 105, at 94–102, 276–82.

107. *See* SWINNEY, *supra* note 105, at 94–102, 276–82; RAPER, *supra* note 9, at 158–81.

local federal law enforcement officials. Judge Hugh L. Bond of the newly created federal Fourth Circuit quickly acquired a reputation for strict enforcement of the civil rights laws in North Carolina after his appointment to the bench in 1869.[108] Because Texas had fewer blacks and Unionists than North Carolina, Conservatives perceived less need to resort to systematic violence to combat them; as a result, there was less Klan activity, and fewer civil rights cases arose in Texas.[109] Texas's federal district judges and Fifth Circuit Judge William Woods interpreted the scope of protection provided by federal civil rights laws more narrowly than did Bond.[110] Federal civil rights enforcement efforts peaked under Attorney General Amos Akerman during 1870–1871, and again briefly in 1873. After that time, political support in the North for Reconstruction gradually ebbed and George Williams, Akerman's successor, instituted a "tokenism" policy of prosecuting only cases of flagrant violence and where the probability of conviction was high.[111] Some scholars have interpreted Williams's policy as a tacit bargain with the Klan and its supporters to reduce prosecutions in return for an end to violence, and in fact Klan activity in North Carolina declined sharply after 1872.[112]

The North Carolina Supreme Court had a more liberal civil rights record than most Southern courts both during and after Reconstruction. In *State v. Underwood* (1869),[113] the court went out of its way to strike down the black code's limits on testimony by blacks as repugnant to the 1868 constitution.[114] The 1868 constitution did not specifically address black testimonial rights, but the court noted that it

108. Bond was a pre-war Maryland Whig who was converted to unconditional Unionism during the Civil War and became an early leader of the state's Republican party. For a thoughtful description of Bond's background and his attitude toward civil rights enforcement, see generally Richard Paul Fuke, *Hugh Lennox Bond and Radical Republican Ideology*, 45 J. S. HIST. 569, 570–74, 583 (1979); LOU FALKNER WILLIAMS, THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS, 1871–1872, at 51–71, 118–22 (1996).

109. *See* Everette Swinney, *Enforcing the Fifteenth Amendment, 1870–1877*, *in* 12 AFRICAN AMERICAN LIFE, 1861–1900: BLACK SOUTHERNERS AND THE LAW 1865–1900, at 318, 331–32 (Donald G. Nieman ed., 1994). *See generally* KACZOROWSKI, *supra* note 79, at 87–88; SWINNEY, *supra* note 105, at 94–102. From 1870 to 1877, federal authorities instituted 559 civil rights enforcement cases in North Carolina and 29 cases in Texas. *See* Swinney, *Enforcing the Fifteenth Amendment*, *supra*, at 331–32.

110. *See infra* notes 143–44 and accompanying text; *see also* WILLIAMS, *supra* note 108, at 71–73; Louis Filler, *William B. Woods*, *in* 2 THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 643, 647–50 (Leon Friedman & Fred L. Israel eds., 3d ed. 1997). Woods was an Ohio Democrat who served as a Union army officer and moved to Alabama after the Civil War. He was appointed to the U.S. Supreme Court in 1880 and served on the Court until his death in 1887. *See* Filler, *supra* at 644–53.

111. *See* KACZOROWSKI, *supra* note 79, at 109–10; *see also* SWINNEY, *supra* note 105, at 317–24.

112. *See, e.g.*, KACZOROWSKI, *supra* note 79, at 110–11; SWINNEY, *supra* note 105, at 281.

113. 63 N.C. 98 (1869).

114. *See supra* note 83 and accompanying text; *Underwood*, 63 N.C. at 99.

allowed blacks to hold office and reasoned that "[t]he greater includes the less."[115] The court also held that blacks could not be struck from a jury panel because of color;[116] and it strictly enforced the rule against coerced confessions in at least one criminal case involving a black defendant, noting that it could not "lose sight of the fact that the moral effect of the supremacy of the white man has not passed away."[117] Near the end of Reconstruction, the court issued one of the first American electoral apportionment decisions, holding in *People ex rel. Van Bokkelen v. Canaday* (1875),[118] that a gross population disparity between Wilmington's three aldermanic districts, with most of the city's blacks placed in the largest district, "violate[d] the fundamental principles of the [1868] Constitution, and [the legislature's] own cherished and declared purpose to maintain free manhood suffrage. . . ."[119] The United States Supreme Court did not recognize equal apportionment as a constitutional right for almost another century.[120]

Surprisingly, the Conservatives who joined the North Carolina court after Reconstruction continued to show flashes of liberalism in the few civil rights cases which came before them. In *Puitt v. Commissioners of Gaston County* (1886),[121] the court struck down a law allowing school districts to hold separate school funding referenda for white and black schools; the law had effectively denied blacks access to the much higher revenues collected from white taxpayers.[122] The justices noted that the 1868 constitution required a common school fund undivided by race;[123] they defended public education and at least

115. *See Underwood*, 63 N.C. at 98–99.

116. State v. Holmes, 63 N.C. 18, 21 (1868). The holding in *Holmes* may have been based on an implicit finding of waiver because the defendant had accepted some black jurors. *See id.* In *State v. McAfee*, 64 N.C. 339 (1870), the court held it was proper to ask members of a criminal jury panel whether they could "do equal and impartial justice between the State and a *colored* man." *Id.* at 340–41. Justice Thomas Settle, one of the court's strongest Unionists, recounted in his opinion an anecdote of a case where 150 panel members had to be called before twelve jurors were found who answered this question "yes." *See id.* at 340–41. Albion Tourgée incorporated the incident into *A Fool's Errand*. *See* TOURGÉE, *supra* note 1, at 256–58.

117. *See* State v. Whitfield, 70 N.C. 356, 357 (1874).

118. 73 N.C. 198 (1875).

119. *See id.* at 225. Justice Rodman, concurring in the judgment, objected that the court's holding was based on a subjective reading of the "spirit" of the constitution, which said nothing about equal apportionment. *See id.* at 230 (Rodman, J., concurring in the judgment).

120. *See* Baker v. Carr, 369 U.S. 186, 226–27, 229 (1962); 2 ALFRED H. KELLY ET AL., THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 614–16 (7th ed. 1991).

121. 94 N.C. 709 (1886).

122. *See id.* at 713–16; Act of Mar. 8, 1883, ch. 148, 1883 N.C. Sess. Laws 37, 37 (authorizing a referendum for the Dallas school district). *See also* Riggsbee v. Town of Durham, 94 N.C. 800, 805–06 (1886) (making a similar decision with regard to a referendum for the Durham school district).

123. The justices based their decision on their conclusion that the statute violated the constitution's tax uniformity clause as well as the common fund clause. *See Puitt*,

minimally fair treatment of blacks in terms that their Reconstruction predecessors surely would have cheered:

> [I]s it not obvious [that the statute] would be subversive of the equality and uniformity recognized in the system of public schools, which looks to a fair participation of all its citizens in the advantages of free education?
>
> . . . .
>
> Nor can we shut our eyes to the fact, that the vast bulk of property, yielding the fruits of taxation, belongs to the white people of the State, and very little is held by the emancipated race; and yet the needs of the latter for free tuition, in proportion to its numbers, are as great or greater than the needs of the former. The act, then, in directing an appropriation of what taxes are collected from each class, to the improved education of the children of that class, does necessarily discriminate "in favor of the one and to the prejudice" of the other race.[124]

The court even enforced integration in those rare instances where enforcement was necessary to comply with the letter of the law. In *Britton v. Atlanta & Charlotte Air-Line Railway Co.* (1883),[125] the railroad announced that segregated cars would be provided on an excursion train, but it did not specify which cars were for which race.[126] The conductor allowed the plaintiff, a black passenger, to sit in the smoking car, but he warned her that he could not control the conduct of the white passengers. A group of whites later entered and ejected her from the car.[127] The court easily could have held that because the plaintiff had failed to heed the warning that the smoking car was intended for whites, the railroad was not liable for her ejection; but instead it focused on the fact that the conductor had allowed her to sit in the car in the first place:

> [T]he plaintiff had . . . acquired an established right to the seat which she occupied upon entering the defendant's train. She held it by the same tenure that every other passenger upon the train held his seat, . . . and upon being notified that her ejection had taken place, the first duty of the officer was to see her restored to it . . . .[128]

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94 N.C. at 713–15; N.C. CONST. of 1868, art. V, § 1; N.C. CONST. of 1868, art. IX, § 2 (1873).

124. *Puitt*, 94 N.C. at 715–16. The following year the court also struck down a new set of laws allowing segregated bond referenda in several cities. *See* Duke v. Brown, 1 S.E. 873, 875–76 (N.C. 1887); Markham v. Durham Graded School, 2 S.E. 40, 40 (N.C. 1887).

125. 88 N.C. 536 (1883).

126. *See id.* at 537.

127. *Id.* at 537–38.

128. *See id.* at 545–46. However, the court, citing cases from numerous Northern states, acknowledged that the railroad was entitled to provide separate but equal accommodations if it wished. *Id.* at 542. *See generally* Stephen J. Riegel, *The Persistent Career of Jim Crow: Lower Federal Courts and the "Separate but Equal" Doctrine, 1865–1896*, *in* 12 AFRICAN AMERICAN LIFE, 1861–1900: BLACK SOUTHERNERS AND

Puitt and *Britton* by no means show that North Carolina was an island of racial enlightenment in the late nineteenth century South. *Puitt* did not guarantee, and was not intended to guarantee, equal funding for black and white schools, and the *Britton* court did not challenge the legality of segregation in any way. The North Carolina Supreme Court was relatively liberal on racial matters for its time and place, but the range within which racial liberalism operated in the late nineteenth century was narrow.[129] Two examples serve to illuminate its confines. In *Harrell v. Watson* (1869),[130] the Reconstruction court held that a promissory note given for the purchase of a slave in 1864 was enforceable even though the Emancipation Proclamation had freed slaves in most of North Carolina as of January 1863.[131] The obligee argued that his note was void as against public policy because slavery was inherently immoral, but the court firmly refused to condemn slavery; it stated that the institution must be viewed

> from a standpoint where [it] was considered as established and made lawful by the laws of the State, and recognized and protected by the Constitution of the United States, and had been handed down and acted upon from father to son among our people, from the first settlement of the colony of Carolina.[132]

Miscegenation laws provide the second illustration. Pre-war laws against interracial marriage survived intact in almost every Southern state; in repealing their slave codes, most states, including North Carolina and Texas, made explicit exceptions for miscegenation laws.[133]

THE LAW, 1861–1900, at 349 (Donald G. Nieman ed., 1994) (discussing lower court opinions and the "separate but equal" doctrine).

129. As courts in North Carolina and other ex-Confederate states frequently pointed out, the range was equally narrow in most Northern states. The *Puitt* court noted that segregated instruction was required in many northern states—even in Massachusetts, the citadel of abolitionism. The court took pains to cite *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 204–05, 210 (1849), a pre-war case in which the Massachusetts Supreme Court had upheld a statute mandating segregation in the Boston schools. *Puitt*, 94 N.C. at 718–19. Even though the Massachusetts Legislature overrode the *Roberts* decision by outlawing school segregation in the mid-1850s, *Roberts* was long a source of embarrassment to Massachusetts abolitionists. *See* DAVID DONALD, CHARLES SUMNER AND THE COMING OF THE CIVIL WAR 180–82 (1960).

130. 63 N.C. 454 (1869).

131. *See id.* at 459–60.

132. *See id.* at 457–58, 459–60. The Texas Supreme Court also concluded that the Emancipation Proclamation did not render slave-related transactions void until Texas was occupied in 1865. *See* Algier v. Black, 32 Tex. 168, 169–70 (1869); Hall v. Keese, 31 Tex. 504, 527, 534 (1868). In *Hall*, Justices Hamilton and Caldwell argued that even though slaves were not "practically free" until 1865, slave-related contracts should not be enforced because they were against public policy. *See Hall*, 31 Tex. at 534–36 (Hamilton, J., dissenting). In *Morris v. Ranney*, 37 Tex. 124 (1872–1873), the Semicolon Court stated that Hamilton's position was better reasoned than the majority's position in *Hall* and suggested that if the issue were being presented for the first time, it would have ruled in accord with Hamilton. *See id.* at 124.

133. Act of Mar. 10, 1866, ch. 40, § 8, 1866 N.C. Sess. Laws 99, 101; *see* STEPHENSON, *supra* note 79, at 78–85. Many northern states also had such laws. *See id.* at 81.

Although Reconstruction-era court decisions suggest there was a significant number of interracial couples in the South who married or tried to marry, the idea of intermarriage as a civil right was inconceivable to Unionists and Conservatives alike.[134] In an 1875 grand jury charge,[135] Judge Robert P. Dick, who had longstanding credentials as a stalwart Unionist, noted that North Carolina's miscegenation law was racially discriminatory on its face but brushed aside any suggestion that the federal government could prohibit such discrimination. Family law, said Dick, was purely a matter of state law.[136] Furthermore:

> Every man has a natural and inherent right of selecting his own associates, and this natural right cannot be properly regulated by legislative action, but must always be under the control of individual taste and inclination . . . . Any law which would impose upon the white race the imperative obligation of mingling with the colored race on terms of social equality would be repulsive to natural feeling and long established prejudices, and would be justly odious. There is no principle of law, human or divine, that requires all men to be thrown into [the] social hotchpot in order that their equality of civil rights may be secured and enforced.[137]

Very few civil rights cases came before Texas courts during Reconstruction.[138] If anything, the Texas Supreme Court was more supportive of civil rights than Texas federal courts, as illustrated by the *Gaines* cases of 1873–1874. In 1873, Matt Gaines, a state senator who was one of Texas's highest elected black officials during Reconstruction, was charged with bigamy.[139] Gaines attempted to remove his case to federal court under the 1866 Civil Rights Act, alleging, as the Act required, that community prejudice prevented him from receiving a fair

134. See State v. Kennedy, 76 N.C. 251, 252 (1877), which declared that an interracial marriage entered by two North Carolina citizens in South Carolina, where such marriages were legal, was void. But see State v. Ross, 76 N.C. 242, 242–43 (1877), in which an interracial couple who lived in North Carolina and married in South Carolina was prosecuted in North Carolina. The court in this case held differently; it reluctantly recognized the validity of the Ross marriage because at the time of the marriage the Rosses had no intent to return to North Carolina. *Id.* at 243–44, 246–47. Justice Rodman, speaking for the majority, held that South Carolina's marriage law must be given comity because "[h]owever revolting to us . . . such a marriage may appear, such cannot be said to be the common sentiment of the civilized and Christian world." *Id.* at 246. Justice Reade passionately argued in dissent that North Carolina "must be its own judge of what is an evil [because] [s]elf-preservation requires it." *Id.* at 250 (Reade, J., dissenting) (citing State v. Reinhart, 63 N.C. 547 (1869)).

