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OBLIGATIONS IMPAIRED: JUSTICE JONATHAN JASPER WRIGHT AND THE FAILURE OF RECONSTRUCTION IN SOUTH CAROLINA

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INTRODUCTION

On January 14, 1868 in Charleston, South Carolina, an integrated group of citizens—about seventy-five African American and fifty White[1]—inaugurated the new year by convening to rewrite the state's constitution. Out of the ashes of the Civil War, their task was to create "a just and liberal Constitution, that will guarantee equal rights to all, regardless of race, color, or previous condition" of servitude.[2] Thus began Reconstruction in South Carolina. Twenty-seven years later, convention delegates reconvened to craft another state constitution. This time only six of the nearly 170 delegates were African American.[3] Now, the convention's explicit charge was to disenfranchise African American voters and guarantee White supremacy.[4] Thus began the reign of Jim Crow.

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1. James Lowell Underwood, *African American Founding Fathers: The Making of the South Carolina Constitution of 1868*, *in* AT FREEDOM'S DOOR: AFRICAN AMERICAN FOUNDING FATHERS AND LAWYERS IN RECONSTRUCTION SOUTH CAROLINA 2 (James Lowell Underwood & W. Lewis Burke, Jr. eds., Univ. of South Carolina Press 2000).

2. PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA 6 (1868) *reprinted in* 1 THE AMERICAN NEGRO, HIS HISTORY AND LITERATURE 6 (1968) [hereinafter CONVENTION]. These were the opening remarks of the Convention, as delivered by Delegate Thomas J. Robertson of Richland.

3. EDWARD L. AYERS, THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION 289 (1992).

4. *See id.* at 288–89.

Why Reconstruction failed to guarantee equal rights for African American South Carolinians is a complicated question. Blame can be doled out to a bevy of diverse groups—war-weary Northerners, an apathetic federal government, "unreconstructed" Confederates. Added to these traditional targets, however, must be South Carolina's African American leadership, which fractured during key moments of Reconstruction, thereby weakening their own political power and emboldening their enemies.

A fundamental feature of their division was a disagreement on questions of law. Jurisprudential conflicts were more than just legal quibbles—they were vital struggles over what a just and unbiased government would mean. In addressing these matters, South Carolina's African American legislators and lawyers often looked to Jonathan Jasper Wright, the nation's first African American state supreme court justice and South Carolina's highest-ranking African American official. Wright was a strict, legal formalist who narrowly interpreted the law based on history and precedent. This perspective, combined with his cautious, political bias, limited his willingness to advocate for progressive measures to aid the freed slaves or support punitive measures aimed at the former rebels. Instead, as a member of the Republican party's conservative bloc, Wright hoped for a peaceful, long-lasting coalition of Whites and African Americans.

Opposing Wright was William James Whipper, a controversial member of the state legislature and Wright's intra-party nemesis.[5] Whipper led a group of Radical Republican pragmatists who focused on immediate, political victories. Like many other Radicals, Whipper continually pressed for initiatives to aid the newly-freed slaves, and against legislation to benefit the former Confederates. When Wright won election to the supreme court in 1870, it was Whipper whom he narrowly defeated. Had Whipper won that position, he likely would have brought a more progressive voice to the high court than Wright.

Part I of this article, on the historiography of South Carolina Reconstruction, explains the difficulty scholars have had in uncovering the documentary history of Reconstruction, and outlines the development of historical interpretations of Reconstruction from the Nineteenth century Redeemer-era accounts to the revisionists of the 1970's. Part II provides brief biographies of both Justice Wright and William James Whipper. Parts III and IV track the different approaches of Whipper and Wright on two vital issues of their day: (1) whether to repudiate all private debts relating to slavery; and (2) how to construct a homestead law to protect cash-poor landowners. Finally, the article concludes that if Wright had taken

5. *See* Richard Gergel & Belinda Gergel, *"To Vindicate the Cause of the Downtrodden": Associate Justice Jonathan Jasper Wright and Reconstruction in South Carolina*, *in* AT FREEDOM'S DOOR: AFRICAN AMERICAN FOUNDING FATHERS AND LAWYERS IN RECONSTRUCTION SOUTH CAROLINA 44 (James Lowell Underwood & W. Lewis Burke, Jr. eds., Univ. of South Carolina Press 2000).

Whipper's more aggressive tact in his judicial opinions and political activity, the story of South Carolina Reconstruction might have evolved differently. African Americans might have retained some of their political voice as memories of Reconstruction faded into the past.

I. HISTORIOGRAPHY OF SOUTH CAROLINA RECONSTRUCTION

Before criticizing Justice Wright for his cautious politics, it is worth pausing to recognize that for decades historians failed to even discuss his achievements at all. The historiography of Reconstruction in South Carolina began with early, racist accounts that attempted either to "erase black officials from the historical record altogether,"[6] or to fabricate tales of "the nightmare of Negro rule," when ignorant African Americans, corrupt carpetbaggers, and traitorous scalawags took control of the Palmetto state.[7] According to these historians, terrorist organizations such as the Ku Klux Klan were formed solely because of the "absolute helplessness of the [White] minority."[8] Any violence that occurred, it was claimed, happened because of the "provocation given the white population ... [by] the instantaneous assembling of hundreds of armed negroes ...."[9] By propagating myths of Reconstruction as they wished to see it, Redeemer-era historians seriously distorted the memory of South Carolina Reconstruction. African American accomplishments were ridiculed or ignored altogether, while racist-inspired terrorism was white-washed. It has taken almost a century to repair the damage caused by these earlier historical accounts.

In 1933, Francis Butler Simkins and Robert Hilliard Woody began the project of repudiating the Redeemer myths.[10] To be sure, Simkins and Woody did not free themselves of the racist stereotypes of their time. Their text is riddled with statements that betray an assumption of African American inferiority. Despite this prejudice, they still revised the story of Reconstruction, crediting the predominantly African American Constitutional Convention of 1868 with designing one of the country's most progressive constitutions. Simkins and Woody concluded that the Convention delegates, "did not create 'the Negro bedlam' which tradition has

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6. Eric Foner, *South Carolina's Black Elected Officials During Reconstruction, in* AT FREEDOM'S DOOR: AFRICAN AMERICAN FOUNDING FATHERS AND LAWYERS IN RECONSTRUCTION SOUTH CAROLINA 167 (James Lowell Underwood & W. Lewis Burke, Jr. eds., Univ. of South Carolina Press 2000).

7. 2 HISTORY OF SOUTH CAROLINA 892–912 (Snowden ed., 1920) [hereinafter Snowden].

8. *Id.* at 907.

9. *Id.* at 947.

10. *See* FRANCIS BUTLER SIMKINS & ROBERT HILLIARD WOODY, SOUTH CAROLINA DURING RECONSTRUCTION (1932).

associated with them."[11] Rather, the Convention was marked by the "sincere and persistent desire of the Negroes" to create a liberal, democratic state that would guarantee the right to a free education and the right to universal, male suffrage.[12]

Robert Woody deserves additional credit for repairing the reputation of State Supreme Court Justice Jonathan Jasper Wright. Previous accounts of Justice Wright ignored his legal contributions altogether, instead emphasizing that he resigned from the bench while "under impeachment for official misconduct."[13] In a short essay in the *Journal of Negro History*, Woody resurrected Wright's reputation as an honest justice.[14] He explained that the impeachment charges were obviously trumped-up in order to drive Wright from office and had no basis in truth. However, Woody paid almost no attention to Wright's skill as a legal scholar, admitting that Wright "evidenced considerable ability" while on the bench, but qualifying that statement by saying that "all the important cases involving novel points of law . . . were decided by" the court's two White justices.[15]

Still, Simkins and Woody succeeded in laying the foundation for W.E.B. DuBois.[16] DuBois' study, *Black Reconstruction,* proved to be groundbreaking for two reasons. First, as a Marxist, DuBois highlighted the class tensions between the African American proletariat and the White, former slave-owning, planter class. More importantly, Dubois was the first historian to directly attack the past Redeemer histories. DuBois remarked:

> The whole history of Reconstruction has with few exceptions been written by passionate believers in the inferiority of the Negro. The whole body of facts concerning what the Negro actually said and did, how he worked . . . is masked in such a cloud of charges, exaggeration and biased testimony, that most students have given up all attempt at new material or new evaluation of the old, and simply repeated perfunctorily all the current legends of black buffoons . . . .[17]

DuBois set to out to correct these egregious errors, but quickly grew frustrated by the fact that "[l]ittle effort has been made to preserve the records of Negro effort and speeches, actions, work and wages, homes and families. Nearly all this has gone down beneath a mass of ridicule and

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11. *Id.* at 105.

12. *Id.* at 104–05.

13. Snowden, *supra* note 7, at 898.

14. *See* R. H. Woody, *Jonathan Jasper Wright, Associate Justice of the Supreme Court of South Carolina, 1870–77*, 18 J. NEGRO HIST. 114 (1933).

15. *Id.* at 121.

