RACE AND PROPERTY AFTER THE CIVIL WAR: CREATING THE RIGHT TO EXCLUDE

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INTRODUCTION

On February 23, 1875, Representative George Frisbie Hoar, a Republican from Massachusetts, reported to the House on the latest

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outbreak of violence as Reconstruction neared its end.[1] A House subcommittee had traveled to Louisiana to investigate a campaign of terror that had cost at least 2,141 people their lives and included the forcible expulsion of the state legislature from the capitol building.[2] According to the report, white resistance to Reconstruction aimed to reduce blacks to "such a condition of political and personal dependence upon the whites," which would allow whites to "fix[] the price and condition of [black] labor."[3] If the federal government did nothing, an all-white legislature would do what the last all-white legislature had done: make laws to harm black people. Meeting in late 1865 and early 1866, an all-white legislature elected by an all-white electorate had enacted "a series of laws which must have been designed to restore the negro to a State of practical servitude."[4]

The report provided a half-dozen examples; all but one would be familiar to any scholar of Reconstruction. The Louisiana vagrancy statutes allowed a "local magistrate, on summary process, to remand the laborer to a condition of practical slavery."[5] Another law tried to prevent blacks from owning firearms, while another imposed a poll tax.[6] A third law made workers beholden to their employers by criminalizing both switching jobs and offering someone already employed a job.[7]

The Hoar Report listed one law that may be unfamiliar: a trespass statute. The authors of the Report recognized the new trespass statute as part of a program of legal aggression aimed at suppressing black autonomy and controlling black labor.

To deprive blacks of economic opportunity, state legislatures across the South replaced property laws that dated to first settlement. This Article uncovers this lost history, exposing the

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[1] 3 CONG. REC. 1647 (1875). Representative Hoar was the chairman of a subcommittee; his report was signed by Rep. William Almon Wheeler and Rep. William Pierce Frye.

[2] *Id.* at 1649.

[3] *Id.* at 1647.

[4] *Id.* at 1648.

[5] *Id.*

[6] *Id.*

[7] *Id.* (describing a Louisiana statute that imposed imprisonment as the penalty for offering a job to the already employed).

rapid change in property law, and placing this history in the context of efforts, both legal and extra-legal, to blunt emancipation.

Some sense of property rights is instinctive, as the parent of any young child can report. With few exceptions, societies recognize property rights over movable objects. That uniformity does not extend to property rights over land. Many societies do not grant the landowner a right to exclude people from open and undeveloped land.

English common law recognized a right to exclude both people and animals from private land, regardless of whether the land was fenced. Within a few years of settlement, every American colony had rejected the English common law, instead granting the public a right to roam on private land. People could hunt and fish on private land, even on fenced land in most colonies. Livestock could graze on unfenced land. These rights extended to all land, not just land designated as a town or village common.[8]

Among scholars, most stories about changes to property regimes are primarily economic. The closing of the range in the United States and the enclosures in the British Isles are stories of economics driving legal change. Demsetz argues that property rights evolve in response to technology and market opportunities.[9] North notes that transaction costs can delay and even prevent changes,[10] while Banner notes that government may adopt more efficient property rules, while ignoring the distributional consequences.[11] These narratives are implicitly Hegelian, where the logic of economic progress means that earlier uses are replaced by higher uses: the trapper gives way to the rancher, who in turn yields to the farmer.[12]

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[8] In several northern colonies, settlers designated some land as commons, just like in England. Commons were communal property; villagers excluded outsiders, but shared the resource. Brian Sawers, *The Right to Exclude from Unimproved Land*, 83 TEMP. L. REV. 665, 674-79 (2011) [hereinafter Sawers, *Exclude*].

[9] Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 350 (1967).

[10] Douglass C. North, *Institutions, Transaction Costs and Economic Growth*, 25 ECON. INQUIRY 419, 420 (1987). *See generally* LANCE E. DAVIS & DOUGLASS C. NORTH, INSTITUTIONAL CHANGE AND AMERICAN ECONOMIC GROWTH (1971).

[11] Stuart Banner, *Transitions Between Property Regimes*, 31 J. LEGAL STUD. S359, S361 & S366-67 (2002).

[12] If the reader prefers their Manifest Destiny in another frame, see John Gast, American Progress, 1872 (oil on canvas).

Ellickson, Smith, and others argue that a broad right to exclude (sometimes called boundary enforcement) is less costly than other arrangements.[13] Beyond the economic logic, legal scholars often ascribe moral value to property rules that grant broader rights to landowners. Merrill and Smith even identify exclusion as a "moral right."[14] Epstein has argued the right to exclude is the "essence of freedom."[15] The history of property rights in the years after the Civil War makes a mockery of these moral arguments. State governments expanded landowner rights at the expense of public rights precisely to deprive blacks of the essence of freedom.

The property rights regimes that existed in 1860 allowed the landless to hunt, fish, forage, and even graze their livestock on private land. These alternatives to sharecropping would have allowed many blacks to live somewhat independently, even without their own land. This economic autonomy was a threat to planters, who had no alternative to black labor, since planters were unwilling to offer wages or working conditions that would attract immigrant labor.

This Article uncovers a largely-forgotten history of property rights. To demonstrate that the motivation for these changes was race, this Article relies on three different strands of evidence. The first strand of evidence is timing. If the motivation is economic, legislatures would not have expanded landowners' rights when blacks were unrepresented, constricted them when government was integrated, only to expand those rights again when integrated governments fell. The second strand is the geographical pattern of

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[13] *See* Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1327 (1993); Henry E. Smith, *Exclusion versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453, S455 (2002); Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13, 25 (1985).

[14] Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1850 (2007); *see also* Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 359 (2001).

[15] RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 66 (1985). While Epstein celebrates exclusion, he does not believe the right to exclude is sine qua non. *See generally* Richard A. Epstein, *Weak and Strong Conceptions of Property: An Essay in Memory of Jim Harris, in* PROPERTIES OF LAW: ESSAYS IN HONOUR OF JIM HARRIS (Timothy Endicott et al. eds., 2006). In contrast, Merrill argues that the right to exclude is fundamental. Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 731 (1998).

these laws. While some laws were statewide, many were tailored to the places where black people lived, excluding those areas that were largely white. The third strand is documentary. Advocates for broader property rights, both privately and publicly, said they wanted to expand property rights to "keep the negroes more confined."[16]

This Article presents a history of property rights that is economic, but not optimistic. This Article does not discount racism motivated by nothing more than animus. But, the particular form of these changes was often motivated by economics. The struggle between white land and black labor over the terms of employment drove planters to turn to government. Plantation owners hoped that the "stern law of necessity" would compel their black neighbors back into the fields.[17] That necessity did not exist without a hostile government willing to overturn centuries of law to prevent black people from prospering.

As one South Carolina legislator wrote to the governor, the "question of the control of labor underlies every other question of state interest."[18] As with Jim Crow, the economics are well understood: criminal and labor laws were used to reduce the economic opportunities available, reinforce black poverty, and enrich white elites. As with disenfranchisement during Jim Crow, these changes ensnared poor whites as well. Although selective enforcement meant that blacks were treated worse, these changes to property law also harmed whites.

Part I provides the context, describing the now largely-forgotten trespass law of the early United States. Part of that context is the informal economy of slavery, which equipped slaves to prosper after emancipation without working for whites. Lastly, Part I provides a summary of the history of Reconstruction, so readers can understand how the timing of the changes to the law shows the racial motivation. Part II describes how emancipation

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[16] Steven Hahn, *Hunting, Fishing, and Foraging: Common Rights and Class Relations in the Postbellum South*, 26 RADICAL HIST. REV. 37, 46 (1982) [hereinafter Hahn, *Common Rights*].

[17] FRANCES BUTLER LEIGH, TEN YEARS ON A GEORGIA PLANTATION SINCE THE WAR 25 (1883).

[18] William H. Trescott, writing to South Carolina governor James L. Orr, December 1865, *quoted in* Vernon Burton, *Race and Reconstruction: Edgefield County, South Carolina*, 12 J. SOC. HIST. 31, 36 (1978).

presented the planter class with an existential crisis, attempts to revive plantation agriculture, and the eventual rise of sharecropping. Part III chronicles the myriad of legal changes that states made to constrict black opportunity, weaken workers' bargaining power, and trap blacks in poverty and economic dependence.

I. RECONSTRUCTION AND ITS CONTEXT

Emancipation freed four million men, women, and children. It also transformed the southern economy and produced changes in almost every area of law. For planters (and the legislatures that catered to them), the central challenge of Reconstruction was not rebuilding the South, but controlling labor. In response to the economic challenge of free labor, legislatures changed many laws, including land law.

To understand legal change after the war, this section describes the status quo ante, which is largely unfamiliar to the modern reader. Property law allowed people to hunt, fish, and forage on open land and even fenced land in almost every state. Also, the southern states were open range: livestock could graze on all unfenced land, whether private or not. One could raise cattle and hogs without owning any land.

The popular image of slaves working in gangs under close supervision is incomplete. An informal economy operated in parallel with plantation agriculture. While enslaved, many slaves supplemented their diets with food they grew, hunted, and fished. They would continue to do so once freed, and would not need to return to the planters' fields.

The politics of Reconstruction determined where and when planters dominated legislatures. Laws adopted by one legislature were frequently repealed in the next session. This Part provides a short summary of Reconstruction to help the reader understand why certain laws were enacted or repealed at a particular time.

A. Property in Land

Although settlers in the American colonies adopted many aspects of English law, much of English property law was soundly rejected. The proprietors of several colonies tried to introduce

feudal property forms, but failed.[19] Elsewhere, the colonists explicitly rejected English property law from first settlement.[20] By independence, the few feudal remnants to be adopted were repealed.[21]

Less well-known, the colonies rejected the English law of trespass. Under English law, the landowner has an unqualified power to exclude. There is no obligation to fence land, all others must take care to avoid crossing private land. The English rule is often described as fence-in, since the owners of livestock must fence their animals in. The first settlers recognized that the English rule was entirely unsuited for a sparsely-populated continent. Fencing is hard work and expensive; fencing-out livestock would minimize that effort.

Each colony replaced the English common law of trespass with an open range statute. Under these open range statutes, people and animals could roam freely across both private and unclaimed land. Landowners who wanted to exclude livestock were required to fence their land. The open range never prevented a landowner from fencing or developing his land.

The open range is not related to the English common, which is a form of shared property. In England, villagers had rights to use the common, but outsiders did not. A few towns in New England had village commons, like those in England. But, the open range is a rule that governs private property, not communal property, and the right to use open land is both public, rather than communal, and extinguishable. No one can prevent a landowner from fencing and thus gaining a right to exclude livestock.

A common misapprehension is that the southern and western states had an open range, while the northern states had a closed range. In fact, every state had an open range at one point. Every colony, including the Plymouth and Massachusetts Bay Colonies, adopted the open range.[22] Most colonies adopted an open range by

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[19] Bernard C. Steiner, *The Adoption of English Law in Maryland*, 8 YALE L.J. 353, 358 (1899).

[20] *See generally* EDWARD T. PRICE, DIVIDING THE LAND: EARLY AMERICAN BEGINNINGS OF OUR PRIVATE PROPERTY MOSAIC (1995).

[21] *See, e.g.*, Act of Feb. 19, 1791, 1791 S.C. Acts 14 (abolishing primogeniture); Ch. 26, 9 HENING'S STAT. AT LARGE 226 (1776) (abolishing entail in Virginia).

[22] WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND 134–35 (1983).

statute within a few years of settlement.[23] As settlement moved westward, each new territory to be organized adopted the open range.[24]

The open range was more than a simple rule apportioning the inevitable costs of livestock wandering. Wandering people and livestock had a right to stay on unfenced land, regardless of the landowner's wishes. In many states, if the landowner harmed livestock grazing on unfenced land, he was liable for double damages.[25] When railroads struck livestock, courts imposed liability without requiring a showing of negligence.[26]

By 1860, a few states in the northeast had closed the range. Generally, the first step in closing the range was a statute authorizing towns or counties to vote on the range locally. For example, New York allowed each town to decide for itself in 1788, but presumed an open range absent any local decision.[27] By 1867, the range was closed statewide.[28] Several of New York's neighbors maintained an open range, including Connecticut and Pennsylvania.[29] While some states were content to legislate at long intervals, others constantly tinkered with the fence law. Quite

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[23] *E.g.*, Virginia enacted an open range statute in 1632. Act 52, 1 HENING'S STAT. AT LARGE 199 (1632); Georgia was established in 1733 and adopted the open range in 1755. 18 COLONIAL REC. OF GA. 73-75 (1910).

[24] *E.g.*, Act of, June 25, 1795, ch. 56, § 1, *reprinted in* 1 STATUTES OF OHIO AND THE NW. TERRITORY 183-84 (1833); Act of Dec. 3, 1801, § 1, 1801 Miss. Laws 6-7 (allowing no trespass if land is unfenced).

[25] *E.g.*, Act of Dec. 3, 1801, § 3, 1801 Miss. Laws 8.

[26] *E.g.*, Vicksburg & Jackson R.R. Co. v. Patton, 31 Miss. 156 (1856). Alabama imposed strict liability on railroads for all livestock damage. Act of Feb. 10, 1852, 1852 Ala. Laws 45-46, *discussed in* Nashville & Chattanooga R.R. Co. v. Peacock, 25 Ala. 229, 230 (1854).

[27] Act of Mar. 7, 1788, 1788 N.Y. Laws 766 (permitting each town to determine whether range should be closed). In 1830, the enabling legislation was amended so that the closed range became the default. N.Y. 1 R.S. 333, ch. XI, § 6, sub. 11 (1830) (allowing electors of each town to make "rules and regulations for ascertaining the sufficiency of all fences in such town" and to determine "times and manner in which cattle, horses, or sheep, shall be permitted to go at large on highways").

[28] Act of Apr. 23, 1862, ch. 459, 1862 N.Y. Laws 844 (closing public highways to livestock). This statute was interpreted to strip towns of the authority to open the range. Cowles v. Balzer, 47 Barb. 562, 570 (1867).

[29] Hine v. Wooding, 37 Conn. 123, 129 (1870); Gregg v. Gregg, 55 Pa. 227, 228 (1867).

frequently, an area might see the range closed, re-opened, and then closed again.[30]

Outside of the northeast, the open range was almost universal at mid-century.[31] After the Civil War, many states in the North and the South enacted local option laws, allowing counties to close the range. While many counties had closed the range by the end of the 19th century, the last open range pockets in the eastern states were closed in the mid-20th century.[32] Counties with more black residents were closed decades earlier than counties without many blacks.

The open range had implications beyond whether the rancher or farmer paid for fencing and whatever damages were caused by the inevitable wandering of livestock. Most land was unimproved and unfenced, and so both people and livestock could wander over a countryside mostly undemarcated as private. While as much as twenty percent of Maryland, Delaware, Virginia, and Kentucky was improved in 1850, less than one percent of Texas or Florida was.[33] But even in the heavily-settled Lowcountry, fences were "exceptional."[34]

The open range expanded and democratized access to resources. Even without owning much land, a rancher can build a large herd.[35] When it rejected a petition to close the range, the Virginia Assembly noted that "[m]any poor persons" benefited from an open range and changing the law would "operate as a great hardship."[36] Even people who owned no livestock could fish, hunt, and forage on the open range. While few people today rely on

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[30] Act of Dec. 1, 1809, 1809 Ga. Laws 11 (closing a portion of M'Intosh County called Harris's Neck), *repealed by* Act of Dec. 15, 1821, 1821 Ga. Laws 30; Act of Aug. 26, 1872, § 7, 1872 Ga. Laws 36 (allowing each county to close the range) (codified at GA. CODE §§ 1449–55 (1873)).

[31] Before the Civil War, only a single county in the southern states had any closed range. Act of Jan. 19, 1858, § 1, 1857–58 Va. Acts 263, 263–64 (allowing named planters to close the range).

[32] *E.g.*, Act of May 30, 1951, 1951 Ala. Laws 266.

[33] Forrest McDonald & Grady McWhiney, *The South from Self-Sufficiency to Peonage: An Interpretation*, 85 AM. HIST. REV. 1095, 1099 (1980).

[34] STEPHANIE MCCURRY, MASTERS OF SMALL WORLDS: YEOMAN HOUSEHOLDS, GENDER RELATIONS, AND THE POLITICAL CULTURE OF THE ANTEBELLUM SOUTH CAROLINA LOW COUNTRY 10 (1995).

[35] W.J.D., Letter to the Editor, *in* 1 FARMERS' REG. 451 (1834) ("[I]t is notorious that those frequently have the largest stock, who have the least land to graze.")

[36] Hahn, *Common Rights*, *supra* note 16, at 42.

hunting to feed themselves, more plentiful game and less competition meant that people in many areas could harvest enough game to feed themselves. Fishing and foraging put food on the table, without the expense of firearms. In the nineteenth century, foraging was an important part of many people's diets.[37]

Hunting and fishing on unfenced private land was so common and well-accepted that few disputes reached the courts. In one of the few reported cases, the South Carolina Supreme Court reaffirmed the hunter's right to enter "unenclosed and uncultivated" land even if the landowner was present and refused the hunter permission.[38] In South Carolina, the hunter's right to enter "ha[d] never been disputed" and had been "universally exercised."[39] As the high court noted, "a civil war would have been the consequence of an attempt, even by the legislature, to enforce a restraint on this privilege."[40]

B. Property in Persons

Before independence, every colony, northern and southern, permitted slavery. By 1860, many states had abolished slavery, often after the number of slaves dwindled to a handful. Manumission did not mean freedom, both slave and "free" states imposed new limits on free blacks and revoked old rights.[41] Slaves in the slave states were not distributed evenly, either among owners or regions. Slaves were expensive, so their owners put them to high-value labor. While many slaves grew cotton, rice, tobacco, or sugar on plantations, other slaves grew wheat and hemp. Other slaves worked as servants, in industry, or practiced a trade.