135. Charge to the Grand Jury—The Civil Rights Act, 30 F. Cas. 999 (W.D.N.C. 1875) (No. 18,258) ("The . . . opinion was given in response to inquiries from the grand jury, in regard to their duties under the act of congress just then passed, commonly called the 'Civil Rights Bill.'").

136. *See id.* at 1001–02.

137. *Id.* at 1000–01.

138. *See supra* note 106 and accompanying text.

139. Gaines v. State, 39 Tex. 606, 606 (1873), *aff'd*, 23 F. Cas. 869 (W.D. Tex. 1874) (No. 13,847).

trial.[140] The Semicolon Court allowed Gaines's petition; it rejected the state's argument that removal was allowed only in cases of *de jure* discrimination, and commented that although Texas laws governing trial procedure did not facially discriminate against blacks, "there may be many localities where the colored man cannot expect to receive his equal rights under the laws."[141] After the case was transferred to federal court, Circuit Judge Woods and District Judge Thomas Duval remanded it.[142] They rejected the Semicolon Court's position, holding that the right of removal was limited to cases involving state-sponsored "legal impediments to the free exercise of the rights secured, and not to private infringements of those rights by prejudice or otherwise, when the laws themselves are impartial and sufficient."[143]

The only other Reconstruction-era Texas cases which touched on civil rights involved testimonial rights and miscegenation. In *Ex parte Warren* (1868),[144] the Military Court held that Texas's prohibition of black testimony against whites was superseded by federal laws permitting such testimony.[145] The court concluded that Congress had plenary power over Texas law until the state was readmitted to the Union; it did not couch its decision in terms of constitutional or human rights.[146] In *Frasher v. State* (1877),[147] a post-Reconstruction case, the Texas Court of Appeals upheld Texas's miscegenation law against a constitutional challenge under the Fourteenth and Fifteenth Amendments.[148] The court held the amendments did not extend to marriage, which was exclusively a matter for state regulation.[149] The court was careful to note, however, that the Texas law was nondiscriminatory in that it barred blacks and whites alike from intermarrying.[150]

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140. Act approved Apr. 9, 1866, ch. 31, § 3, 14 Stat. 27, 27.

141. *See Gaines*, 39 Tex. at 611–13. The court cited a North Carolina court decision, *State v. Dunlap*, 65 N.C. 491, 495 (1871), to the same effect. *Gaines*, 39 Tex. at 612–13.

142. Texas v. Gaines, 23 F. Cas. 869, 871 (W.D. Tex. 1874) (No. 13,847).

143. *Id.* at 870–71.

144. 31 Tex. 143 (1868).

145. *See id.* at 144; *see supra* note 82 and accompanying text.

146. *See Warren*, 31 Tex. at 144.

147. 3 Tex. Ct. App. 263 (1877).

148. *See id.* at 264–78.

149. *Id.* at 274–78.

150. *See id.* at 276–77. Prior to the *Frasher* decision, Judge Duval had ruled that the state's 1858 anti-miscegenation law violated the 1866 Civil Rights Act and the Fourteenth and Fifteenth Amendments because it penalized only whites. *See Ex parte* Francois, 9 F. Cas. 699, 701 (W.D. Tex. 1879) (No. 5,047). Duval, like Dick, was a firm Unionist but did not view the right to marry as a civil right: "Marriage between the two races," he stated, "is wholly abhorrent to my sense of fitness and propriety." *See id.* at 701. In *Francois*, Duval concluded that his earlier decision was wrong; a law penalizing only whites for miscegenation might violate the spirit but did not violate the letter of federal law. *See id.* at 700–01. Duval noted that the Texas Legislature had recently amended the law to penalize both races equally, and he concluded by presenting an unusual view of miscegenation. Duval believed that miscegenation:

IV. THE RECONSTRUCTION CONSTITUTIONS

The 1865–1866 North Carolina and Texas Restoration constitutions, like the Restoration constitutions of most Southern states, were largely reversions to the states' pre-war constitutions. The only important changes they embodied were provisions formally abolishing slavery and repudiating Confederate debts as required by President Johnson's Reconstruction program.[151] Both constitutions rejected black suffrage and gave blacks only the minimum rights convention delegates considered necessary to avoid federal reprisal.[152] Texas voters approved the 1866 constitution by a narrow margin;[153] but the North Carolina Constitution was rejected because of Unionist discontent over the lack of black suffrage and Conservative discontent with a provision that would have based legislative representation on the white population only.[154]

Congress's 1867 Reconstruction program required the ex-Confederate states to call new conventions whose delegates were to be elected by adult males of both races.[155] It also required the conventions to provide for black suffrage; if they did not, readmission to Congress would be denied.[156] Because Congress limited ex-Confederates' right to vote for delegates, the Texas and North Carolina conventions were dominated by white Unionists who were long-time residents of the state; there was a small number of black delegates at each convention and a significant contingent of recent Northern emigrants familiar with state constitutional innovations made in other parts of the nation during the past thirty years.[157] As a result, the Reconstruction constitutions of 1868–1869 incorporated a variety of reforms that by no

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> would rarely occur but for the influence of [whites] over [blacks]—an influence resulting from the superior education and intelligence of the whites, and the subordinate position so long held by the colored race. For such unnatural marriages, the whites are mainly to blame, and this may furnish some excuse, if not a justification, for punishing them alone, as a means of prevention.

Id. at 701.

151. *See* TEX. CONST. of 1866, art. VIII, § 1; ORTH, *supra* note 45, at 12.

152. *See* ALEXANDER, *supra* note 82, at 36–41; MONEYHON, *supra* note 9, at 32; *see also supra* notes 81–87 and accompanying text.

153. *See* Tex. Gov. Proclamation, Oct. 8, 1866, TEX. CONST. of 1866, *reprinted in* H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 886, 886 (Austin, Gammel Book Co. 1898).

154. *See* ORTH, *supra* note 45, at 12. Because North Carolina's black population was concentrated in the east, a whites-only representation formula would have allowed the west to dominate the legislature for the first time in the state's history. *See id.*

155. Act of Mar. 2, 1867, ch. 153, § 5, 14 Stat. 428, 429.

156. *Id.* Congress also required that certain high level ex-Confederates be excluded from suffrage unless previously pardoned. *Id.*

157. Traditional Reconstruction historiography created a myth that the 1868–1869 conventions, like other facets of the Reconstruction government, were dominated by northern "carpetbaggers" and blacks. *See* FONER, *supra* note 4, at 294–99, 316–18. These groups had a voice in the Texas and North Carolina conventions but native

means were limited to race relations. Many of the reforms remained in place after Reconstruction ended, and they were probably the most enduring legacy of Reconstruction at the state level.[158]

The North Carolina convention enacted a variety of important reforms closely tailored to North Carolina's particular history and needs. Texas adopted fewer reforms because many of the innovations adopted by the North Carolina convention had been incorporated into Texas law before the war. North Carolina, which had mostly appointive state offices before the war, made many of the offices (including the supreme court) elective for the first time; by contrast, Texas Unionists made their court appointive for the first time since 1850.[159] Unionists from western North Carolina sought to end legislative malapportionment that favored the eastern, planter-dominated counties; they failed to obtain redress in the 1865 convention, but they obtained partial relief in 1868 when property qualifications for voting were eliminated for the first time.[160]

North Carolina added other provisions that read almost like a checklist of major American legal reforms of the mid-nineteenth century. The 1868 constitution prohibited those engaged in dueling from holding public office;[161] limited offenses for which the death penalty might be imposed;[162] abolished imprisonment for debt (except in

Unionists formed a large majority of delegates in both states. *See* MONEYHON, *supra* note 9, at 82–86; ORTH, *supra* note 45, at 12.

158. For useful general descriptions of the conventions, see HENRY G. CONNOR & JOSEPH B. CHESHIRE, JR., THE CONSTITUTION OF THE STATE OF NORTH CAROLINA ANNOTATED xxxiii–xxxvi (1911) (North Carolina); ORTH, *supra* note 45, at 12–15 (North Carolina); MAY, THE TEXAS STATE CONSTITUTION: A REFERENCE GUIDE (1996); MONEYHON, *supra* note 9, at 82–103 (Texas).

159. *See* N.C. CONST. of 1868, art. IV, §§ 21, 26. *Compare* TEX. CONST. of 1869, art. V, § 2, *with* TEX. CONST. of 1845, art. IV, § 1 (1850). The movement to make judgeships elective was a product of the Jacksonian era; Mississippi was the first state to provide for elective judgeships, in 1832, and many western states (both north and south) then followed its lead. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 126–27 (2d ed. 1985).

160. N.C. CONST. of 1868, art. VI, § 1. Texas, with a more fluid society and a much stronger Jacksonian tradition than North Carolina, had never imposed property qualifications for voting. *See, e.g.*, TEX. CONST. of 1869, art. VI, § 1; TEX. CONST. of 1866, art. III, § 1; TEX. CONST. of 1861, art. III, § 1; TEX. CONST. of 1845, art. III, § 1.

161. N.C. CONST. of 1868, art. XIV, § 2. Proscriptions on dueling originated in the late 1700s and were adopted by many northern states during the first half of the nineteenth century. *See* EDWARD L. AYERS, VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH-CENTURY AMERICAN SOUTH 15–16 (1984). After the Civil War, dueling in the South was "increasingly eclipsed by less formalized and more deadly violence." *Id.* at 268.

162. *See* N.C. CONST. of 1868, art. XI, § 2. The American movement to limit the death penalty originated in Pennsylvania in the 1790s; several states abolished the death penalty outright for the first time between 1847 and 1853. *See* David Brion Davis, *The Movement to Abolish Capital Punishment in America, 1787–1861*, 63 AM. HIST. REV. 23, 26, 43–45 (1957).

fraud cases);[163] placed restrictions on the amount of debt that municipalities could incur for subsidizing railroads or for any other purpose;[164] mandated a homestead exemption;[165] required the legislature to enact incorporation laws;[166] and conferred on married women a limited right of direct control over their property for the first time.[167] The 1869 Texas Constitution likewise contained provisions mandating a homestead exemption and prohibiting imprisonment for debt; both provisions were copied from the state's 1845 constitution.[168] Texas had accorded married women many community property rights since before statehood, and the constitution also preserved such rights without any significant change.[169] Unlike North Carolina, Texas's Reconstruction convention did not limit municipal support of railroads,[170] and no serious thought was given to limiting the death penalty.[171]

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163. N.C. CONST. of 1868, art. I, § 16. For a general description of the movement toward abolishing imprisonment for debt in the United States, see PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607–1900 (1974). *See also infra* notes 215–21, 226, and accompanying text.

164. N.C. CONST. of 1868, art. V, § 4; *see* N.C. CONST. of 1868, art. VII, § 7. From roughly 1840 to 1875, municipalities in many northern and southern states incurred heavy debt in order to induce railroads to provide them with service and later had difficulty paying off the debt for a variety of reasons. In response, many states eventually adopted constitutional provisions like North Carolina's, imposing restrictions on the amount of debt municipalities could incur. *See, e.g.*, WIS. CONST. of 1848, art. XI, § 3 (amended 1874); FRIEDMAN, *supra* note 159, at 192–93, 512.

165. N.C. CONST. of 1868, art. X, § 2 (1873); ORTH, *supra* note 45, at 15–16. Homestead exemptions, which had antecedents in Mexican law and were largely an outgrowth of Jacksonian sympathy for small debtors, originated in Texas's 1845 constitution and were adopted by many states, mostly in the west, during the following decades. *See* Joseph W. McKnight, *Protection of the Family Home from Seizure by Creditors: The Sources and Evolution of a Legal Principle*, 86 S.W. HIST. Q. 369, 396–97 (1983). They gained momentum in the South during Reconstruction as one means of alleviating severe post-war poverty. *See infra* notes 203–14 and accompanying text.

166. *See* N.C. CONST. of 1868, art. VIII, § 1. Up to the mid-nineteenth century, most corporations were created through private laws. As the industrial revolution progressed, many state legislatures grew weary of the ever-increasing volume of applications and of constant charges that some corporations received preferential treatment over others. Between 1850 and 1880, most states switched to a system of general incorporation laws providing automatic incorporation for any company which followed the statutory procedures. *See* FRIEDMAN, *supra* note 159, at 188–93, 512–13.

167. *See* N.C. CONST. of 1868, art. X, § 6; *see also infra* notes 313–31 and accompanying text.

168. *Compare* TEX. CONST. of 1869, art. XII, § 15, art. I, § 15, *with* TEX. CONST. of 1845, art. VII, § 22, art. I, § 15.

169. *See* TEX. CONST. of 1869, art. XII, § 14; *see also infra* notes 332–37 and accompanying text.

170. However, a movement to limit such support was growing in Texas in 1868–1869, and in the early 1870s, the legislature adopted statutory limitations that were later reflected in the state's 1876 Redeemer constitution. *See infra* notes 286–94 and accompanying text.