16. W.E.B. DuBois, *The Black Proletariat in South Carolina, in* BLACK RECONSTRUCTION (1935) *reprinted in* RECONSTRUCTION IN THE SOUTH 62 (Edwin C. Rozwenc ed., 2d. ed. 1972).

17. *Id.* at 145–46.

caricature, deliberate omission and misstatement."[18] As a result, he was forced to rely extensively on the Simpkins and Woody text. Using the evidence that they had compiled, DuBois concluded that northern and southern Whites doomed Reconstruction to failure by abandoning the African American majority. Yet, due to African American achievements against all odds, it was "a splendid failure" nonetheless.[19]

In the 1960s and 1970s a new perspective appeared, this time from modern revisionist historians like Joel Williamson. Williamson claimed that his work "was a broad-scale and time-consuming revision of a classic in revisionism: Simpkins' and Woody's *South Carolina During Reconstruction*."[20] Williamson succeeded in uncovering a mountain of new, primary source documents. With this evidence at hand, he was able to begin the process of effectively dismantling the myth of Reconstruction as dominated by carpetbaggers, scalawags and incompetent, illiterate former slaves. In short, he was able to answer DuBois' call for a new history of Reconstruction.

One of the most important revisionist scholars to follow Williamson was Thomas Holt. Holt claimed that the failure of Reconstruction was a failure of the African American political leadership to present a united front.[21] Employing a neo-Marxist approach, Holt explains that "[t]here were subtle but distinct differences between the largely mulatto bourgeoisie and the black peasantry, with the urban-based slaves and ex-slave domestics constituting something of a swing group."[22] Holt argued that because of their different socioeconomic perspectives, African American leaders rarely voted as a unified bloc. In fact, according to Holt's figures, African American legislators never averaged better than a unification voting percentage of seventy-five percent.[23]

This lack of unity became crucially important from 1874 to 1876, when White Republican Governor Daniel H. Chamberlain sought to expand his own political base, reaching out to moderate, native, White Democrats.[24] A handful of conservative, African American Republicans joined Chamberlain in the hope of forming an elite coalition of both races.[25] While the number of African American conservatives was small, their number "when added to the four to six conservative white

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18. *Id.* at 147.

19. THOMAS HOLT, BLACK OVER WHITE: NEGRO POLITICAL LEADERSHIP IN SOUTH CAROLINA DURING RECONSTRUCTION 152 (1977) (quoting DuBois, BLACK RECONSTRUCTION).

20. JOEL WILLIAMSON, AFTER SLAVERY: THE NEGRO IN SOUTH CAROLINA DURING RECONSTRUCTION, 1861–1877 vii–viii (UNC Press 1965).

21. *See* HOLT, *supra* note 19, at 224.

22. *Id.* at 17.

23. *See id.* at 148

24. *See id.* at 180.

25. *Id.* at 190.

Republicans and the thirty-four Democrats ... could constitute a winning coalition."[26]

It was the lack of solidarity among African-American legislators fueled by socioeconomic differences that eventually allowed White Democrats to take total control of the government and strip African Americans of most of their recently won freedoms. The sad conclusion was that "[f]rozen into inaction by the fear of defeat, decimated by defections and deaths, the Republican leadership continued to be weakened by internal dissension ...."[27] Holt placed the blame for this dissension on the conservative leaders. These politicians, who hoped to form a coalition of well-educated Whites and African Americans, fatally weakened the Republican party. Holt noted the foolishness of the conservative unification plan. He concluded that native Whites would never have accepted an African-American government, no matter how responsive that government was to White South Carolina's concerns. "It is much more likely that they would have chosen to make their peace with a strong government, responsive or not."[28] Holt's thesis has remained the dominant view of South Carolina Reconstruction. It has achieved this status for doing something that no other prior history had done: treating African Americans during Reconstruction as individuals rather than as a homogenous bloc.

Following Holt's lead, historians have begun to study some of the individual African-American leaders of Reconstruction in more detail. Most recently, James Underwood and W. Lewis Burke have put together a series of enlightening essays on African-American lawyers in Reconstruction South Carolina.[29] One of the book's greatest contributions is its rediscovery of Justice Jonathan Jasper Wright.

Going far beyond Robert Woody's essay are Richard and Belinda Gergel's *"To Vindicate the Cause of the Downtrodden": Associate Justice Jonathan Jasper Wright and Reconstruction in South Carolina*, and J. Clay Smith, Jr.'s, *The Reconstruction of Jonathan Jasper Wright*.[30] The Gergels have done extensive research on the life and work of Justice Wright, uncovering stories about his early education,[31] his rise to political and

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26. *Id.*

27. *Id.* at 224.

28. *Id.* at 4.

29. AT FREEDOM'S DOOR: AFRICAN AMERICAN FOUNDING FATHERS AND LAWYERS IN RECONSTRUCTION SOUTH CAROLINA (James Lowell Underwood & W. Lewis Burke, Jr. eds., Univ. of South Carolina Press 2000).

30. *See generally* Gergel & Gergel, *supra* note 5, at 36–72; J. Clay Smith Jr., *The Reconstruction of Jonathan Jasper Wright, in* AT FREEDOM'S DOOR: AFRICAN AMERICAN FOUNDING FATHERS AND LAWYERS IN RECONSTRUCTION SOUTH CAROLINA 72–90 (James Lowell Underwood & W. Lewis Burke, Jr. eds., Univ. of South Carolina Press 2000).

31. Gergel & Gergel, *supra* note 5, at 37–40.

judicial power,[32] and his role in the South Carolina election crisis of 1876 (where dual governments ruled the state while Democrat Wade Hampton and Republican Daniel Chamberlain fought to establish their legitimacy).[33] In addition, the Gergels present new evidence of Wright's life after his departure from office and his death in Charleston of tuberculosis.[34] Their work provides the most thorough and detailed account of Justice Wright's contributions to date.

Similarly, Smith's essay provides a detailed legal study of Justice Wright, charting every opinion he authored. Smith analyzes Wright's jurisprudential style, concluding that Wright was a classic legal formalist.[35] He discusses Wright's "unwavering deference to the binding authority of precedent"[36] and his willingness to yield to the legislature in matters of statutory construction.[37] However, both chapters are too fond of their subject. For example, Wright's support of a Democratic candidate for circuit judge in exchange for White backing of his supreme court bid could be criticized as selling out to the party of White supremacy for personal political gain. Gergel however, favorably conclude that this event demonstrated Wright's "considerable political savvy."[38] Again, to support the contention that Wright was an articulate, forceful leader, they cite the *Charleston Daily News*, which stated "that Wright was 'clear headed, [and] quick as a flash . . . .'"[39] Apparently, this favorable comment on an African-American legislator in a paper that vigorously denounced 'Negro equality' raises no red flags for the authors. It does not suggest to them that perhaps Justice Wright went farther than necessary in appeasing the indigenous White population.

J. Clay Smith acknowledges that Wright "was more conservative than he needed to be," but he does not blame Wright for being overly cautious.[40] Instead, he concludes that Wright was "one of the finest legal minds that the Reconstruction era, or any other, has produced."[41] To bolster this claim, he offers three short paragraphs on the "long-term effect of Justice Wright's decisions."[42] He claims that because ninety percent of Wright's opinions were cited by other courts, that Wright had a long-lasting effect on South Carolina jurisprudence.[43] However,

32. *Id.* at 40–46.
33. *Id.* at 51–64.
34. *Id.* at 67–71.
35. *See* Smith, *supra* note 30, at 76.
36. *Id.* at 79.
37. *Id.* at 80.
38. Gergel & Gergel, *supra* note 5, at 44.
39. *Id.* at 43.
40. Smith, *supra* note 30, at 85.
41. *Id.* at 86.
42. *Id.* at 84.
43. *Id.* at 84–85.

Smith never explains how Wright's opinions were cited. While none of Wright's rulings were ever expressly overruled, only eight of ninety-four opinions were "directly followed by the citing court."[44] In short, Smith's evidence is unable to sustain a claim one way or the other about the staying power of Wright's legal contributions.

Wright's mere presence on the South Carolina Supreme Court was monumental, but to name him as one of the "finest legal minds" overstates the case. Wright was a conservative justice who stayed well within the bounds of well-established legal reasoning for his time. Admittedly, being the lone African American on the court must have made it difficult for him to reach beyond this safe legal ground. Still, his jurisprudence cannot seriously be compared against that of John Marshall or Learned Hand—geniuses who succeeded in using the existing legal doctrines of their eras in order to revolutionize the entire state of the law. Therefore, it is clear that a careful assessment of Justice Jonathan Jasper Wright is in order. By comparing him to another African-American lawyer, William James Whipper, we can critically and accurately gauge the effect of Wright's contributions during Reconstruction.