Feeding a slave was a large and recurring cost. Most planters shifted part of the cost to the slaves themselves. Most commonly,

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[37] STEVEN HAHN, THE ROOTS OF SOUTHERN POPULISM: YEOMAN FARMERS AND THE TRANSFORMATION OF THE GEORGIA UPCOUNTRY, 1850–1890, at 58–63 (1983) [hereinafter HAHN, ROOTS].

[38] McConico v. Singleton, 9 S.C.L. (2 Mill.) 244, 351 (1818).

[39] *Id.* at 352.

[40] *Id.* While hunting rights were certainly treasured, this statement may reflect South Carolina's propensity for insurrection.

[41] Free blacks lost the right to vote in several states. Act of Nov. 17, 1807, ch. II § 1, 1807 N.J. Laws 14; GUION GRIFFIS JOHNSON, ANTE-BELLUM NORTH CAROLINA: A SOCIAL HISTORY 601 (1937) (free blacks could vote until 1835).

each slave received rations of cornmeal and fatback.[42] The slaves raised everything else they ate on land set aside for gardens. Slaves often raised a surplus, which they sold or traded. Even before emancipation, slaves were feeding themselves and producing goods for sale. The informal economy of slavery meant that freedmen were well-positioned to support themselves without returning to the fields as dependent plantation workers. The extension of market relations within slavery varied, both regionally and among slaves.

In common law states, slaves had no property rights, except in rare circumstances.[43] In Louisiana, the civil code recognized a form of property from Roman law. A slave owner could grant the slave a *peculium*, property which the slave could manage.[44] In the common law states, however, courts implicitly sanctioned the property rights of slaves.[45] Where a planter had paid his slaves for cotton they grew on their own, the executor of his estate could continue paying them.[46] If the slave owner had granted a slave the freedom to spend a portion of her earnings, the executor could not stop the slave from emancipating another slave bought with those earnings.[47] Accumulating too much property, however, was considered "evil."[48]

Since autonomy undermined the institution of slavery, the informal economy suffered from periodic repression. In the Carolinas, hogs owned by slaves were subject to seizure and sale.[49]

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[42] On St. Simons Island, slaves received no meat, only corn, rice, and sweet potatoes. John Solomon Otto, *A New Look at Slave Life*, 88 NAT. HIST. 8, 20 (1979).

[43] *E.g.*, ALA. CODE § 1018 (1852); *see also* THEOPHILUS PARSONS, 1 LAW OF CONTRACTS 340-01 (3d ed. 1857).

[44] LA. CIV. CODE. art. 175 (1825).

[45] White v. Cline, 52 N.C. (7 Jones) 174 (1859).

[46] Waddill v. Martin, 38 N.C. (3 Ired. Eq.) 562, 563-64 (1845). Do not think the high court was sympathetic to slaves: executors were required to break up families if selling slaves individually fetched higher prices. Cannon v. Jenkins, 16 N.C. (1 Dev. Eq.) 422, 426 (1830).

[47] Guardian of Sally v. Beaty, 1 S.C.L. (1 Bay) 260, 260-61 (1792).

[48] Lea v. Brown, 58 N.C. (5 Jones Eq.) 379, 382 (1860). The court was careful to note that "small amounts of luxuries," including sugar, coffee, and tobacco were desirable. *Id.* at 381.

[49] Richardson v. Broughton, 34 S.C.L. (3 Strob.) 1, 5 (1848). Even as it upheld the statute, the opinion's dicta questioned the rationale for seizing slave property. *Id.* at 8-9. McNamara v. Kerns, 24 N.C. (2 Ired.) 66 (1841) (discussing 1 N.C. REV. STAT. ch. 89, § 24. (1837)); *see also* N.C. REV. CODE ch. 107, § 31 (1854); JOHNSON, *supra* note 41, at 531 (discussing whether slaves could own property).

Mississippi imposed a fine of $50 on slave owners who permitted their slaves to keep livestock.[50] If Maryland slave owners allowed their slaves to hire themselves out, except at harvest time, the penalty was $20.[51] Other restrictions were common in slave states.[52] Poorly-enforced laws produced intermittent foment and agitation, both by newspapers and also by private associations.[53] Since whites depended on the informal economy embedded within slavery, laws restricting it were honored in the breach.

Among slave owners, the autonomy that slaves enjoyed and their exposure to markets varied considerably.[54] As important as the temperament of the slave owner was the slave's occupation. Most slaves worked in agriculture and the crop grown was the most important determinant of their exposure to markets.

Slaves growing cotton worked in gangs, with little autonomy from sunup to sundown for much of the year. Even so, many cotton plantations set aside ten percent of their acreage for garden plots. One freed slave reported working plots of two acres in size, but sometimes he could plant three or four acres. Most slaves were not permitted to grow cash crops like cotton or tobacco, so vegetables and corn were most frequently grown (both for home consumption and sale). Many slaves also kept chickens and a few kept hogs, cattle, and even horses.[55] Many slaves were able to grow more than they could eat and sold the surplus.

Hunting, fishing, and trapping provided both food and income to slaves. Slaves enjoyed "indiscriminate permission to fish at large."[56] Some whites grumbled that slaves "monopolized all the good fishing holes."[57] On St. Simons Island, Georgia, there is

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[50] Act of Jan. 29, 1825, §4, 1825 Miss. Laws 33-34.

[51] Slave pilots, however, were excepted. Act of Feb. 4, 1818, 1818 Md. Laws 106.

[52] For a more complete treatment, see HARRIET BEECHER STOWE, A KEY TO UNCLE TOM'S CABIN 112 (1853).

[53] DYLAN C. PENNINGROTH, THE CLAIMS OF KINFOLK: AFRICAN AMERICAN PROPERTY AND COMMUNITY IN THE NINETEENTH-CENTURY SOUTH 67-69 (2003); CHARLESTON STANDARD, Nov. 23, 1854, *quoted in* FREDERICK LAW OLMSTED, 1 THE COTTON KINGDOM: A TRAVELLER'S OBSERVATIONS ON COTTON AND SLAVERY IN THE AMERICAN SLAVE STATES 253 (2d ed. 1862) [hereinafter OLMSTED, 1 COTTON].

[54] More autonomy did not mean better treatment; planters still whipped their slaves and sold family members. PENNINGROTH, *supra* note 53, at 57.

[55] *Id.* at 47.

[56] Hahn, *Common Rights*, *supra* note 16, at 48.

[57] *Id.*

archeological evidence that slaves ate fish, turtle, rabbit, opossum, raccoon, and clapper rails (a marsh bird).[58] As with surplus from their gardens, slaves sold some of their catch to local whites, including turkey, deer, and even mink pelts.[59]

Some slaves worked under a task system, including those growing rice.[60] Each day, slaves had a specific task. Once finished, slaves might have as much as three or four hours for their own activities.[61] As elsewhere, land was set aside for vegetable gardens, which may have been larger than elsewhere.[62]

Slaves working in industry generally worked under a task system. Enslaved lumberjacks were paid extra for exceeding their quota.[63] The same was true for slaves making naval stores (distillates of pine sap, like turpentine and tar) and coopers.[64] Enslaved coal miners in Virginia had a daily quota, once it had been reached, they worked on another shaft they had sunk.[65] In Richmond, slaves and free blacks worked side-by-side in tobacco factories, often negotiating for their wages. Like the coal miners, these workers were paid "over-wages."[66]

A small group of slaves, often skilled artisans, negotiated with their owners and prospective employers, called "hiring their own time." A slave hiring their own time would negotiate directly with potential employers for their wages, a portion of which they would pay to their owner. One estimate found that 31 percent of urban

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[58] Otto, *supra* note 42, at 20.

[59] PENNINGROTH, *supra* note 53, at 61.

[60] For a description of the task system in rice cultivation in North Carolina, see JOHNSON, *supra* note 41, at 488-89. *See also* OLMSTED, 1 COTTON, *supra* note 53, at 247-48.

[61] Philip D. Morgan, *Work and Culture: The Task System and the World of Lowcountry Blacks, 1700 to 1880*, 39 WM. & MARY Q. 563, 587–93 (1982). Olmsted reported that some slaves finished their tasks by two o'clock. OLMSTED, 1 COTTON, *supra* note 53, at 248. Even if the task system allowed slaves some autonomy, many thought rice growing was the "hardest work." JOHNSON, *supra* note 41, at 489.

[62] LOREN SCHWENINGER, BLACK PROPERTY OWNERS IN THE SOUTH, 1790-1915 at 30-31 (1990).

[63] OLMSTED, 1 COTTON, *supra* note 53, at 147.

[64] PENNINGROTH, *supra* note 53, at 50. Coopers working in turpentine production were paid 25¢ for each barrel, if the materials were furnished. JOHNSON, *supra* note 41, at 488.

[65] PENNINGROTH, *supra* note 53, at 52.

[66] OLMSTED, 1 COTTON, *supra* note 53, at 98.

slaves were hired out.[67] Hired slaves often received a weekly bonus for good behavior, often 25 cents.[68] On many plantations, midwives earned a fee for each delivery.[69]

A few slaves worked in small, somewhat independent groups. Along the coast, some slaves were fisherman.[70] Slaves ran ferries in Virginia and North Carolina and even refused passengers when they had doubts about being paid.[71] Among the Sea Islands, slave-run ferries were entrenched enough to litigate against the army's new ferries.[72] Along rivers, steamships needed to refuel and slaves sold wood from the riverbank.[73]

Slaves did more than operate somewhat independently in markets as producers. Many slaves were market intermediaries, trading with both blacks and whites. Enslaved women had dominated the market in Charleston since the colonial period.[74] In Natchez, slaves monopolized the sale of butter, fish, and poultry; only meat prices were not set by slaves.[75] Even in rural areas where slaves enjoyed less freedom, slave markets were common.[76] Urban slaves were middlemen, buying in bulk from rural slaves and selling door-to-door at a mark-up.

Slaves were also consumers. For local shops, slaves were better customers than poor whites because they paid cash, rather than asking for credit.[77] Slaves were more likely to shop locally since planters often bought in bulk at a distance.[78] In the 1850s, planters complained that a "swarm of Jews" settled in the towns,

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[67] PENNINGROTH, *supra* note 53, at 53.

[68] Washington v. Emery, 57 N.C. (4 Jones Eq.) 32, 37 (1858).

[69] LEIGH, *supra* note 17, at 92–93.

[70] JOHNSON, *supra* note 41, at 489, 556.

[71] FREDERICK LAW OLMSTED, A JOURNEY IN THE SEABOARD SLAVE STATES 307 (1856).

[72] PENNINGROTH, *supra* note 53, at 65 & n.159.

[73] *Id.* at 65.

[74] PHILIP D. MORGAN, SLAVE COUNTERPOINT: BLACK CULTURE IN THE EIGHTEENTH-CENTURY CHESAPEAKE AND LOWCOUNTRY 250-51 (1998).

[75] NATCHEZ FREE TRADER, Oct. 18, 1858, at 2, *quoted in* JOHN HEBRON MOORE, THE EMERGENCE OF THE COTTON KINGDOM IN THE OLD SOUTHWEST: MISSISSIPPI, 1770-1860, at 280 (1988).

[76] PENNINGROTH, *supra* note 53, at 61-63. Most of the produce, fish, game, butter, and eggs sold in town markets in Mississippi were sold by slaves from nearby plantations. MOORE, *supra* note 75, at 279.

[77] PENNINGROTH, *supra* note 53, at 66.

[78] JOHNSON, *supra* note 41, at 532. For details on trading, see *id.* at 532–33.

ignoring established limits on trading with slaves.[79] Archeological digs on St. Simons Island have shown that slaves bought tobacco and alcohol.[80] Reports of slaves buying "Sunday best" are common.[81]

A few slaves were extremely sophisticated economic actors. George Moses Horton, a slave, sold poems to students at the University of North Carolina.[82] The patent office denied a patent in 1857 on the grounds that the inventor, a slave, was not a citizen.[83] Edmund Moss, a slave, speculated in land.[84] Late in the Civil War, Charles Mencer bought gold and watches with soon to be worthless Confederate currency.[85] Even those without the liquidity to speculate responded to currency movements: later in the war, slaves demanded payment in silver, U.S. money, and even salt.[86]

While most slaves never accumulated much property, a few had amassed wealth. Sam Williams kept a bank account in Lexington, Virginia.[87] Benjamin Sterling Turner, a slave, owned $1600 in gold and proved losses of $4958 before the Southern Claims Commission.[88] Lunsford Lane hired his own time and sold tobacco cured by a secret process. He purchased his own freedom for $1000 and that of his wife and six children for $2500.[89]

Although very few slaves accumulated any wealth, most slaves had some exposure to the market economy. On many plantations, slaves were already feeding themselves from their garden plots,

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[79] OLMSTED, 1 COTTON, *supra* note 53, at 252-53.

[80] Otto, *supra* note 42, at 24, 30.

[81] *E.g.*, N.C. STANDARD, Dec. 25, 1835, *quoted in* JOHNSON, *supra* note 41, at 524-25.

[82] THOMAS H. CLAYTON, CLOSE TO THE LAND: THE WAY WE LIVED IN NORTH CAROLINA, 1820-1870, at 21 (1983).

[83] Dorothy Cowser Yancy, *The Stuart Double Plow and Double Scraper: The Invention of a Slave*, 69 J. NEGRO HIST. 48, 48 (1984). Slaves could receive Confederate patents. Act of May 21, 1861, ch. 46, § 50, *reprinted in* STATUTES AT LARGE OF THE PROVISIONAL GOVERNMENT OF THE CONFEDERATE STATES OF AMERICA (1864).

[84] PENNINGROTH, *supra* note 53, at 68

[85] J.T. TROWBRIDGE, THE SOUTH: A TOUR OF ITS BATTLE-FIELDS AND RUINED CITIES, A JOURNEY THROUGH THE DESOLATED STATES, AND TALKS WITH THE PEOPLE 437 (1866). What is most surprising is that he could find a counterparty, someone willing to take Confederate money in exchange for assets of durable value.

[86] PENNINGROTH, *supra* note 53, at 61.

[87] RONALD L. LEWIS, COAL, IRON, AND SLAVES: INDUSTRIAL SLAVERY IN MARYLAND AND VIRGINIA, 1715-1865, at 126 (1979), *quoted in* PENNINGROTH, *supra* note 53, at 76.

[88] PENNINGROTH, *supra* note 53, at 55.

[89] JOHNSON, *supra* note 41, at 586.

fishing, foraging, and hunting. A few slaves were tradesmen or petty merchants, hiring other slaves, or trading livestock. No slaves, however, had experience marketing cash crops. After emancipation, blacks spurned cotton and the other crops they had grown under slavery.[90]

Contemporary white observers blamed the bitter memory of slavery; however, an economic explanation is equally plausible. Blacks had no experience marketing cotton, so they continued to produce goods they already knew how to market. As one teacher in the Sea Islands wrote, the "negro can see plainly enough that the proceeds of the cotton will never get into black pockets."[91] In addition to the problems of marketing a cash crop, cotton prices were unstable. Growing vegetables was less risky since the farmer could always eat some of his crop. As one Texas freedman noted, blacks "never planted cotton, because we could not eat this."[92]

Slaves did have enough experience with markets to survive without planters after emancipation. Planters, however, could not survive without black labor, whether slave or free. Instead of offering higher wages, planters relied on the coercive power of the state, and when the state was unavailable, planters relied on terrorism. Postbellum legislatures, dominated by planter interests, introduced a wide variety of laws intended to weaken the bargaining power of blacks and force them into the fields, on the planter's terms.

C. Reconstruction

Reconstruction is a complicated period, but the linguistic conventions are especially confusing. After Reconstruction, white America embraced a narrative written by apologists for slavery and rebellion. Frederick Douglass was scathing in his criticism of a sectional reconciliation predicated on this re-telling, calling it

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[90] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 108 (1988) [hereinafter FONER, RECONSTRUCTION]. The "negro paradise" of Davis Bend, Mississippi is an exception. There, blacks raised 2000 bales of cotton, earning a profit of $160,000. *Id.* at 59.

[91] LAURA M. TOWNE, LETTERS AND DIARY OF LAURA M. TOWNE 20 (Rupert Sargent Holland ed., 1912).

[92] FONER, RECONSTRUCTION, *supra* note 90, at 108. On the Sea Islands, blacks only grew enough cotton to "supply them with spending money." *Id.*

"peace among the whites."[93] However, the dominant narrative among whites labeled Reconstruction as "[black] misrule."[94] Thus, the end of integrated government and the return of racist all-white state government was termed "Redemption." Johnson's impeachment divides Reconstruction into two acts. During Presidential Reconstruction, Johnson demanded only that states ratify the Thirteenth Amendment, but not adopt universal manhood suffrage. After Johnson's acquittal, Congress directed the course of Reconstruction. During Congressional (or Radical) Reconstruction, new state governments were organized, blacks voted, and state governments were integrated. Cloaked in religious rhetoric, Redemption was the recapture of state governments by Bourbon Democrats from Republican and integrated rule. See Table 1 for a summary.