171. *See supra* note 19 and authorities there cited; TEX. CONST. of 1869, *passim.*

Like most ex-Confederate states, Texas and North Carolina made major changes to their constitutions at the end of Reconstruction, but contrary to a common stereotype, they stopped far short of destroying all Reconstruction-era reforms.[172] Shortly after the end of Reconstruction in Texas, a legislative committee drafted a new constitution that was not enacted because many legislators believed only an elected convention should make a new constitution.[173] In 1875, a convention was called; it produced a new constitution that was ratified by a large margin and has remained in effect, with numerous amendments, to this day. The 1875 convention was dominated by delegates who were primarily interested in agricultural reform and reduced taxes;[174] as a result, the 1876 constitution's defining characteristic was a vision of state government much narrower than that of the 1869 constitution. The 1876 constitution limited permissible rates of taxation at both the local and state level,[175] reenacted a pre-war limit on state debt,[176] imposed strict limits on municipal debt,[177] prohibited state and local aid to private enterprise for the first time,[178] and placed restrictions on the purposes for which state government could use tax revenues.[179] The constitution also returned the supreme court to elective status,[180] and reduced the terms of various officials.[181] Interestingly, proposals to make the state poll tax into a device for limiting

172. *See* C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH 1877–1913, at 65–66 (A History of the South, vol. IX, 1951); *see also* John Walker Mauer, *State Constitutions in a Time of Crisis: The Case of the Texas Constitution of 1876*, 68 TEX. L. REV. 1615, 1615–16 (1990) (arguing that state constitutions were products of Reconstruction, but that Reconstruction played a smaller role in the creation of state constitutions than historians believed).

173. *See* Mauer, *supra* note 172, at 1635.

174. *See id.* at 1637, 1640.

175. *Compare* TEX. CONST. art. VIII, §§ 1 (amended 1978), 2 (amended 1906), *with* TEX. CONST. of 1869, art. XII, § 19.

176. *Compare* TEX. CONST. art. III, § 49 (amended 1991), *with* TEX. CONST. of 1845, art. VII, § 33.

177. *See id.* at art. III, §§ 50, 51 (amended 1894), 52 (amended 1904); *see also infra* notes 291–94 and accompanying text.

178. *See* TEX. CONST. art. III, §§ 50, 51 (amended 1894), 52 (amended 1904), art. XI, § 3 (amended 1989).

179. *See id.* at art. III, § 48 (repealed 1969), art. XVI, § 6 (amended 1966).

180. *Compare id.* at art. V, § 2 (amended 1989) (mandating that the justices of the Texas Supreme Court are to be elected), *with* TEX. CONST. of 1869, art. V, § 2 (mandating that the justices were to be appointed by the Governor), *and* TEX. CONST. of 1866, art. IV, § 2 (mandating that the justices were to be elected).

181. *Compare, e.g.*, TEX. CONST. art. IV, §§ 4 (amended 1972) (setting the Governor's term at two years), 16 (amended 1999) (setting the Lieutenant Governor's term at two years), 23 (amended 1999) (setting the Comptroller of Public Accounts', State Treasurer's, and Commissioner of the General Land Office's terms at two years), *with, e.g.*, TEX. CONST. of 1869, art. IV, §§ 4 (setting the Governor's term at four years), 15 (setting the Lieutenant Governor's term at four years), 20 (setting the Comptroller of Public Accounts' term at four years), 21 (setting the State Treasurer's term at four years), 22 (setting the Commissioner of General Land Office's term at four years).

black suffrage were defeated, and as one commentator stated, delegates "while accepting discrimination against blacks, . . . believed it was more important to preserve the political rights of poor whites than to exclude the blacks from the political process."[182]

Unlike their Texas counterparts, North Carolina Unionists continued to be an important political force after Reconstruction; as a result, North Carolina did not replace the 1868 constitution, but instead amended it extensively in 1873 and 1875.[183] The primary purpose of the amendments was to readjust the balance of governmental powers; Redeemers restored the legislature's power to appoint many state and county officials, which would effectively limit local autonomy in eastern counties with heavily black populations.[184] Unlike Texas, there was little support for limiting the powers of government as a whole.[185] The 1876 amendments also mandated segregation in the public schools[186] and prohibited interracial marriages,[187] but these provisions did not change existing law; miscegenation was illegal in North Carolina throughout Reconstruction, and no serious effort was ever made to integrate schools during that era. None of the major reforms implemented in 1868 were repealed.[188] No effort to restrict black suffrage by constitutional means would be made in North Carolina or Texas until the end of the nineteenth century.[189]

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182. Mauer, *supra* note 172, at 1644.

183. CONNOR & CHESHIRE, *supra* note 158, at xxxv–xxxvii; *see* ORTH, *supra* note 45, at 15–17.

184. CONNOR & CHESHIRE, *supra* note 158, at xxxv–xxxvii; *see* ORTH, *supra* note 45, at 16.

185. *See* Mauer, *supra* note 172, at 1640–43. Some historians have argued that the delegates acted primarily out of frugality and a desire to keep Texas out of debt. *See id.* at 1638–41. Others have argued that the delegates were pursuing a broader goal, namely to reduce the effect of government in all areas of Texans' lives to an absolute minimum. *See* FEHRENBACH, *supra* note 7, at 433–38. Mauer makes an interesting and persuasive argument that during Reconstruction, the Southern states divided into a "restrictive constitutionalist" group of states which restricted government power in railroad finance and other areas and a "liberal constitutionalist" group which accepted a broader role for government. *See* Mauer, *supra* note 172, at 1620–21. The two groups were about equal in size, and some states moved from one to the other. *Id.* at 1621, 1623. North Carolina was relatively liberal throughout Reconstruction and afterwards; Texas moved into the liberal camp in 1869 but left it for good in 1876. *See id.* at 1621 n.35, 1625 n.63.

186. N.C. CONST. of 1868, art. IX, § 2 (1876); *see* ORTH, *supra* note 45, at 144–45.

187. *See* N.C. CONST. of 1876, art. XIV, § 8; ORTH, *supra* note 45, at 17.

188. *See* ORTH, *supra* note 45, at 15–17.

189. In 1900, the North Carolina Constitution was amended to incorporate a literacy test for suffrage: voters had to be able to read and write any section of the constitution and were required to pay a poll tax in advance of an election. However, most white voters were "grandfathered" out of this requirement: persons eligible to vote before January 1, 1867 or their descendants were exempt from the requirements, so long as they registered to vote before December 1, 1908. *See* N.C. CONST. of 1868, art. VI, § 4 (1900); ORTH, *supra* note 45, at 15–17; Act of June 13, 1900, ch. 2, art. IV, § 2, 1900 N.C. Sess. Laws 54, 54–55. In 1902, Texas amended its constitution to impose a poll tax. TEX. CONST. art. VI, § 2 (1902) (amended 1966 (eliminating the poll tax)); MAY, *supra* note 158, at 20.

V. THE TRANSITION TO A POST-WAR ECONOMIC SYSTEM

The Reconstruction era brought substantial economic as well as social change to the South. This Article focuses on three legal subjects that were important to post-war economic development. The first two subjects, debtor relief efforts during Reconstruction and the evolution of sharecropping law as a device for labor control, have attracted significant popular and scholarly attention. The third subject, evolution of corporation law and limits on governmental support for railroads and other internal improvement corporations, has not.

A. *Debtor Relief Law*

Poverty was widespread throughout the South after the war, and many Southern states responded to the problem by modifying their legal systems to be more debtor-friendly. Debtor relief efforts were not driven solely by humanitarian concerns; they also reflected lawmakers' practical desire to enable people to support themselves rather than become charges of the state.[190] Debtor relief sparked more controversy in North Carolina than in Texas because before the war, North Carolina had made relatively few concessions to debtors, whereas Texas had been one of the most debtor-friendly states in the nation.[191] The legal debate over debtor relief centered on three issues: enactment of stay laws; the homestead exemption; and abolition of imprisonment for debt.

At the beginning of the Civil War, North Carolina enacted a law that effectively stayed debt collections by allowing defendants in collection actions twelve months to answer the complaint.[192] Supplemental stay laws were enacted at the close of the war; the 1866 legislature stayed all collection actions for a year,[193] and the 1865 constitutional convention, again reflecting the North Carolinian taste for compromise, enacted an ordinance that allowed debtors continuing extensions of time to answer the complaint as long as they made regular payments on their debts.[194] The 1867 legislature enacted further extensions,[195] and the 1868 constitutional convention suspended all collection proceedings until the constitution went into effect.[196] Between 1865 and 1868, several of these laws were challenged as unconstitutional impairments of creditors' rights, but the North Carolina Su-

190. *See* COLEMAN, *supra* note 163, at 9–10. This mix of humanitarian and practical motives had been characteristic of debtor relief efforts in the South and elsewhere since colonial times. *Id.* at 9–15.

191. *See* McKnight, *supra* note 165, at 375, 393.

192. Act of Jan. 1, 1861, ch. 4, § 1, 1861–1862 N.C. Sess. Laws 100, 100.

193. Act of Jan. 1, 1866, ch. 16, § 1, 1866 N.C. Sess. Laws 100, 100.

194. *See* N.C. CONST. CONVENTION (1865), ORDINANCES, No. 19.

195. Act of Dec. 6, 1866, ch. 37, 1866–1867 N.C. Sess. Laws 56, 56–57.

196. *See* Kenneth Edson St. Clair, *Debtor Relief in North Carolina During Reconstruction*, 18 N.C. HIST. REV. 215, 216–17 (1941).

preme Court upheld the laws, reasoning that they did not "materially" change the remedies available to creditors.[197] In so holding, the court followed a well-established line of American law that originated in the 1840s.[198]

For reasons that are not entirely clear, North Carolina lawmakers abruptly changed their attitude after 1868. In an 1869 address to the legislature, Governor Holden urged that it was time to end the stay laws. "The 'evil day' of payment," he reasoned,

> is postponed in most cases to be felt with added force by the debtor. . . . We may lament his misfortunes and sympathize with him, but still the fact remains that he is still in possession of property which justly belongs to his creditors, some of whom may have been reduced to his condition by his failure to meet his obligations.[199]

Shortly after Holden's speech, a divided supreme court struck down the 1866 convention's stay ordinance and the 1868 constitution's amended version thereof in *Jacobs v. Smallwood* (1869).[200] Justice Reade, speaking for the majority, agreed with Holden that the stay laws had done more harm than good, and held that the laws impaired contract obligations and impermissibly discriminated in favor of debtors.[201] Justice Rodman, dissenting, argued that the laws did not so materially impair creditors' remedies as to be unconstitutional; he noted that "[a] great social and political revolution had occurred in the State" and that "some change in the remedies formerly in use, was unavoidable."[202] North Carolina enacted no further stay laws during Reconstruction.

The movement for homestead exemption laws began in the 1830s. Backed by Jacksonians and several influential reform groups, it quickly gained support in many parts of the United States.[203] However, the movement attracted comparatively little interest in North Carolina; eastern planters felt it would not help save their large-scale

197. *See, e.g.*, Parker v. Shannonhouse, 61 N.C. (Phil. Law) 209 (1867) (holding that an ordinance repealing an additional remedy for creditors did not deny them a remedy at common law); Crawford v. Bank of Wilmington, 61 N.C. (Phil. Law) 136 (1867) (upholding the 1861 act).

198. In *Bronson v. Kinzie*, 42 U.S. (1 How.) 311 (1843), the U.S. Supreme Court developed the distinction between "material" and "non-material" changes of remedy in addressing a challenge to Illinois debtor relief laws enacted in response to the depression of 1837. *See id.* at 311–22. Other state courts had interpreted stay laws in a liberal fashion similar to the North Carolina court. *Compare Parker*, 61 N.C. at 215, *and Crawford*, 61 N.C. at 145, *with e.g.*, Von Baumbach v. Bade, 9 Wis. 559, 583 (1859).

199. 1868–1869 LEGISLATIVE DOCS. OF N.C., No. 1, 10–12, *quoted in* St. Clair, *supra* note 196, at 223.

200. 63 N.C. 112, 113 (1869).

201. *See id.* at 115, 117.

202. *See id.* at 126–27 (Rodman, J., dissenting).

203. *See* FRIEDMAN, *supra* note 159, at 244; McKnight, *supra* note 165, at 388.

operations in hard times, and western farmers, who did not depend heavily on credit, had little need of it. The North Carolina Legislature enacted a modest asset-shelter law in 1849 exempting only limited personal property such as work tools, clothing, furniture, and a supply of food.[204] In response to post-war poverty, the 1867 legislature substantially expanded the law to exempt additional farming and trade tools from collection and also to exempt up to 100 acres of rural homestead property and city lots up to one acre.[205] In 1873, the exemption was expanded and elevated to constitutional status.[206]

The 1867 exemption was challenged as an impairment of contract, but the North Carolina Supreme Court upheld it in *Hill v. Kessler* (1869).[207] Reade, again speaking for the majority, agreed with courts in other states that such exemptions were designed primarily to preserve homes and not to evade debts; any effect on debts was "incidental."[208] Chief Justice Pearson, dissenting, launched what was to be a continuing campaign against the exemption; he pointed to the risk that future legislatures would expand the exemption to the point of "dishonesty and fraud."[209] In *Garrett v. Cheshire* (1873),[210] the court also held the 1868 constitutional exemption could be applied to debts incurred after the original 1867 exemption was passed but before the expanded constitutional exemption went into effect.[211] The United States Supreme Court had recently ruled, in a case involving a similar Georgia exemption, that expanding amendments could not be applied retroactively,[212] but the North Carolina court strained to distinguish the Georgia case on the basis that North Carolina law limited the creditor's right to levy on a debtor's property, not the creditor's contract rights.[213] Reade, again speaking for the court, took advantage of a rare opportunity to assert that despite the court's Unionist reputa-

204. *See* Act of Jan. 29, 1849, ch. 38, §§ 1–2, 1848–1849 N.C. Sess. Laws 85, 85.

205. Act of Feb. 25, 1867, ch. 61, §§ 1, 7, 1866–1867 N.C. Sess. Laws 81, 81–82, 83.

206. The exemption was expanded to cover up to $500 of personal property and homesteads up to a value of $1,000. *See* N.C. CONST. of 1868, art. X, §§ 1–2 (1873); ORTH, *supra* note 45, at 15–16.