II. *WHIPPER V. WRIGHT*

Jonathan Jasper Wright and William James Whipper were well-educated, freeborn northerners who moved to South Carolina at the close of the Civil War. Wright was born in Pennsylvania as the son of a runaway slave.[45] Through his own success in the common schools of Pennsylvania and with the aid of private tutoring from a local, abolitionist minister,[46] Wright attended college in New York, and then went on to study law with a judge in Wilkes-Barre.[47] In 1865, he was sent by the American Missionary Society to Beaufort, South Carolina to organize schools for the freedmen.[48] Whipper was also a Pennsylvania native, born in Philadelphia, the nephew of "a prominent, black abolitionist."[49] Whipper left Pennsylvania for Michigan and received his legal training in Detroit.[50] He made his way to South Carolina as a non-commissioned

44. *Id.* at 85.

45. Gergel & Gergel, *supra* note 5, at 36.

46. *Id.*

47. Woody, *supra* note 14, at 114–15.

48. *Id.* at 115.

49. ERIC FONER, FREEDOM'S LAWMAKERS: A DIRECTORY OF BLACK OFFICERHOLDERS DURING RECONSTRUCTION 226 (1993).

50. J.R. Oldfield, *A High and Honorable Calling: Black Lawyers in South Carolina, 1868–1915* (1989), *reprinted in* BLACK SOUTHERNERS AND THE LAW, 1865–1900, at 272 (Donald G. Nieman, ed.) (1994).

officer with the U.S. Army and stayed as a teacher with the Freedmen's Bureau.[51]

In 1868, the two were among the first three African Americans admitted to the South Carolina bar.[52] Once in South Carolina, both Wright and Whipper became dominant Reconstruction political figures. They played central roles in the constitutional convention of 1868,[53] and upon the creation of the new government, they were elected to the state legislature.[54] When a seat opened on the state supreme court in 1870, Whipper and Wright quickly emerged as the two leading candidates.[55] The position was to be filled "by a joint vote of the General Assembly."[56] Whipper had the clear support of the majority of the African-American officeholders, while Wright was the overwhelming choice of Conservative Republicans and White, mostly northern-born Democrats.[57] During a tense vote in the joint session,[58] Wright was elected, becoming the highest-ranking African-American politician in the nation.

Whipper, an "outgoing, articulate and flamboyant"[59] radical Republican, earned much of his support from former field slaves.[60] While in the army, he had been court martialed twice: once for gambling and a second time for fighting with a lieutenant. His gambling apparently continued throughout his political career. In 1875, it was rumored he lost $75,000 on a single night of poker. Perhaps inspired by these accounts, the White Democratic press portrayed him as "utterly corrupt."

In the 1868 Constitutional Convention, Whipper advocated progressive, egalitarian measures, such as extending the right to vote to

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51. HOLT, *supra* note 19, at 76–77; FONER, *supra* note 49, at 226.

52. *See* John Oldfield, *The African American Bar in South Carolina*, *in* AT FREEDOM'S DOOR: AFRICAN AMERICAN FOUNDING FATHERS AND LAWYERS IN RECONSTRUCTION SOUTH CAROLINA 127 (James Lowell Underwood & W. Lewis Burke, Jr., eds. 2000); *see also* J.R. Oldfield, *A High and Honorable Calling*, *supra* note 50, at 272. The third African American lawyer in South Carolina in 1868 was Robert B. Elliott. *See* Oldfield, *The African American Bar in South Carolina*, *supra* note 52, at 127. Elliott became a prominent U.S. Congressman from South Carolina and used that office to denounce Klan violence in the 1870s. Elliott was also a passionate opponent of political corruption. For his honest ways, he lost elections for the U.S. Senate and for State Attorney General. *See* Foner, *supra* note 49, at 70.

53. *See generally* CONVENTION, *supra* note 2.

54. Holt, *supra* note 19, at 108; Woody, *supra* note 14, at 117.

55. *See* Gergel & Gergel, *supra* note 5, at 44.

56. S.C. CONST. of 1868, art. iv, § 2.

57. Holt, *supra* note 19, at 188. White Democrats knew that an African American was guaranteed to be selected, and therefore supported Wright as "the lesser of two evils." *Id.*

58. *See* Gergel & Gergel, *supra* note 5, at 45 (noting that "[g]reat beads of perspiration stood on the foreheads" of the elected officials as they "bent eagerly forward" to hear the vote tally)(quoting the CHARLESTON DAILY COURIER, Feb. 3, 1870, and the CHARLESTON DAILY NEWS, Feb. 2, 1870).

59. Williamson, *supra* note 20, at 331.

60. *See* Holt, *supra* note 19, at 150.

women.[61] The proposal was ahead of its time, and the Convention settled on universal, male suffrage instead. Conservative Whites also frequently accused Whipper of waging class warfare. To these charges, he responded, "I want class legislation in favor of liberty, justice and equality as a remedy for the evils of the past. . . . The white race have had the benefit of class legislation ever since the foundation of our government."[62]

Whipper's most dramatic fight came towards the end of Reconstruction, when he struggled unsuccessfully to earn a seat on the First Circuit Court in Charleston. In 1875, Radical Republicans protested Governor Chamberlain's recent appointment of Democrats to several government positions by electing Whipper and other Radical Republicans to circuit court judgeships.[63] The *Charleston News & Courier* reacted with strong, racist language. Under the headline, "THE BLACK FLAG HOISTED!," the paper reported that "the Negro Ring" of the General Assembly had elected Whipper to "the coveted Charleston circuit."[64] The editor of the *News & Courier*, Francis W. Dawson, added that Whipper, "a full-blood negro, who is known to be ignorant and malignant, and is believed to be utterly corrupt, was chosen as Judge of the most important Circuit in South Carolina."[65]

Dawson had become a close friend of Chamberlain's,[66] and used this opportunity to publicly goad the Governor into action. He wrote, "*War is declared upon the honest people of South Carolina, whether Conservatives or Republicans* . . . And if the issue be met squarely, if the people stand together . . . the fight can be won."[67] Chamberlain rose to the challenge and declared that it was "a horrible disaster—a disaster equally great to the State, to the Republican party, and greatest of all to those communities which shall be doomed to feel the full effects of the presence of . . . Whipper upon the bench."[68] Two days later, the Governor refused to sign Whipper's commission.[69]

Whipper sued Judge Reed directly in an attempt to gain possession of his office, but his case was not heard by the supreme court until June of 1877.[70] By then the Redeemers had regained complete control of the

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61. Foner, *supra* note 49, at 226–227.

62. *Id.* at 227.

63. *See* Holt, *supra* note 19, at 185–186.

64. *The Black Flag Hoisted!*, CHARLESTON NEWS & COURIER, Dec. 17, 1875 [hereinafter *The Black Flag Hoisted*].

65. Editorial, *Whipper, the Black Judge!*, CHARLESTON NEWS & COURIER, Dec. 17, 1875 [hereinafter *Whipper the Black Judge*].

66. Holt, *supra* note 19, at 183.

67. *See Whipper the Black Judge*, *supra* note 65.

68. *Gov. Chamberlain's Views on the Whipper-Moses Infamy*, CHARLESTON NEWS & COURIER, Dec. 20, 1875.

69. *The Governor's Coup D'Etat*, CHARLESTON NEWS & COURIER, Dec. 22, 1875.

70. Whipper v. Reed, 9 S.C. 5 (1877).

government. Amiel Willard, who had been rewarded with the post of Chief Justice after supporting Wade Hampton in the 1876 election,[71] wrote the opinion of the court.[72] He ruled for Reed.[73]

After the fall of Reconstruction, Whipper stayed involved in public life and became a probate judge in 1885. When White Southerners grew tired of Whipper's presence on the bench, they fixed the election of 1888, thereby ensuring his defeat. However, Whipper refused to go quietly. He declined to relinquish his official papers, and as a result spent more than a year in jail.[74] After being released, Whipper would not fade away. Before the 1895 constitutional convention, Democrats manipulated registration laws to prohibit African Americans from voting. Despite the fact that less than eight percent of South Carolina's African American, male population could make it to the polls,[75] Whipper was elected to represent Beaufort, South Carolina at the convention.[76]

In contrast, Wright was a conservative Republican[77] who actively sought the support of Whites[78] such as the northern-born, Harvard- and Yale-educated governor of South Carolina, Daniel Chamberlain.[79] While the Democratic *Charleston Daily News* had labeled Whipper's election to the First Circuit as "The Crowning Infamy of Negro Rule,"[80] that same paper considered Wright to be a "very intelligent, well-spoken colored lawyer."[81] During the 1868 Constitutional Convention, Wright supported a poll tax designed to fund the public schools. To critics claiming that a poll tax would disenfranchise the recently freed slaves, Wright replied that the poor should "smoke less cigars or chew less tobacco" if they wanted to vote.[82]

After Reconstruction's demise, Wright briefly stayed involved in politics, but not in the aggressive, defiant way as did Whipper. Instead of fighting White Democratic control, he supported Redeemer Democrat Wade Hampton during his gubernatorial re-election campaign of 1878. Hampton, of course, was a plantation owner, former slave master and exalted Confederate General who was "determined to reclaim his homeland