Even at the end of the Civil War, the federal government had no clear plan for the confederate states after surrender. Before the summer of 1865, President Johnson gave every indication that he would try to restructure southern society to weaken the power of the planters. As a self-made man from east Tennessee, his loyalties lay with poor whites, not blacks. As military governor of Tennessee, Johnson explained his support for abolition thus, "[d]amn the Negroes, I am fighting those traitorous aristocrats, their masters."[95] As President, however, Johnson ordered the return of land confiscated or abandoned during the war. Freedmen who were settled on that land during the war by the Army were ejected. Except on Sea Islands, land reform would not be part of Reconstruction and the planters would retain a disproportionate share of the soil.

Military government set an uneven pattern that continued into Reconstruction. Some officers were sympathetic to freed slaves and intervened to protect them.[96] Elsewhere, federal troops re-introduced many of the legal restrictions of slavery. In some

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[93] Douglass scorned sectional reconciliation as "peace among the whites." Frederick Douglass, The Color Question (July 5, 1875).

[94] For the classic racist history, see WILLIAM ARCHIBALD DUNNING, RECONSTRUCTION: POLITICAL AND ECONOMIC 1865-1877, at 267 (1907) (noting the "scandalous misrule of the carpet-baggers and negroes"). W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA (1935) was ignored by white historians until the 1960s.

[95] FONER, RECONSTRUCTION, *supra* note 90, at 44.

[96] *Id.* at 80 & 154-55.

districts, the Army imposed a curfew and required that blacks show a pass from their employer to travel during the daytime.[97] In Richmond, the Army required blacks in the city to sign labor contracts, banned further black settlement, and returned hundreds of blacks to the countryside.[98] In some places, blacks were whipped for resisting a return to the fields.[99]

The Freedman's Bureau continued the uneven pattern of Reconstruction. Some agents intervened to protect blacks, in other areas agents acted with malice. In October 1865, the Bureau closed an asylum for black orphans and apprenticed the orphans to planters.[100] Some agents sought to arrest all "idlers and vagrants" to ensure that all blacks worked in agriculture. The Bureau chief in Florida ordered his agents to "prevent freedmen from collecting about towns . . . with an apparent intention [to] escap[e] labor on the plantations."[101] In Tennessee, patrols under the command of General Davis Tillson told black children walking to school that they should instead be picking cotton.[102] The Bureau never required "idle white men" to sign labor contracts or leave cities.[103] Whether the local agent was sympathetic to the former slave or the planter, the main obstacle to the Bureau's impact during Presidential Reconstruction was its limited manpower.

In 1865, Johnson allowed states to elect constitutional conventions using the 1860 voter rolls, which meant no black voters. In every state, the first legislature to meet under the new constitution adopted a Black Code. Very little in the Black Codes was innovative, most of the restrictions applied to free blacks before the Civil War. And that lack of change inflamed Northern public opinion, leading to the 1866 Civil Rights Act and the Fourteenth Amendment.[104]

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[97] *Id.* at 154. In July 1865, General Stanton ended the pass system in Richmond, but it persisted in other areas. *Id.* at 155, 157.

[98] *Id.* at 154. In Memphis, blacks were regularly deported in late 1865 to meet labor needs in the countryside. *Id.* at 157.

[99] *Id.* at 154.

[100] *Id.* at 157.

[101] H.R. Exec. Doc. No. 39-70, at 80 (1866).

[102] FONER, RECONSTRUCTION, *supra* note 90, at 157.

[103] *Id.* at 167.

[104] CHARLES L. FLYNN, JR., WHITE LAND, BLACK LABOR: CASTE AND CLASS IN LATE NINETEENTH-CENTURY GEORGIA 36 (1983). For an example of the reaction in the

Mississippi was the first state to pass a Black Code and hence received disproportionate attention. Even before the Mississippi legislature adjourned, the federal government responded. General Wood "forbade the prosecution of Negroes charged with offenses for which whites were not prosecuted or punished in the same manner or degree."[105]

South Carolina's legislature passed its Black Code not long after Mississippi. South Carolina's Black Code required black workers to call their employers "master," work from sunrise to sunset, and allowed whippings.[106] Black workers needed a pass from their "master" to leave the plantation or sell any farm products.[107] The military governor of South Carolina, General Daniel E. Sickles, suspended South Carolina's Black Code since "[a]ll laws shall be applicable alike to all the inhabitants."[108]

But, local courts operated with considerable freedom, staffed by elected judges without formal legal training.[109] Through 1867, local whites controlled the courts, and unjust decisions were rarely overturned by the military.[110] If local courts enforced them, even invalid laws could serve the purpose of coercing blacks into labor.[111] Later, ostensibly race-neutral laws were enforced to disadvantage freed slaves, and the Freedman's Bureau was unable to intervene in more than a few cases.

Northern press, see *Civil Rights*, N. Y. TRIBUNE, Mar. 1, 1866, at 4 (all that southern state legislatures did was "meanly, grudgingly, shabbily done").

[105] *Order of General Wood*, JACKSON DAILY CLARION, Feb. 14, 1866, *quoted in* THEODORE BRANTNER WILSON, THE BLACK CODES OF THE SOUTH 70 (1965) (which was coupled with Commissioner Howard instructing agents of the Freedman's Bureau to allow blacks to rent farmland, which the legislation forbade).

[106] S.C. BLACK CODE, §§ 35, 45, 52-53, 1864-65 S.C. Acts 295-97.

[107] Act of Dec. 19, 1865, § 10, 1864-65 S.C. Acts 274.

[108] *General Orders, No. 1*, EDGEFIELD ADVERTISER, Jan. 31, 1866, at 1. In (belated) response, South Carolina repealed its Black Code, except for the prohibition on miscegenation. Act of Sept. 21, 1866, § 2, 1866 S.C. Acts 393, 394.

[109] HAHN, ROOTS, *supra* note 37, at 92. Even a state supreme court was considered a threat to local autonomy. Public meetings in Franklin and Jackson counties described the newly-created Georgia Supreme Court as "unconstitutional [and] organized against the express will of the people." *Id.* at 97.

[110] FONER, RECONSTRUCTION, *supra* note 90, at 308.

[111] As late as 1939, courts in Caswell County, North Carolina, enforced a law invalidated in 1909. BALT. EVENING SUN, Dec. 6, 1939, § 2, at 27, *quoted in* William Cohen, *Negro Involuntary Servitude in the South, 1865–1940: A Preliminary Analysis*, 42 J.S. HIST. 31, 38 (1976).

Republicans in Congress lost faith in Presidential Reconstruction as it became clear that President Johnson would not intervene to protect freedmen. Increasing confidence among planters raised fears that those who had led the South into the war had learned nothing in defeat. Johnson's veto of the re-authorization of Freedman's Bureau and the Civil Rights Act of 1866 precipitated open conflict between the first and second branches of government. Johnson's impeachment ended in acquittal, but he played no further role in Reconstruction. Johnson's lawyers (quietly) had let it be known that he would not interfere any further in Reconstruction, if permitted to remain in office.[112]

In 1867, Congress directed that the states draft new constitutions, accept universal manhood suffrage, and ratify the Fourteenth Amendment.[113] With both blacks and whites voting, Republicans dominated the legislature until a state was Redeemed. Virginia was the only state without a Republican interregnum. In 1870, Virginia adopted a new constitution and a coalition of Democrats and moderate Republicans took the governorship and the legislature.[114]

While the Army and the Freedman's Bureau were never able to provide much security in early Reconstruction, most violence before Congressional Reconstruction was unorganized. Integrated government provoked organized violent resistance, first by costumed paramilitaries like the Ku Klux Klan and later by rifle clubs operating without disguise. In Arkansas, Tennessee, and Texas, state governments suppressed the Klan without federal help.[115] Elsewhere, state governments were hesitant to use state militias to suppress the Klan, especially since many state militias were integrated.[116] Although the northern commitment to

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[112] ERIC FONER, FOREVER FREE: THE STORY OF EMANCIPATION AND RECONSTRUCTION 146 (2005).

[113] Act of Mar. 2, 1867, 14 Stat. 428, 429. Act of Mar. 23, 1867, 15 Stat. 2, 2. Act of July 19, 1867, 15 Stat. 30. Act of Mar. 11, 1868, 15 Stat. 41.

[114] FONER, RECONSTRUCTION, *supra* note 90, at 412-13. In 1874, the Democrats had no further need for moderate Republicans and ran on a platform of "race against race." *Id.* at 549.

[115] *Id.* at 435, 439-40.

[116] In North Carolina, Governor Holden suppressed the Klan with militia units from Western North Carolina, contributing to his impeachment. W. MCKEE EVANS, BALLOTS AND FENCE RAILS: RECONSTRUCTION ON THE LOWER CAPE FEAR 147-48 (1966).

Reconstruction was already waning by 1872, widespread terrorism prompted Congress to pass several Enforcement Acts. The newly formed Department of Justice suppressed the Klan with a few hundred indictments, suspending habeas corpus in nine counties in South Carolina.[117]

The Panic of 1873 was followed by more than five years of economic collapse with falling incomes and prices. In response, northern public opinion lost interest in the freedman. In 1874, Democrats gained a majority in the House of Representatives for the first time since 1858.[118] Alabama, Arkansas, and Texas were Redeemed over the next two years. In Texas, white migration from other southern states reduced the electoral power of blacks and white Republicans, who were largely European immigrants. Arkansas was Redeemed when Grant recognized one of two competing state governments. Alabama and Mississippi were Redeemed by force. In contrast, Grant directed the army to retake New Orleans after the Republican state government was expelled by force.[119] Louisiana and South Carolina only fell into Democratic hands after newly-elected President Hayes directed federal troops to withdraw from the statehouse, allowing armed whites to expel the last integrated governments.[120]

II. THE PLANTER AND THE FREEDMAN

In 1865, it was not clear what social and economic relations would replace slavery. Sharecropping was not an immediate or inevitable development. Planters wanted to recreate slavery as much as the federal government would permit them, but freed slaves did not want to continue in renamed bondage. Planters and

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[117] FONER, RECONSTRUCTION, *supra* note 90, at 457. Although *United States v. Cruikshank*, 92 U.S. 542 (1876), cast doubt on the federal government's power to suppress paramilitaries, Grant had already decided to curtail federal enforcement two years earlier, after disastrous mid-term elections. FONER, RECONSTRUCTION, *supra* note 90, at 523-24, 551-52.

[118] Republicans would not regain the lost ground until 1896. Democrats also won in New York, New Hampshire, New Jersey, Pennsylvania, Illinois, Indiana, Ohio, and Massachusetts (a first). *Id.* at 512-13, 523.

[119] *Id.* at 550-51.

[120] *Id.* at 558-59. A miniscule number of blacks continued in office after Redemption, largely in the Carolinas and Texas. *Id.* at 591.

freedmen experimented with a variety of arrangements before sharecropping came to dominate.

Emancipation presented freedmen with opportunity and planters with a challenge. Even in 1865, there were many ways to make a living without working for planters. But, there was no way for planters to maintain their wealth without black labor. As one Georgia planter noted: "we needed them as slaves, we need them as freedmen."[121]

The challenge that planters faced was in no way unique: every firm needs workers. Planters could pay a market wage to attract labor, but planters wanted to pay less. Newly-freed slaves were offered wages much lower than the cost of renting a slave before the war. Planters wanted to pay $75 per year in wages, even though a slave rented for $200.[122] An army officer reported that blacks "thought it strange he was not worth as much as before."[123] In most labor markets, firms have little control over labor supply and hence, wages. But, unlike most firms, planters could turn to all-white legislatures and local governments to coerce blacks into working for below-market wages.

A. The Planter's Problem

Almost all the fighting during the Civil War took place in the southern states. Certain parts of Virginia changed hands again and again during the war. Although Sherman's March to the Sea is remembered with especial bitterness,[124] retreating Confederates were responsible for tremendous damage to anything with potential military value. As late as February 1865, General Bragg destroyed cotton and naval stores, as well as bridges, wharfs, and railroads, before retreating from Wilmington, North Carolina, to prevent their use by the advancing Union army.[125] Whoever lit the blaze, much of the wealth of the South had been destroyed by Appomattox.

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[121] *The Farmers: Last Day's Session of the Agricultural Society*, ATLANTA CONST., Aug. 16, 1883, at 1.

[122] Benj. B. Kendrick, The Journal of the Joint Committee of Fifteen on Reconstruction: 39th Congress 1865-1867, at 276 (1914) (Ph.D. dissertation, Columbia University).

[123] *Id.*

[124] GONE WITH THE WIND (Warner Bros. 1939).

[125] EVANS, *supra* note 116, at 35.

In 1866, the South had 32 percent fewer horses and 42 percent fewer swine than before the war; across the South, cultivated land shrank by 18 percent between the 1860 and 1870 census and fell by a third in South Carolina.[126] Much of the great wealth enjoyed by planters disappeared. In one Black Belt county in Alabama, white per capita wealth was $19,000 in 1860, but only a sixth of that ten years later.[127] Prosperity did not return with peace. The cotton harvests of 1866 and 1867 were poor, damaged by weather and pests.[128]

Despite the destruction, a different question dominated the conversations of southern whites in 1865 and 1866. Planters and politicians wanted to know: "[w]ill the free Negro work?"[129] After emancipation in the West Indies, plantation agriculture had collapsed. Newly-freed slaves had abandoned the sugar plantations to grow food in the hills. Only on islands, like Barbados, where whites owned all the land, did plantation agriculture survive.[130] By all indications, freedmen in the South would follow the path of newly-freed slaves in the Caribbean. A Freedman's Bureau agent reported that newly-freed slaves wanted to farm on their own, rather than toil in the planter's fields. A North Carolina planter despaired since freedmen "have no other desire than to cultivate their own land in grain and raise bacon."[131] An agent of the Freedman's Bureau in Mississippi reported that most newly-freed slaves are "determined to try farming on their own responsibility."[132] Another agent of the Bureau noted that black farmers had "good success" when allowed the opportunity.[133] That good success was exactly what planters feared.

Although contemporary reports emphasized the massive population movements in 1865 and 1866, only a minority of freed blacks left their home plantations and most went only a few

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126 James L. Sellers, *The Economic Incidence of the Civil War in the South*, 14 MISS. VALLEY HIST. REV. 179, 184 (1927).

127 FONER, RECONSTRUCTION, *supra* note 90, at 129 (describing Dallas county).

128 *Id.* at 140-41.

129 *Id.* at 132. Most whites believed that the "negro [will not] work without physical compulsion." Carl Schurz, Report, S. Exec. Doc. 2, at 32 (1865).

130 Burton, *supra* note 18, at 36; ERIC FONER, NOTHING BUT FREEDOM: EMANCIPATION AND ITS LEGACY 14 (1983).

131 FONER, RECONSTRUCTION, *supra* note 90, at 133.

132 Hahn, *Common Rights*, *supra* note 16, at 44.

133 *Id.*

miles.[134] A few freed slaves traveled long distances looking for family. One freedman walked 600 miles in Georgia and the Carolinas looking for his wife and children.[135] As a result, counties with large slave populations in 1860 had large black populations during Reconstruction. A South Carolina planter noted: "most of the former laborers are here, but won't *labor*."[136]

The threat to plantation agriculture was particularly acute since women and children withdrew from the labor force early in Reconstruction. A Georgia newspaper noted that the "freedmen . . . have almost universally withdrawn their women and children from the fields, putting the first at housework and the latter at school."[137] That withdrawal of black women from the fields was a source of conflict; one letter to the editor held that there was no trouble between the races, except where black women "remain in the house, and don't work on the farm–in fact, acting *the lady*."[138]

Blacks responded quickly to the new opportunities available in Reconstruction. Planters faced competition for their labor from railroads, phosphate mining, and cattle ranching in Texas.[139] Responding with the well-bred grace for which the gentry were rightly famous, the planters had black workers who were laying railroad track whipped and told to return "back to the farms to labor."[140] On St. Simons Island, Georgia, freedmen received government rations, but still hunted, "selling the venison at high prices in Savannah."[141] After emancipation, newly-freed slaves were quick to sell their eggs and poultry to the highest bidder.[142]

While freed slaves were eager to embrace their freedom and opportunity, planters were not eager to negotiate with them as most employers and employees would. A member of the planter class

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[134] FONER, RECONSTRUCTION, *supra* note 90, at 81. Since southern cities were so small, the marginal increase in the black population was particularly noticeable. *Id.* at 81-82.

[135] JOHN RICHARD DENNETT, THE SOUTH AS IT IS 1865–1866, at 130 (Caroline E. Janney ed., 2010).

[136] W.F. Robert, *Letter to the Editor*, 28 S. CULTIVATOR 15 (1870).

[137] FONER, RECONSTRUCTION, *supra* note 90, at 85.

[138] Ord., *Letter to the Editor*, ATLANTA CONSTITUTION, July 10, 1869, at 1.

[139] FONER, RECONSTRUCTION, *supra* note 90, at 108, 400-01.

[140] *Id.* at 429.

[141] FLYNN, *supra* note 104, at 122.

