Introduction

An Abolitionist Vision

James Govan Taliaferro (1798–1876) was an unlikely and unconventional abolitionist. A southerner by birth, he grew cotton and raised livestock on a plantation in Catahoula Parish, Louisiana – a rural "backwater" district west of Natchez, Mississippi. The forced labor of twenty-seven enslaved people made the plantation profitable, and they comprised a significant portion of Taliaferro's wealth. In the 1840s, he was an ardent Whig – a party of nationalist entrepreneurs and businessmen, professionals, and evangelical reformers – and he detested "lawlessness, violence, and demagoguery." The Whig Party collapsed in the 1850s, but Taliaferro remained a staunch nationalist. When eleven states voted to secede from the United States after the election of Abraham Lincoln in 1860, he called their Confederate States of America a "wretched oligarchy."[1]

[1] Peyton McCrary, *Abraham Lincoln and Reconstruction: The Louisiana Experiment* (Princeton: Princeton University Press, 1978), 59–60; Evelyn L. Wilson, "Louisiana Supreme Court Justices: Profiles of Three Reconstruction-Era Justices," *Louisiana Bar Journal* 61, no. 2 (September 2013): 100; Wynona Gillmore Mills, "James Govan Taliaferro (1798–1876): Louisiana Unionist and Scalawag" (MA thesis, Louisiana State University, 1968), 43; Kenneth Michael Stickney, "Silenced: The Abrupt Demise of Catahoula Parish's Unionist Newspaper" (MA thesis, University of Louisiana Monroe, 2007), 33, 114, 115–16; Charles Gayarre, ed., "In Memoriam: James G. Taliaferro," in *Reports of Cases Argued and Determined in the Supreme Court of Louisiana*, vol. 28 (New Orleans: F.F. Hansell, 1877); Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815–1848* (New York: Oxford University Press, 2007), 583.

Taliaferro's longstanding commitment to the Union eventually led him to take an active role in Reconstruction after the bloody Civil War (1861–1865) had upended his home state. At war's end, Taliaferro opposed the Thirteenth Amendment that prohibited enslavement and ran an unsuccessful campaign for governor of Louisiana on a platform against Black suffrage. The New Orleans Riots of 1866, however, convinced him that Louisiana was on a disastrous path backwards into barbarism, a sort of *status quo* antebellum with ex-Confederates in charge of the state.[2] Soon, Taliaferro was given an opportunity to help steer Louisiana toward a more modern and forward-looking approach. In 1867, he was appointed to the Louisiana Supreme Court as a newly minted Conservative Republican. As a judge, Taliaferro left an enduring mark. He sought to thoroughly overturn the legal rules that had supported slavery.

Taliaferro ultimately understood the end of slavery as a two-step process. He believed that the Emancipation Proclamation of 1863 and the Thirteenth Amendment of the U.S. Constitution, ratified in 1865, expressed "the will of the sovereign power." They eradicated slavery – root and stem. "The laws which had theretofore sustained the institution of slavery," he declared, "ceased to exist."[3] But Taliaferro came to realize that this was only the first step. Emancipation had destroyed the property relationship between slaveholders and those held in bondage, but it had not fully *abolished* slavery. The Fourteenth and Fifteenth Amendments, adopted in 1868 and 1870, respectively, took the next steps: They destroyed the remnants of slavery by granting equal legal rights and Black suffrage.[4] Moving forward, citizenship would be crucial for protecting and incorporating Black people into American society.[5] Together, Taliaferro maintained, the Reconstruction Amendments required the total demolition of slavery and laid the foundation for the construction of equal citizenship. This two-step conception, which paired the destruction of slavery with the construction of full legal rights, guided Taliaferro's work until his death in 1876.

[2] Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877* (New York: HarperCollins, 1988), 262–64; Philip D. Uzee, "The Beginnings of the Louisiana Republican Party," *Louisiana History* 12, no. 3 (Summer 1971): 197–211.
[3] *Wainwright v. Bridges* 19 La. Ann. 234 (1867), 238–39.
[4] Fifteenth Amendment questions were not raised in the cases under consideration here.
[5] W. E. B. Du Bois, *Black Reconstruction* (New York: The Free Press, 1935), 182.