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71. Holt, *supra* note 19, at 210–11.
72. *Reed*, 9 S.C. at 6.
73. *Id.* at 13.
74. Foner, *supra* note 49, at 227.
75. Ayers, *supra* note 3, at 289.
76. Foner, *supra* note 49, at 227.
77. *See* Woody, *supra* note 14, at 116.
78. *See* Holt, *supra* note 19, at 188.
79. *Id.* at 194.
80. *The Black Flag Hoisted!*, *supra* note 64.
81. Woody, *supra* note 14, at 117 (quoting the CHARLESTON DAILY NEWS, Mar. 9, 1868).
82. Gergel & Gergel, *supra* note 5, at 41–42.

from interlopers."[83] When asked about Hampton, Wright proclaimed, "There is not a decent Negro in the state that will vote against him."[84] Thus, Robert Woody accurately concluded, "Wright was a compromiser," who sought to form a coalition of well-educated African Americans and White "men of experience."[85]

The split between Wright and Whipper is emblematic of the split that developed within the Republican party during Reconstruction. In 1876, with the Democratic party in resurgence, the Republicans failed to unite in opposition.[86] As a result, the Republicans played a critical role in their own downfall. Thomas Holt claims that the reason the Republicans splintered was because of economic differences within the party.[87] The elite, well-educated African Americans who dominated the Republican party leadership were too disconnected from the ex-slaves to adequately represent them.[88] Holt contends that in the waning days of Reconstruction, the elite failed to fight for the rights of the freedmen, and instead vainly sought to forge an elite coalition with Whites.[89]

In addition to economic discord, there were also important legal divisions. Wright and Whipper shared similar socioeconomic backgrounds, yet the two differed greatly over their interpretation of the law. If Whipper were a judge today, his critics would label him an extreme judicial activist: someone who interprets the law broadly in order to deliver justice to those whom the law has left behind. Whipper would have justified his activism by reasoning that the existing legal system contained a strong bias in favor of White supremacy. Therefore, it needed radical change in order to provide equal protection for African-American citizens. In contrast, the more conservative Wright believed that the old legal doctrines and common-law precedents, "if applied with blinders on, would eventually be fairly applied to all, regardless of race or class."[90] By adopting a more cautious legal approach, Wright surrendered opportunities to secure African-American rights that Whipper would have exploited.

III. THE REMNANTS OF SLAVERY

The law guided the decisions of Jonathan Jasper Wright and other Conservative Republicans throughout Reconstruction. This fact became

83. Ayers, *supra* note 3, at 8.

84. Gergel & Gergel, *supra* note 5, at 68.

85. *See* Woody, *supra* note 14, at 116 (stating that Wright "exerted a moderating and restraining influence upon the more radical colored members of the convention").

86. Holt, *supra* note 19, at 224.

87. *See id.* at 3.

88. *See id.*

89. *See id.* at 220–221.

90. Smith, *supra* note 30, at 85.

vibrantly clear when political discussions turned to slavery. How to tie up the loose ends of slavery's demise was obviously an emotional issue for the former slaves and freeborn African Americans. Not surprisingly, one of the most popular proposals of the 1868 constitutional convention was the repudiation of all private slave debts.[91] That is, any private debt incurred for the purchase of slaves would be void. The contract for a slave sale could not be enforced as contrary to public policy. But throughout the debate on this proposal, Wright tempered the convention's well-justified emotion with judicial caution.

The first ordinance the convention passed was to declare "null and void all Contracts and Judgments and Decrees ... for the purchase of slaves."[92] This ordinance, effectively a law passed by the convention acting as a legislature, won nearly unanimous support.[93] As Simkins and Woody delicately phrased it, the discussion on this ordinance afforded the delegates the "opportunity for the display of feelings against the former slaveholders."[94] William James Whipper gave one of the most passionate and genuinely inspirational speeches on the subject. Whipper told his fellow delegates, some of whom had been slaves only three years earlier:

> I am zealous to see this Ordinance passed, to see the last vestige of that hated institution buried so deep in the sea of oblivion that no resurrection air shall ever breach it in its loathsome walls .... The facts are simply these: men in this portion of the country, for a long period of time, had been conniving at wholesale robbery—robbing, stealing, and selling human plunder .... We are told, also, [by opponents to the ordinance] that this is a quarrel between two gentlemen [the slave trader and the slave owner] and it is proposed to let them fight it out. I am willing they shall, and that the buyer and seller shall settle upon whatever terms they choose, but I am not willing that the machinery of our Courts should be used for the purpose of wringing the

91. *See* CONVENTION, *supra* note 2, at 248–49 (listing the yeas and nays on the private slave debt ordinance, with 92 for and 19 against).

92. S.C. CONST. of 1868, An Ordinance Declaring Null and void all Contracts and Judgments and Decrees heretofore made and entered up, where the consideration was for the purchase of slaves.

93. *See* CONVENTION, *supra* note 2, at 248–249. *See also* A. A. TAYLOR, THE NEGRO IN SOUTH CAROLINA DURING THE RECONSTRUCTION, 130–131 (1924) (describing the "heated debate" wherein "the majority of delegates agreed that the repudiation of these bonds was absolutely necessary on the ground that it was violative of the fundamental principle of moral law expressed in the Declaration of Independence").

94. SIMKINS & WOODY, *supra* note 10, at 99.

> bone from the two dogs. I ask, then, that we wipe out this thing forever.[95]

While other delegates spoke with similar fervor,[96] Wright adopted an entirely different tone. He commented:

> We are here, I trust, as I have already said, with hatred and malice towards no man who has held a slave. I trust we are here to extend the right hand of fellowship to all, and that our hearts will be filled with the milk of human kindness towards all. But we should repudiate these debts, [because] ... in the laying the foundation of a new government it becomes our duty to have no litigation going on in our Courts where the consideration is for slaves.[97]

Thomas Holt might contend that Wright's words on this issue mark him as an elitist attempting to build a future with South Carolina Whites.[98] On one level, Holt would be correct. Only a freeborn Northerner could claim to hold no malice towards the former slaveholding class. Yet there is an additional explanation for Wright's perspective; as a legal formalist, he was particularly aware of the precarious legal situation of the delegates. While federal law, through the Reconstruction Act, guaranteed their right to assemble, a large population of ex-rebels refused to recognize them. Wright observed, "I know it is said by our opponents that we are an unlawful assembly, that we are an unconstitutional body."[99] In addition, Wright had listened to the statements of some of the White members of the convention who had suggested that for South Carolina to repudiate private slave debts would violate the Contracts Clause, contained in Article 1, section 10 of the United States Constitution.[100] It states, "No state shall ... make any ... law impairing the obligation of contracts."[101] Therefore, Wright counseled caution: "We are not here to establish any new precedents," he advised.[102] He was determined to stay well within the bounds of constitutional and common law.

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95. CONVENTION, *supra* note 2, at 230–31.

96. *Id.* at 214–249. Delegate B. Odell Duncan denounced slavery as "a crime against civilization and Christianity" perpetrated by "the very scum of all lawless desperadoes, the African slave traders." *Id.* at 215. Robert B. Elliott pleaded, "I hope we will vote unanimously upon this Ordinance, and put our stamp of condemnation upon this remnant of an abominable institution .... this bastard of iniquity." *Id* at 227.

97. *Id.* at 218.

98. *See generally* Holt, *supra* note 19.

99. CONVENTION, *supra* note 2, at 217–18.

100. *See id.* at 222.

101. U.S. CONST. art. I, § 10.

102. CONVENTION, *supra* note 2, at 218.

Instead of delivering a stirring speech like Whipper's, Wright presented a staid analysis on the legality of the ordinance. He first noted that slave owners had kept slaves under control by whip and chain, partly in order to keep them from educating themselves.[103] "This very fact," he stated, "is sufficient to show that those persons they held were men in every sense of the definition of man."[104] Once he had established that African Americans were legally "men," he continued his analysis, asserting "that there can be no property in man."[105] Finally, on the basis of these premises, he concluded "that whenever a debt was contracted, the proposed consideration of which was a slave, there was no consideration received, and where there was no consideration the debt was null and void."[106]

In other words, Wright justified the ordinance by applying well-known common law doctrines of contracts law. For a contract to be valid there had to be consideration: both parties had to offer each other something of value. Since there was no property in man, there was no consideration offered by the slave trader. Since there was no consideration, the contract was void. The slave debts were repudiated in Wright's mind not by Whipper's passionate moral argument but by a rigid application of the law. The distinction between Whipper's and Wright's rationales for repudiating slave debts appeared again toward the end of the convention. Both opposed a motion to place the slave debt ordinance directly into the constitution, but they did so for different reasons.[107] Wright's argument was based strictly on a legal interpretation, while Whipper's plea was more pragmatically motivated.