[142] FONER, RECONSTRUCTION, *supra* note 90, at 108; *see also* FLYNN, *supra* note 104, at 121 (gathering blackberries for sale in Cave Spring, Ga.).

wrote that it "seems humiliating to be compelled to bargain and haggle with our own servants about wages."[143] Many planters thought that the employer should be the sole judge of wages.[144] One planter would pay wages "where I thought them earned, but this must be left to me."[145] Many planters tried to impose contracts where any infraction was cause for termination, with all wages forfeit.[146] Planters were largely unsuccessful, since blacks did have some freedom to choose their employer. The Laurel Hill plantation, for example, was abandoned by its workers when the planter would not match the wages offered by other nearby plantations.[147]

Complaints of labor shortages began in Reconstruction and continued for the rest of the century. There was no shortage: low wages deterred immigration and discouraged local workers from offering more of their time. Higher wages would prompt locals to work more and attract workers from elsewhere. Of course, some planters accepted the logic of the market. Edward B. Heyward, a rice planter, boasted that his workers were free to leave, if they could find better work.[148] In every locality, there was a planter who paid cash and so enjoyed "plenty of labor."[149]

Planters also tried to negotiate amongst themselves the terms that they could impose on their workers. Contemporary newspapers are filled with calls for cartelization.[150] Planters in three Maryland counties held public meetings and attempted to set wages for all laborers.[151] The Freedman's Bureau fought cartelization,[152] but planter cartels largely failed because of labor mobility. There are isolated instances, however, where planters enforced below-market wages or crop shares. In 1866, Tuscaloosa, Alabama, planters paid

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[143] ELIZA FRANCES ANDREWS, THE WAR-TIME JOURNAL OF A GEORGIA GIRL 1864-1865, at 319 (1997).

[144] FONER, RECONSTRUCTION, *supra* note 90, at 132.

[145] *Id.*

[146] FLYNN, *supra* note 104, at 32–33.

[147] FONER, RECONSTRUCTION, *supra* note 90, at 140.

[148] *Id.* at 132.

[149] *The Labor Question*, 32 S. PLANTER & FARMER 671 (Nov. 1872).

[150] FLYNN, *supra* note 104, at 180; *see also* FONER, RECONSTRUCTION, *supra* note 90, at 139.

[151] Richard Paul Fuke, *Planters, Apprenticeship, and Forced Labor: The Black Family Under Pressure in Post-Emancipation Maryland*, 62 AGRIC. HIST. 57, 69 (1988).

[152] ROBERT HIGGS, COMPETITION AND COERCION: BLACKS IN THE AMERICAN ECONOMY 1865–1914, at 48 (1977).

their sharecroppers only one-eighth of the crop, after costs. When one planter agreed to one-sixth, the offending planter was brought before his peers and his tenants were forced to accept one-eighth.[153]

Planters did try to replace black labor, but without success. Planters could not hire a white man because he "demands a good house, stoves, [sic] and a diversified diet."[154] Immigrant labor would not accept living in "windowless log huts."[155] One Alabama planter hired 30 Swedes, housed them in abandoned slave cabins, and fed them the usual slave rations. In less than a week, the workers had left, telling the planter "they were not slaves."[156] One newspaper hoped that Chinese immigration would depress wages, turning "forty acres and a mule" into "work nigger or starve."[157] But, Chinese immigrants refused the low wages and poor working conditions of the plantation.[158] That planters could not attract new workers is not surprising given how planters treated their existing workers. After a sharecropper's son died of rabies, John Horry Dent wrote in his diary: "Niggers ought to die when there is not much work on hand, for when one of them dies, it stops the work of the whole neighborhood."[159] A month later, he recorded similar sentiments when another black boy died.[160]

B. From Slavery to Sharecropping

Planters wanted as little as possible to change after emancipation. Where slaves had worked in gangs, planters tried to hire freedmen as wageworkers to work in gangs, but freedmen showed little enthusiasm for gang labor.[161] Both 1866 and 1867 saw disastrous harvests and continued resistance from blacks. After

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153 Jt. Cmt. on Reconstruction, *Report*, Pt. III, at 9.

154 FLYNN, *supra* note 104, at 154 (alteration in original).

155 *Flight from South Carolina*, N.Y. TIMES, Jan. 12, 1882, at 1.

156 FONER, RECONSTRUCTION, *supra* note 90, at 213.

157 FONER, RECONSTRUCTION, *supra* note 90, at 419. Another editor wrote that the immigration argument "stripped of its verbosity" was simply "[w]e have lands but can no longer control the niggers." *Id.*

158 FLYNN, *supra* note 104, at 153 (discussing Chinese immigration); *see also* LEWIS NICHOLAS WYNNE, THE CONTINUITY OF COTTON: PLANTER POLITICS IN GEORGIA 1865–1892, at 9–10 (1986); LEIGH, *supra* note 17, at 146–47, 168 (describing efforts to import Chinese labor in Georgia).

159 FLYNN, *supra* note 104, at 18.

160 *Id.*

161 FLYNN, *supra* note 104, at 67.

1868, sharecropping was the most common arrangement, especially after cotton prices fell in the 1870s.[162] Sharecropping allowed blacks more daily autonomy than working for wages.

Although landowners preferred wage labor, sharecropping did benefit them. Firstly, the risk of a bad harvest was shared with the cropper. Secondly, women (and to a lesser extent children) returned to the fields with sharecropping. "Where the negro works for wages, he tries to keep his wife at home. If he rents land, or plants on shares, the wife and children help him in the field."[163] During slavery, overseers had raped enslaved women. But sharecroppers did not work under the same close supervision, which was safer for women.[164]

Sharecropping was the most common arrangement, but it was just one of the arrangements between landowners and labor. The lowest rung was wage labor, often paid "standing" wages. Standing wages were paid in crops, which was common because cash was scarce. Wage labor often worked in groups and lived in the old slave cabins. Even though wage labor declined in importance, 280,000 Georgians worked for wages in 1880.[165] The Census found that wages averaged $10 per month, including rations. Day laborers earned 50¢ per day or 75¢ if they fed themselves.[166] Young men were the most likely to be wage laborers.

In contrast, sharecroppers lived in separate cabins and enjoyed some day-to-day autonomy. Sharecroppers received between a quarter and half the harvest, after the cost of fertilizer was deducted. Sharecroppers provided their labor, while the landowner provided a mule and advanced them supplies. Sharecroppers who received rations surrendered a larger share of the harvest.[167]

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[162] FONER, RECONSTRUCTION, *supra* note 90, at 172-74, 537.

[163] CHARLES NORDHOFF, THE COTTON STATES IN THE SPRING AND SUMMER OF 1875, at 99 (1876).

[164] FONER, RECONSTRUCTION, *supra* note 90, at 86-87.

[165] FLYNN, *supra* note 104, at 67.

[166] HIGGS, *supra* note 152, at 53 (summarizing 1880 Census report on cotton). Wages were higher in the southwest (*e.g.*, Texas) and lower in the southeast. *Id.* at 52-53. Alternately, workers received 50¢ for every hundred pound of seed cotton. *Id.* at 53.

[167] S. Exec. Doc. No. 6, at 44 (1867); FLYNN, *supra* note 104, at 70-71; *see also* HIGGS, *supra* note 152, at 49.

Share tenants owned a mule and often a plow. Since he contributed capital, he received a greater share of the harvest, albeit after paying a greater share of the fertilizer bill.[168] Tenants paid fixed rent, often measured in bales of cotton.[169] Generally, renters provided everything but the land, though a few rented a mule.[170] A good year allowed croppers and tenants to accumulate a little more capital and ascend another rung. A bad year might destroy whatever gains the croppers or tenants had been able to secure.

By 1880, the Census found that land alone earned the landlord a third of the cotton and half the corn. If the landlord also provided a mule, he received one half of the cotton. If the landlord also provided the cropper with rations, he would receive two-thirds of the harvest. Renting land for a set figure was less common, varying with the location and soil quality.[171]

Labor mobility was a limit, however weak, on unfair contracts and fraud. Some sharecropping contracts were manifestly unfair, allowing the landlord to expel the worker and seize the entire crop if the landlord felt the worker had breached his contract.[172] During Reconstruction, reports of sharecroppers being cheated at settlement in December were frequent.[173] In 1865 and 1866, armed bands drove blacks from plantations to deprive them of their share.[174] But, the market again operated to limit planters' freedom: the planters who cheated their workers often found it difficult to hire workers for the following year.[175]

Although courts contributed less to legal change than legislatures in the postbellum South, southern courts did play a larger role in defining sharecropping. In 1872, the Georgia Supreme Court decided that a sharecropper was not a tenant, but an

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168 FLYNN, *supra* note 104, at 71. Share tenants often received two-thirds of the cotton and three-quarters of the corn. *Id.*

169 *Id.* In the 1870s, rents varied from $3 to $10. Eighty pounds of cotton sold for $10. HIGGS, *supra* note 152, at 50.

170 FLYNN, *supra* note 104, at 71.

171 HIGGS, *supra* note 152, at 52-53 (summarizing 1880 Census report on cotton).

172 Haskins v. Royster, 70 N.C. 601, 608 (1874) (quoting contract language). Sharecroppers were not tenants in North Carolina. *Id.* at 611

173 HIGGS, *supra* note 152, at 53; *see also, e.g.*, CHARLES STEARNS, THE BLACK MAN OF THE SOUTH AND THE REBELS 527-28 (1872).

174 FONER, RECONSTRUCTION, *supra* note 90, at 429.

175 HIGGS, *supra* note 152, at 54.

employee.[176] Arkansas followed Georgia, holding that a sharecropper had no interest in the crop to lien.[177] Although croppers were tenants in Alabama, crop lien laws meant that tenants could borrow only through the landlord. Many landowners became merchants to their croppers to extract a second income from them.[178]

After the war, cotton cultivation spread both west and upcountry, and the share grown by blacks fell from 90 percent in 1860 to 60 percent in 1876.[179] By 1880, one-third of whites in the cotton-growing states were sharecroppers or tenants.[180] Sharecroppers, regardless of race, were offered similar contract terms.[181] Whites and blacks responded similarly to similar incentives, planting the same ratio of cotton, adjusting for their poverty.[182] Whites were more likely to rent than sharecrop and were on average slightly better off than blacks. Whether white or black, farmers who did not own the land they tilled were poor. White and black sharecroppers suffered from "different degrees of poverty, not wealth."[183]

Although sharecropping was decried in the twentieth century, it was an important victory in the battle with planters for more autonomy. Without a doubt, sharecroppers would have preferred to own their land. But, sharecropping is a significant improvement over gang labor. Even in the face of hostile legislatures, courts, sheriffs, and landowners, blacks insisted on a modicum of autonomy. In 1870, the Department of Agriculture described sharecropping as an "unwilling concession to the freedman's desire."[184] A Georgia planter complained about sharecropping, "I had to yield, or lose my labor."[185]

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176 Appling v. Odom, 46 Ga. 583, 585 (1872).

177 Sentell v. Moore, 34 Ark. 687, 690 (1879).

178 FLYNN, *supra* note 104, at 173–74.

179 FONER, RECONSTRUCTION, *supra* note 90, at 393.

180 *Id.* at 394. By 1935, 45 percent of white farmers were sharecroppers or tenants. Only slightly more whites than black were sharecroppers. W.W. McPherson & Max R. Langham, *Commercial Agriculture in Historical Perspective*, 63 AM. J. AGRIC. ECON. 894, 896 (1981) (summarizing census data).

181 HIGGS, *supra* note 152, at 54.

182 FLYNN, *supra* note 104, at 120–21.

183 *Id.* at 158.

184 FONER, RECONSTRUCTION, *supra* note 90, at 405.

185 *Id.*

III. LEGAL CHANGE

Legislatures changed many aspects of state law, not just property law, in response to emancipation. The challenge of black autonomy was real, so lawmakers responded with every law they could devise. Other aspects of the postbellum reaction to emancipation, from the Black Codes to Jim Crow, are well-known. This Article instead concentrates on changes to property law, which have received less attention than other changes.

The evidence for a racial motivation in changing property law is three-fold: documentary, timing, and geography. Historical documents show that planters demanded broader property rights to control black labor. The timing of the closing of the range in the South is consistent with the labor control thesis, but inconsistent with explanations rooted in economic progress. Legislatures closed the range during Presidential Reconstruction and again after Redemption, when planters were well-represented, but blacks were not at all. The geographic pattern of property law change follows race. Legislatures closed the range in counties with large black populations, but not where there were few blacks to coerce into plantation labor.

Planters wanted a full panoply of laws to control and coerce black labor. In newspapers and farm journals, planters argued the range must be closed because of the "altered system of labor," meaning emancipation.[186] A list of "Needed Laws" included enticement, vagrancy, crop liens, dog taxes, the closed range, and no hunting or fishing without permission.[187] In 1875, a planter's association called for punishing trespassers, enforcing game laws, and closing the range.[188] During Presidential Reconstruction, one planter wrote that since "we have been stripped in a great degree of our labor," planters should "agitate[]" until the range closed.[189]

Planter agitation fluctuated with the political realities. Planters demanded legal change when legislatures might respond,

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[186] Hahn, *Common Rights*, *supra* note 16, at 45.

[187] X.X., Letter to the Editor, dated Dec. 2, 1871, 3 S. FARM & HOME 89–91 (Jan. 1872). His variant of the closed range would not disturb the fence law, but limited grazing in proportion with landowning. To wit, large landowners could continue to graze on unfenced land, but the landless could not graze their herds at all. *Id.*

[188] Hahn, *Common Rights*, *supra* note 16, at 37 & n.1.

[189] W.H.B., Letter to the Editor, 25 S. CULTIVATOR 172 (June 1867).

but did not bother to lobby integrated state governments, knowing that a program of legal change aimed at disadvantaging black workers would not advance. In 1872, for example, planters met in Griffin to petition the state legislature for a closed range a few months after Georgia was Redeemed.[190]Planters' demands acknowledged the political reality that many whites benefited immensely from the existing open range and game laws. Thus, planters asked to close the range only where black labor was present. In 1871, N.H. Davis, a South Carolina planter, called for closing the range in the "middle country," noting that the open range was "well adapted to the pine and sand country, and also to the mountain country."[191] The middle country had large numbers of blacks, while the mountain and sand country had few.

The first Black Codes were explicitly racial, but subsequent laws were nominally race-neutral. Democratic control of local government and law enforcement ensured that the law would be used to coerce black labor. Even when Reconstructed legislatures did not repeal these laws, Republican control of local government meant that planters could not use these laws to control labor. After Redemption, legislatures resumed lawmaking aimed at labor control.

A. Regulating Labor

The federal reaction to the Black Codes was not lost on the state legislatures that met later.[192] Georgia's constitutional convention of 1865 tasked a special commission with drafting a black code. In early 1866, the commission proposed eleven laws to the governor, who gave his approval. Seeing how the federal government had suspended the Black Codes elsewhere, Georgia's legislature settled on four core elements: enticement, vagrancy, apprenticeship, and criminalized trespass.[193] Georgia's legislature set the pattern for lawmaking across the South. Legislatures

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[190] Resolution dated Aug. 26, 1872, 1872 Ga. Laws 529.

[191] N.H. Davis, Letter to the Editor, 2 RURAL CAROLINIAN 593–94 (Oct. 1870).

[192] For more detail on the differences between law passed by legislatures that met earlier or later, *see* DAVID MONTGOMERY, BEYOND EQUALITY: LABOR AND THE RADICAL REPUBLICANS, 1862–1872, at 55–56 (1967).

[193] FLYNN, *supra* note 104, at 35–36. Almost thirty bills were introduced, some of which were very harsh. WILSON, *supra* note 105, at 102.

abandoned explicitly racial lawmaking for ostensibly race-neutral laws which were designed to coerce blacks. Also, Georgia's edited black code shows what southern lawmakers thought was most important. Planters hoped to re-build their world with less labor mobility, more labor coercion, and an end to public access to private land.

1. Direct Labor Regulation

The pillars of labor law in the postbellum South were enticement, vagrancy, and apprenticeship. Enticement is the crime of offering a job to someone already employed. Enticement remained criminal through the mid-twentieth century.[194] Planters felt very strongly that enticement was a pillar of their efforts to constrain black labor. If a planter enticed another's workers, he "should be driven from the community."[195]

Enticement statutes were not new. Maryland even provided for an action of replevin in cases of enticement, as if the worker were personal property.[196] After the Civil War, enticement became a criminal offense across the region. During Congressional Reconstruction, state legislatures in Arkansas, Louisiana, Mississippi, and South Carolina repealed their enticement statutes. After Redemption, however, all these states re-criminalized enticement.[197] Tennessee had not criminalized enticement during Presidential Reconstruction, but the legislature did enact a criminal enticement statute in 1875 during the wave of states being Redeemed.[198]

While enticement statutes prevented workers from changing jobs, vagrancy and apprenticeship statutes forced people into work, regardless of actual need. Vagrancy was defined broadly, allowing sheriffs and judges to force black people into work. Mississippi defined the "idle" as vagrants, without requiring a showing that the vagrant was destitute. Also, vagrants included "persons who

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[194] Cohen, *Involuntary Servitude*, *supra* note 111, at 36 & n. 10.

[195] FONER, RECONSTRUCTION, *supra* note 90, at 139.

[196] MD. CODE art. 66, § 83 (1860). Leaving an employer during the contract term was a misdemeanor. *Id.* §§ 76–79 (1860).

[197] Alabama, Florida, Georgia, and North Carolina did not repeal during Congressional Reconstruction. Cohen, *Involuntary Servitude*, *supra* note 111, at 35.