Other judges shared Taliaferro's view. Thomas Peters had also owned enslaved people before the Civil War. Peters was elected to the Alabama Supreme Court in 1868 as a Republican, and had served in the state's constitutional convention.[6] Judge Henry Clay Caldwell grew up on the frontier, in what is now West Virginia, where he developed a "homespun populist philosophy and extreme sense of judicial fairness." Union military service led Caldwell to Arkansas, where he remained after Lincoln appointed him to the federal bench. He was known thereafter as a "die-hard Republican."[7] Mississippi justice Jonathan Tarbell was one of the few northerners to serve postbellum on a southern bench.[8] A native New Yorker, he had served as a brigadier general in the Union Army and worked with the reconstruction committee of Mississippi after moving to the state and becoming a planter in 1865.[9] His appointment to the Mississippi Supreme Court stirred controversy. Though he opposed the policies of congressional Radicals, he still reportedly ran a "loyal league" – a pro-Union interracial club – in the state.[10] A Democratic newspaper accused the moderate Republican "carpetbagger" of being a "briefless pettifogger." In a letter to Massachusetts representative George Boutwell, Tarbell described the outcry: His "county paper" encouraged residents to "catch" him and "give him a coat of feathers."[11] Despite the threats, Tarbell stayed on the bench and advocated for Black rights until 1880.

[6] Alabama Department of Archives and History, "Alabama's Supreme Court Chief Justices: Thomas M. Peters," May 7, 2010, www.archives.alabama.gov/judicial/peters.html.

[7] Richard S. Arnold and George C. Freeman III, "Judge Henry Clay Caldwell," *University of Arkansas at Little Rock Law Review* 23, no. 2 (2001): 317, 320, 324; American Council of Learned Societies, *Dictionary of American Biography*, ed. Allen Johnson, vol. 2 (New York: Scribner, 1929), 408.

[8] Though certainly not the only native northerner to serve as a judge in a southern court, most judges, even during Military Reconstruction, hailed from slave states.

[9] William Arba Ellis, ed., *Norwich University 1819–1911: Her History, Her Graduates, Her Roll of Honor*, vol. 2 (Montpelier, VT: The Capital City Press, 1911), 303–4; William C. Harris, "The Creed of the Carpetbaggers: The Case of Mississippi," *The Journal of Southern History* 40, no. 2 (May 1974): 206.

[10] Harris, "The Creed of the Carpetbaggers: The Case of Mississippi," 206–7; Franklin L. Riley, ed., *Publications of the Mississippi Historical Society*, vol. XIII (Oxford, MS: Mississippi Historical Society, 1913), 117. On loyal leagues, see Michael W. Fitzgerald, *The Union League Movement in the Deep South: Politics and Agricultural Change during Reconstruction* (Baton Rouge: Louisiana State University Press, 1989).

[11] Forrest Cooper, "Reconstruction in Scott County," in *Publications of the Mississippi Historical Society*, ed. Franklin L. Riley, vol. XIII (Oxford: University of Mississippi, 1913), 116–18.

The unappreciated novelty of the abolitionism expressed by Taliaferro and like-minded judges is its emphasis on the rules of private law (involving disputes between individuals), rather than (or only) on suffrage or national politics. Private legal rules – including those governing contracts, marriage, inheritance, property, and other personal relationships – had all accommodated slavery in significant ways. Even after the end of enslavement, private law doctrines and precedent thwarted freedpeople's incorporation into society. These judicial abolitionists aimed to eliminate slavery's continued influence on that law so that freedpeople could fully enjoy newly granted rights.

To that end, Taliaferro held that judges should not enforce antebellum contracts for the sale of enslaved people, which were remnants of slavery itself. Likewise, he urged his colleagues to interpret the new legal rights of freedpeople retroactively. For example, Taliaferro upheld a freedman's right to inherit from his father, despite the fact that his enslaved parents' inability to marry rendered him illegitimate. Recognizing such relationships would ensure that formerly enslaved people enjoyed private law protections equal to those accorded to freeborn Americans. In this way, abolitionist judges worked to support and advance the promises of liberty *and liberation* by recognizing the rights of citizens established in postbellum constitutional amendments and civil rights statutes. Their decisions, Taliaferro believed, would build the legal scaffolding necessary to ensure slavery's total annihilation and the inclusion of freedpeople into American society as full and equal members.