Defending his lack of consideration rationale, Wright admitted that slave contracts "are contracts, whether there is or whether there is not consideration."[108] As a result, he stated that the ordinance might be unconstitutional. Even more, he confessed that if the case were to come before him as a judge, he "would be compelled" to find it contrary to the Contracts Clause.[109] Therefore, he was reluctant to add the private slave debt section to the state constitution, as the Supreme Court of the United States might be called upon to decide whether the new South Carolina constitution conflicted with the federal Constitution.[110] Wright did not want put the entire constitution and the Reconstruction government in jeopardy. If one questionable statute was held unconstitutional, that would be a loss, but an acceptable one. If a section of the state's constitution was

103. *See id.* at 217.
104. *Id.*
105. *Id.*
106. *Id.*
107. *See id.* at 911–14.
108. *Id.* at 913.
109. *Id.*
110. *See id.*

found to be invalid, the results could be disastrous. Finally, Wright advised, "We should leave this matter, then, as we have already acted upon it, and let it go before the courts."[111]

Whipper saw similar constitutional problems, but he never worried about the possibility of a constitutional provision being struck down by a judicial body.[112] Instead, he focused on winning over the voters of South Carolina who would be called upon to adopt the new constitution. While he had been "zealous to pass the [original] Ordinance, abolishing contracts for slave debts," he adamantly believed that the ordinance should be kept out of the constitution:

> There are large numbers who zealously support the Constitution we have framed so far, but who cannot do it with that article attached. I hope therefore, as there is no necessity for it, we will not burden our Constitution with a clause that may, in a manner, have a tendency to defeat it.[113]

Despite their best efforts, Whipper's and Wright's arguments failed to persuade their colleagues, and the motion for the new section passed.[114] Added to article IV were the words, "All contracts, whether under seal or not, the consideration of which were for the purchase of slaves, are hereby declared null and void. . . ."[115] While Wright and Whipper came to the same conclusion on this issue, they arrived there through different routes: one rooted in legal formalism and the other concerned with the pragmatic and political questions of establishing a successful government. These different rationales would prove important as questions surrounding the legality of slave debts persisted.

It did not take long, as Wright predicted, for this matter to come before the courts in the 1870 case of *Calhoun v. Calhoun*.[116] In 1854, Andrew Calhoun had purchased an 1,100-acre plantation with fifty slaves.[117] The slaves alone were valued at $29,000.[118] Andrew was to pay for the entire property, land and slaves, within fifteen years.[119] He defaulted, and when the previous owner, Floride Calhoun, sued to collect, Andrew claimed that the Constitution of 1868 repudiated one hundred percent of his private slave debt owed to Floride.[120]

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111. *Id.* at 914.
112. *Id.* at 912–13.
113. *Id.* at 912.
114. *Id.* at 918.
115. S.C. CONST. of 1868, art. IV, § 34.
116. 2 S.C. 283 (1870).
117. *Id. at* 284.
118. *Id.* at 285.
119. *Id.* at 284.
120. *Id.* at 292.

Chief Justice Moses wrote the opinion for a unanimous court.[121] Andrew Calhoun presented a series of arguments as to why the slave contract was void. He argued that he had been sold a bad title to the slaves,[122] that slave contracts should not be recognized for public policy reasons,[123] and most importantly, that the state constitution repudiated all slave debts, public and private.[124]

Moses rejected all of these theories.[125] He held that the Contracts Clause of the United States Constitution voided article IV, section 34 of the state constitution.[126] Moses pointed out that the contract for slaves, when entered into by the parties, was a good contract according to law.[127] He held that it was "of the character of those [contracts] within the meaning" of the United States Constitution.[128] As for applying the Contracts Clause, Moses quickly noted, "Where it is attempted to expunge the whole contract, to make it 'null and void,' it would be a waste of words to enquire if the obligation was impaired."[129] Justice Wright concurred.[130]

At first glance, Justice Wright's concurrence was expected. From his statements at the Convention, it is clear that he agreed with Chief Justice Moses that the constitutional language on the repudiation of debts could not be applied, and neither could the ordinance repudiating slave debts. However, he could have applied his own reasoning from the 1868 Convention, where he stated,

> We are not to recognize the right of our Courts to go on contending and fighting over these matters. We should not allow them to proceed bringing in their witnesses on each side, and continuing the cases perhaps for half a century, contending over slavery, and discussing whether one man had the right of property in another man.[131]

However, Wright the jurist would be more conservative than Wright the convention delegate. Most importantly, as J. Clay Smith has explained, Wright was a strict legal formalist, and "[u]nder classical formalism it was not within the purview of the judge to make any moral or policy decisions."[132] Therefore, Wright felt compelled to leave the policy decisions for

121. *Id.* at 291.
122. *Id.* at 302.
123. *Id.* at 306.
124. *Id.* at 301.
125. *Id.* at 301–07.
126. *Id.* at 301.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 309.
131. CONVENTION, *supra* note 2, at 218.
132. Smith, *supra* note 30, at 77.

the legislature, not the court. Beyond legal formalism, there is also the fact that Wright, as a conservative Republican, wanted to be accepted by Whites of both parties. Smith suggests that Wright "may have tried to prove that the first black justice in South Carolina and the nation was not a radical or pro-black."[133] This case came before the court during Wright's first year on the bench, and thus, he would have been especially reluctant to dissent from his White colleagues.

It is doubtful, however, that Whipper would have been so cautious. He stated during the convention that he never believed a contract for the sale of a slave to be valid. "Just so long then as man is not property now, he never was, and hence there never was an obligation."[134] He pressed this point on the convention, asking, "[I]s there a Court anywhere that would enforce obligations payable to robbers, legalized though they might be for the time being[?]"[135] Whipper stated his point clearly. Any court over which he presided would not enforce these obligations. Admittedly, it is possible that Whipper, like Wright, would have been more conservative as a justice than he was as a delegate. He might have bit his tongue and silently concurred with the majority in *Calhoun*.

It is a near certainty, however, that Whipper would have taken a more radical position than Wright on *Russell v. Cantwell*, an 1875 case involving a lawsuit by a former slave against a White man.[136] During the Civil War, James Cantwell had accused George Russell, then a slave, of theft.[137] There was scant, if any, evidence against Russell, and he was acquitted.[138] After the war, Russell, now a free man, sued Cantwell for malicious prosecution.[139] Cantwell's only defense was that Russell had no cause of action against him since Russell was a slave at the time. The only person who had standing to sue on the matter was Russell's owner, since he was the only person wronged.[140]

Justice Wright wrote for the court.[141] The question for the court was whether former slaves had any of the natural rights of citizens before they were emancipated. The constitutional convention of 1868 attempted to answer this question with an emphatic 'yes' by repudiating all existing slave debts. Since there were no rights of property in human beings,[142] slavery had never legally existed. Wright held to this belief during the

133. *Id.* at 85.
134. CONVENTION, *supra* note 2, at 231.
135. *Id.* at 230.
136. 5 S.C. 477 (1875).
137. *Id.* at 477.
138. *Id.*
139. *Id.*
140. *Id.* at 478.
141. *Id.* at 477.
142. *See* CONVENTION, *supra* note 2, at 217.

constitutional convention. "I contend that the institution of American slavery never was a legal institution" he declared.[143]

But as a supreme court justice, Wright did not rely on his 'no consideration' theory from the convention. Instead, as the law required, Wright looked to the law at the time the wrong was committed. He ruled, "If the respondent was a slave at the time the act complained of was committed, under the then existing laws of this State he could not have brought this action. . . ."[144] As a legal formalist, Wright felt he had no choice. George Russell's suit was dismissed, since he had suffered no legal wrong.[145] J. Clay Smith, Jr. has concluded that Wright's opinion in *Russell* is a testament to his "ability to maintain his judicial integrity in the face of sensitive, socially and politically divisive issues [and] is evidence of his strength of character, as well as his pledge to uphold the law."[146]

However, Wright did bend to the political pressures from the White establishment in deciding this case. Not only did Wright bar Russell's claim, he went even farther when he concluded that "To permit those who were slaves and are now free to bring actions . . . for wrongs committed against them during the existence of slavery would prove disastrous to all classes of persons in the State."[147] Ironically, this reasoning suggests that Wright was partly motivated by public policy, and not just legal formalism. If slaves were allowed to sue for wrongs committed against them while in slavery, then the courts would be overwhelmed by retributive cases filed by slaves against their former masters, overseers and oppressors.

Additionally, Wright's reasoning is reminiscent of the rationale employed in the most infamous prewar case, *Dred Scott v. Sanford*.[148] In *Dred Scott*, the U.S. Supreme Court was called upon to determine whether the plaintiff, a slave who was asserting a claim that he had been freed, was a citizen capable of bringing a suit in federal court. To answer this question, Chief Justice Roger Taney adopted one of the classic methods of legal formalism—originalist interpretation of the Constitution—and declared that "The duty of the court is, to interpret [the Constitution] with the best lights we can obtain on the subject . . . according to its true intent and meaning when it was adopted."[149] After an extensive analysis, Taney concluded that Dred Scott was "not a citizen . . . in the sense in which that word is used in the Constitution."[150] The suit was dismissed.