[198] Act of Mar. 23, 1875, § 1, 1875 Tenn. Pub. Acts 168, 168.

neglect their calling or employment, [or] misspend what they earn."[199] In Alabama, vagrants were defined to include "stubborn servant[s]."[200] Even attempts to demand higher wages could risk a charge of vagrancy. Virginia defined vagrancy to include refusing "the usual and common wages given to other laborers."[201] While vagrancy statutes might be race-blind, one planter, former slaveowner, and Klansman noted, "[t]he vagrant contemplated was the plantation negro."[202]

Northern public opinion was incensed by the vagrancy statutes of Presidential Reconstruction. Northern newspapers reported that under a "barbarous Vagrant law . . . freed slaves are rapidly being reënslaved."[203] Vagrancy statutes targeted at black people were not new in 1865. Colonial Pennsylvania introduced a vagrancy statute in 1725 (or 1726). The punishment for vagrancy was involuntary servitude: a magistrate could bind free blacks who refused work for a year.[204] In antebellum Maryland, free blacks who refused work could be sold as a "slave for one year."[205]

During Congressional Reconstruction, some Republican-dominated legislatures repealed their vagrancy statutes. Other states did not, relying on Republican control of local government to prevent abusive vagrancy prosecutions. During Congressional Reconstruction, planters complained that vagrancy statutes were unenforced.[206]

Vagrancy laws were a double boon to planters. Vagrancy laws were interpreted to mean working for whites, even if the black defendant could support themselves otherwise. Moreover, the penalty for not working was working. Vagrants bound to a term of

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[199] Act of Nov. 24, 1865, § 1, 1865 Miss. Laws 90, 90.

[200] Act of Dec. 15, 1865, § 1, 1865–66 Ala. Laws 116, 116.

[201] Act of Jan. 15, 1866, §2, 1865–66 Va. Acts 91, 92-93.

[202] JOHN WITHERSPOON DUBOSE, ALABAMA'S TRAGIC DECADE 55 (James K. Greer ed., 1940).

[203] *Civil Rights*, N. Y. DAILY TRIBUNE, Mar. 1, 1866, at 4 (reporting a correspondent's letter to the Cincinnati *Commercial*). While Congress and northern public opinion were extremely critical of vagrancy laws in 1865 and 1866, a decade later many northern states adopted the same laws in response to the growing number of hobos after 1873. In Indiana, the unemployed could be put to work on the streets or leased to industry. EMMA LOU THORNBROUGH, INDIANA IN THE CIVIL WAR ERA 1850–1880, at 316–17, 588 (1965).

[204] Act of Mar. 5, 1725–26, § 4, Pa. Stat. at Large 59, 61–62 (repealed Mar. 1, 1780).

[205] MD. CODE art. 66, § 53 (1860).

[206] FONER, RECONSTRUCTION, *supra* note 90, at 401.

servitude were a ready source of labor for planters. Alabama's 1865 vagrancy statute is a good example. Under the new law, planters could buy six months of labor by paying the vagrant's fine and court costs.[207]

Like vagrancy, forced apprenticeship did not originate in 1865.[208] Before the war, laws authorizing forced apprenticeships were common in slave states, including Delaware, Georgia, Maryland and North Carolina.[209] Within weeks of emancipation, thousands of children in Maryland were apprenticed – as many as two-thirds of children in some areas. Some apprentices were already 18 and "hired out by their new masters, before they left the court room."[210] Although Maryland's statute was held to violate the Thirteenth Amendment, similar laws in other states were not overturned.[211]

Vagrancy and apprenticeship statutes worked in tandem, since the children of those declared vagrants were then apprenticed.[212] Even though the pool of potential apprentices was smaller than that of possible vagrants, apprenticeship did have some practical advantages. While vagrants were generally bound for only a year, apprentices were bound until majority, generally 21 for boys and 18 for girls.[213]

Apprenticeship statutes provided for criminal penalties if someone enticed away an apprentice.[214] Escaping apprentices could

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[207] Act of Dec. 15, 1865, § 4, 1865–66 Ala. Laws 119, 120. Note that Alabama's prewar vagrancy law did not provide for binding vagrants. ALA. CODE § 3796–98 (1852); *see also* Act of Nov. 24, 1865, § 5, 1865 Miss. Laws 90, 92 (hiring out vagrants).

[208] Act of Mar. 5, 1725–26, Pa. Stat. at Large 59, 61–62 (repealed Mar. 1, 1780).

[209] DEL. CODE ch. 79, § 3 (1852); GA. CODE § 1824 (1861); MD. CODE art. 6, §§ 31, 33 (1860); Midgett v. McBryde, 48 N.C. 21, 22 (1855) (discussing 1837 N.C. Rev. Stat., ch. 5, § 5).

[210] Fuke, *supra* note 151, at 63–64.

[211] *In re* Turner, 24 F.Cas. 337, 339-40 (C.C.D. Md. 1867). Missouri's Supreme Court overturned a vagrancy statute, relying in part on this case. Thompson v. Bunton, 22 S.W. 863, 864-65 (Mo. 1893). No other case of apprenticeship or vagrancy cited In re *Turner*. The Maryland Court of Appeals had upheld forced apprenticeship in an earlier case. Brown v. State, 23 Md. 503, 511-12 (1865).

[212] Act of Jan. 12, 1866, § 3, 1865 Fla. Laws 34, 34.

[213] *E.g.*, Act of Jan. 12, 1866, § 6, 1865 Fla. Laws 28, 29.

[214] Act of Feb. 23, 1866, § 5, 1865–66 Ala. Laws 128, 129; Act of Mar. 17, 1866, no. 3, § 9, 1865–66 Ga. Laws 6, 8.

be returned by force.[215] Some apprenticeship statutes did not provide any opportunity for the parents to object. Alabama did provide for an opportunity, though the justice of the peace was not obligated to honor their wishes.[216] Many apprenticeship statutes allowed courts to determine the age of child, including Alabama and Mississippi.[217] In North Carolina, hundreds of freedmen were apprenticed to their former owners in early 1866; one of these "orphans" supported a wife and child.[218] Although the Army rescued many of these orphans, the practice continued. As late as 1872, a planter advertised for two runaway orphans, offering a reward.[219]

In 1865 and early 1866, several states adopted apprenticeship statutes that gave former owners preference, including Alabama, Mississippi, and North Carolina.[220] Like other explicitly racial laws, apprenticeship to former owners inflamed northern public opinion and prompted Congressional Republicans to act. In the debates of the Civil Rights Act of 1866, many proponents identified the forced apprenticeship with slavery.[221] The following year, North Carolina amended its pre-war apprenticeship statute, replacing "free negroes" with "all base born."[222] During Congressional Reconstruction, many apprenticeship laws were repealed.[223]

Since wages were consistently lower in the southeast, black workers could improve their prospects by moving west, even within the South. The Freedman's Bureau served as a broker, arranging to move workers.[224] Left unrestricted, the outmigration that labor brokers were facilitating would equalize wages across regions,

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[215] Act of Feb. 23, 1866, § 4, 1865–66 Ala. Laws 128, 129; Act of Nov. 22, 1865, § 4, 1865 Miss. Laws 86, 87–88.

[216] Act of Feb. 23, 1866, § 11, 1865–66 Ala. Laws 128, 131.

[217] Act of Feb. 23, 1866, § 10, 1865–66 Ala. Laws 128, 131; Act of Nov. 22, 1865, § 10, 1865 Miss. Laws 86, 90.

[218] EVANS, *supra* note 116, at 75.

[219] J. W. Wright, Advertisement, WILMINGTON DAILY J., Mar. 5, 1872, at 2, *quoted in* Evans, *supra* note 116, at 75.

[220] Act of Feb. 23, 1866, § 1, 1865–66 Ala. Laws 128, 128; Act of Nov. 22, 1865, § 1, 1865 Miss. Laws 86, 86-87; Act of Mar. 10, 1866, § 4, 1866 N.C. Sess. Laws 99, 100.

[221] *Cong. Globe*, 39th Cong., 1st Sess. 3210 (1866).

[222] Act of Jan. 26, 1867, § 1, 1866–67 N.C. Sess. Laws 10, 10.

[223] *E.g.*, Act of May 13, 1871, ch. 92, § 1, 1871 (1st sess.) Tex. Gen. Laws 90, 90, *repealing* Act of Oct. 27, 1866, 1866 Tex. Gen. Laws 61.

[224] William Cohen, *Black Immobility and Free Labor: The Freedman's Bureau and the Relocation of Black Labor, 1865–1868*, 30 CIVIL WAR HIST. 221, 222 (1984).

pushing up wages in the southeast. But planters in the southeast did not want wages to rise, so in response state legislatures required expensive licenses from labor brokers and taxed them heavily.[225]

2. Labor Regulation by Other Means

State government did not stop with direct labor regulation. To supplement enticement, vagrancy, and apprenticeship statutes, states authorized forced labor to pay debts, fine, and taxes. Those unable to pay were bound to a planter, while others were sent to the chain gang.

Again, colonial Pennsylvania first enacted a law later adopted across the South. Free blacks who could not pay fines imposed could be bound to servitude.[226] Even before the Civil War, similar laws were common in the southern states. In antebellum North Carolina, insolvent blacks could be hired out against their will to pay their debts.[227] Florida, Georgia, and North Carolina allowed courts to lease free blacks who could not pay court judgments.[228] Before the war, states and cities imposed heavy poll taxes on free blacks.[229] In Virginia, the sheriff could bind free blacks who could not pay their taxes.[230]

After the war, binding of those who could not pay fines or debts continued. Most were careful not to call the practice slavery, but a Maryland newspaper advertised the sale of a black man convicted of larceny "as a slave."[231] In Georgia, newspapers reported a scheme where a black man was accused of theft, and he and his relatives

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[225] David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans*, 76 TEX. L. REV. 781, 782 (1998).

[226] Act of Mar. 5, 1725–26, 4 Pa. Stat. at Large 59, 62, (repealed Mar. 1, 1780).

[227] 1831-32 N.C. Sess. Laws 10, 10 (upheld by State v. Manuel, 20 N.C. 144 (1838)). Blacks who were judged unable to support their children could be bound to labor. JOHNSON, *supra* note 41, at 611.

[228] Act of Feb. 4, 1832, § 3, 1832 Fla. Laws 32, 32; GA. CODE § 4718 (1861); 1831-32 N.C. Sess. Laws 10, 10-11.

[229] Brian Sawers, *The Poll Tax before Jim Crow*, 57 AM. J. L. HIST. 166, 186 (2017) [hereinafter Sawers, *Poll Tax*].

[230] Ch. 21, § 3, XI Hening's Stat. at Large 39, 40 (1782).

[231] *Cong. Globe,* 39 Cong., 2d. Sess. 153 (1866).

were bound for a period of years, even though there were "grave doubts about *Sambo* having stolen at all."[232]

Under these laws, courts had the option of imposing forced labor on behalf of a private party or government. In Florida, those unable to pay a fine (or court cost) could be sent to work for the county or hired out "at public outcry."[233] In North Carolina, the mayor could require those unable to pay fines to "work on the streets or other public works."[234] Those convicted of more serious crimes were often sentenced to work on a chain gang.[235] In 1866, Georgia directed that convicts could labor on "chain gangs," or the court could "hire out, or bind out" convicts to work on public works.[236] Large numbers were employed in building the Western & Atlantic Railroad.[237] In places, the punishment for nonpayment of city taxes was forced labor; "if the tax is not paid, . . . the chain gang is punishment."[238]

One northern reporter noted that "no white men were ever sentenced to the chain-gang."[239] In 1867, two-thirds of prisoners in Texas were white, but 90 percent of those hired out were black.[240] During Congressional Reconstruction, black legislators limited convict leasing in Alabama and Georgia and abolished it in South Carolina.[241] Although Congress passed the Peonage Act in 1867, it remained unenforced until the twentieth century.[242] Even after

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[232] LEXINGTON OGLETHORPE ECHO, Mar. 18, 1881 (emphasis in original), *quoted in* WYNNE, CONTINUITY OF COTTON, *supra* note 158, at 27. Note that even sympathetic descriptions of blacks were laden with racist slurs.

[233] Act of Jan. 11, 1866, § 9, 1865 Fla. Laws 20, 22.

[234] Act of Mar. 2, 1867, § 1, 1866–67 N.C. Sess. Laws 17, 17.

[235] Act of Mar. 2, 1867, § 1, 1866–67 N.C. Sess. Laws 47, 47-48 (allowing convicts to be sentenced to a chain-gang, except those convicted of murder or manslaughter).

[236] Act of Mar. 20, 1866, § 1, 1865–66 Ga. Laws 37, 37.

[237] WILSON, *supra* note 105, at 104; Act of Mar. 20, 1866, § 3, 1865–66 Ga. Laws 37, 38.

[238] MOBILE NATIONALIST, Mar. 22, 1866, *quoted in* FONER, RECONSTRUCTION, *supra* note 90, at 206.

[239] TROWBRIDGE, *supra* note 85, at 436.

[240] FONER, RECONSTRUCTION, *supra* note 90, at 205; *see also* Act of Nov. 12, 1866, § 3, 1866 Tex. Gen. Laws 192, 193 (authorizing convict leasing); Act of Nov. 9, 1866, §§ 1-2, 1866 Tex. Gen. Laws 119, 119-20 (authorizing convict leasing for misdemeanor and unpaid fines).

[241] FONER, RECONSTRUCTION, *supra* note 90, at 390.

[242] Peonage Act, ch. 187, 14 Stat. 546 (Mar. 2, 1867) (codified as amended at 18 U.S.C. § 1581 (2000)). The only reported case in the nineteenth century is *In* re *Sah Quah*, 31 F. 327 (D. Alaska 1886).

Alabama's law was held unconstitutional in 1911,[243] the practice continued in many southern states until 1944.[244]

B. Restricting Landownership

Regulating labor was only part of the planter's legal aggression. The land and its bounty provided another avenue for black opportunity and, thus, another plank in the planter's agenda. Owning land would give blacks autonomy, an autonomy that planters were loath to permit them.

Knowing that owning land would give them autonomy, blacks showed a "mania for owning a small piece of land."[245] A Georgia planter complained that blacks "will almost starve and go naked before they will work for a white man if they can get a patch of ground to live on, and get from under [white] control."[246] As an Alabama newspaper noted, black landowners "will raise their corn, squashes, pigs, and chickens, and will work no more in the cotton, rice, and sugar fields."[247]

The Freedman's Bureau, and later the 1866 Civil Rights Act, prevented planters from using the law to keep blacks landless. Planters, however, could rely on class allegiance, and, when that failed, violence. Planters resolved in public meetings never to sell land to blacks.[248]

A northern reporter was told that if a white man did sell land to blacks, even small parcels, he would be in "actual personal danger."[249] In Georgia, Frances Butler reported that blacks could only buy land from "small shopkeepers and Jews (the gentlemen refusing to sell their land to the negroes)."[250] Black land buyers were often cheated or the land was very poor.[251] In Mississippi, land

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[243] Bailey v. Alabama, 219 U.S. 219, 244-45 (1911); Peonage Cases, 123 F. 671 (M.D. Ala. 1903).

[244] Taylor v. Georgia, 315 U.S. 25 (1942); Pollock v. Williams, 322 U.S. 4 (1944); *see also* Cohen, *Involuntary Servitude*, *supra* note 111, at 43–44.

[245] FONER, RECONSTRUCTION, *supra* note 90, at 104

[246] G.A.N., Letter to the Editor, dated Feb. 2, 1867, 25 S. CULTIVATOR 69 (Mar. 1867).

[247] Hahn, *Common Rights*, *supra* note 16, at 44.

[248] FONER, RECONSTRUCTION, *supra* note 90, at 134.

[249] WHITELAW REID, AFTER THE WAR: A SOUTHERN TOUR 564–65 (Moore, Wilstach & Baldwin eds., 1866) (describing white sentiment in the Mississippi Valley).

[250] LEIGH, *supra* note 17, at 79.

[251] *Id.*

was sold for half the $10 offered by blacks just to keep the land in white hands. In Florida, Klansmen who beat black homesteaders and killed their animals told them to work for a white farmer. [252]

Even renting land to blacks was considered by white planters as "unpatriotic and unworthy of a good citizen."[253] Black renters were in danger themselves. In Florence, South Carolina, the Klan killed a freedman on a plantation that had been rented to black tenants. A source inside the Klan in Noxubee County, Mississippi reported that the Klan wanted to "keep them from renting land, so that the majority of the white citizens may control labor."[254]

Although there were no legal restrictions on black landownership after 1866, white racial solidarity and terrorism largely worked. Few blacks were able to buy land. In 1876, an incomplete survey found that only four percent of black Alabamians owned land, while the figure for Florida was eight percent.[255] In Georgia, blacks owned only 586,000 acres, worth approximately $1.5 million.[256] Even when blacks were able to overcome the odds, they were more likely to lose their land. Although in many states land was protected from seizure by homestead exemption laws, judges ignored the exemption if the debtor was black.[257]

C. Closing the Range to People

Before the Civil War, unfenced land was open to public hunting, fishing, and foraging. If blacks could feed themselves without working for planters, many of them would do so. Even those who chose to work for planters could demand higher wages. A strike is more feasible if workers can feed themselves during the strike with wild food. Thus, the availability of wild food threatened planter control. Hunger had been one of the planter's key tools in controlling slaves, along with whippings. Planters were accustomed to starving uncooperative slaves, but despaired when they could no

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[252] FONER, RECONSTRUCTION, *supra* note 90, at 403–04, 429.

[253] REID, *supra* note 249, at 565.

[254] FONER, RECONSTRUCTION, *supra* note 90, at 403–04.

[255] U.S. Dep't of Agric., Rep. of the Comm'r of Agric. for the Year of 1876, at 137 (1877), *quoted in* HIGGS, *supra* note 152, at 52.

[256] W.E.B. Du Bois, *The Negro Landholder of Georgia*, U.S. Dep't of Labor, Bulletin No. 35, at 665 (1901).