Nothing More than Freedom recovers their work, revealing a road not taken. With few exceptions, these judges were not products of northern Republican politics. Nor were they necessarily moved by any moral imperative against slavery, as Black and radical abolitionists had been before and after the war. Indeed, many antislavery judges – including Taliaferro – may very well have continued to own enslaved people had it not been for the ratification of the Thirteenth Amendment, and many did continue to harbor the common racist beliefs of their day. Instead, theirs was a peculiar abolitionism that was homegrown and unique. These judges were motivated by a firm commitment to the rule of law, and, specifically, to the Constitution as it had become, not as it was. After the mighty scourge of civil war, they saw the amelioration of proslavery doctrines that shaped everyday life as a fundamental

requirement of the Reconstruction Amendments, and they believed adherence to their provisions offered the only peaceful path to reconstructing southern life and law. But unlike many others – even Radicals in Congress – these judges understood that slavery's vestiges and freedpeople's rights were often addressed in the realm of private law and in spaces of private power. They were right, and they believed they were obligated to eradicate these residues.

Taliaferro and other post–Civil War abolitionist judges failed to realize their vision. Bondspeople had been freed, but not liberated. If they had succeeded, U.S. history might look very different. The harm inflicted on freedpeople, including illegal bondage, invalidations of family relationships, and loss of property, would have been minimized. And the suffering of their descendants, including the denial of wealth, exploitation of heirs' property, and proscriptions on marriage would not necessarily have become hallmarks of Black life. Abolition, in this sense, was a lost promise.

But it is crucial to tell this story, both for its immediate impact and because our understanding of Reconstruction and the onset of Jim Crow is incomplete without engaging with this legal history. Most important, by recovering the peculiar abolitionism of post–Civil War judges, we gain a much fuller account of the long and complex history of systemic racism. Abolition was (and still is) a process that is distinct from and takes place after the moment of emancipation. Abolition after the Civil War would have required legal change on a massive scale: the identification and eradication of slavery's vestiges in law and the creation and consistent maintenance of equal citizenship without regard to race or former status.

Individual acts of manumission had occurred throughout America's slave past, but neither these acts nor gradual emancipation regimes adopted in northern states ever challenged the racialized assumptions or threatened the structures that undergirded the peculiar institution. After the Civil War, however, the Thirteenth Amendment partly opened the door, by (at least) prohibiting the practice of slavery.[12] The Fourteenth and Fifteenth Amendments provided a clear path to

[12] Especially during the first years of Reconstruction, some believed the Thirteenth Amendment secured citizenship. See, e.g., *United States v. Rhodes* 27 F. Cas. 785 (No. 16,151) C.C. Ky. (1866).

equal citizenship. Reflecting on that promise some seventy years later, W. E. B. Du Bois captured the essence of the post-emancipation abolitionist project: "The abolition of slavery meant not simply abolition of legal ownership of the slave; it meant the uplift of slaves and their eventual incorporation into the body civil, politic, and social, of the United States."[13] From their different vantage points, Du Bois and antislavery judges agreed that abolition required the remaking of law and society in ways that dismantled slavery and allowed freedpeople both to shed the markers of their previous enslavement and assume the status of legal equality in all its dimensions. Abolition rested on a deeper, more complete understanding of the liberty guaranteed by the Reconstruction Amendments.

This book builds on and qualifies Du Bois' definition of abolition as it examines postwar jurisprudence. Antislavery judges did not inherit the same intellectual traditions or share the same ideologies or motivations as Du Bois, but their jurisprudence aligned with and defended abolitionism according to the terms DuBois defined decades later. Regardless of motivations, the acceptance of these judicial views would have facilitated Du Bois' ultimate goal for total political equality and social "uplift." Unlike Du Bois and others, however, these judges recognized that in quotidian and various ways, law disadvantaged freedpeople and distinguished them from those who had been born free. And as long as disadvantages and inequities based on former enslavement remained, they would continue to resonate in American jurisprudence.