207. 63 N.C. 437, 447–48 (1869) (citing *Smallwood*, 63 N.C. at 112).

208. *See id.* at 447. Reade had previously indicated in *Smallwood*, that the homestead exemption would pass constitutional muster and had spoken approvingly of the exemption as "allow[ing] a man to be comfortable and honest, and encourag[ing] industry." *Smallwood*, 63 N.C. at 115–16.

209. *See Hill*, 63 N.C. at 451 (Pearson, C.J., dissenting). *Hill* involved a contractual debt; three years later, in *Dellinger v. Tweed*, 66 N.C. 206, 211 (1872), the court divided on similar lines in ruling that the homestead exemption also applied in actions to collect debts arising out of tort or criminal activity. Pearson again dissented. *Id.* at 212–14 (Pearson, C.J., dissenting).

210. 69 N.C. 396 (1873).

211. *Id.* at 401.

212. *See* Gunn v. Barry, 82 U.S. (15 Wall.) 610, 622–24 (1872).

213. *See Garrett*, 69 N.C. at 401–02. The U.S. Supreme Court was not persuaded; it rejected Reade's position in *Edwards v. Kearzey*, 96 U.S. 595, 606–07 (1877).

tion, its heart lay with North Carolinians rather than the federal government:

> It would be verging on the ridiculous to say that the Supreme Court of the United States, or any other court, better knows the details of what is necessary for the "comfort and support" of the citizens of North Carolina than the Legislature of the State . . . . If under our circumstances our people are to be left without any exemptions, the policy of christian civilization is lost sight of . . . .[214]

The final component of debtor relief was liberalization of debtor imprisonment laws. The use of imprisonment as a sanction for failure to pay debts was a well-established feature of English common law in the seventeenth century and was adopted with mild variations by all of the American colonies.[215] Some colonies adopted a "full relief" system that contained enough debt payment options to allow virtually any debtor to avoid jail by providing sureties, agreeing to work off the debt, or (when all else failed) declaring bankruptcy. Other colonies, including North Carolina, adopted more limited relief systems.[216] The movement to abolish imprisonment for debt altogether began in the early nineteenth century; it found favor in many northeastern and western states but not in the south Atlantic region.[217] North Carolina enacted several statutes in the 1820s that narrowed the circumstances under which debtors could be imprisoned, but it did not abolish imprisonment altogether.[218] Post-war economic pressure on Southern lawmakers to make debtors productive rather than turn them into public charges triggered renewed opposition to imprisonment for debt. In 1867, the North Carolina Legislature prohibited imprisonment except for debts incurred by fraud; fraud was viewed as being close enough to criminal behavior that imprisonment should remain available in such cases.[219] The 1868 constitution abolished imprisonment for all contractual debts but not for debts arising from fraud.[220] These post-war debtor laws were never challenged on constitutional grounds.[221]

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214. *See Garrett*, 69 N.C. at 404–05.

215. *See* COLEMAN, *supra* note 163, at 9–15. Imprisonment was a sanction of last resort: in most cases, creditors allowed debtors to avoid prison if they made regular payments to reduce their debts. *See id.* at 9–15.

216. *Id.* at 215–27.

217. *See* FRIEDMAN, *supra* note 159, at 271–72; COLEMAN, *supra* note 156, at 9–15, 179–81, 191–94, 215–20, 228–31.

218. *See* COLEMAN, *supra* note 163, at 224; 1821 N.C. Laws, p. 1541; 1823 N.C. Laws, ch. 31; 1844–1845 N.C. Laws, ch. 31.

219. *See* Act of Feb. 21, 1867, ch. 63, § 1, 1866–1867 N.C. Sess. Laws 85, 85 (providing that it is lawful to imprison a person for debts incurred by fraud).

220. N.C. CONST. of 1868, art. I, § 16.

221. The only serious complaint made was that the 1867 law allowed creditors to force in-state debtors to give security before leaving the state, it provided no such protection from out-of-state debtors. In *Holmes v. Sackett, Belcher & Co.*, 63 N.C. 58,

Texas was a debtor-friendly state from its beginning: many early settlers came to Texas in part to escape their creditors; Texans had a strong desire for personal independence; and there was tremendous demand for settlers to fill up the state.[222] Texas enacted its first homestead exemption in 1839, and in 1845, it became the first state to enshrine an exemption in its constitution.[223] Texas's exemption was one of the most generous of any state allowing debtors to shelter rural homesteads of up to 200 acres or town lots up to $2,000 in value.[224] The Republic of Texas completely abolished imprisonment for debt in its 1836 constitution; the abolition provision was unchanged in the 1845, 1866, and 1869 state constitutions.[225]

Because Texas was remote from the main theaters of the Civil War, it suffered less economic destruction and post-war privation than most Confederate states. Nevertheless, the war affected its economy sufficiently, and as a result, one of the 1866 legislature's first acts was to continue a wartime stay on collections and allow judgment debtors to avoid execution for a time by making installment payments.[226] On this issue, as on other war-related economic issues, the Texas Reconstruction courts took a stand very much at odds with popular sentiment; in 1868, the Military Court struck down a wartime stay law, reasoning that it impaired the contracts clause of the federal constitution.[227] The court defined material impairment of remedies broadly and stated it would presume stay laws were intended to discriminate in favor of debtors rather than promote the general "public interests and convenience," unless there was clear evidence to the contrary.[228] A few months later, in *Jones v. McMahan* (1868),[229] the court concluded that the 1866 stay law did not pass constitutional muster under

63 (1868), the supreme court ruled that only the legislature could remedy the discrepancy, and the legislature did so in 1869.

222. *See* McKnight, *supra* note 165, at 375–76. *See generally* John Cornyn, *The Roots of the Texas Constitution: Settlement to Statehood*, 26 TEX. TECH L. REV. 1089 (1995).

223. *See* Act approved Jan. 26, 1839, 3d Cong., 1st R.S., § 1, 1839 Repub. Tex. Laws 125, 125–26, *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 125, 125–26 (Austin, Gammel Book Co. 1898); TEX. CONST. of 1845, art. VII, § 22; McKnight, *supra* note 165, at 388, 396. Exemptions for essential personal property had been part of Spanish law for centuries; an exemption was first extended to personal property by the Mexican provincial legislature of *Coahuila y Texas* in 1827 as an incentive to colonization. *See* Cornyn, *supra* note 222, at 1185–88.

224. *See* Cornyn, *supra* note 222, at 1188.

225. *See id.* at 1134–37, 1188–89. *Compare* TEX. CONST. of 1869, art. I, § 15, *and* TEX. CONST. of 1866, art. I, § 15, *and* TEX. CONST. of 1845, art. I, § 15, *with* REPUB. TEX. CONST. of 1836, Declaration of Rights, para. 12, *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1082, 1083 (Austin, Gammel Book Co. 1898).

226. *See* Act approved Nov. 10, 1866, 11th Leg., ch. 125, §§ 1, 2, 1866 Tex. Gen. Laws 126, 126–27, *reprinted in* 5 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1044, 1044–45 (Austin, Gammel Book Co. 1898).

227. *See* Luter v. Hunter, 30 Tex. 688 (1868).

228. *See id.* at 696–700.

229. 30 Tex. 719 (1868).

this standard.[230] The court bluntly stated that it would not be influenced by Texas's pro-debtor tradition:

> We have been apprised by the defendant's attorney of the pecuniary situation of the people of this state, and that there is a real necessity for the stay law. . . . We have been told that "the safety of the people is the supreme law."
>
> . . . The "supreme law" is the constitution of the United States and this state, and the safety of the people consists in the faithful performance of each and all their requirements. . . . We do not agree with the distinguished counsel that distress would prevail should debts be rigidly collected.[231]

Because Texas's economy was relatively healthy by 1868, subsequent legislatures saw no need to pass new stay laws; but given Texas's tradition of helping debtors, it is likely the Redeemer court would have upheld new stay laws or at least would have reversed the presumption against them if such laws had been enacted after *Jones*.[232]

B. *Labor Regulation: The Sharecropper Laws*

Sharecropping (that is, payment of tenant farmers or hired hands with a share of the crop rather than with cash) was not unknown before the Civil War, but many Reconstruction historians suggest it did not become widespread or controversial until after the war.[233] Sharecropping had important implications both for race relations and for the allocation of economic power in the post-war South. Racial prejudice and lack of money made it extremely difficult for most black farmers to buy land after the war, and many of them viewed sharecropping as the next best option; because it gave them a direct interest in the fruits of their labor, it "represented a fundamental shift in the balance of power in rural [Southern] society, and afforded blacks a degree of control over their time, labor, and family arrangements inconceivable under slavery."[234] Planter landlords benefitted from sharecropping because it gave tenants an incentive to work hard and work as a family unit, but many landlords were concerned that sharecropping would erode their power over an agricultural system that

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230. *See id.* at 737–38.

231. *Id.* at 735–36. *See also* Earle v. Johnson, 31 Tex. 164, 165 (1868) (reaffirming the result in *Jones* under similar facts).

232. The Semicolon Court went along with the Military Court's holdings but stated that "we have not, nor will we allow any citizen to be prejudiced in his rights, by reason of his obedience to those laws whilst they were supposed to be valid and binding." *See* Townsend v. Quinan, 36 Tex. 548, 553 (1871–1872).

233. *See* FONER, *supra* note 4, at 173–74, 404–06; *see also* HAROLD D. WOODMAN, NEW SOUTH—NEW LAW: THE LEGAL FOUNDATIONS OF CREDIT AND LABOR RELATIONS IN THE POSTBELLUM AGRICULTURAL SOUTH 2–4 (1995).

234. FONER, *supra* note 4, at 406; *but see* WOODMAN, *supra* note 233, at 28–64 (discussing crop lien laws).

was becoming increasingly decentralized.[235] Merchants who supplied sharecroppers were also concerned about relative priorities between their liens and landlords' liens; in bad crop years, such priorities could determine whether they or the landlords survived.[236]

Despite these issues, sharecropping law generated little overt controversy in either Texas or North Carolina. Legislatures in some Southern states gave tenants a statutory first lien on their crops, but that did not occur in either Texas or North Carolina, and the lack of tenant priority does not seem to have troubled Unionist lawmakers in either state.[237] Reconstruction legislatures and courts in both states favored landlords over merchants more than many other Southern states, and Redeemer legislatures in both states increased landlord protection at the end of Reconstruction.[238]

Texas had a pre-war lien law that required only minor modifications to meet planters' post-war concerns.[239] The pre-war law gave landlords a first lien on all crops and other property of their tenants as security for unpaid rent; an exception was made for goods supplied by merchants to assist in the making of the crop.[240] The tenant could not remove the crops without the landlord's consent; if the landlord suspected that the tenant intended to remove the crops illegally, he could obtain a "distress warrant," giving him physical control of the crops without notice or hearing to the tenant.[241] The tenant's only relief was that the landlord's lien expired three months after removal of the crops.[242] The 1866 Texas Legislature added a provision that gave merchants who furnished supplies to the tenant second priority behind landlords if they obtained and recorded written liens;[243] it also made a small concession to tenants by giving them a second lien on half the crops as security for payment of wages.[244] The Reconstruction legisla-

235. *See* FONER, *supra* note 4, at 174, 405–06.

236. *See* WOODMAN, *supra* note 233, at 30–33.

237. *See infra* notes 239–52 and accompanying text.

238. *See* WOODMAN, *supra* note 233, at 51–54, 59.

239. *See* Act approved Jan. 16, 1843, 7th Cong., 1843 Repub. Tex. Laws 41, 41–42, *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 861, 861–62 (Austin, Gammel Book Co. 1898).

240. *See id.* § 1, *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 861 (Austin, Gammel Book Co. 1898).

241. *See id.* §§ 1–2, 4, *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 861–62 (Austin, Gammel Book Co. 1898).

242. *See id.* § 1, *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 861 (Austin, Gammel Book Co. 1898).

243. Act approved Oct. 27, 1866, 11th Leg., ch. 64, § 1, 1866 Tex. Gen. Laws 64, 64, *reprinted in* 5 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 982, 982 (Austin, Gammel Book Co. 1898). Merchants could obtain a second lien on crops and property by obtaining and recording the tenant's statement that the supplies furnished were necessary to make the crop. *Id.* §§ 1–2, *reprinted in* 5 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 982 (Austin, Gammel Book Co. 1898).

244. *See* Act approved Nov. 1, 1866, 11th Leg., ch. 80, § 6, 1866 Tex. Gen. Laws 76, 77, *reprinted in* 5 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 994, 995 (Austin, Gammel Book Co. 1898).

tures made no change in the 1866 law; no challenges were mounted to the lien laws during Reconstruction, and in the few cases involving the laws that came before the Texas Supreme Court, the court did not take any exception to the laws.[245] In 1873, the court assisted landlords by ruling that if they furnished supplies, their lien would extend to supplies even if they did not record the lien; they were only required to give other lien-holding merchants notice that their lien extended to supplies as well as rent.[246] In 1874, the Redeemer legislature gave landlords a first lien for both rent and supplies and eliminated the recording and notice requirement for supply liens.[247]

Before the war, North Carolina had no lien statutes but followed the common law doctrine of settlement by appropriation, which struck a balance between landlords and tenants by conferring title to the crop on the landlord until the crop was out of the ground. North Carolina modified the doctrine by giving tenants joint title when the crop was harvested until both parties agreed on the proper division of the crop.[248] Reconstruction lawmakers moved away from this balance; the fact that North Carolina Unionists were much more integrated into the state's political and economic establishment than Unionists elsewhere in the South led them to "show[ ] far more concern for the landlords than did Republicans elsewhere in the South."[249] The 1869 legislature tilted the balance toward landlords by authorizing them to make agreements with tenants that gave them sole ownership of the crop both before and after harvest and provided that in such cases the tenant's unauthorized removal of the crop would be a crime.[250] The supreme court softened the effects of the law slightly in 1874, by hold-

245. *See* Ewing v. Perry, 35 Tex. 777, 778–79 (1871–1872); Mathews v. Burke, 32 Tex. 419, 433–34 (1870). In the early 1870s, the landlord's lien was slightly narrowed to cover crops and supplies furnished by the landlord but not other property of the tenant. *See* 1874 Tex. Laws, ch. 48, § 5.