Of course, Jonathan Wright would have denounced any similarity between him and Justice Taney. Wright had once insisted that Taney, who

143. *Id.*
144. *Russell*, 5 S.C. at 478.
145. *Id.*
146. Smith, *supra* note 30, at 77.
147. *Russell*, 5 S.C. at 478.
148. 60 U.S. 393 (1856).
149. *Id.* at 405.
150. *Id.* at 454.

as a federal judge was appointed for life, should have been murdered after the *Dred Scott* ruling. "If there is anything in this world that would induce me to assassinate a person," Wright proclaimed, "it would be because that person was trampling upon the liberties of the people, and that he was placed in such a position that he could not be removed in any other way."[151] Yet the similarities between Wright's "borderline heartless"[152] formalism and Taney's racist originalism persist.

Even more surprising is the fact that a legally formalistic approach could have allowed Wright to conclude that Russell's suit was valid. Russell's injury occurred in Charleston in July of 1864. While state law might have considered Russell a slave, that law would have been trumped by the federal Emancipation Proclamation,[153] which pronounced that Russell, as a slave in an area currently under rebellion, was free. Wright could have allowed Russell's claim to go forward while still limiting his holding to those slaves who were wronged after January 1, 1863, the date Lincoln issued the final Emancipation Proclamation. By limiting his decision as such, Wright could have allowed the suit to proceed without opening up the floodgates to a sea of endless slave litigation. Of course, such a decision might have been legally defensible, but it would have generated extreme political controversy. It would have been an official decree from the state supreme court that the former masters had flagrantly broken federal law in treating African Americans as slaves after an executive proclamation had declared them free. In this respect, it would have been a direct affront to the former Confederates.

The fact that Wright refused to travel this route suggests that he cared about more than just legal formalism. Wright knew a declaration that Russell's case was valid would be seen as an insult to the White elite. Not only would they have lost their slaves, but now those slaves would be able to demand restitution for wrongs committed against them during slavery. Considering that "slave reparations" in the 1870s meant repaying slave owners for their lost property (not slaves for their lost wages), such a decision would have been a radical, aggressive act by the court.

Whipper, however, might have embraced this opportunity. While Moses and Willard would have written the majority opinion, Whipper's dissent would have stood as a symbolic victory. As Whipper repeated often during the convention, the existence of slavery had indelibly marred the otherwise glorious reputation of antebellum South Carolina. He wished to abolish all remnants of slavery, to treat all people, African American or White, as equals, "not as a matter of expediency, but as a matter of right

151. CONVENTION, *supra* note 2, at 599.

152. Smith, *supra* note 30, at 85.

153. Abraham Lincoln, Final Emancipation Proclamation (Jan. 1, 1863) *reprinted in* 12 Stat. 1268–69 (1863). The Proclamation states that as of January 1, 1863, "all persons held as slaves within any state or designated part of a state, the people whereof shall then be in rebellion against the United States, shall be then, thenceforward, and forever free."

and as a matter of justice . . . ."[154] Therefore, while legal formalism required Wright to look backward for precedential support, Whipper focused his gaze into the future, declaring:

> I hope we may establish a system of laws that will stand the favorable criticism of a holier and brighter civilization even than our own. For it is to be remembered that we are now doing what is to go down to future generations, to be criticised [sic] by ages that will judge us from the past.[155]

Even if Whipper had been reluctant to accept a pre-Civil War claim, he certainly would have accepted Russell's 1864 case. After all, during the convention, the delegates passed without discussion an ordinance repealing all "Acts of Legislation" passed after secession "pledging the faith and credit of the State for the benefit of any corporate body or private individual" unless the new General Assembly chose to ratify them.[156] Since an illegitimate government in rebellion could not pledge money from the state's coffers, Whipper could reason that the same illegitimate government could not recognize slaves as property after the federal government had declared them free.

Even more, the first section of the new constitution declared that "All men are *born* free and equal—endowed by their Creator with certain inalienable rights . . . ."[157] The second section announced that "Slavery shall never exist in this State . . . ."[158] Therefore, the former slaves did not need to wait for a declaration from Lincoln to be able to "defend[] their lives and liberties . . . protect[] [their] property, and . . . .obtain[] their safety and happiness."[159] God had granted them these rights at birth. In writing such an opinion, Whipper would have been demonized by the former Confederates. However, he would have been lionized by the majority of South Carolinians, sixty percent of whom were African American.

IV. THE HOMESTEAD ACT

Like private slave debts, the creation of a homestead law weighed heavily on the minds of the delegates at the constitutional convention. The question first appeared on the fourth day of the convention,[160] and

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154. CONVENTION, *supra* note 2, at 231.

155. *Id.*

156. S.C. CONST. of 1868, An Ordinance To Repeal all Acts of Legislation passed since the twentieth day of December, one thousand eight hundred and sixty, which pledge the faith and credit of the State for the benefit of any Corporate Body.

157. S.C. CONST. of 1868, art. I, § 1 (emphasis added).

158. S.C. CONST. of 1868, art. I, § 2.

159. S.C. CONST. of 1868, art. I, § 1.

160. CONVENTION *supra* note 2, at 41–43.

despite the early start, the delegates continued to fight over the exact language of the homestead provision until the penultimate day.[161] In between, passionate arguments on the floor grew so heated as to cause one speaker to burst into tears.[162] The text of the homestead section finally agreed upon read in part:

> The family homestead of the head of each family, residing in this State, such homestead consisting of dwelling house, outbuildings and lands appurtenant, not to exceed the value of one thousand dollars, and yearly product thereof, shall be exempt from attachment, levy or sale on any mesne or final process issued from any court.[163]

Also protected by the section was a considerable amount of personal property belonging to the head of the household; "to wit: household furniture, beds and bedding, family library, arms, carts, wagons, farming implements, tools, neat cattle, work animals, swine, goats and sheep, not to exceed in value in the aggregate the sum of five hundred dollars . . . ."[164] In short, the section pledged to shield up to fifteen hundred dollars of an individual's real and personal property from his creditors. The aim of the provision was to help cash-poor South Carolinians retain their farms if they became unable to pay their debts.

Homestead exemptions had swept through nineteenth-century state legislatures in the 1840s and 1850s, beginning with Texas in 1839.[165] Twenty-four states, including nine Confederate states, had homestead exemptions in place at the start of the Civil War. After the war the second wave of homestead laws arrived. During Reconstruction, every Southern state that had a homestead act expanded the scope of their laws' coverage, often doubling or quadrupling their prewar dollar amount. In the case of Texas and Georgia, the governments increased homestead coverage tenfold.[166] As the U.S. Supreme Court declared in comparing the two Georgia statutes, "No one can cast his eyes over the former [antebellum]

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161. *See id.* at 887–89.

162. *Id.* at 474. In the midst of the debate, Charles Leslie took the floor to state that he wanted to craft a homestead law that served all of the citizens of South Carolina, not just the freed slaves. *Id.* at 472. "I want to see the white men and the black men . . . all going to the polls to ratify this Constitution," he declared. *Id.* at 473. This vision overwhelmed Leslie, who concluded, "I am speaking for my people, for I love them with all my heart." *Id.* at 474. At that point, the convention reporter observed that Leslie "was so overcome by his feelings as to burst into tears, and sat down amidst intense silence." *Id.*

163. S.C. CONST. of 1868, art. II, § 32; CONVENTION, *supra* note 2, at 888–89.

164. *Id.*

165. *See generally* Paul Goodman, *The Emergence of Homestead Exemption in the United States: Accommodation and Resistance to the Market Revolution, 1840–1880*, 80 J. AMERICAN HISTORY 470 (1993). For dates when particular states adopted their homestead provisions, see Table 1 at 472.

166. *Id.* at 472, 492.

and later [Reconstruction] exemptions, without being struck by the greatly increased magnitude of the latter."[167] The only two Confederate states without prewar exemptions, Virginia and South Carolina, added generous provisions in 1867 and 1868, respectively.[168]

Thomas Holt acknowledged the importance of land issues to African-American citizens.[169] "As with peasants everywhere," he wrote, "control of the land was an issue they could understand and mobilize around."[170] A nineteenth-century northern observer similarly reported, "The sole ambition of the freedman appears to become the owner of a little piece of land, there to erect a humble home . . ."[171] But the issues surrounding the homestead exemption extended far beyond the former slaves, since the South's economic difficulties hit Whites extremely hard as well. As Paul Goodman observes, "Before the war the planters' most valuable asset had been black labor; after the war 'the key to survival of the plantations was the ability of the former slave owners to hold onto their land.' "[172]

The debate over land reform split on the question of whether to design the provision so as to assist the former slaves only, or to adopt a more universal approach that would help all South Carolinians, White and African American.[173] Specifically, the delegates wondered whether they should restrict the clause to homesteads purchased after the ratification of the constitution (which would leave White, prewar landowners without aid), or whether the act must cover all homesteads, regardless of when they were purchased.[174] Most Republicans, both African American and White, lobbied for the universal approach.[175] Conservatives like Wright felt that such a clause offered the brightest possibility for a union with elite Whites.[176] Radicals like Whipper concurred, believing that White support was necessary to win ratification of the constitution. On the other side of the debate, however, were a handful of radicals who argued for constitutional language that would deny the former rebels any protection.[177]

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167. Gunn v. Barry, 82 U.S. 610, 622 (1872).

168. South Carolina had actually passed a meager $500 homestead act in 1851, but repealed it in 1858. Goodman, *supra* note 165, at 480.