[257] FONER, RECONSTRUCTION, *supra* note 90, at 421.

longer use hunger for coercion. Frances Butler, a Georgia planter, complained that she could not starve freedmen into submission like slaves.[258]

Since few black workers preferred working in agriculture for whites, black workers would feed themselves whenever they could and work only when there was no alternative. Planters complained that black labor was less available when wild food was plentiful.[259] Planters knew that their workers would avoid working for low wages under bad conditions, but improved neither. Instead, planters hoped for bad weather. One planter wrote that "good fruit years demoralize the Negro more than anything else."[260]

Knowing the natural bounty, planters were quite right to fear that wild food gave blacks economic autonomy.[261] One planter complained that blacks living nearby grew corn and potatoes, supplemented with fish, oysters, and wild game. The planter lamented that "they have as much to eat as they want."[262] She noted that those that worked for whites and were paid $12 per month and rations lived no better than those that did not work for whites.[263] The combination of low wages and nature's bounty meant that working in agriculture for white landowners would not increase someone's standard of living.

One freed slave reported that an afternoon's hunting on his owner's plantation would yield many squirrels, pigeons, and wild ducks.[264] Even where deer were scarce, raccoon and possum were plentiful. Additionally, in many places, the fishing was excellent.[265] A planter in South Carolina complained that his former slaves "can do with very little bread—live on fish and oysters, coons, &c., &c. There being therefore but little necessity for labor, very little work

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[258] LEIGH, *supra* note 17, at 124. An overseer named J.D. Collins did try to starve his workers in 1865, but most planters recognized that emancipation reduced their leverage. FLYNN, *supra* note 104, at 57-58.

[259] Hahn, *Common Rights*, *supra* note 16, at 44.

[260] FLYNN, *supra* note 104, at 120.

[261] By the end of the century, wild food was less available, as cultivation expanded and more hunters took to the field. If hunters were willing to eat more opossum and less venison, wild food could still feed their families. *Id.* at 122-24.

[262] LEIGH, *supra* note 17, at 124.

[263] *Id.*

[264] FLYNN, *supra* note 104, at 122.

[265] OLMSTED, 1 COTTON, *supra* note 53, at 145 (describing wild game near North Carolina's Dismal Swamp).

is done by the negroes."[266] Another letter complained that freedmen did a quarter of the work they had done as slaves.[267]

Attempts to disarm blacks after emancipation were only partially successful.[268] One commentator wrote: "Game is getting scarce where it was once plenty, because every vagabond negro that can get a three-dollar gun . . . [is] killing everything that flies."[269] Another complained about the "colored hero of the dollar shotgun."[270] But blacks did not need firearms to hunt. One Texas freedman reported making his own bow and arrows.[271] Even simpler tools could harvest wild game. One enslaved man made a homemade spear and left it along a game trail. In one week he had managed to kill two deer.[272]

Trespass and game laws were the most direct means to restrict black access to wild food. States, however, used indirect means as well. Many states tried to disarm and un-dog blacks. These efforts largely replicated prewar laws that restricted or prohibited free blacks from owning a gun or dog.[273] In 1866, Georgia authorized three coastal counties to levy a tax on guns and dogs. The first three dogs and guns on each plantation were untaxed. [274] Since each planter reported and paid the tax, he could decide which dogs and

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[266] W.F. Robert, Letter to the Editor, 28 S. CULTIVATOR 15 (1870). Another letter from South Carolina complained that "the nigger won't work." Panola, Letter to the Editor, 28 S. CULTIVATOR 198 (1870).

[267] W.F. Robert, Letter to the Editor, 28 S. CULTIVATOR 15 (1870).

[268] EVANS, *supra* note 116, at 101. Before the war, many states banned free blacks from owning or carrying a firearm without a license *E.g.*, Act of Jan. 11, 1841, ch. 30, 1840–41 N.C. Sess. Laws 61, *discussed in* State v. Dempsey, 31 N.C. (9 Ired.) 384 (1849) and State v. Newsom, 27 N.C. (5 Ired.) 250 (1844).

[269] Old Sport, *Muskets, Darkies, and Game*, 16 FOREST & STREAM, at 208 (1881). *See also The Freedman and the Quail*, 20 FOREST & STREAM, at 87 (1883).

[270] *A Hint to Southern Plantation Owners*, 13 FOREST & STREAM, at 610 (1879), *quoted in* Thomas Lund, *Nineteenth Century Wildlife Law: A Case Study of Elite Influence*, 33 ARIZ. ST. L. J. 935, 967 (2001).

[271] FONER, RECONSTRUCTION, *supra* note 90, at 108.

[272] FREDERICK LAW OLMSTED, 2 COTTON KINGDOM 197 (London, Sampson Low & Son, Co. 1861).

[273] For example, free blacks in Maryland needed a license to own a dog or firearm before the war. MD. CODE art. 66, §§ 72–73, 75 (1860). *See also* Act of Jan. 11, 1841, ch. 30, 1840–41 N.C. Sess. Laws 61, *discussed in* State v. Dempsey, 31 N.C. (9 Ired.) 384 (1849) and State v. Newsom, 27 N.C. (5 Ired.) 250 (1844).

[274] Act of Dec. 7, 1866, § 1, 1866 Ga. Laws 27, 27-28. Between 1860 and 1870, all three counties experienced a declining share of black residents: Camden, 76 to 69 percent, Effingham, 46 to 40 percent, and Glynn, 73 to 68 percent. Overall, Georgia was 46 percent black in 1870.

guns (his own) were tax free.[275] In South Carolina, the first dog on each plantation was untaxed.[276] Taxes on guns and dogs were frequently used to reduce the number of both.[277]

1. Trespass

Planters wanted new trespass laws to "keep the negroes more confined"[278] and Democratic-controlled legislatures during Presidential Reconstruction and again after Redemption obliged. Criminalizing trespass directly restricted the ability of the landless to feed themselves from what they could hunt, fish, and forage on privately-owned land. Before the war, unfenced land was open to the public, and state codes did not make entering unfenced land a trespass.[279]

Trespass was a core element of the planter's legal agenda. Louisiana's legislature met for a special session at the end of 1865, passingly only 35 acts and resolutions. As in Georgia, the state legislature settled on four laws to control black labor, cognizant of the reaction to the Black Codes of Mississippi and South Carolina. As in Georgia, Louisiana passed enticement, vagrancy, and apprenticeship statutes along with a criminal trespass statute. Entering private land was made a misdemeanor, punishable by a $100 fine or one month's imprisonment.[280]

As noted before, Georgia had winnowed its wish-list of eleven laws down to four. To complement the trinity of labor regulation (enticement, vagrancy, and apprenticeship), Georgia criminalized trespass. Since the new trespass statute worked such a large change in Georgia's property law, the legislation was explicit that trespass included applied to "land, enclosed and unenclosed."[281]

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[275] *Id.*

[276] Act of Dec. 21, 1866, 1866 S.C. Acts 395, 397.

[277] *E.g.*, 1861 Va. Acts 45 (Wheeling); Act of Dec. 21, 1865, § 1, 1864–65 S.C. Acts 264, 264; Act of Dec. 14, 1875, § 1, 1875 Ark. Acts 163, 163. The standard tax was $1 per dog per year.

[278] Hahn, *Common Rights*, *supra* note 16, at 46.

[279] *E.g.*, ALA. CODE (1852).

[280] Act of Dec. 20, 1865, 1865 La. Acts 16.

[281] Act of Feb. 23, 1866, §1, 1865–66 Ga. Laws 237, 237-38.

In 1866, Alabama adopted a new penal code, which made entering private land after being warned a misdemeanor.[282] The penalty was $100 or three months of hard labor. Note that Alabama's pre-war code of 1852 did not contain a similar provision. In Florida, entering fenced land was punished with 39 lashes.[283]

North Carolina made trespass a misdemeanor in 1866, except to those who made a written affidavit to a justice of the peace that they were recovering livestock.[284] To ensure the statute's efficacy, the North Carolina Supreme Court interpreted the law to permit liberal (i.e., defective) pleading in prosecution.[285]

In 1866, South Carolina made "[e]very entry on the enclosed or unenclosed land of another, after notice" a misdemeanor.[286] A century later, this statute was used to prosecute blacks during a sit-in.[287]

In addition to general trespass statutes, many states adopted trespass laws specific to hunting. Before the Civil War, only two southern states prohibited hunting on private land without permission. In South Carolina, commercial hunters needed landowner permission if they hunted more than seven miles from home. South Carolina's colonial legislature had enacted this restriction in 1769 to restrain commercial hunters who had been taking hides, but leaving the meat to rot.[288] South Carolina's code was revised under an integrated government and this restriction

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[282] ALA. PENAL CODE § 16 (1866) (prepared by George W. Stone & J.W. Shephard), adopted by Act of Feb. 23, 1866, 1866 Ala. Laws 121. The provision was preserved in subsequent codes. ALA. CODE § 4419 (1876), *discussed in* Owens v. State, 74 Ala. 401 (1883).

[283] Act of Jan. 15, 1866, §§ 16, 17, 1865-66 Fla. Laws 23, 26.

[284] Act of Feb. 2, 1866, § 1, 1866 N.C. Sess. Laws 123, 123–24.

[285] State v. Whitehurst, 70 N.C. 85, 86 (1874); *see also* State v. Yellowday, 152 N.C. 793, 795-96 (1910) (containing similar pleading defects to *Whitehurst*); State v. Hause, 71 N.C. 518, 521 (1874) (finding no application where defendant believed he had a right to enter).

[286] Act of Dec. 21, 1866, § 7, 1866 S.C. Acts 405, 406. Entry was held to take its ordinary meaning, not its technical meaning of taking possession. State v. Cockfield, 49 S.C.L. 53 (1867) (upholding an indictment for visiting an ill sister); *see also* Baldwin v. Cooley, 1 S.C. 256, 260-61 (1869) (holding that the statute did not apply to disputes between white heirs and those buying lands from the estate); State v. Green, 14 S.E. 619, 620 (S.C. 1892) (holding that the lack of title is no bar to prosecution).

[287] Bouie v. City of Columbus, 378 U.S. 347, 356 (1964).

[288] Act of Aug. 23, 1769, 1769 S.C. Acts 275, 276.

was preserved,[289] probably because it did not affect almost all hunters, who would have hunted within seven miles of home. In North Carolina, hunters with guns or dogs needed landowner permission east of the Appalachian Mountains if the landowner had posted their land under a 1784 statute. Under what was the first posting statute in the United States, landowners were required to advertise their intention to exclude in two public places.[290] In Virginia, landowner permission was only required for hunting within fenced land, except in three coastal counties.[291]

Laws that required landowner permission were rare in the United States at mid-century. In most states, there were no legal restrictions on where hunters could hunt.[292] A few states did limit hunting near dwellings. New York, for example, deemed it a trespass to hunt on the "lawn, garden, orchard or pleasure grounds immediately surrounding a dwelling-house."[293] Thus, laws requiring landowner permission for hunting were rare and certainly a notable change in the immediate postbellum.

Some states acted right away after emancipation. In 1866, Florida banned hunting on enclosed land without landowner permission.[294] Other states waited until Redemption. In 1875, Arkansas made hunting within an enclosure a trespass.[295] The year following Redemption, Texas granted landowners the right to exclude hunters after posting their land.[296] In Mississippi, the first legislative session after Redemption made hunting on land posted by the landowner a misdemeanor.[297]

In 1870, Tennessee outlawed hunting on private land without permission in Fayette and Rutherford counties.[298] In 1870, only 26 percent of Tennesseans were black, but Fayette was 65 percent black, while Rutherford was 49 percent. In 1875, Tennessee adopted two different hunting laws. The first banned hunting on

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289 S.C. REV. CODE ch. 77, §§ 14, 15 (1873).

290 1784 N.C. SESS. LAWS 364, 365.

291 VA. CODE ch. 101, § 2, 4 (1860).

292 FIN, FUR, AND FEATHER: CONTAINING THE GAME LAWS OF THE PRINCIPAL STATES OF THE UNITED STATES, AND CANADA (4th ed. 1868).

293 Act of May 13, 1867, § 11, 1867 N.Y. Laws 2240, 2242.

294 Act of Jan. 15, 1866, § 19, 1865 Fla. Laws 23, 27.

295 Act of Jan. 21, 1875, 1874–75 Ark. Acts 91.

296 Act of May 2, 1874, 1874 Tex. Gen. Laws 201, 201–02.

297 Act of Mar. 31, 1876, § 9, 1876 Miss. Laws 49, 51.

298 Act of July 5, 1870, § 1, 1870 Tenn. Pub. Acts 168, 168–69.

fenced land without permission.[299] Tennessee adopted a parallel law proscribing fishing with nets on private land without written permission.[300] This law did not apply to East Tennessee,[301] which has always been largely white. The following day, Tennessee imposed limits on hunting in specified counties. Also, Tennessee allowed landowners to post their land, thus excluding hunters without permission.[302]

As in Tennessee, Georgia required hunters in certain counties to have landowner permission, but not in others. Kantor found that counties with larger black populations were more likely to see the legislature require landowner permission. Increasing the black population by one standard deviation increased the likelihood that the legislature would grant landowners a right to exclude by 11 percent.[303]

While many state legislatures restricted hunting in specific counties, Virginia took a different tack. A month after allowing each county to close the range to livestock in 1866, Virginia allowed counties to prohibit hunting on private land without permission.[304] Since Virginia had no elected county officials then, the justices of the county court would decide if hunters needed landowner permission. (New justices were chosen by the existing members of the county court.) Several counties with large black populations adopted the statute within months of its passage.[305] As in Virginia, Louisiana allowed each parish to decide whether hunters needed landowner permission. The statute, however, long predates the war, suggesting no racial motivation.[306] Individual parishes,

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[299] Act of Mar. 23, 1875, 1875 Tenn. Pub. Acts 183.

[300] Act of Mar. 24, 1875, § 2, 1875 Tenn. Pub. Acts 204.

[301] *Id.* § 3.

[302] Act of Mar. 24, 1875, § 7, 1875 Tenn. Pub. Acts 213, 214–15.

[303] SHAWN EVERETT KANTOR, POLITICS AND PROPERTY RIGHTS: THE CLOSING OF THE RANGE IN THE POSTBELLUM SOUTH 123-124 (1998).

[304] Act of Feb. 20, 1866, 1865-66 Va. Acts 202.

[305] Amelia County Court Order Book (hereinafter CCOB) 45, reel 191, 588 (July 26, 1866); Greensville CCOB 12, reel 17, 272 (July 2, 1866); and Nottoway CCOB 1, reel 20, 55 (May 3, 1866). In 1870, Amelia, Greensville, and Nottoway counties were 69%, 66%, and 76% black, respectively. In contrast, the median Virginia county was only 45% black.

[306] Act of Feb. 2, 1825, § 1, 1824 La. Acts 62, 62 (authorizing the Police Jury to punish "trespasses committed by hunters in closes or lands fenced in"). The civil code uses slightly different language. LA. CIV. CODE § 3378 (1825) ("proprietor of a tract of land may forbid any person from entering it for the purpose of hunting thereon").

however, may have required landowner permission in response to emancipation.

Alabama was slow to enact hunting restrictions, but the racial pattern is clear. In 1889, Alabama adopted its first hunting trespass law, applying it only to two black-majority counties. Only landowners could prosecute and the penalty was hard labor.[307] Two years later, hunters needed written permission in nine counties, all of which were had a higher percentage of black population than Alabama as a whole.[308]

Before the war, the public had free access to unfenced land across the South. In almost all states, the public could even hunt on fenced land. In response to emancipation, states adopted criminal trespass statutes for the first time. Similarly, states required hunters get landowner permission before hunting on private land. Both laws restricted the ability of blacks to feed themselves on open land, pushing blacks into the agricultural labor market.

2. Game Laws

Writing in 1866, a Georgia planter called for "stringent game laws" to complement "stringent trespass laws."[309] John Horry Dent complained that his "farms hands white and black are making fish traps."[310] Planters knew that slaves could feed themselves by hunting and fishing. Even though blacks owned little or no land, criminalizing trespass was not enough to starve blacks into submission. Blacks could still hunt and fish on the public domain, including rivers and streams. In some circumstances, game laws are easier to enforce. A trespasser must be caught *in flagrante delicto*, but a poacher can be identified until the meal is eaten. After the disastrous reaction to the black codes, game laws were ideal; even a criminal trespass statute lacks the presumption of worthiness that a game law enjoys.

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[307] Act of Feb. 11, 1889, 1888–89 Ala. Laws 335 (requiring landowner permission in Lowndes and Calhoun Counties and parts of Macon County). In 1890, the population of Lowndes County was 86 percent black and Calhoun County was 77 percent black. Macon County was only 29 percent black.

[308] Act of Feb. 18, 1891, 1890–91 Ala. Laws 1343 (requiring landowner permission in seven counties are parts of two more). In 1890, the counties ranged from 48 to 84 percent black with a mean value of 71 percent.

[309] Hahn, *Common Rights*, *supra* note 16, at 46 & n.35.

[310] HAHN, ROOTS, *supra* note 37, at 163.

Game laws motivated by race were not new in 1865. As early as 1737, New York punished oystering by Indians or blacks, whether slave or free, with between fifteen and thirty-one lashes.[311] After 1866, the states could no longer enact explicitly racial laws. State legislatures used the pretense of game laws to restrict hunting and fishing by blacks. Laws requiring landowner permission were the most transparent limits. Legislatures adopted a variety of other restrictions aimed at the same goal. States limited hunting and fishing in counties with large black populations. Also, states banned specific fishing techniques preferred by blacks (*e.g.*, nets) or banned taking game on the days blacks had time off. Occasionally, the game law prohibited a combination of these, *e.g.*, no trot lines without landowner permission.