246. *See* McGee v. Fitzer, 37 Tex. 27, 28 (1872–1873). The Redeemer Court affirmed this rule after Reconstruction ended in Texas. *See* Jones v. Avant, 41 Tex. 650, 654–55 (1874).

247. *See* Act approved Apr. 4, 1874, 14th Leg., 1st R.S., ch. 48, § 5, 1874 Tex. Gen. Laws 55, 58, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 57, 60 (Austin, Gammel Book Co. 1898).

248. *See* Brazier v. Ansley, 33 N.C. (11 Ired.) 12, 14 (1850). In *Brazier*, the court demonstrated the value it placed on a balancing of interests by commenting that "[i]t would be manifestly unjust to suffer the landlord to be the sole judge of the rights of his cropper." *See id.* at 15–16.

249. *See* WOODMAN, *supra* note 233, at 51. The 1866 Restoration legislature enacted a sharecropper law which gave merchant suppliers a first lien on crops with the proviso that such liens "shall not affect the rights of landlords to their proper share of rents." Act of Mar. 1, 1867, ch. 1, §§ 1–2, 1866–1867 N.C. Sess. Laws 3, 3–4. The law established a distress warrant procedure similar to that in Texas, except that if tenants disputed the landlord's claim, local authorities were required to hold the crop proceeds pending resolution of the dispute, rather than turn them over to the landlord. *Id.* § 2, 1866–1867 N.C. Sess. Laws, at 4.

250. Act of Apr. 10, 1869, ch. 156, §§ 13, 15, 1868–1869 N.C. Sess. Laws 355, 359–60; WOODMAN, *supra* note 233, at 51.

ing that such agreements must be in writing,[251] but the next year, the Conservative-controlled legislature eliminated this requirement and affirmed that landlords' liens for both rent and supplies would be paramount in all cases.[252]

C. *Corporation Law and Municipal Aid to Corporations*

At the beginning of the nineteenth century, virtually all corporations were created by individual legislative acts. During the first half of the century, as corporations proliferated and became the preferred medium for business enterprise, private incorporation acts were increasingly criticized for fostering special privilege and requiring ever-increasing amounts of legislative energy and time.[253] A movement for general incorporation laws arose, which reached many Southern states for the first time during Reconstruction.[254] In addition, concerns about governmental financial support of railroads and other internal improvement corporations, such as turnpike and canal companies, plagued many states before the war: was it proper for government to extend such support, and if so, should limits be placed on the extent of such support?[255] During Reconstruction, virtually all Southern states actively sought to encourage railroad development, and in the process, they confronted these issues.[256]

Corporation laws evolved in similar fashion in Texas and North Carolina. Texas placed some limits on private incorporation laws before the Civil War; the 1845 constitution allowed the legislature to create private corporations only by a two-thirds vote of each chamber.[257] The provision was continued in the 1866 constitution,[258] but for reasons that are unclear, it was omitted from the 1869 constitution. Nevertheless, by that time, a rare political consensus developed in Texas, that the time had come to end private incorporation laws. The Conservative-dominated 1871 legislature enacted, and Governor Davis approved, the state's first general incorporation law, which pre-

251. *See* Harrison v. Ricks, 71 N.C. 7, 12 (1874); *see also* Haywood v. Rogers, 73 N.C. 320 (1875). The *Harrison* court emphasized that unlike most pre-war tenants, sharecroppers contracted to give the landlord an interest in the crop from the start rather than simply to pay rent; therefore, it reasoned, a continuing first lien on the crop as security for rent was appropriate. *See Harrison*, 71 N.C. at 10–11.

252. *See* Landlord and Tenant Act, ch. 209, sec. 1, § 13, 1874–1875 N.C. Sess. Laws 281, 281–82. Two years later, another Conservative legislature, perhaps feeling that the balance had tilted too far in favor of landlords, enacted a law giving tenants the right to seek a prompt division of crops by the landlord after all obligations to the landlord had been met. *See* Landlord and Tenant Act, ch. 283, sec. 2, § 2, 1876–1877 N.C. Sess. Laws 551, 551–52.

253. *See* FRIEDMAN, *supra* note 159, at 188–93, 512.

254. *See id.* at 188–93, 512.

255. *See id.* at 192–93, 512–13.

256. *See* FONER, *supra* note 4, at 379–92.

257. *See* TEX. CONST. of 1845, art. VII, § 31.

258. *See* TEX. CONST. of 1866, art. VII, § 31.

scribed detailed procedures and regulations that corporations had to follow in order to remain in good standing.[259] Conservatives sponsored an 1873 constitutional amendment that limited the types of private laws the legislature could enact; incorporation laws were not included in the permissible category.[260] The 1876 constitution explicitly provided that corporations could be created only under general incorporation laws and required the legislature to enact such laws.[261]

North Carolina relied exclusively on private incorporation laws before the war.[262] The 1868 constitutional convention prohibited private incorporation laws and mandated general laws; but, perhaps reflecting the state's Whiggish tradition of caution in checking business development, it also allowed the legislature to enact private laws "in cases where, in [its] judgment . . . the object of the corporations cannot be attained under general laws."[263] Like Texas, the North Carolina Legislature enacted a detailed general incorporation law in 1872.[264] Incorporation under the general law became the norm, but the legislature continued to enact private corporation laws regularly under the constitutional exception. The 1868 constitution's general incorporation provision and exception both survived Reconstruction and continue to this day.[265]

Texas and North Carolina took similar approaches to the public financing of internal improvement corporations. The North Carolina Legislature was not content with supporting railroads indirectly; in 1849, it incorporated and retained partial state ownership of the North Carolina Railroad, and from the 1830s forward, it regularly chartered other railroads and provided benefits in the form of tax exemptions.[266] Pre-war Texas legislatures avoided state ownership, but like North Carolina, they chartered new railroads freely; they also provided tax exemptions and land grants as development incentives.[267] Neither state imposed any restrictions on municipal financial support of railroads; in fact, both explicitly authorized it.[268] Many counties and towns in each state provided railroad support, usually in the form of

259. *See* Act approved Dec. 2, 1871, 12th Leg., Adj. S., ch. 80, 1871 Tex. Gen. Laws 66, 66–82, *reprinted in* 7 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 68, 68–84 (Austin, Gammel Book Co. 1898).

260. TEX. CONST. of 1869, art. XII (1873).

261. *See* TEX. CONST. art. XII, §§ 1, 2.

262. The 1850–1851 legislature enacted a law enumerating the powers of corporations but the law did not prescribe incorporation procedures. *See* Act of Jan. 22, 1851, ch. 50, 1850–1851 N.C. Sess. Laws 118, 118–19.

263. *See* N.C. CONST. of 1868, art. VIII, § 1 & note (amended 1916).

264. *See* Act of Feb. 12, 1872, ch. 199, 1871–1872 N.C. Sess. Laws 347, 347.

265. In 1916, the constitution was amended to allow private incorporation laws for charitable, educational, and other specified types of corporations sponsored by the state, and to allow repeal of corporate charters by private act. *See* N.C. CONST. art. VII, § 1 & note (amended 1916).

266. *See* POWELL, *supra* note 6, at 285–94.

267. FEHRENBACH, *supra* note 7, at 319.

268. *See infra* notes 271, 289–97, 305 and accompanying text.

stock purchases or direct subsidies, in order to obtain the economic benefits of rail service.[269] No challenge to railroad support laws came to the Texas Supreme Court before the war;[270] a challenge was mounted in North Carolina but was firmly rejected in 1855 by the supreme court, which noted that other states had "uniformly" upheld the power of legislatures to enact such laws.[271] In *Caldwell v. Justices of Burke* (1858),[272] Justice Thomas Ruffin, writing for the court, went a step further; he openly praised support laws because they promoted freedom and local autonomy: "the ability of the people, according to their own judgment, is to govern. The law does not force them to subscribe, but allows them to take what stock they will. Why then, may not a county make a subscription whenever it chooses and as often as it chooses?"[273]

North Carolina's 1868 constitutional convention limited public financing of railroads for the first time; it prohibited the legislature from providing state subsidies or credit unless so authorized by the state's voters in a referendum.[274] Nevertheless, the legislature on several occasions gave generous credits to new railroads without a referendum.[275] The supreme court tried to put a stop to the practice in *University Railroad Co. v. Holden* (1869);[276] it construed the 1868 referendum requirement to apply to both private and state-owned railroads, even though the constitution did not explicitly require referenda as to state-owned railroads.[277] The court recognized that its decision would be unpopular, but urged the legislature to put its trust

269. *See infra* notes 271, 289–97, 305 and accompanying text.

270. An 1850 statute authorizing San Antonio to subscribe for stock in the San Antonio Railroad Co. was challenged in 1857, but the challenge was still working its way through the trial court when the Civil War broke out, and it did not reach the Texas Supreme Court until 1866. *See* City of San Antonio v. Jones, 28 Tex. 19, 22–24 (1866); *see also infra* note 305 and accompanying text.

271. *See* Taylor v. Comm'rs of New Bern, 55 N.C. (2 Jones Eq.) 141, 142 (1855). The court's statement was essentially correct but strikingly, the court chose not to mention that courts in other states had serious doubts about the wisdom of such laws and in many cases had upheld the laws only reluctantly. The court also omitted any mention of the fact that several states had already amended their constitutions to prohibit or severely restrict local aid to railroads and other corporations. Compare *Jones*, 28 Tex. at 30, 32–33, in which the Texas Restoration Court also concluded that decisions in other states allowed public financing of railroads, but regarded the decisions with a more critical eye than did the North Carolina court, with *Taylor*, 55 N.C. at 141–42.

272. 57 N.C. (4 Jones Eq.) 323 (1858).

273. *See id.* at 329.

274. *See* N.C. CONST. of 1868, art. V, § 5. The constitution made exceptions for railroads already under construction in 1868 or of which the state was part owner. *See id.*

275. *See* POWELL, *supra* note 6, at 396.

276. 63 N.C. 410 (1869).

277. *See id.* at 412–13. Justice Reade argued that the constitution should not be interpreted to prohibit the legislature from building a state-owned railroad. *Id.* at 417 (Reade, J., concurring).

in the voters in cases where it truly felt railroad subsidies were necessary.[278]

The North Carolina court also confronted a related issue which occupied many American courts in the 1870s: the extent to which constitutional restraints on impairment of contract restricted legislatures from imposing new regulations on existing railroads. In the early 1870s, many states enacted rate laws and other railroad regulatory laws for the first time. The railroads vigorously challenged such laws; relying on the United States Supreme Court's decision in the *Dartmouth College* case (1819),[279] they argued that when a legislature chartered a railroad, the terms of the charter created vested property rights that could not be altered or limited thereafter. In *Raleigh & Gaston Railroad Co. v. Reid* (1870),[280] North Carolina became one of the first states to reject this argument.[281] In the *Raleigh & Gaston* case, the railroad's 1852 charter exempted it from taxes until 1867 and provided that after that time, it could not be taxed more than twenty-five cents per share, but the 1869 legislature taxed the railroad's franchise and rolling stock at higher rates.[282] The North Carolina court held that even though the state constitution in effect in 1852 did not reserve any power of charter amendment to the legislature, such power was inherent: corporate charters "are presumed to be made subject to the change of circumstances that future events may develop, and to the right and duty of the State to regulate the currency and to preserve its own existence by equal taxation."[283] In so holding, the court went a step beyond many other state courts, which relied on state constitutional provisions reserving to their legislatures the right to amend corporate charters.[284] The court took a bemused attitude

278. *See id.* at 430 (Rodman, J., concurring).

279. Tr. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819). Article I of the U.S. Constitution prohibits states from passing any "Law impairing the Obligation of Contracts." U.S. CONST. art. I, § 10. The 14th Amendment prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

280. 64 N.C. 155 (1870), *rev'd*, 80 U.S. 269 (1879).

281. *See id.* at 156–57. The U.S. Supreme Court also rejected the Contract Clause argument in a series of cases in 1876, but it relied heavily on the fact that the constitutions of the states at issue reserved to their legislatures the power to alter corporate charters and concluded that the railroads accepted their charters subject to such condition. *See, e.g.*, Munn v. Illinois, 94 U.S. 113, 133–34 (1876) (involving an Illinois railroad commission law); Chicago, Burlington, & Quincy R.R. Co. v. Iowa, 94 U.S. 155, 161–62 (1876) (upholding a similar Iowa law).

282. *See Raleigh & Gaston R.R. Co.*, 64 N.C. at 156.

283. *See id.* at 161; *see also* Wilmington & Weldon R.R. Co. v. Reid, 64 N.C. 226, 232 (1870) (holding that the North Carolina Legislature was able to levy an *ad valorem* tax on the railroad franchise because it falls under *Raleigh & Gaston* principles), *rev'd*, 80 U.S. 264 (1871).

284. *See, e.g.*, Attorney Gen. v. Chicago & Northwestern Ry. Co., 35 Wis. 425, 574 (1874); *see also supra* note 279.

toward post-war railroad development, commenting that a corporate charter:

> instead of being, in its strict sense, a *contract*, is more like the act of an indulgent head of a family dispensing favors to its different members, and yielding to importunity. So the courts, to save the old gentleman from being stripped of the very means of existence by sharp practice, have been forced to reverse the rule of construction [that ambiguities in a contract should be construed against the drafter], and to adopt the meaning most favorable to the *grantor*.[285]

Like North Carolina, Texas encouraged government support of railroads before the war,[286] but took steps to limit such support during Reconstruction. The 1866 constitution allowed the legislature to guarantee railroad obligations, but only on a limited basis, and only if the guarantee was approved by a two-thirds vote of both houses.[287] The drafters of the 1869 constitution, perhaps influenced by a new wave of enthusiasm for railroad building that swept the state in the late 1860s and early 1870s, eliminated this provision,[288] and in 1871, the legislature authorized counties to subsidize internal improvements if their citizens approved by a two-thirds vote.[289] The depression of 1873 caused many railroads to default on their bond obligations and triggered a swift reaction against government subsidies. The 1874 legislature repealed the 1871 law with respect to all but a few counties,[290]

285. *See Raleigh & Gaston R.R. Co.*, 64 N.C. at 158.