169. Holt, *supra* note 19, at 68.

170. *Id.*

171. *Id.* (quoting Letter from "A," to Editor, Orangeburg, S.C. (Sept. 8, 1865)).

172. Goodman, *supra* note 165, at 491 (quoting GAVIN WRIGHT, OLD SOUTH, NEW SOUTH: REVOLUTION IN THE SOUTHERN ECONOMY SINCE THE CIVIL WAR 84, 102 (1986)).

173. *See* CONVENTION, *supra* note 2, at 452–506.

174. *See id.*

175. *See id.* at 452–77. Most of the debate on the homestead act is recorded on these pages, which provides the transcript from Tuesday, February 18, 1868.

176. *See id.*

177. *See id*; Holt, *supra* note 19, at 131.

As he had done before, Wright adopted a conciliatory tone in addressing the convention. He stated, "I do not, and I trust there is not a man here who does cherish any feeling of hatred or malice towards any person .... It is not for the black man or the white man, but for the whole people that we should legislate."[178] But this politically moderate approach was legally troublesome, because the federal Contracts Clause was again at issue.[179] A retrospective homestead exemption might impair the obligation of contracts between pre-1868 creditors and debtors. Therefore, if the delegates wanted to be absolutely sure that their work would not violate the U.S. Constitution, they would have rejected any homestead exemption covering antecedent debts.

Jonathan Jasper Wright demonstrated, however, that the legally formalistic road was not always the legally cautious one. Applying his well-known, strict-construction analysis, Wright declared that "no Court can order a sale of property of the amount exempted here and claimed as a homestead, whether there is a judgment on that property or not."[180] In making this assertion, Wright drew upon traditional nineteenth-century contracts law, which distinguished the obligation of a contract from the remedy available after the contract was breached.[181] The convention could alter the remedy (e.g., foreclosure on a homestead) without impairing the underlying obligation in the contract to pay the debt.[182]

Whipper joined Wright in supporting the retrospective version of the clause. But while Wright claimed to hold no malice towards the former slaveholders, Whipper was less magnanimous. He opined:

> We are framing laws for the whole people, and are not to consider the fact that the law protects the man who was once a political criminal. We are not to refuse to pass an act that will benefit the great masses of the people, lest we should protect somebody in favor of secession .... There are colored people in the State of South Carolina who have already obtained lands, who have property, and who desire this protection ....[183]

Whipper's language was a far cry from Wright's call for a constitution that "shall be so broad and wide that all the people of the State can stand, live

178. CONVENTION, *supra* note 2, at 463.

179. *See* U.S. CONST, art. 1, § 10.

180. CONVENTION, *supra* note 2, at 465.

181. *See* BENJAMIN FLETCHER WRIGHT, JR., THE CONTRACT CLAUSE OF THE CONSTITUTION 103 (Harvard University Press 1938).

182. The U.S. Supreme Court would later hold that this interpretation was unconstitutional. *See* Gunn v. Barry, 82 U.S. 610 (1872); *see also infra* notes 191–197 and accompanying text. In 1868, however, the law remained unclear. *See* WRIGHT, *supra* note 181, at 103.

183. CONVENTION, *supra* note 2, at 462–63.

and flourish upon it."[184] Instead, Whipper seemed committed to the idea of helping every single African-American citizen of the state, including the handful that had already acquired property. If that meant crafting a constitution that also protected the occasional secessionist, then he begrudgingly accepted this cost.

At its core, Whipper's argument was political. Like many convention delegates, he feared that the former Confederates would stand against the constitution and refuse to ratify it. A homestead exemption represented a tempting carrot to offer his political opponents. In Georgia, for example, "white men who 'cursed the [Georgia state] constitution' ... still voted for it 'on account of its homestead provisions.' "[185] In fact, "It was the influence of the present homestead that ratified the Constitution of 1868."[186] The South Carolina delegates, cognizant of the progress of other states' conventions, [187] recognized their own uneasy situation. Delegate C.P. Leslie, for example, reported:

> We have just received over the wire intelligence of the defeat of the Alabama Constitution. We all desire to prevent such a result in South Carolina. The Constitution of Alabama is a good one, but they have omitted a homestead law, and the result is a defeat by 15,000 majority. Write down the word "Alabama;" spell it, dream over it, reflect upon it, and let it be a lesson.[188]

As mentioned above, Whipper did not want to "burden [the] Constitution with a clause that may ... have a tendency to defeat it."[189] Therefore, while he chose the accommodationist route on this one issue during the convention, it is probable, given his attitude towards the "political criminals" of the state, that he would have changed his viewpoint once the new government was well-established. Other radicals, however, did not wait to give voice to their most heartfelt opinions. Thomas Robertson asserted, "I am not willing ... [to give] to the men who brought on the war, staked their all on secession, and who have turned off and driven the colored men, to whom they owe their property, from their

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184. *Id.* at 465.

185. Goodman, *supra* note 165, at 494 (quoting an unnamed Georgia politician).

186. *Id.*

187. *See* CONVENTION, *supra* note 2, at 464–65 (comparing the South Carolina homestead provision to the Alabama section); *Id.* at 887 (noting the visit to the convention by H.H. Sweet, a delegate to the North Carolina convention).

188. *Id.* at 473.

189. *See infra* note 103 and accompanyint text; CONVENTION, *supra* note 2, at 913.

plantations without a dollar," any protection under a homestead law.[190] He concluded:

> I do not believe in any resolution or law that is retrospective in its operations. The men who made this war did not count the cost; they did not care whose property was sacrificed. They drove men like cattle into slaughter pens, and I want to know if this body is prepared to relieve them at the expense of the loyal men of the country.[191]

Yet Robertson's opinion was shared by only a tiny minority of the delegates. His passionate argument did not carry the day. The delegates voted down his amendment that would have explicitly limited the homestead act to post-1868 purchases, and instead adopted an open-ended provision that left the retrospective question open for legal interpretation by the courts.

The first case to wrestle with the dilemma was *In re Kennedy*.[192] At issue was whether the homestead exemption would protect a debtor who had both incurred his debt and suffered an adverse judgment against him before 1868. In 1863, a judgment "for $70,000, and upwards" was entered against the estate of Richard Kennedy.[193] In 1866, a separate claim was filed seeking the sale of Kennedy's entire real estate to pay the earlier judgment. The claim was granted in 1868, and the Kennedy land was ordered to be sold. After this final judgment had been issued, Kennedy's surviving children began a third suit to establish a homestead for themselves on the property. The case reached the state supreme court in 1870.[194]

Two opinions were filed by the court, one by Justice Willard, and the other by Chief Justice Moses. Justice Willard applied the same contracts analysis that Jonathan J. Wright had described during the convention. First, he noted that the convention clearly intended the section to apply retrospectively.[195] Second, he distinguished the remedy from the obligation under the contract. He determined that "a judgment is a mere right of preference among purchasers and creditors. It is to be regarded as an incident of the remedy not in contemplation of the contracting parties."[196] Therefore, it did not come under the protection of the Contracts Clause.

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190. CONVENTION, *supra* note 2, at 452. Although this author is not certain, it appears that T.J. Robertson was White. Regardless of his race; however, his statements are useful for understanding the position of radical Republicans in South Carolina.

191. *Id.*

192. In re Kennedy, 2 S.C. 216, 227 (1870).

193. *Id.* at 216.

194. *Id.* at 216–18.

195. *Id.* at 226.

196. *Id.* at 226.

While Chief Justice Moses agreed that the homestead exemption could "prevail against creditors on contracts existing prior to its adoption," he "entirely dissent[ed]" from the Justice Willard's extension of "the exemption against creditors holding *judgments* . . . prior to the adoption of the State Constitution."[197] Therefore, since a judgment mandating the sale of Kennedy's estate had already been entered, he believed that the children had no claim for a homestead.

With these two justices split, the decision lay with Justice Wright's vote. He concurred with Justice Willard, vastly extending the homestead exemption's coverage.[198] Such a decision conflicts with the perception of Wright as a pure legal formalist, "dedicat[ed] to the institution of law."[199] As mentioned above, applying the homestead exemption retrospectively might run afoul of the Contracts Clause of the U.S. Constitution. But Justices Wright and Willard were doing more than just applying the act to a prewar debt. They were taking a final judgment against a debtor, and allowing his children to go back to court and use the new homestead exemption to effectively rewrite the judgment. To do so, they had to read the Contracts Clause extremely narrowly—completely divorcing the obligation to pay on the contract from the obligation to pay on the ensuing judgment. Wright's narrow reading of the Contracts Clause—both in this case and during the 1868 convention—is unsettling, especially when compared to the broader reading he gave the same clause in the slave debts scenario. At the very least, this inconsistency suggests that policy considerations trumped Wright's application of legal formalism.