The small and frequent encounters that generated legal disputes, it turns out, were every bit as important as the more dramatic and violent oppression that unfolded at the hands of the Ku Klux Klan and other vigilantes, the blatant disenfranchisement produced by Jim Crow laws, and debates over racial integration in national politics. But these smaller, private legal matters have remained just beyond our gaze. The lawsuits and decisions studied here illustrate the many ways that the legal system profoundly affected everyday life. Despite

[13] Du Bois, *Black Reconstruction*, 189. On the preceding page, Du Bois was equally blunt: "Slavery was not abolished even after the Thirteenth Amendment. There were four million freedmen and most of them on the same plantation, doing the same work that they did before emancipation, except as their work had been interrupted and changed by the upheaval of war."

the best efforts of abolitionist judges, the ordinary disputes and the legal doctrines that judges used to resolve them helped to perpetuate race-based oppression after emancipation. Adherence to antebellum contract doctrines, for example, limited the power of the Thirteenth Amendment. Similarly, litigation related to racially heterodox families became the model for limiting Black civil rights.

The failure of abolition in the nineteenth century ensured that racial inequality would remain endemic in American life and law. As a result, abolition theory has gained new traction in recent decades. Heeding Du Bois' call, the important work and theorizing of activists dedicated to abolition – including Angela Davis and Ruth Wilson Gilmore, and social movements such as Critical Resistance and Black Lives Matter – have renewed calls for "abolition democracy." They target "all systems of domination, exploitation, and oppression" in the name of abolition. They demand new measures to address the needs of those still ensnared by race-based inequality. In particular, they argue that the criminal justice system, which disproportionately polices, arrests, convicts, incarcerates, and executes people of color, is derived from the same racism and racist policies that supported slavery. Above all, they seek to demolish all manifestations of slavery and build just institutions to serve those who experience subjugation and race-based oppression.[14]

[14] Angela Y. Davis, *Abolition Democracy: Beyond Empire, Prisons, and Torture* (New York: Seven Stories Press, 2005), 93. Modern abolitionists identify prisons and the carceral state as particular sites of racial subjugation. They also target the inequities of racial capitalism, white supremacy, and patriarchy. "Manifesto for Abolition," *Abolition: A Journal of Insurgent Politics*, accessed August 27, 2020, https://abolitionjournal.org/frontpage/; Dylan Rodríguez, "Abolition as Praxis of Human Being: A Foreword," *Harvard Law Review* 132, no. 6 (2019): 1581, 1612; Patrisse Cullors, "Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability," *Harvard Law Review* 132, no. 6 (April 2019): 1684–94. See also Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2010); Amna A. Akbar, "Toward a Radical Imagination of Law," *New York University Law Review* 93, no. 3 (2018): 405–79; Joy James, *The New Abolitionists: (Neo)Slave Narratives and Contemporary Prison Writings* (Albany: State University Press of New York, 2005); Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* (Cambridge, MA: Harvard University Press, 2016); Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (Berkeley: University of California Press, 2007); The CR10 Publications Collective, *Abolition Now!* (Oakland, CA: AK Press, 2008).

These are laudable goals. But like Du Bois, today's abolitionists underestimate the breadth of the problem. They overlook critically important areas of private law, which perpetuate less obvious forms of racial subjugation. To "challenge the historical conditions" derived from human bondage and eradicate the "oppressive forms of state and cultural violence" used to maintain them, we must understand at a more granular level how and where slavery's remnants have endured, so long after emancipation.[15]

This book draws attention to the contingencies for abolition during Reconstruction; explores the unappreciated ways that private law interacted with constitutional interpretation to frustrate it; and, in the process, offers a new explanation for why the promises of Reconstruction have yet to be fulfilled and abolition remains incomplete. Twenty-first-century abolitionists must add to their important challenges the carceral state and criminal justice system, and deepen their analysis of the ways that political and economic inequities became pervasive within – and even constitutive of – American law and society.[16] Judicial decisions in Reconstruction-era private litigation – often between parties who were white – expose an overlooked site of state action that facilitated the institutionalization of race-based difference and anti-Blackness in American law, and then sustained the creation of new forms of racial subjugation. The fundamental tenets of those rulings, which circumscribed Black citizenship, tied whiteness to economic privilege, and restricted civil rights statutes, remain embedded in American jurisprudence.

Nothing More than Freedom examines everyday legal disputes to show how and where aspects of slavery survived emancipation. Between December 1865 – when the Thirteenth Amendment became part of the U.S. Constitution – and the formal end of Reconstruction in 1877, supreme courts in former slave states (states where slavery remained legal at the outbreak of the Civil War) decided some

[15] Dylan Rodríguez, "Abolition as Praxis of Human Being: A Foreword," *Harvard Law Review* 132, no. 6 (2019): 1581, 1612.