286. *See infra* notes 305–06 and accompanying text.

287. TEX. CONST. of 1866, art. VII, § 36. This section limited the guarantee to $15,000 per mile of track; it also provided the guarantee would not go into effect until at least 25 miles of line had been graded, and it would be extended to additional construction only upon completion of 10-mile installments. *Id.* The constitution required that the guarantees be secured by a first lien on all railroad property and that the bond proceeds must be used for construction purposes only. *See id.*

288. *Compare id.*, *with* TEX. CONST. of 1869, art. XII. The debate over railroad financing did not break down along party lines. Both the Republican 1869 legislature and the Conservative-dominated 1871 legislature gave expansive subsidies to many different railroads. Although many of the subsidies were passed over Governor Davis's veto, his opponents used the subsidies as an example of waste and fraud in his administration, and their attacks played a part in his 1873 defeat in his run for reelection. FEHRENBACH, *supra* note 7, at 418. For a discussion of some of the subsidy laws enacted between 1869 and 1873, see *Galveston, Brazos, & Colo. Narrow-Gauge Railway Co. v. Gross*, 47 Tex. 428, 432–36 (1877).

289. *See* Act approved Apr. 12, 1871, 12th Leg., R.S., ch. 37, §§ 1–5, 16, 1871 Tex. Gen. Laws 29, 29–30, 32, *reprinted in* 6 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 931, 931–32, 934 (Austin, Gammel Book Co. 1898). The 1869 constitution barred the legislature from making further land grants, but Conservative-sponsored constitutional amendments effectively eliminated the land grant bar by 1876. *Compare* TEX. CONST. of 1869, art. X, § 6, *with* TEX. CONST. of 1876, art. XIV, § 3.

290. Act approved Apr. 22, 1874, 14th Leg., 1st R.S., ch. 93, § 1, 1874 Tex. Gen. Laws 118, 118–19, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 120, 120–21 (Austin, Gammel Book Co. 1898); *see* Act approved Apr. 22, 1874, 14th Leg., 1st R.S., ch. 158, § 1, 1874 Tex. Gen. Laws 213, 213–14, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 215, 215–16 (Austin, Gammel Book Co. 1898).

and the 1876 constitutional convention imposed some of the sharpest restrictions of any American state on government railroad financing;[291] it prohibited municipalities from lending their credit to corporations or buying corporate bonds except under very limited circumstances,[292] and it absolutely prohibited them from making grants, lending credit to corporations, or buying corporate stock.[293] The convention also prohibited the legislature from extending the state's credit to municipalities or private corporations.[294]

The Texas Supreme Court had difficulty developing a consistent approach to railroad support issues during Reconstruction. Two important railroad financing matters came before the court: the *Kuechler* case in 1871[295] and the *San Antonio* bond cases, which began in 1866 and did not end until 1879.[296] In *Kuechler,* the Semicolon Court paid formal deference to popular concerns about excessive corporate power, but the justices were so divided in their approaches that each of them issued a separate opinion. The issue in *Kuechler* was whether the Houston & Great Northern Railroad was entitled to receive public lands under an 1854 act awarding land to railroads which constructed 25 miles of railroad within two years of being chartered.[297] The act was to expire in 1864, but in 1862, the Confederate state legislature extended its expiration date to two years after the war's close. The Houston & Great Northern was chartered in 1866 and completed the requirements for the grant in early 1870.[298]

Although it seemed at first blush that the railroad's claim was hopeless, on a 2-1 vote the court threaded its way through several legal obstacles and concluded that the railroad was not too late to qualify for the grant. Despite their distaste for all things Confederate, Justices Evans and Walker concluded that the land grant law was not a war-related matter; therefore, its Confederate-era extension was valid. Furthermore, the railroad's deadline did not expire in 1868; during the period of military control between 1867 and 1870, "[t]he state of war—not open, but suppressed war—continued."[299] As a result, the

291. The 1876 convention delegates adopted limitations on railroad financing as part of a larger effort to reduce the scope of government and taxes in general. *See supra* notes 175–79 and accompanying text.

292. TEX. CONST. art. III, § 52 (amended 1904). Municipalities could buy bonds or extend credit only up to twenty-five percent of the assessed value of municipal property, only for improvement of rivers, lakes and highways, and only if the action was approved by two-thirds of the voters. *Id.*

293. *Id.* at art. XI, § 3.

294. *Id.* at art. III, § 50.

295. Houston & Great N. R.R. Co. v. Kuechler, 36 Tex. 382 (1871–1872), *overruled by* Quinlan v. Houston & Tex. Cent. Ry. Co., 34 S.W. 738 (Tex. 1896).

296. *See infra* notes 306–10 and accompanying text.

297. *Kuechler*, 36 Tex. at 385–89; *see also* Act approved Jan. 30, 1854, 5th Leg., ch. 15, § 1, 1854 Tex. Gen. Laws 11, 11, *reprinted in* 3 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1455, 1455 (Austin, Gammel Book Co. 1898).

298. *Keuchler*, 36 Tex. at 394–98.

299. *Id.* at 397.

railroad's time to comply with the act was tolled and its completion of twenty-seven miles of railroad in 1871 was timely.[300] Walker went a step further in favor of corporation rights; although he recognized "there is great danger to be apprehended from the influence which colossal moneyed corporations are now exerting," he believed the *Dartmouth College* doctrine should be strictly applied because once charter rights were granted, they could never be changed, either by constitution or by statute.[301] Justice Ogden, dissenting, argued the court should adhere to its past policy of striking, wherever possible, at vestiges of Confederate influence in Texas's legal system.[302] He argued that only those acts of the Confederate legislatures (and the 1866 legislature) that provided for "the absolute necessities of society" should be enforced; this did not include the 1862 land grant extension or the 1866 railroad charter.[303] Ogden protested that the majority's decision struck a blow against the efforts of the 1869 constitutional convention to preserve the state's public lands for the school fund.[304]

In the *San Antonio* bond cases, the city of San Antonio repeatedly challenged its obligation to pay for railroad stock that the legislature had authorized it to buy in 1850.[305] The Restoration Court rejected the city's argument that the legislature was constitutionally prohibited from authorizing municipal stock subscriptions. The court candidly admitted that the issue was not free from doubt; but after an exhaustive discussion of relevant cases in all sections of the United States, it concluded that most states had upheld such authority and it agreed with the majority rule.[306] Three years later, the city challenged the

300. *See id.* at 398.

301. *See id.* at 431–36 (Walker, J., concurring); *see supra* note 278 and accompanying text.

302. *Kuechler*, 36 Tex. at 438–40 (Ogden, J., dissenting); *see supra* notes 58–65 and accompanying text.

303. *See Kuechler*, 36 Tex. at 439 (Ogden, J., dissenting).

304. *Id.* at 445–47 (Ogden, J., dissenting). Ogden was considerably less sanguine about railroad subsidies than his colleagues; he predicted that:

> the decision in this case will open the door for the claims of almost numberless dead and dormant companies, whose voracious maws are now gaping to swallow up the last acre of all that is valuable of our undisposed-of public lands.
>
> . . . [S]hould it be claimed for [the railroad] that the disturbed condition of the country between 1866 and 1870 was such that capitalists would not risk an investment in this State, and that therefore that time should not be counted against it, it may be answered that Constitutions and laws were never intended to yield to the caprice or interest of capitalists.

See id. at 446–47 (Ogden, J., dissenting).

305. *See* Act approved Sept. 5, 1850, 3d Leg., 1st C.S., ch. 36, §§ 1, 2, 1850 Tex. Gen. Laws 32, 32, *reprinted in* 3 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 814, 814 (Austin, Gammel Book Co. 1898). The law allowed the city to subscribe for stock only if two-thirds of eligible voters approved the subscription. *Id.* § 12, *reprinted in* 3 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 817 (Austin, Gammel Book Co. 1898).

306. *See* City of San Antonio v. Jones, 28 Tex. 19 (1866).

law on other grounds that were also rejected; the Military Court agreed with its predecessor that the legislature had authority to authorize municipal financing.[307] In the 1870–1871 term, the Semicolon Court refused to revisit the issue.[308] San Antonio mounted a final wave of challenges in the late 1870s, perhaps hoping that the Redeemer Court would ignore all Reconstruction-era decisions and consider the law afresh.[309] But the court chided the city for assuming it was "practicable, on a doubtful question, to easily procure a change of decision with every change in the members, who might, from time to time, compose the Supreme Court."[310] The court also expressed hope that the new limits on municipal subsidies of the 1876 constitution would put an end to the dispute, noting that "[i]t was unquestionably the intention of the framers . . . to put an end to this controversy in this State."[311] The court made it clear that it would uphold financing measures only if they complied with the letter of the 1876 constitution.[312]

In short, during Reconstruction, Texas and North Carolina displayed very similar approaches to incorporation laws and government subsidies to corporations. Both states joined the national trend away from private corporate charters to general incorporation laws, and both imposed restrictions on government subsidies, although Texas's restrictions were more thoroughgoing than North Carolina's. In Texas, the legislature took the lead in imposing restraints; in North Carolina, the supreme court acted as the main check on subsidies. Divisions of opinion on these issues crossed party lines and was not related to wartime loyalties.

307. *See* City of San Antonio v. Lane, 32 Tex. 405, 406–09, 411–12 (1869), *overruled by* City of San Antonio v. Gould, 34 Tex. 49 (1870–1871). The main ground of challenge in *Lane* was that the 1850 law violated article VII, section 24 of the 1845 constitution, which required that every law embrace only one object. *See id.* at 407; TEX. CONST. of 1845, art. VII, § 24. The court rejected the challenge. *See Lane*, 32 Tex. at 412–13.

308. *See* City of San Antonio v. Gould, 34 Tex. 49, 73–74 (1870–1871).

309. *See* Peck v. City of San Antonio, 51 Tex. 490 (1879); Giddings v. City of San Antonio, 47 Tex. 548 (1877).

310. *See Giddings*, 47 Tex. at 557. The court gave little weight to the Military Court's decision because that court was not "regularly constituted" under Texas law, but it concluded that the Restoration and Semicolon Court decisions were sufficiently well-reasoned and the need for judicial consistency was strong enough that the earlier decisions should stand. *See Peck*, 51 Tex. at 492–93; *see also supra* note 67.

311. *See* Austin v. Gulf, Colo. & Santa Fe R.R. Co., 45 Tex. 234, 264 (1876).

312. *See id.* at 264–65; *see also* The Tex. & The Miss. River, Canal, & Navigation Co. v. County Court, 45 Tex. 272, 286–87 (1876) (upholding a law authorizing Galveston to subsidize a canal company and requiring payment of a promised subsidy even though enabling legislation was not passed until after the canal company began work).

VI. RECONSTRUCTION AND MARRIED WOMEN'S RIGHTS

At the beginning of the Civil War, the United States was in the midst of a wave of reform of married women's property rights.[313] Prior to the 1830s, virtually all states adhered to the English common law doctrine of marital unity, which provided that the husband was the legal master of the marriage relationship and had complete control over all property that either spouse brought to the marriage or acquired during the course of the marriage.[314] But during colonial times, most of the older Southern states used contract and equity law to give wives a measure of control over their separate property if they desired such control. Premarital trusts, under which a husband allowed his wife or members of her family or an independent trustee to control her property for her benefit, were common and were routinely enforced by the courts.[315] Many of the older states also refused to recognize a wife's release of her dower rights in property sold or pledged by her husband unless she was privately examined to ensure that her consent had been freely given.[316]

Beginning in the 1830s, sentiment rose for the enactment of laws allowing married women to control their property directly. The movement spread rapidly through the northern and western states, including the newer slave states.[317] The older Southern states gave the movement a cool reception, perhaps because they felt their existing system adequately protected married women. But post-war poverty and the increased social role for women after the war, which was due in part to the large number of white Southern men killed in the war,

313. *See* Richard H. Chused, *Married Women's Property Law: 1800–1850*, 71 GEO. L. J. 1359, 1398–99 (1983); Suzanne D. Lebsock, *Radical Reconstruction and the Property Rights of Southern Women*, 43 J. S. HIST. 195, 196–97, 214 (1977).

314. *See* MARYLYNN SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA 14–15, 81–119 (1986). The British jurist William Blackstone stated the doctrine as follows:

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs every thing . . . .

Id. at 200 n.1 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *430) (emphasis in original).

315. *See id.* at 88–89, 108–12. *See also, e.g.*, Heathman v. Hall, 38 N.C. (3 Ired. Eq.) 414, 420 (1844) (discussing an equity court's recognition of gifts made exclusively to a wife); Steel v. Steel, 36 N.C. (1 Ired. Eq.) 452, 455–56 (1841) (discussing an equity court's recognition of premarital trusts).

316. *See, e.g.*, Sutton v. Sutton, 18 N.C. (1 Dev. & Bat.) 582, 584 (1836); Barfield v. Combs, 15 N.C. (4 Dev.) 514, 515–16 (1834); *see also* SALMON, *supra* note 314, at 40–44 (concluding that although the examination requirement did not eliminate all duress, it provided a genuine degree of protection to married women).