Even more, the *Kennedy* decision potentially violated the legal doctrine of res judicata, which states that a final judgment on the merits bars any further litigation on the same claims or issues. Res judicata is an ancient, Roman principle that was "certainly well-established in the United States by the nineteenth century."[200] In *Kennedy*, the creditors brought a suit on the contract, which they won in 1863. Unable to collect on this judgment, the creditors petitioned for the sale of the Kennedy estate in order to pay for their decree. In 1868, they won this case as well, thereby finalizing the sale of the estate. However, "[a]fter the decree for sale was made" the children of Richard Kennedy[201] "filed this petition . . . praying that a homestead out of the real estate of the testator be set off and assigned to them."[202] It was this final suit by the children that should have been barred by res judicata.

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197. *Id.* at 227 (emphasis added).

198. *Id.* at 226.

199. Smith, *supra* note 30, at 85.

200. Eric T. Dean, Jr., *Reassessing Dred Scott: The Possibilities of Federal Power in the Antebellum Context*, 60 U. CIN. L. REV. 713, 722 (1992).

201. The children, being in privity with their father on this claim, would be barred from relitigating the issue, just as Richard Kennedy himself would have been barred.

202. *Kennedy*, 2 S.C. at 217.

That a strict legal formalist like Wright felt no qualms about altering a final judgment suggests that he was worried about the policy implications of his decision more than he was about a strict interpretation of the law. By siding with Willard, Wright cast a clear victory for South Carolina Whites. Few African Americans owned land in South Carolina prior to the adoption of the state constitution, and even fewer had judgments against them requiring that they sell their land. By extending the homestead exemption to cover antecedent debts *and* judgments, Wright helped White, prewar landowners almost exclusively. To Wright, who had won some White approval during his campaign for the supreme court and who had enjoyed White support while on the court, voting with Willard would have appeared to be politically promising. He could further endear himself to his White Republican supporters by construing the homestead exemption to be as far-reaching as possible.

To the U.S. Supreme Court, however, southern states were too generous in their interpretations of homestead laws. The high court therefore righted the situation in *Gunn v. Barry,* handed down in December of 1872.[203] *Gunn* involved the application of an 1869 Georgia homestead statute to an 1866 judgment against the debtor.[204] Justice Swayne, an Ohio Republican appointed by Lincoln during the Civil War,[205] wrote for the Court.[206] Citing the Contracts Clause, he severely limited the retrospective reach of any homestead law. If "the remedy is part of the obligation of the contract," he held, "a clearer case of impairment can hardly occur than is presented in the record before us. The effect of the act in question, under the circumstances of this judgment, does not indeed merely impair, it annihilates the remedy."[207]

As for Justice Wright's distinction between the obligation and the remedy, the Court reigned in that argument as well. "The legal remedies for the enforcement of a contract, which belong to it at the time and place where it is made, are a part of its obligation. A state may change them, provided the change involves no impairment of a substantial right."[208] That is, a state might retroactively change the remedy available to a creditor, but only insofar as the change did not impair "a substantial right" embodied in the obligation. The obligation and the remedy could not be wholly separated. While this opinion left some room for protecting

203. 82 U.S. 610 (1872).

204. *See id.* at 620–22.

205. GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW B-3 (The Foundation Press, 13th ed. 1997).

206. *See* Gunn, 82 U.S. at 620.

207. *Id.* at 622.

208. *Id.* at 623.

prior debts under a homestead law,[209] it was now clear that Justice Wright's support for altering past judgments was unconstitutional.[210]

By allowing pre-1868 homesteads to be protected, land remained tied up in White ownership, and, as some delegates to the constitutional convention realized, "the colored man [got] no land."[211] Unfortunately for South Carolina's African-American population, only a handful of Radical Republicans fully understood how closely access to land was connected to political power. As Paul Goodman has commented, "[t]heir control of land left prewar elites preeminent in shaping the region's postwar destiny."[212] In short, by taking a conservative, accommodationist perspective, Justice Wright gave the planter class control of the land without a struggle. With that control, White elites gained the power to block African-American opportunities for advancement.

Had Wright voted with the Chief Justice in *Kennedy* and not extended the homestead exemption to pre-existing judgments, the situation might have been different. He could have denied the *Kennedy* claim, leaving undecided the question of antecedent debts. After the *Gunn* decision, Wright could have used the federal precedent as authority for denying claims to pre-existing debts as well. There is little doubt that William Whipper would have voted this way. While he concurred with Wright during the convention, he did so because he realized that a retrospective homestead clause was the only kind that stood a chance of being ratified by the state's voters. That is, Whipper remained faithful to his oft-stated commitments to do as much as possible for the former slaves of South Carolina. Once on the state supreme court, Whipper would have had less need for a far-reaching homestead provision. Certainly, he would not have sanctioned the one that Justice Willard approved, which did nothing for South Carolina's African-American population.

Even more, Whipper might have gone farther and written an opinion prohibiting the use of the homestead clause to cover pre-existing debts as well. *McKeown v. Carroll*, an 1874 case wherein the court upheld a retrospective application of the homestead protection, would have been the perfect opportunity for Wright to pen such an opinion.[213] *McKeown* involved land that was purchased before the war and homesteaded in 1869.[214] The creditor, Samuel McKeown, sought an injunction in 1872 to prevent the children of the deceased debtor, who were now in possession

209. The South Carolina Supreme Court did in fact uphold a retrospective application of the homestead exemption after *Gunn*. *See* McKeown v. Carroll, 5 S.C. 75 (1874).

210. *See* Cochran v. Darcy, 5 S.C. 125 (1874) (recognizing that *Kennedy* had been overruled in part by the Supreme Court's *Gunn* decision).

211. CONVENTION, *supra* note 2, at 454.

212. Goodman, *supra* note 165, at 491.

213. 5 S.C. 75 (1874).

214. *Id.* at 75.

of the homestead, from logging on it.[215] Wright could have supported Mr. McKeown's claim for injunction on strict, legally formalistic grounds. As the Supreme Court's *Gunn* decision made clear, invalidating the homestead claim was the only way to avoid problems with the Contracts Clause. In fact, the plaintiff in *McKeown* cited the *Gunn* decision, thereby inviting the court to limit the homestead exemption precisely on these grounds.[216]

However, Wright rejected this argument and concurred in Judge Willard's majority opinion. Judge Willard dismissed McKeown's claim, reasoning that the homestead provision should be interpreted as broadly as possible. Without ever citing *Gunn*, he explained, "The object of the Constitution was, clearly, to perpetuate in the judgment debtor or his family . . . the ownership as well as the use of the family homestead. We are not justified in diminishing the force and effect" of this constitutional protection.[217] Had Wright applied *Gunn* and invalidated the retroactive use of the homestead clause, the effect of his ruling would have been to make land more accessible to the newly recognized African-American citizens. Instead of shielding former Confederates from their creditors, Wright would have created new economic opportunities for the freed slaves. Such a decision would have marked the melding of strict, legal formalist philosophy with radical Republican public policy. The results from publishing this opinion might have been revolutionary.

CONCLUSION

It is clear that radical, progressive opportunities were available to Justice Wright and that he declined to take them. As Whipper's deeds and declarations testify, Wright did not have to follow the path of cautious, conservative jurisprudence. Even staying truthful to his formalistic training, Wright could have recorded great victories for South Carolina on the questions of slave debts and the homestead exemption.

The flaw with legal formalism, as the legal realist critics of the 1930s made clear, is that the application of its principles does not provide a single, unambiguous, "correct" answer. Rather, the doctrines of formalism will point wherever a judge, depending on his political outlook, chooses to aim them. As Felix Cohen cynically concluded in 1935, formalist jurisprudence is simply "legal magic and word-jugglery;"[218] it is nothing more than "a special branch of the science of transcendental nonsense."[219]

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215. *See id.*

216. *See id.* at 83.

217. *Id.*

218. Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 821 (1935).

219. *Id.*

Wright's formalism, combined with his conservative political bias, stubbornly guided him to pursue long-term White support. Wright frequently reached out to the former Confederates during the Constitutional Convention of 1868 and echoed Lincoln's Second Inaugural Address. He asserted, "We are here, I trust, as I have already said, with hatred and malice towards no man who has held a slave."[220] Like other Conservative African-American leaders, Wright sought to form a union of elite Whites and African Americans, Republicans and Democrats. In pursuing this goal, he alienated the radical Republicans and divided the party in two. The effects of this division would be the loss of political power for Republicans, and the birth of a Redeemer regime under Wade Hampton.

Despite the failure of Reconstruction in South Carolina, Jonathan Jasper Wright earned one of the greatest civil rights victories of the nineteenth century: he became the first African-American justice of any state supreme court in a state dominated by a hostile, unreconstructed, White-supremacist culture. In serving on the court, however, Wright adopted an accommodationist approach that was doomed to fail. This fact was made most clear by Wright's continued support for Governor Hampton, even as the ex-Confederate campaigned for overtly racist policies. Had William James Whipper won election to the South Carolina Supreme Court in 1870, he would have likely led African-American Republicans on an aggressively egalitarian campaign through Reconstruction. Yet instead of Whipper's legacy, we are left with Wright's cautious, conservative jurisprudence and the unanswerable question about what might have been.

220. Convention, *supra* note 2, at 218.