Although historians have written considerably more about ranging pigs than roaming hunters, Georgia still has received more attention than other southern states. Restrictions on hunting and fishing developed with a piecemeal pattern, although restrictions in the Black Belt came first.[312] The state legislature was more likely to adopt restrictions on hunting in counties with more black residents. Kantor demonstrated that increasing the black population of Georgia counties by one standard deviation increased the likelihood of the state legislature imposing a closed season by 23 percent.[313]

After Redemption, Georgia adopted a variety of restrictions. In 1873, the legislature adopted a closed season for deer, partridge, and wild turkey in two largely black majority counties.[314] Two years later, the same restrictions plus a ban on trapping birds were extended to three black majority counties.[315] Also in 1875, the legislature banned seine, gill, and drag nets in specified parts of

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[311] 2 Colonial Laws of New York 656 (Albany, James B. Lyon 1894).

[312] FLYNN, *supra* note 104, at 128.

[313] KANTOR, *supra* note 303, at 123.

[314] Act of Feb. 21, 1873, 1873 Ga. Laws 235 (adopting a closed season in Chatham and Bryan Counties). In 1870, Chatham County was 59 percent black, while Bryan County was 69 percent. Overall, 46 percent of Georgians were black. Act of Mar. 3, 1875, 1875 Ga. Laws 302, 302-03. In 1870, Baldwin County was 64 percent black, Lincoln County was 67 percent black, and Muscogee County was 55 percent black.

[315] Act of Mar. 3, 1875, 1875 Ga. Laws 302, 302-03. In 1870, Baldwin County was 64 percent black, Lincoln County was 67 percent black, and Muscogee County was 55 percent black.

Chatham County, also black majority.[316] In another restriction aimed at the landless, Georgia restricted the method of take, but allowed landowners to continue using the banned methods. In 1875, Georgia banned any "contrivances for catching fish for sale" on private land without written landowner permission.[317]

Unlike Georgia, Mississippi enacted hunting restrictions immediately after Appomattox. Mississippi banned hunting of "hogs or other stock" without landowner permission in 1865, but excluded a dozen counties in the piney woods and hill country, where few blacks lived.[318] The penalties imposed on whites were fines and imprisonment, while freedmen would be auctioned by the sheriff to pay the fines with forced labor.[319] In 1867, Mississippi banned all hunting without landowner permission in sixteen counties.[320] These counties were two-thirds black.[321] In 1870, an integrated legislature repealed the hunting restriction in sixteen counties.[322]

States banned hunting and fishing when black people would have free time. In 1866, Georgia banned hunting with guns or dogs on Sunday, but only in 63 counties.[323] In 1866, sharecropping was rare, and most blacks still worked six days, so no hunting on Sunday meant no hunting by blacks. Even though sharecroppers had more autonomy than wage labor, they were more likely to have free time over the weekend. In 1876, Georgia banned fishing shad on Saturday and Sunday.[324]

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316 Act of Mar. 2, 1875, 1875 Ga. Laws 296. Chatham was 59 percent black in 1870.

317 Mar. 2, 1875, §1, 1875 Ga. Laws 113, 113.

318 Act of Dec. 1, 1865, §§ 1, 6, 1865 Miss. Laws 199, 199-200. The law forbade trapping hogs anywhere in the state except with permission. Act of Nov. 17, 1865, 1865 Miss. Laws 209.

319 Act of Dec. 1, 1865, §§ 3, 4, 1865 Miss. Laws 199, 199-200 ("hired, at public outcry").

320 Act of Feb. 21, 1867, § 1, 1867 Miss. Laws 270, 270-71.

321 In 1860, only three of the sixteen counties were less than 60 percent black, while one county was 93 percent black. Ten years later, a fourth county was less than 60 percent black.

322 Act of May 23, 1870, 1870 Miss. Laws 599.

323 Act of Dec. 20, 1866, § 1, 1866 Ga. Laws 154-55. Laws allowing only God to take a life on Sunday were not always aimed at black hunters. Other states did limit hunting on Sunday before the war. *E.g.*, ALA. CODE § 3303 (1852). North Carolina's Republican-dominated legislature banned Sunday hunting. Act of Jan. 27, 1869, § 1, 1868-69 N.C. Sess. Laws 59, 59–60.

324 Act of Feb. 29, 1876, § 4, 1876 Ga. Laws 20, 21.

Two years after Redemption, South Carolina banned fishing with nets or traps during certain months in six counties, five of which were black majority.[325] Richland County, which was 68 percent black, was added by 1883.[326] In Florida, also, the timing of game laws suggests a racial motivation. Less than two months after Redemption, Florida enacted a closed season, but exempted landowners hunting on their own property.[327]

During Congressional Reconstruction, integrated governments responded to their constituents, rather than the landowners who wanted to restrict them. Legislatures imposed few restrictions and local government failed to enforce the laws already on the books. During Congressional Reconstruction in South Carolina, one planter complained that the "white man is so poorly represented in the legislature, the poacher wanders unreproved."[328] Another planter grumbled that "trial justices as we have now" did not enforce the game laws.[329]

D. Closing the Range to Livestock

Across the South, the open range allowed the landless to use unfenced land without owning it. Although some planters before the war had tried to close the range, their efforts were largely futile.[330] If freed slaves could use the open range like landless whites had, then they could feed themselves without owning land or working for whites. Alternatives to sharecropping reduced the supply of labor, driving wages higher. Instead of fewer workers at higher wages, planters wanted more workers at lower wages. The open range was a direct threat to the reestablishment of plantation agriculture.

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[325] Act of Mar. 1, 1878, § 1, 1877–78 S.C. Acts 392, 392. The percentage of the population in each county was black in 1880 was: Clarendon – 62 percent, Darlington - 63 percent, Georgetown – 82 percent, Horry – 32 percent, Marion – 53 percent, and Williamsburg – 68 percent. Overall, 61 percent of South Carolinians were black. Later that year, the statute was amended to add Chesterfield County (42 percent black) and Marlboro (61 percent black) Counties. Act of Dec. 23, 1878, § 1, 1878 S.C. Acts 724, 724.

[326] Act of Dec. 22, 1883, § 1, 1883 S.C. Acts 408, 408.

[327] Act of Feb. 27, 1877, § 1, 1877 Fla. Laws 103, 103.

[328] EDWARD KING, THE SOUTHERN STATES OF NORTH AMERICA 434 (1875).

[329] Hahn, *Common Rights*, *supra* note 16, at 48.

[330] Brian Sawers, *Property Law as Labor Control in the Postbellum South*, 33 LAW HIST. REV. 351, 368 (2015).

In addition to raising the stakes for planters, emancipation made closing the range easier. Before the war, closing the range would harm many, but benefit few, a calculus most voters would not accept. After the war, planters could accuse those defending the open range of defending blacks. Even though many whites wanted to keep the range open, closed range advocates ignored them, emphasizing the racial divide. Closed range advocates succeeded in framing the public debate in racial terms, ignoring the landless whites and their interest in maintaining the open range.[331]

Black opposition to closing the range was well-known, so this accusation had enough truth to prevail. In South Carolina, W.J. McRee reported that "every negro we met, any and everywhere, was utterly opposed" to the closed range.[332] Thus, the standard narrative reported in newspapers was racial, ignoring the many whites who opposed closing the range. A Georgia newspaper repeated the standard explanation after voters rejected closing the range: "Whites favored it, negroes opposed to it."[333]

Even before the war, closed range advocates had linked the open range with blacks. In 1847, a Virginia planter complained that his crops were damaged by stock owned by "some thriftless free negro."[334] Another Virginia farmer speculated that free blacks broke his fences at night so their animals could eat his crops.[335] After the war, complaints about blacks using the open range only increased. In 1871, Sam Weller complained that hogs belonging to a "vagabond negro" ate rutabagas (planted on unfenced land).[336]

Along with identifying the open range with blackness, advocates for broader property rights denigrated white opponents as little better than blacks. W.J. McRee asked everyone he met in

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331 FLYNN, *supra* note 104, at 135.

332 *The Stock Law*, Letter from W.J. McRee, JACKSON HERALD, Oct. 31, 1884, at 3.

333 SPARTA ISHMAELITE, Nov. 21, 1883. The Atlanta Constitution noted that "negroes in every instance vote" to preserve the open range. *Fence or No Fence*, ATLANTA CONSTITUTION, Nov. 11, 1883, 13. In North Carolina, vote tallies were reported, as well as the report that blacks had voted against the closed range. *Vote on Fence Law*, CHARLOTTE DEMOCRAT, Oct. 19, 1874, 1.

334 Drew Addison Swanson, *Fighting over Fencing: Agricultural Reform and Antebellum Efforts to Close the Virginia Open Range*, 117 VA. MAG. HIST. & BIOGRAPHY 105, 120 (2009).

335 *Id.*

336 His tirade against the "African squatter" filled a page. Sam Weller, Letter to the Editor, dated Nov. 1871, 3 S. CULTIVATOR 52–53 (Dec. 1871).

South Carolina what they thought of the new closed range. He found only three whites opposed to the closed range and made sure to note that one of them was a "very sorry specimen of creation–so much so that he was hardly worthy the name of *man*."[337] One South Carolina planter's association recorded in its minutes a complaint of "whites and blacks, poor, lazy, worthless people . . . who eke out a living on a few hogs and other stock running at large."[338]

White defenders of the open range resisted that racial accusation strenuously. One letter printed in a Georgia newspaper described it as "abuse" for "classing [poor whites] with a 'nigger.'"[339] Another defender of the open range tolerated no confusion on where he stood on racial equality, describing himself as an enemy.[340] Whites who wanted to maintain an open range tried to shift the debate from race to economics. One open range advocate argued that closing the range would "simply take rights away from the poor man and give them to the rich."[341] Another opponent argued that voting for the closed range would be "proof of insanity for a poor man."[342] As much as advocates of the open range tried to avoid the accusation, they could not avoid the racial taint. The race card, however, trumped any other hand in the nineteenth century. Even so, racism was insufficient in many local elections and closed range advocates had to resort to "bribery, threats, ticket-fixing, ballotbox stuffing, and the tossing out of votes."[343]

The open range represented the best hope for black autonomy after it became clear that land reform would not happen. Thus, closing the range was a bitter experience. Decades later, a former slave named A.J. Mitchell remembered the closing of the range like

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[337] *The Stock Law*, Letter from W.J. McRee, JACKSON HERALD, Oct. 31, 1884, at 3.

[338] Hahn, *Common Rights*, *supra* note 16, at 46.

[339] FLYNN, *supra* note 104, at 147. John Horry Dent, a planter and closed range advocate, complained that "Niggers and white trash" had voted against the closed range. Hahn, *Common Rights*, *supra* note 16, at 56.

[340] FLYNN, *supra* note 104, at 147.

[341] Plow Boy, Letter to the Editor, DAWSON SW. NEWS, May 4, 1887, *quoted in* FLYNN, *supra* note 104, at 131.

[342] Hahn, *Common Rights*, *supra* note 16, at 55. Another noted that it would benefit "extensive landowners," but "would be the greatest curse to the poor laboring men that ever befell them." *Id.*

[343] *Id.* at 56.

this: "This here no fence law was one of the lowest things they ever did."[344]

Planters told us in their own words that they wanted to expand property rights to disadvantage blacks. But, there are two additional sources of evidence. The closing of the range had a distinct geographical pattern, one that mirrors the racial composition. Counties with large black populations saw the range closed decades earlier than elsewhere. Even within counties, districts with more black residents saw the range closed. As one newspaper columnist noted, the closed range only applied in the districts of Madison Count, Alabama that were "largely colored" and then proceeded to list the districts.[345] In Mississippi, counties with a closed range contained 60 percent of the state population, but 68 percent of the black population. In Alabama, the disparity was stark: sixty percent of the state population lived in closed range counties, yet 81 percent of the black population did.[346]

The timing of the closing of the range is further evidence. If the closing of the range was motivated by changes in economic development, whether changes in market opportunities, new technologies, or shifts in consumer demand, then the closing of the range would not follow a distinctly political timetable. Instead, legislatures closed the range in Presidential Reconstruction, paused, and even re-opened the range during integrated government, and then proceeded to close the range with a vengeance after Redemption. There is no neutral story of economic development that conforms to reversals that follow the exclusion and inclusion of blacks on the voter rolls and in government.

The actual mechanics of the closing of the range are extraordinary complicated. The closing of the range proceeded through a mix of local option, legislative fiat, and the creation of new administrative units. In some states, the local option meant county or sub-county voting, elsewhere unelected local elites decided for the county. When the closed range was put to a ballot, sometimes voting was limited to landowners; however, sometimes all voters could participate. Legislative fiat took a variety of forms,

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[344] Works Projects Admin., 2 Slave Narratives: Arkansas Part 5, at 103 (1941).

[345] *Gurley's Notes and Comments*, HUNTSVILLE GAZETTE, Mar. 7, 1885, at 3.

[346] King treats a county as closed range if any part of the county were closed. KING, *supra* note 328, at 64.

even within the same legislative session. State legislatures created new administrative units, operating in parallel with local government. Each new administrative unit followed its enabling legislation, which was often amended, sometimes every year.

The result of all these changes is that each state might see many changes each year and the region, as a whole, saw dozens of changes every year between the end of the Civil War and the end of the century. Also, the statutes took many forms, but the objective and the result were identical. For example, the Alabama legislature declared that livestock could not "run at large" in one county in 1866.[347] In the same legislative session, another statute closed the range in two other counties by declaring all property boundaries to be lawful fences, whether fenced or not.[348] Two years later, Alabama closed the range in another county a third way, suspending the portions of the state code that dealt with the open range and then specifying penalties for roaming livestock.[349] Thus, a complete treatment is beyond the patience of any reader. The following sections aim to summarize the most salient changes.

The following two sections describe the closing of the range across the southern states. In many states, the evidence is quite clear. The range was closed to harm black people and benefit white landowners. No other explanation fits the timing and geographical pattern. But, the southern states were not monolithic. Black people were not spread evenly across the region; many parts of the South had few plantations and even fewer black people. In several states, the evidence is either lacking or conflicting. It may be that state legislatures or local government closed the range to harm black people, but there is no way to know given the almost complete lack of legislative histories and scant newspaper reporting. In some states, there are aspects of the closing of the range that suggest a racial motivation, while other aspects suggest some other

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[347] Act of Dec. 3, 1866, § 1, 1866–67 Ala. Laws 46, 46 (closing the range in part of Dallas County between February 15 and December 25). In 1870, Dallas County was 79 percent black, while only 48 percent of Alabamians were black.

[348] Act of Feb. 19, 1867, 1866–67 Ala. Laws 586, 586 (declaring property boundaries to be lawful fences in Pickens and Sumter Counties). In 1870, Pickens County was 54 percent black, while Sumter County was 78 percent black. Overall, 48 percent of Alabamians were black.

[349] Act of Dec. 29, 1868, § 1, 1868 Ala. Laws 473 (closing the range in Greene County). Greene County was 79 percent black in 1870.

motivation. In other parts of the United States, states were closing the range for reasons that had nothing to do with race.[350]

1. States Where the Evidence is Unambiguous

In Alabama, Arkansas, Georgia, Mississippi, South Carolina, and Virginia, the closing of the range was motivated by race. Alabama and Mississippi deserve particular attention because of the breadth of their legislative activity. Historians have devoted more attention to closing the range in Georgia than elsewhere in the southern states.[351] A comparison of the lawmaking in this Article and that reported by historians suggests that Georgia was not representative of the region, since its history combined elements of planter-dominated states, like Alabama, Mississippi, and South Carolina, with states with more poor whites, like Tennessee.

Alabama and Mississippi show the full diversity of closed range lawmaking. Mississippi closed the range in nine counties in 1866.[352] The following year, Mississippi closed the range in one more county, one that was two-thirds black.[353] Alabama got a slower start. In 1866, the Alabama legislature closed the range in part of one disproportionately-black county.[354] Both states also authorized specified counties to close the range. In 1865, Mississippi authorized local government in Hinds County to close the range in any township, upon application of a majority of the voters.[355] A single county could be subject to both legislative fiat

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[350] Sawers, *Exclude*, *supra* note 8, at 679–83.

[351] Two counties have received the lion's share of the attention. *See* HAHN, ROOTS *supra* note 37 (arguing planters and merchants strove to close the range), *but see* KANTOR, *supra* note 303 (arguing that farmers closed the range to promote economic efficiency).

[352] Act of Oct. 26, 1866, 1866 Miss. Laws 141 (allowing Adams, Holmes, Jefferson, Lowndes, Madison, Oktibbeha, and Yazoo Counties to close the range); Act of Oct. 26, 1866, 1866 Miss. Laws 163 (creating Wahalak Agricultural District in Kemper County); Act of Oct. 23, 1866, 1866 Miss. Laws 200 (closing Noxubee County)

[353] Act of Jan. 31, 1867, 1867 Miss. Laws 259 (closing the range in Warren County). Overall, 54 percent of Mississippians were black in 1870.

[354] Act of Dec. 3, 1866, 1866–67 Ala. Laws 46 (closing the range in part of Dallas County between February 15 and December 25). In 1870, Dallas County was 79 percent black, while only 48 percent of Alabamians were black.