[16] Scholars in other fields, critical race theorists in particular, have been addressing the institutionalization of racism in the United States more fully. They have emphasized the way otherwise colorblind policies, such as housing policies and zoning practices, perpetuate racial inequality and shaped experiences of nonwhite people in legal settings.

700 cases related to slavery or the meaning of Black freedom.[17] The records of these lawsuits comprise an archive that traces the cautious beginnings and then lost promise of abolition in southern courts.[18] All involve attempts to define the meaning of freedom, and many reflect Black litigants' historical willingness to use the courts to secure freedom and civil rights. Most were private law matters, including contracts; family; estates; property; and, on occasion, labor. The select criminal lawsuits included in this study explicate issues raised in private litigation (especially about family, labor, and civil rights), and vice versa. Indeed, our understanding of many post-bellum crimes that historians have long interpreted, including those related to "miscegenation" and adultery and fornication, remain incomplete without this broader contextualization. These criminal suits intersect with and were constitutive of judicial conversations that took place in private law suits. All were crucial to daily life for freedpeople and could have supported a new definition of American liberty in the aftermath of the Civil War. Litigation initiated by or about freedpeople set the terms for private law and Black citizenship in the New South.[19]

[17] Reconstruction as a congressional policy ended in 1877. Other scholars identify different end dates to the era. See, e.g., Laura F. Edwards, *A Legal History of the Civil War and Reconstruction*, (New York: Cambridge University Press, 2015); Pamela Brandwein, *Rethinking the Judicial Settlement of Reconstruction* (New York: Cambridge University Press, 2011); Douglas R. Egerton, *The Wars of Reconstruction* (New York: Bloomsbury Press, 2014).

[18] This study relies on a database of cases compiled by the author. It includes all reported suits related to slavery heard by the supreme courts of states in which slavery was legal in 1861 (Confederate and border states). It also includes unreported cases found in archives.

[19] Focusing on appellate cases has benefits and drawbacks. Using records from appellate courts revealed the most important legal questions of the day that were heard in courts across the South. Rulings in such cases ultimately identified the ways that abolition would be circumscribed. Admittedly, however, cases that were not appealed could reveal much about the people of the post-emancipation South. Extant appellate court records often do not include materials from lower courts. Orders and petitions (sometimes preprinted forms filled in by a court reporter) remain, but depositions are scarce. Some historical voices, especially those of freedpeople who left few other records, were muffled or refracted through lawyers and judges. (Exceptionally, records from Louisiana include a great deal more than other state records. For example, they include the poignant words of mothers seeking legitimacy for their children as well as the angry complaints of those who had gambled on the slave economy and lost.)

The chapters that follow address the central questions raised in these cases. Some, including the next chapter, focus primarily on the effects of the Thirteenth Amendment on private law, while others assess judicial interpretations of the Fourteenth Amendment and federal civil rights statutes.[20] All analyze the ways decisions in post-emancipation cases inflicted lasting harm. In some instances, that harm was direct, affecting individuals and their family members – including descendants. In others, it was indirect, but nevertheless potent. Though more difficult to appreciate, some decisions, and the legal doctrines on which they were based, left elements of slavery and racism embedded in law and jurisprudence in subtle but dangerous ways. Whether the outcomes were felt mostly individually or festered more broadly, the vestiges of slavery shaped postbellum law and dashed prospects for abolition.

These cases are also a window onto the struggles faced by newly emancipated people and former slaveholders. Litigants recognized that judicial rulings could shape their lives; for example, a white family might lose the farm if debts owed for the purchase of slaves were not forgiven, a formerly enslaved Black child could inherit from his father, or a former slaveholder could marry the woman once considered his concubine. These particular suits reveal the stakes in law for those who emerged from the rubble of war.

Had the law followed the path that Taliaferro hoped it would, the process of abolition might have begun on solid legal footing. Instead, this book tells the story of how judges' rulings in private law undermined racial equality and reinscribed the vestiges of involuntary servitude. It begins with one of the most complex legal questions raised in state courts: whether contracts for the sale or hire of enslaved people retained their validity and enforceability after the Civil War. In these quieter corners of the legal system, slavery survived in legal doctrine and fatally compromised abolition.

[20] The Fifteenth Amendment, which granted suffrage to formerly enslaved men, did not become the focus of any of the litigation considered in this book.