317. Chused, *supra* note 313, at 1398–406. For example, Arkansas enacted the first married women's property act of any sort in 1835, and Mississippi enacted the first comprehensive act in 1839. *Id.* at 1398–406; Act of Nov. 2, 1835, 1835 Ark. Terr. Laws 34–35; 1839 Miss. Laws, ch. 46.

prompted many of the older states to reconsider and enact married women's property acts during Reconstruction.[318]

North Carolina followed the pattern of older Southern states. Prior to the war, the North Carolina Supreme Court consistently affirmed the marital unity doctrine,[319] but it upheld with equal consistency the use of marital trusts to preserve wives' separate property from their husbands' control.[320] North Carolina lawmakers did not make any significant changes in married women's rights immediately after the war, but the 1868 convention incorporated a broad property rights provision into the new constitution; it decreed that a wife's separate property acquired before and during marriage was her sole property, and thus, it was unavailable to satisfy her husband's debts.[321] Married women retained the right to bequeath their separate property, and for the first time were given the right to convey such property during their lifetime with their husbands' consent.[322] The convention members were probably motivated more by a desire to alleviate post-war poverty by sheltering property from husbands' creditors than by an explicit desire to advance women's rights, although there was probably some genuine feminist sentiment at the convention.[323]

In some states, enactment of married women's property laws was followed by a period of conservative judicial reaction and limitation of laws.[324] North Carolina followed this pattern. The supreme court recognized that under the 1868 constitution it was "called upon to make a new departure, leaving old ideas behind" as to married women's rights,[325] yet it did not do so enthusiastically. In *Baker v. Jordan* (1875),[326] the court stated that the 1868 constitution changed the husband's role from possessor to "*overseer*" of his wife's separate property, but it declined to give the wife complete control of her earnings

318. *See* SCOTT, *supra* note 17, at 99–102; Lebsock, *supra* note 313, at 201–03.

319. *See infra* notes 325–31 and authorities there cited.

320. *See infra* notes 326–27 and authorities there cited. Like many older states, North Carolina also required in cases of transfer of marital property that the wife be examined outside her husband's presence in order to determine whether she had freely consented to the transfer. *See Barfield*, 15 N.C. at 515–16.

321. *See* N.C. CONST. of 1868, art. X, § 6.

322. *See id.*

323. *See* Lebsock, *supra* note 313, at 197–200, 203–04, indicating that this mix of sentiments motivated Reconstruction conventions in other states. There is no reason to believe that the mix of sentiments was any different in North Carolina. The North Carolina Legislature enacted laws to implement the new constitutional provision in 1869 and 1872, but did not expand married women's rights beyond what the constitution provided. *Compare* Act of Mar. 28, 1870, ch. 233, 1869–1870 N.C. Sess. Laws 316, 316, *and* Act of Feb. 12, 1872, ch. 193, 1871–1872 N.C. Sess. Laws 328, 328, *with* N.C. CONST. of 1868, art. X, § 6.

324. *See* Joseph A. Ranney, *Anglicans, Merchants, and Feminists: A Comparative Study of the Evolution of Married Women's Rights in Virginia, New York, and Wisconsin*, 6 WM. & MARY J. WOMEN & L. 493, 526–29, 532–35 (2000) (describing such a pattern in New York and Wisconsin).

325. *See* Shuler v. Millsaps, 71 N.C. 297, 298 (1874).

326. 73 N.C. 145 (1875).

and the income from her property.[327] Because the husband still had an obligation to support the family, the court reasoned he was "entitled to her services, and to *contribution from the profits of her estate.*"[328] In 1876, the court stated it would strictly limit a married woman's powers over her separate estate to those listed in the constitution; in particular, her right to make contracts would be limited to contracts involving her separate property, and her husband's consent would still be required for all other types of contracts.[329] Two years later, the court preemptorily rejected a wife's effort to gain effective control over her property by bringing an action of ejectment against her husband; it reasoned that sustaining such a claim would make the husband a mere "tenant at sufferance" and that such a result "could hardly have been contemplated" by the constitutional convention.[330] The court repeatedly emphasized that in cases of serious mismanagement or abuse of property by a husband, the wife could still resort to traditional equitable remedies.[331]

Texas's married women's property law did not fit any conventional American pattern either before or after the war, because community property principles, centered around the rule that spouses had an equal interest in all property brought to and acquired during the marriage, had become deeply imbedded in Texas's legal system during its years as a Spanish colony and a Mexican province.[332] Early American settlers were divided as to whether Texas should retain a Hispanic civil law system or convert to the common law.[333] In 1840, a compromise was reached; married women could retain land and slaves as separate property, but all other property that they brought to the marriage and all property accumulated during the marriage would be treated as community property.[334] Husbands were given the right to manage community property and their wives' separate property; they could dispose of community property freely but could not dispose of their wives' separate property without the consent of their wives' father and

327. *See id.* at 146, 147.

328. *Id.* at 147.

329. *See* Pippen v. Wesson, 74 N.C. 437, 444–46 (1876); *see also* Kirkman v. Bank of Greensboro, 77 N.C. 394, 395–96 (1877).

330. Manning v. Manning, 79 N.C. 293, 294–95 (1878).

331. *See, e.g., id.* at 296–97.

332. *See generally* KATHLEEN ELIZABETH LAZAROU, CONCEALED UNDER PETTICOATS: MARRIED WOMEN'S PROPERTY AND THE LAW OF TEXAS 1840–1913, at 43–62 (1986).

333. *See id.* at 52–54. The Republic of Texas Constitution directed the Texan Congress to adopt a common law system "with such modifications as our circumstances . . . may require." REPUB. OF TEX. CONST. of 1836, art. IV, § 13, *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1069, 1073 (Austin, Gammel Book Co. 1898).

334. *See* LAZAROU, *supra* note 332, at 54–55; Act approved Jan. 20, 1840, 4th Cong., §§ 3–4, 1840 Repub. Tex. Laws 3, 4, *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 177, 178 (Austin, Gammel Book Co. 1898).

a court.[335] At the time of statehood in 1845, the constitutional convention rejected efforts to return to a pure community property system, but it gave some community law principles constitutional status[336] and directed the legislature to implement a community property-oriented system for married couples to give wives protection against husbandly improvidence.[337]

Led by Chief Justice John Hemphill, who was the state's leading expert on Hispanic civil law and was sympathetic to the values it represented,[338] the pre-war supreme court interpreted Texas community property laws liberally in favor of women. For example, in 1849, the court concluded that Texas's property statutes, unlike those of most community property jurisdictions, gave married women the right to make management decisions about their separate property without their husbands' consent; Hemphill opined that such right of free choice was guaranteed by the 1845 constitution.[339] In *Christmas v. Smith* (1853),[340] Hemphill also criticized the legislature for allowing creditors to attach wives' separate property to pay for necessary family supplies without requiring them to first exhaust their rights in community property.[341] He again invoked the 1845 constitution as a bulwark of married women's rights and held that wives' separate property "cannot be sacrificed for debts contracted during marriage where there is common property from which these may be satisfied."[342]

During Reconstruction neither Unionists nor Conservatives made any significant efforts to change married women's property rights, probably because Texas married women's rights were sufficiently ad-

335. *See* Act approved Jan. 20, 1840, 4th Cong., §§ 3–4, 1840 Repub. Tex. Laws 3, 4, *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 177, 178 (Austin, Gammel Book Co. 1898); LAZAROU, *supra* note 321, at 55.

336. *See* TEX. CONST. of 1845, art. VII, §§ 19–20.

337. *See id.* at art. VII, § 19. In 1848, the legislature enacted a law that was similar to the 1840 law, but reflected the expanded rights mandated by the 1845 constitution. *See* Act approved Mar. 13, 1848, 2d Leg., ch. 79, § 3, 1848 Tex. Gen. Laws 77, 78, *reprinted in* 3 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 77, 78 (Austin, Gammel Book Co. 1898).

338. Hemphill served on the court from 1840 to 1858. For a sketch of Hemphill's life and jurisprudence, see TIMOTHY S. HUEBNER, THE SOUTHERN JUDICIAL TRADITION: STATE JUDGES AND SECTIONAL DISTINCTIVENESS, 1790–1890, at 99 (1999); *see also* 3 THE NEW HANDBOOK OF TEXAS, *supra* note 23, at 550 (John Hemphill).

339. *See* Cartwright v. Hollis, 5 Tex. 152, 165–66 (1849); *see also* Milburn v. Walker, 11 Tex. 329, 343–44 (1854) (holding that a husband's management of wife's separate property does not limit her authority over that property). In 1855, the court held that notwithstanding the general rule that married women could not sue in their own name, they would be allowed to sue in cases where their husbands made "excessive or capricious" transfers of community property with the intent to harm the wife. *See* Stramler v. Coe, 15 Tex. 211, 215 (1855).

340. 10 Tex. 123 (1853).

341. *See id.* at 129.

342. *See id.* at 129–30. Hemphill relied on Spanish legal authorities in support of his interpretation of the constitution. *Id.* at 129.

vanced for the times such that neither faction felt further changes were necessary. The 1866 constitution retained the property rights provision of the 1845 constitution unchanged.[343] The 1869 constitution substituted a more general directive that "[t]he rights of married women to their separate property, . . . and the increase of the same, shall be protected by law,"[344] but the 1876 constitution restored the 1845 provision.[345] Nor did the Reconstruction courts make any substantive changes in married women's property law. In 1867, the Restoration Court affirmed the rule Hemphill had laid down in *Christmas* and rejected arguments that cases after *Christmas* had expanded creditors' rights to attach wives' separate property.[346] In 1873, the Semicolon Court affirmed a pre-war rule that wives could offer their separate property as security for separate debts but not for marital debts, and it rejected an effort to change the rule.[347] The Redeemer Court and Redeemer legislatures did not make any significant changes in married women's property rights; the next wave of important changes would not arrive until 1911.[348]

In sum, the difference in the evolutionary patterns of married women's property rights in Texas and North Carolina is striking. It appears that North Carolina was typical of the older southeastern states that relied heavily on equity courts to shape women's legal rights and adopted married women's property laws only when forced to do so by post-war economic pressures. Texas was one of the newer southwestern states formed during the early nineteenth century. Many of the southwestern states enacted married women's property laws because of their enthusiasm for Jacksonian reforms, but in Texas, married women's rights were shaped by the state's Hispanic legal heritage and by Chief Justice Hemphill, a connoisseur of Spanish civil law, rather than by Jacksonism.

VII. Conclusion: The Legal Legacies of Reconstruction in Texas and North Carolina

This study began with the question: Did pre-war legal, economic, and social differences among the Confederate states result in different

343. *Compare* Tex. Const. of 1866, art. VII, § 19, *with* Tex. Const. of 1845, art. VII, § 19.

344. *Compare* Tex. Const. of 1869, art. XII, § 14, *with* Tex. Const. of 1845, art. VII, § 19, *and* Tex. Const. of 1866, art. XII, § 14.

345. *Compare* Tex. Const. art. XVI, § 15 (amended 1948), *with* Tex. Const. of 1845, art. VII, § 19.

346. *See* Stansbury v. Nichols, 30 Tex. 145, 147–49 (1867).

347. *See* Rhodes v. Gibbs, 39 Tex. 432, 445–46 (1872–1873). The rule at issue was originally laid down in *Hollis v. Francois*, 5 Tex. 195, 198 (1849). *See also* Magee v. White, 23 Tex. 180, 193–95 (1859) (stating that a wife's separate property is not obligated for a husband's debts).

348. *See* Lazarou, *supra* note 332, at 90.

legal responses to the problems of Reconstruction?[349] Texas and North Carolina took different legal paths in some areas after the Civil War, but they took similar paths in other areas and the differences between them were sometimes not what one would expect.[350] Both the differences and the similarities raise important questions and provide guidelines for further study of the evolution of Southern legal systems.

A. *State Supreme Courts as Doorkeepers for Change*

The most striking finding of the study is how important a role Southern state's supreme courts played in mediating their states' transition from a pre-war to a post-war society and how differently they approached this task.[351] The choices that the Texas and North Carolina supreme courts made were heavily influenced by the differing degrees of pre-war Unionism in their respective states.[352]

North Carolina's strong pre-war strain of political and economic nationalism created a pool of Unionist jurists who engaged actively in the state's political life during the war and as a result of their engagement, felt less need to revolutionize North Carolina after the war than did Reconstruction-era jurists in other states.[353] The North Carolina Supreme Court steered a middle course through Reconstruction, combining strong Unionist rhetoric and pragmatic decisions. The court made clear very early that it accepted the war's outcome and viewed Reconstruction as a reasonable effort by the federal government to steer its own middle course between "continu[ing its] military rule or leav[ing] the country in anarchy."[354] The court quickly disposed of several issues that threatened to undermine post-war Unionism and reconciliation in the South; it upheld the validity of debts payable in Confederate money but at a scaled-down value,[355] and it upheld most wartime laws and contracts (except those that indisputably aided the rebellion) in the interest of social stability.[356] Wherever possible, the court also appealed to Unionists' desire to move away from the past toward social and economic progress and to Conservatives' desire to return to local control free from federal interference.[357] The court

349. *See supra* notes 3–8 and accompanying text.

350. *See infra* notes 373–88 and accompanying text.

351. *See supra* notes 47–77 and accompanying text.

352. *See supra* notes 21–46 and accompanying text.

353. *See supra* notes 33–46 and accompanying text.

354. *In re* Hughes, 61 N.C. (Phil. Law) 57, 71 (1867); *see supra* notes 68–77 and accompanying text. *See also, e.g.*, Hayley v. Hayley, 62 N.C. (Phil. Eq.) 180, 185 (1867) (holding that at the outbreak of the Civil War North Carolina's "rightful" government was "suspended by usurpation").

355. *See supra* notes 74–77 and accompanying text.

356. *See supra* notes 68–73 and accompanying text.

357. *See supra* notes 213–14 and accompanying text.

continued to sound these themes throughout Reconstruction.[358] Its strategy was successful; the court retained its institutional stability and legitimacy in the eyes of both Unionists and Conservatives throughout Reconstruction.[359]

The position of Texas Unionists during the war and the Texas Supreme Court's approach to Reconstruction were dramatically different from their counterparts in North Carolina. The justices of the Military and Semicolon Courts, many of whom had paid for their Unionism with exile during the war,[360] believed that upholding and promoting Unionist ideology was as much a part of their mission as aiding in the practical aspects of Texas's transition to a post-war society.[361] Virtually alone among Southern courts, the Military and Semicolon Courts refused to give any legal sanction to Confederate debts; they maintained that even Confederate currency was "illegal and treasonable in character" and that virtually all Confederate-era transactions should be treated as aiding the rebellion, even after the United States Supreme Court concluded that a more moderate rule was appropriate.[362] Judicial efforts to instill Unionism and nationalism in Texans were courageous but ineffective. Each change of government during Reconstruction brought in an entirely new court. Many Texans considered all of the Reconstruction courts illegitimate, and any lasting imprint the courts left on Texas legal history was due more to the Redeemer Court's reluctance to contravene *stare decisis* than to the Reconstruction courts' powers of popular persuasion.[363] Given the weakness of pre-war Unionism in Texas, this result was probably inevitable.