[355] Act of Nov. 29, 1865, 1865 Miss. Laws 289 (allowing the Board of Police to close the range in any township in Hinds County after application by a majority of the legal

and local option at different times. In Warren County, Mississippi, the legislature closed the range in 1867, but allowed a local ballot in 1877.[356]

Both Alabama and Mississippi created agricultural districts, the purpose of which was to hold a ballot and then enforce the closed range. In 1866, Alabama created the Cane-brake Agricultural District, including parts of four counties, all at least 70 percent black.[357] Initially, only whites could vote, but even after all landowners could vote in 1872, the practical result was the same since so few blacks owned land.[358] Alabama created nine more agricultural districts before 1900.[359] Like Alabama, Mississippi created an agricultural district in 1866 to close the range, limiting voting to white landowners.[360]

In Georgia, closing the range proceeded more slowly. The year that Georgia was Redeemed, the legislature authorized each county to close the range.[361] Reflecting the power of poor whites, the local ballot was open to all voters, not just landowners.[362] In the decade

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voters). Blacks could not vote in Mississippi in 1865. Hinds County was 67 percent black in 1870.

[356] Act of Jan. 31, 1867, 1867 Miss. Laws 259 (closing the range); Act of Jan. 22, 1877, 1877 Miss. Laws 203 (allowing voters to close the range in all or part of the county). After 1875, black Mississippians were often prevented from voting. In 1870, 70 percent of Warren County residents were black.

[357] Act of Feb. 20, 1866, §1, 1865–66 Ala. Laws 334, 334. In 1870, Dallas and Greene Counties were 79 percent black, Marengo County was 77 percent black, while Perry County was merely 71 percent black. Overall, 48 percent of Alabamians were black.

[358] Act of Feb. 20, 1866, § 4, 1865-66 Ala. Laws 334, 335 (limiting voting to white male resident landowners); *amended by* Act of Jan. 2, 1872, § 4, 1871-72 Ala. Laws 335, 337 (allowing all male resident landowners to vote).

[359] KING, *supra* note 328, at 53, 58.

[360] Act of Oct. 26, 1866, 1866-67 Miss. Laws 163 (creating Wahalak Agricultural District in Kemper County). In 1870, Kemper County was 56 percent black.

[361] Act of Aug. 26, 1872, § 7, 1872 Ga. Laws 34, 36 (codified at GA. CODE §§ 1449–55 (1873)).

[362] In 1870, a coalition of black and upcountry interests defeated a similar bill. FONER, RECONSTRUCTION, *supra* note 90, at 373. Like elsewhere, planters wanted to limit voting to "freeholders of the county." KING, *supra* note 328, at 57 (quoting a planter with landholdings in both Alabama and Georgia); *see also* Hahn, *Common Rights*, *supra* note 16, at 48; FLYNN, *supra* note 104, at 133. The Georgia legislature considered a bill in 1891, but did not pass it. Shawn Everett Kantor & J. Morgan Kousser, *Common Sense or Commonwealth? The Fence Law and Institutional Change in the Postbellum South*, 59 J. S. HIST. 201, 224 & n.106 (1993).

following 1872, only a dozen counties closed the range.[363] Those seeking to close the range were often frustrated and returned to the legislature. In response, the legislature allowed voting in sub-county districts and closed some areas by fiat. In 1881, the legislature authorized closing the range in each militia district.[364] Since convincing the entire county to support a closed range had been difficult, the hope was that voting on a smaller scale would permit more areas to close the range.

By 1889, part or all of forty-four of the sixty-four counties in the Black Belt had a closed range. In more than half of these, the legislature had intervened to close the range after voters chose to keep the range open.[365] Elsewhere, the legislature had closed the range by fiat in only three counties. By 1889, the state legislature had closed 22 militia districts by fiat.[366] In total, the state legislature closed 14 counties, and militia districts in another 16 counties by 1890.[367]

South Carolina closed the range during Presidential Reconstruction and again after Redemption, but not during integrated government. In 1866, the legislature closed the range on four islands with large black populations.[368] In the first legislative session following Redemption, South Carolina's legislature granted most counties (and districts within the counties) the option to close the range.[369] If a county or district closed the range, landlords could not allow their sharecroppers to keep more than two head of

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[363] Shawn Everett Kantor, *Property Rights and the Dynamics of Institutional Change: The Closing of the Georgia Open Range, 1870–1900*, 52 J. ECON. HIST. 456, 457 (1992).

[364] Act of Sept. 29, 1881, 1880–81 Ga. Laws 79, 79-80.

[365] FLYNN, *supra* note 104, at 136. *E.g.*, Act of Sept. 28, 1881, 1880–81 Ga. Acts 645 (closing Putnam County); Act of Sept. 29, 1881, 1880–81 Ga. Acts 648 (closing Monroe County); Act of Sept. 29, 1881, 1880–81 Ga. Acts 647 (closing a part of Screven County). In 1880, Monroe County was 64 percent black, Putnam County was 76 percent black, while Screven County was only 52 percent black. Overall, 47 percent of Georgians were black.

[366] FLYNN, *supra* note 104, at 136, 180.

[367] KANTOR, *supra* note 303, at 71.

[368] Act of Dec. 20, 1866, § 1, 1866 S.C. Acts 414, 414 (closing the range on Edisto, John's, James, and Wadmalaw Islands). These islands lay along the coast south of Charleston.

[369] Act of June 7, 1877, 1877 S.C. Acts 251, 251–54 (excluding Horry, Colleton, Beaufort, Charleston, Williamsburg, and Georgetown Counties). The following year four more counties were excluded. Act of Dec. 23, 1878, 1878 S.C. Acts 746, 746 (excluding Marion, Darlington, Spartanburg, and Aiken Counties)

livestock.[370] The following year, the legislature closed the range in four black-majority counties.[371] In 1881, South Carolina was the first southern state to close the range state-wide.[372] As before the war, South Carolina was the bastion of planter power.[373]

In Arkansas, the racial disparity between the open and closed range is particularly stark. In 1875, a Redeemed legislature closed the range in parts of Lee and Phillips counties.[374] While only a quarter of Arkansans were black, 74 percent of Phillips County was black and 69 percent of Lee County.[375]

Virginia enacted a local option scheme, similar to the local option hunting trespass law the legislature had enacted a fortnight earlier. In January 1866, Virginia allowed the justices of the county court to close the range.[376] As noted before, the justices of the county court were not elected, instead new justices were chosen by the existing members of the court. The county with the largest black population closed the range at its first county court session after the new law.[377] By 1871, most of Virginia's plantation counties had closed the range.[378]

During Congressional Reconstruction, black voters were able to force a re-opening of the range. In Alabama, the "dissatisfaction among the negroes" in the Black Belt led to repeal.[379] The legislature re-opened the range in Dallas and Limestone

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[370] Act of June 7, 1877, § 8, 1877 S.C. Acts 251, 253.

[371] Act of Dec. 14, 1878, § 1, 1878 S.C. Acts 689, 689 (closing Abbeville, Newberry, Laurens, and Union Counties). The share of the population that was black in 1880 was: Abbeville County - 68 percent, Newberry County - 69 percent, Laurens County - 60 percent, and Union County - 56 percent. Overall, 61 percent of South Carolinians were black in 1880.

[372] Act of Dec. 20, 1881, 1881–82 S.C. Acts 591, 591-92.

[373] THOMAS HOLT, BLACK OVER WHITE: NEGRO POLITICAL LEADERSHIP IN SOUTH CAROLINA DURING RECONSTRUCTION 190 & n.57 (1977) (Democratic support was uniform, so Holt used the roll call vote as a conservative baseline in his study of South Carolina politics).

[374] Act of Dec. 15, 1875, 1875 Ark. Acts 185, 185-86.

[375] Since Lee County was created after 1870, these figures are from 1880.

[376] Act of Jan. 26, 1866, 1865–66 Va. Acts 203, 203-04. Accomack County was excepted. *Id.* § 5. Earlier laws in Prince William, Fairfax, and Arlington Counties were repealed. *Id.* § 6.

[377] Nottoway CCOB 1, reel 20 (May 3, 1866), 55.

[378] Sam Weller, Letter to the Editor, dated Nov. 1871, 3 S. FARM & HOME 52–53 (Dec. 1871).

[379] FONER, RECONSTRUCTION, *supra* note 90, at 373.

Counties.[380] In two other counties, the legislatures re-opened part of the closed range.[381] Lastly, the legislature repealed a statute authorizing landowners to impound livestock found running at large or damaging crops in Montgomery County.[382] The effect of this repeal was to allow livestock to roam free, since landowners had no recourse. In Mississippi, the Republican legislature re-opened the range in four counties and part of a fifth.[383] At the very end of Congressional Reconstruction, the Wahalak Agricultural District was abolished, which re-opened the range in those counties.[384]

During Congressional Reconstruction, state government was integrated, but more importantly local government was integrated. Republican control of local government meant that sympathetic sheriffs refused to enforce the closed range laws that were not repealed. Elected judges would not alienate broad swathes of the electorate by enforcing the closed range. Lastly, integrated government meant integrated juries, where both poor white and blacks were represented, making recovery nearly impossible. The result was that unrepealed closed range laws went unenforced during Congressional Reconstruction.[385] A former Confederate soldier and planter from Sumter County, Alabama complained that a "black and tan jury" would always find for the livestock owner.[386]

2. States Where the Evidence is Less Clear

While race explains the closing of the range in six southern states, race explains little in the others. Texas and Florida were

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[380] Act of Dec. 3, 1866, § 1, 1866–67 Ala. Laws 46, 46 (closing Dallas County), *repealed by* Act of Mar. 9, 1871, 1870–71 Ala. Laws 93, 93; Act of Mar. 6, 1871, 1870–71 Ala. Laws 97, 97 (repealing the closure of Limestone County). Dallas County was 79 percent black, while Limestone County was 49 percent.

[381] Act of Feb. 18, 1871, 1870–71 Ala. Laws 94, 94 (re-opening part of Greene County); Act of Apr. 8, 1873, § 1, 1872–73 Ala. Laws 248, 248 (re-opening part of Lowndes County). Both counties were four-fifths black in 1870.

[382] Act of Mar. 28, 1873, 1872–73 Ala. Laws 267, 267.

[383] Act of Mar. 28, 1872, 1872 Miss. Laws 210, 210 (re-opening DeSoto and Holmes Counties); Act of Apr. 9, 1873, 1873 Miss. Laws 200, 200 (re-opening Madison County); Act of Apr. 9, 1873, 1873 Miss. Laws 200, 200-01 (re-opening Lowndes county); Act of Act of Mar. 25, 1872, 1872 Miss. Laws 207, 207-08 (re-opening part of Warren County).

[384] Act of Feb. 12, 1875, 1875 Miss. Laws 111, 111 (repealing the statute authorizing the establishment of Wahalak Agricultural District).

[385] Hahn, *Common Rights*, *supra* note 16, at 48.

[386] Ex. Confed., Letter to the Editor, dated May 1870, 28 S. CULTIVATOR 203 (1871).

only partly settled in the early postbellum and closed the range many decades after the war. Only west Tennessee had plantation agriculture, east Tennessee was hilly, Unionist, and white. In Louisiana, the local option already existed.

In Tennessee, the evidence is mixed. Firstly, Tennessee did not close the range in any county until 1895, almost thirty years after Redemption. When Tennessee finally acted, the oddity of its approach suggests that race may have played a role. Instead of the local option or closing named counties, Tennessee used an algorithm. The range was closed in counties with between 30,000 and 34,000 residents or more than 55,000 residents in the 1890 or any subsequent census.[387] Three counties had populations larger than 55,000, and only one county had a population between 30,000 and 34,000. These counties had a mean black population of 40 percent, compared with 16 percent for the remaining 92 counties. The carve-in for Madison County (population 30,497) is particularly suspicious since 48 percent of the county was black compared with only a quarter of the state population. Two years later, the legislature redesigned the algorithm, closing the range in counties with a population larger than 59,000.[388] In the same session, the legislature closed the range in three counties with large black populations.[389]

In 1873, Texas was Redeemed and passed its first closed range statute, suggesting a link. Texas closed the range only to hogs, goats, and sheep in ninety-one counties, while horned cattle and horses continued to run at large; sixty-six counties remained entirely open range.[390] But, there is no apparent racial disparity between the open and closed range counties.[391] Three years later, the voters in every county were authorized to vote on whether to

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[387] Act of May 14, 1895, § 1, 1895 Tenn. Pub. Acts 380, 380.

[388] Act of Mar. 17, 1899, 1899 Tenn. Pub. Acts 33, 33. In 1900, four counties had populations larger than 59,000.

[389] Act of Apr. 6, 1899, 1899 Tenn. Pub. Acts 276, 276 (closing Fayette County); Act of Apr. 7, 1899, 1899 Tenn. Pub. Acts 849, 849 (closing Tipton County); Act of Apr. 17, 1899, 1899 Tenn. Pub. Acts 986, 986 (closing Lauderdale County). Only a quarter of Tennesseans were black, over half of the residents of these counties were.

[390] Act of May 16, 1873, §§ 4, 9, 1873 Tex. Gen. Laws 76, 76-79.

[391] In the 19th century, the census did not separately tabulate the Chicano population, so that comparison cannot be made.

close the range to hogs, goats, and sheep.[392] In 1899, Texas allowed certain counties to close the range to cattle and horses.[393]

In Florida, there is little evidence of a racial motivation. In Florida, an integrated legislature reinforced the open range by making it a misdemeanor to harm livestock even grazing on fenced land, if the fence was deficient.[394] But, the end of integrated government did not produce much closed range lawmaking. Between Redemption and 1900, the state legislature only closed parts of two counties.[395]

Louisiana had authorized parishes to close the range in 1825.[396] Drafted during Congressional Reconstruction, the Revised Statutes maintained the local option.[397] Investors with capital and strong connections to New Orleans banks had replaced the pre-war sugar planters. Unlike planters elsewhere, the new sugar planters could pay wages in cash, while maintained expensive machinery and irrigation.[398] Where planters had the means and inclination to pay market wages, there was less need for legal coercion. Until the parish records have been studied, however, it is impossible to say whether local government closed the range in response to emancipation.

Race does a poor job of explaining the closing of the range in North Carolina. In the ten years following Redemption, North Carolina legislated a dozen times, either closing counties (or parts

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[392] Act of Aug. 15, 1876, 1876 Tex. Gen. Laws 150, 150, *amended by* Act of Mar. 26, 1879, 1879 Tex. Gen. Laws 66, 67 (excluding four counties).

[393] Act of May 20, 1899, 1899 Tex. Gen. Laws 220, 220.

[394] Act of Jan. 27, 1871, 1871 Fla. Laws 35, 35.

[395] Act of May 31, 1889, 1889 Fla. Laws 177 (closing part of Leon County); Act of Jun. 2, 1897, 1897 Fla. Laws 150 (closing part of Dade County). The state capital and largest city were in Leon county, suggesting the motivation may be urbanization.

[396] Act of Feb. 2, 1825, § 3, 1824 La. Acts 62, 64.

[397] La. Rev. Stat. § 2743 (1870). Parishes retain the power to open or close the range. La. Rev. Stat. § 33:1236.

[398] As before, the workers were provided a garden plot. FONER, RECONSTRUCTION, *supra* note 90, at 399, 402.

of counties) directly or allowing voters to close the range. While some statutes do show a racial pattern,[399] others do not.[400]

The southern states were not monolithic, so it would be surprising if every state closed the range in response to emancipation. On the thinly-settled periphery, closing the range would have been very costly, given the few acres under cultivation. Scarce labor meant high wages, so planters' priority was importing labor form elsewhere.

CONCLUSION

This Article uncovers a lost history of property, showing the role that race and white supremacy played in the development of modern trespass law. Property law does not change in response to economic opportunities, evolving to ever-more efficiency. Instead, property law reflects political power. At times, the political process may reorient property law to produce a larger surplus. Oftentimes, politics produce redistribution from the weak to the powerful. States closed the range to coerce blacks into working for white landowners for low wages and under bad conditions. Southern society as a whole suffered from the planter's greed. Low wages and cruel laws impoverished not only black and white sharecroppers, but the entire region. Changing property law was a core element of the program of legal aggression that began with the black codes and continued with Jim Crow.

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[399] In 1873, North Carolina allowed voters in five counties to close the range. Act of Mar. 3, 1873, 1872–73 N.C. Sess. Laws 314, 315. Those counties had a third more black residents than the 85 counties not included.

[400] In 1879, for example, twenty counties were authorized to close the range. Act of Mar. 7, 1879, 1879 N.C. Sess. Laws 252, 252. Those twenty counties were slightly whiter than those not authorized or the state as a whole.

TABLE 1: RECONSTRUCTION, REDEMPTION, AND POPULATION

	Integrated Government	Re-admission	Redemption	Black Population	
				1870	1880
Alabama	1868	1868	1874	48	48
Arkansas	1868	1868	1874	25	26
Florida	1868	1868	1877	49	47
Georgia	1868	1870	1871	46	47
Louisiana	1868	1868	1877	50	51
Mississippi	1868	1870	1876	54	57
North Carolina	1868	1868	1870	37	38
South Carolina	1868	1868	1876	59	61
Tennessee		1866	1869	26	26
Texas	1868	1870	1873	31	25
Virginia		1870	1869	42	42

Notes:

Integrated Government lists the first legislature session where blacks and whites served.

When a state's representatives were re-admitted to Congress, military supervision ceased also.

The black population is given as a percentage of the state's population. Every census undercounts, but the 1870 census was less reliable than most, which means the black population could have been slightly larger than indicated.