It is doubtful that the North Carolina court's middle path contributed to a more advanced state of race relations than in Texas, but a case can be made that the North Carolina court performed a lasting service, perhaps unknowingly, by keeping the door open at least a crack for future civil rights reform. The Civil War conferred freedom on blacks; Reconstruction attempted to follow up by conferring legal

358. For example, in 1872, the court again defended the currency laws and stated that the legislature "may not have regarded with critical accuracy and technical precision" the finer points of the laws' validity under "a constitution which our people had repudiated, and had just made such strenuous efforts to destroy," but nonetheless "[t]he statutes have done much good, and will soon cease to have any vitality, and to declare them unconstitutional now, would be like speaking disrespectfully of the honored dead." *See* King v. W. & W. R.R. Co., 66 N.C. 277, 282–83 (1872), *rev'd*, 91 U.S. 3 (1875).

359. *See supra* notes 33–46 and accompanying text.

360. At least two of the five members of the Military Court (Hamilton and Morrill) and two of the four justices who served on the Semicolon Court (Evans and Ogden) had gone into exile during the war. *See* 3 THE NEW HANDBOOK OF TEXAS, *supra* note 23, at 427–28 (Andrew Jackson Hamilton); 4 *id.* at 842 (Amos Morrill); 2 *id.* at 906 (Lemuel Dale Evans); 4 *id.* at 1115 (Wesley B. Ogden).

361. *See supra* notes 58–67 and accompanying text.

362. *See supra* notes 58–67 and accompanying text.

363. *See supra* note 67 and accompanying text.

equality.[364] The effort failed, but federal and state constitutional amendments and civil rights laws enacted between 1866 and 1875 opened the door to the possibility that true legal equality would someday be achieved.[365] Some Southern lawmakers, including the North Carolina court, helped in a modest way to keep that possibility alive. The court did not conceive of using its power to foster social or economic equality,[366] but it made clear, in cases coming before it, that the law would be applied evenhandedly to blacks and whites, regardless of whether the result harmonized or clashed with the established racial order. The *Ambrose* case, in which the court established due process rights in apprenticeship proceedings,[367] and the *Underwood* case, in which it interpreted the 1868 constitution to bar all limitations on black testimony,[368] are leading examples of this tradition. It is striking that the tradition was carried on by the more conservative justices who came after Reconstruction, most notably in the 1883 *Britton* case, involving integrated railroad seating,[369] and the *Puitt* line of school funding cases in the late 1880s.[370] The supreme court's example brought little comfort to the many blacks who did not have the resources to pursue their grievances through the court system or to appeal adverse lower court decisions, but the example remained in place for future use by a later generation of civil rights reformers. The Texas Reconstruction courts were not able to leave such an example behind, partly because they were unable to make a lasting imprint on Texas law generally, and partly because few civil rights cases came before them.[371]

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364. *See* KACZOROWSKI, *supra* note 79 *passim*; SWINNEY, *supra* note 105 *passim*.

365. *See, e.g.*, U.S. CONST. amends. XIII, XIV; N.C. CONST. of 1868, arts. I, XI, XIV; TEX. CONST. of 1869, arts. I, VIII, XII; An Act to Protect All Persons in the United States in Their Civil Rights and Furnish the Means of Their Vindication (Civil Rights Act of 1866), ch. 31, 14 Stat. 27, 27 (1866) (codified as amended at 42 U.S.C. §§ 1981–82 (2000)); Act of Mar. 10, 1866, ch. 40, § 3, 1866 N.C. Sess. Laws 99, 99–100; Act approved Nov. 10, 1866, 11th Leg., ch. 128, 1866 Tex. Gen. Laws 131, 131, *reprinted in* H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1049, 1049; *see also supra* notes 105–51 and accompanying text. *See generally* KACZOROWSKI, *supra* note 79 *passim*; SWINNEY, *supra* note 105 *passim*.

366. *See supra* notes 113–28 and accompanying text.

367. *In re* Ambrose, 61 N.C. (Phil. Law) 91 (1867); *see supra* notes 97–100 and accompanying text.

368. State v. Underwood, 63 N.C. 98 (1869); *see supra* note 113–17 and accompanying text. The *Ross* case, in which the court deplored interracial marriages but gave comity to South Carolina's law permitting them, is another example. State v. Ross, 76 N.C. 242 (1877); *see supra* note 135.

369. Britton v. Atlanta & Charlotte Air-Line Ry. Co., 88 N.C. 536 (1883); *see supra* notes 125–28 and accompanying text.

370. Puitt v. Comm'rs of Gaston County, 94 N.C. 709 (1886); *see supra* notes 121–24 and accompanying text.

371. *See supra* notes 139–51 and accompanying text. It is important to note that many of the racial reforms embodied in the North Carolina and Texas Reconstruction constitutions, most importantly testimonial and voting rights, also survived Reconstruction. *See supra* notes 173–89 and accompanying text. Their survival was due more to outside federal forces than to state acceptance of equal rights for blacks; the

These findings raise important questions for the study of Reconstruction legal history in other states. What guidance did the courts of other ex-Confederate states give their constituents in responding to emancipation and Reconstruction, and did their constituents heed their example? Did other courts follow the North Carolina court's pragmatic path, the Texas courts' ideological path, or some other path? Did their choices and their influence depend on the strength of pre-war Unionist sentiment in their states? It would be interesting to know which state courts successfully performed a "doorkeeper" function of preserving at least a nominal tradition of evenhanded application of the laws to blacks and whether the presence or absence of a "doorkeeper" tradition affected the reaction of Southern states to the second great civil rights movement in the 1940s and 1950s. Did North Carolina and other states with such a "doorkeeper" tradition accept integration more readily and peacefully than states without such a tradition, and did they modernize their civil rights law ahead of other Southern states?[372]

B. *Catching up with Reform: The Divide Between Older and Newer States*

One might postulate that, as part of their effort to preserve as much of the pre-war social system as possible, Southern states would resist economic and other non-racial reforms as well as racial legal reforms and, in particular, would resist the importation of any reforms from

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Fifteenth Amendment directly prohibited race-based suffrage restrictions, U.S. CONST. amend. XV, and some jurists felt that the 1866 Civil Rights Act, An Act to Protect All Persons in the United States in Their Civil Rights and Furnish the Means of Their Vindication, ch. 31, 14 Stat. 27, 27 (1866) (codified as amended at 42 U.S.C. §§ 1981–82 (2000)), and the Fourteenth Amendment, U.S. CONST. amend. XIV, prohibited testimonial limitations. *See, e.g.*, United States v. Rhodes, 27 F. Cas. 785, 787–89 (D. Ky. 1866) (No. 16,151); KACZOROWSKI, *supra* note 79, at 5–7. However, it is significant that neither state rushed to create devices limiting black suffrage at the end of Reconstruction, although they could easily have done so: such limitations did not come until much later. *See supra* note 189 and accompanying text. The 1876 Texas convention explicitly rejected such restrictions, and North Carolina declined to enact a new constitution after Reconstruction ended. *See supra* notes 188–89 and accompanying text. Did any Southern states enact suffrage restrictions at the end of Reconstruction, and what distinguished states which did from states which did not?

372. Furthermore, it is often forgotten that although the border slave states did not secede they faced post-war racial and social problems very similar to those of the ex-Confederate states. *See* Richard O. Curry, *Introduction* to RADICALISM, RACISM, AND PARTY REALIGNMENT: THE BORDER STATES DURING RECONSTRUCTION xv–xvi (Richard O. Curry ed., 1969). The border states too had to replace their slave codes with new laws, and they sometimes experienced resistance to federal civil rights laws which matched in intensity that found in the ex-Confederate states. *Id.* at xxi–xxii. The question of whether the predominance of Unionist sentiment in those states led their legislatures to enact more liberal racial laws than the ex-Confederate states, and whether it led their courts to follow a path similar to North Carolina's or gave the courts freedom to follow a more ideological path similar to Texas's courts, would also be worthwhile subjects for study.

the North. Alternatively, one might postulate that less developed states, such as Texas, would promote economic reform more eagerly after the war than states like North Carolina.[373] This study suggests that neither postulate is correct; rather, many ex-Confederate states caught up with mainstream nineteenth century non-racial reforms during Reconstruction[374] and the newer southwestern states experienced less change because they had gone further with reform before the war than had the older southeastern states.[375]

During Reconstruction, North Carolina enacted several important reforms that did not penetrate the southeastern states before the Civil War; most notably, abolition of imprisonment for debt, married women's property rights, and a homestead exemption.[376] There has been surprisingly little study of the influence of these reforms on American state legal history and of how the reforms spread from one region to another. These subjects are worthy of further study because the reforms in question were probably the most enduring legal legacy of Reconstruction at the state level. The movements against debtor imprisonment and for married women's property rights arose more or less simultaneously in the North and the old Southwest;[377] the homestead exemption movement first arose in the old Southwest (with Texas being the pioneer) and quickly spread to the North.[378] It is not clear whether the 1868 North Carolina constitutional convention looked to the North, the Southwest, or to both regions in adopting these reforms, but unquestionably the convention felt that the need to alleviate war-induced poverty and accommodate wartime changes in women's roles made it imperative for the state to join in these reforms.[379] The North Carolina Supreme Court, like courts in some other states, was ambivalent about debtor-oriented reforms and increased property rights for married women and imposed some mild checks on both.[380]

Reconstruction left a more modest constitutional legacy in Texas, not because the state was resistant to the reforms just described, but because many of the reforms were already in place before the war. Texas was the only Confederate state with a Hispanic civil law tradition; married women's property rights and the homestead exemption were a direct product of that tradition, were preserved at statehood in

373. *See supra* notes 6–8 and accompanying text.

374. *See supra* notes 161–66, 203, 319–23 and accompanying text.

375. *See supra* notes 169, 222–25, 343–45 and accompanying text.

376. *See supra* notes 159–67 and accompanying text.

377. *See supra* notes 217, 317 and accompanying text. As used here, "the North" means the free states and "the old Southwest" means the newer slave states: Louisiana, Mississippi, Alabama, Missouri, Arkansas, and Texas.

378. *See supra* note 209 and accompanying text.

379. *See supra* notes 192–96, 199, 321 and accompanying text.

380. *See supra* notes 197–98, 319–20 and accompanying text.

1845, and were not subjects of controversy during Reconstruction.[381] Texas also abolished imprisonment for debt well before the war, primarily due to the strong Jacksonian sentiments it shared with other states of the old Southwest.[382]

North Carolina had a pre-war tradition of support for economic nationalism and industrialization which Texas lacked, and accordingly one would expect Texas and North Carolina to have followed different patterns of development in their economic laws during Reconstruction. This was not the case. Even though Texas joined the Industrial Revolution later than North Carolina, it adopted general incorporation laws and limits on governmental support of internal improvement corporations at the end of Reconstruction, just a few years after North Carolina; this supports a conclusion that the movement for such reforms was national in scope and was not related to the war.[383] Both states' courts initially affirmed that the legislature and municipalities had power to subsidize railroads and other forms of local economic development, but relied heavily on their views of precedents in other states rather than on original social or constitutional thinking.[384] Surprisingly, the North Carolina court was largely sympathetic to debtor relief laws throughout Reconstruction, though it turned away from its initial support of stay laws after 1868.[385] The Texas Reconstruction courts were skeptical of stay laws but their opposition was based on Unionist more than economic concerns.[386] Lastly, Reconstruction historians have paid close attention to the evolution of sharecropping and to its implications for post-war racial relations in the South. In light of the importance they attach to this institution, it is surprising to find that it generated little legal debate in either Texas or North Carolina, and that both states, despite their very different legal patterns during Reconstruction, gave priority to landlords' interests and expressed little concern for either tenants or merchants.[387]

The questions raised and the findings presented in this Article are important not only to readers interested in understanding how Southern law (and American law as a whole) developed after the Civil War, but also to those who wish to understand how modern civil rights law evolved and more generally, how American legal systems behave in times of acute social crisis. The meaning of Reconstruction in American legal history lies somewhere between Albion Tourgée's rueful description of reform efforts as "a fool's errand" and his later, more

381. *See supra* notes 332–37 and accompanying text.
382. *See supra* note 225 and accompanying text.
383. *See supra* notes 253–312 and accompanying text.
384. *See supra* notes 268, 312 and accompanying text.
385. *See supra* notes 197–202 and accompanying text.
386. *See supra* notes 227–32 and accompanying text.
387. *See supra* notes 233–52 and accompanying text.

measured conclusion that "there was a good foundation laid" during the era for future reform.[388] Modern civil rights law did not arise from a void; it was built in part upon surviving legal remnants of the Reconstruction era (namely, the federal constitutional amendments and civil rights laws enacted between 1866 and 1875) and the doorkeeping activities of some state courts during Reconstruction. It was also based in part on memories of the legal and social experiments that had failed during that era. Furthermore, the Civil War and Reconstruction, being revolutionary in nature, imposed pressures on Southern state legal systems unprecedented in American history. In many societies such pressures would have caused the existing legal system to collapse. In the post-war South, state legal systems bent—severely in states such as Texas—but they did not break. Their resilience was due primarily to local forces: specifically, the ways in which Southern lawmakers used the legal system to mediate wrenching post-war social and legal changes; the impulse to use the legal system to promote new growth and prosperity; and the post-war penetration of national legal reform movements into the South, particularly the older Southern states. These forces did not disappear after Reconstruction, and a comparison of their behavior during Reconstruction with their behavior during other eras of crisis and transition may provide important clues as to why the American experiment in democratic self-governance has lasted as long as it has.

388. *See supra* notes 1–2 and accompanying text.