A "MIXTURE OF RACE AND REFORM": THE MEMORY OF THE CIVIL WAR IN THE ALABAMA LEGAL MIND[1]

> We are sometimes asked in the name of patriotism to . . . remember with equal admiration those who struck at the nation's life, and those who struck to save it—those who fought for slavery and those who fought for liberty and justice. . . . [I]f this war is to be forgotten, I ask in the name of all things sacred what shall men remember?
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> —Frederick Douglass, Address at the Grave of the Unknown Dead, Arlington Virginia, May 30, 1871 (Memorial Day)[2]

> Never was there happier dependence of labor and capital on each other. The tempter came, like the serpent of Eden, and decoyed them with the magic word of "freedom" . . . He put arms in their hands, and trained their humble but emotional natures to deeds of violence and bloodshed, and sent them out to devastate their benefactors.
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> —Jefferson Davis, The Rise and Fall of the Confederate Government (1881)[3]

Nearly every town square in Alabama contains a statue of a Confederate soldier, but these are not the only monuments to the war that exist in the state. The volumes of the *Alabama Reports* in the decades following the war contain mental monuments, created by the ever-present memory of the Civil War.[4] In the last decades of the nineteenth century, the justices of the Alabama Supreme Court employed both their individual memories and a developing collective memory in the interpretation of laws involving contract and property disputes, the identity of former slaves, marriage laws, and questions surrounding equal protection.

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1. The quotation in the title and those following are taken from MICHAEL PERMAN, STRUGGLE FOR MASTERY: DISFRANCHISEMENT IN THE SOUTH, 1888-1908 (2001).

2. *Id.* at 181.

3. *Id.* at 280.

4. For an interesting analysis of the role monuments play in public life, see STANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES (1998).

As historian David W. Blight details in *Race and Reunion: The Civil War in American Memory*, the "War Between the States" left an indelible mark on nearly every aspect of American life during the fifty years following the war.[5] From Memorial Day observations during Reconstruction[6] to the "Lost Cause" mythology that developed in Southern states in the late nineteenth century,[7] the way in which Americans chose to remember the Civil War had a deep and lasting impact on regional, social, political, and—most significantly—racial divisions.

While Blight explores Civil War memory in the larger American landscape in terms of military observances, literature, and politics—all with the undertones of how racial identity and division developed throughout this period[8]—his approach invites another exploration: how American legal thought reflects the memory of the Civil War. Many veterans of the war went on to serve their communities as lawyers and judges;[9] new legal issues involving equal protection and the abolition of slavery arose out of the war;[10] and states created and interpreted their own statutes and constitutions in a different light after the war.[11] While many volumes have been written on the effect of the Reconstruction Amendments on legal thought,[12] scholars have not previously explored the role that the memory of the Civil War and the antebellum slave system played on legal development. This Comment focuses specifically on how the memory of the Civil War affected the legal system in Alabama.[13] It will examine how questions involving the legality

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5. DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY (2001) [hereinafter BLIGHT, RACE AND REUNION]. Blight and other historians have continued to explore this theme of memory and how it impacts our understanding of pivotal events such as the Civil War. *See, e.g.*, DAVID W. BLIGHT, BEYOND THE BATTLEFIELD: RACE, MEMORY, AND THE AMERICAN CIVIL WAR (2002); ALICE FAHS, THE IMAGINED CIVIL WAR: POPULAR LITERATURE OF THE NORTH AND SOUTH, 1861-1865 (2003); PAUL A. SHACKEL, MEMORY IN BLACK AND WHITE: RACE, COMMEMORATION, AND THE POST-BELLUM LANDSCAPE (2003); JIM WEEKS, GETTYSBURG: MEMORY, MARKET, AND AN AMERICAN SHRINE (2003).

6. *See* BLIGHT, RACE AND REUNION, *supra* note 5, at 65.

7. *See, e.g.*, WILLIAM C. DAVIS, THE CAUSE LOST: MYTHS AND REALITIES OF THE CONFEDERACY (1996); GAINES M. FOSTER, GHOSTS OF THE CONFEDERACY: DEFEAT, THE LOST CAUSE, AND THE EMERGENCE OF THE NEW SOUTH, 1865 TO 1913 (1987); THE MYTH OF THE LOST CAUSE AND CIVIL WAR HISTORY (Gary W. Gallagher & Alan T. Nolan eds., 2000); CHARLES REAGAN WILSON, BAPTIZED IN BLOOD: THE RELIGION OF THE LOST CAUSE, 1865-1920 (1980).

8. *See* BLIGHT, RACE AND REUNION, *supra* note 5.

9. WILLIAM WARREN ROGERS ET AL., ALABAMA: THE HISTORY OF A DEEP SOUTH STATE 231 (1994).

10. *Id.* at 235.

11. J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910 19 (1974).

12. *See, e.g.*, MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION, 1863-1869 (1974); Robert J. Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of* Runyon v. McCrary, 98 YALE L.J. 565 (1989); Randall Kennedy, *Reconstruction and the Politics of Scholarship*, 98 YALE L.J. 521 (1989) (book review).

13. One could, obviously, make much of the relationship between the memory of the Civil War and American legal thought more generally, such as the Supreme Court Justices' memories of war, and the way these memories shaped their understanding of African-Americans, Southerners and Northerners, the relationship of the state to individuals, and of the states to the federal government. Surely memories of the war influenced landmark cases such as the *Civil Rights Cases*, 109 U.S. 3 (1883), and *Plessy v.*

of the Confederacy, contract and property disputes involving slaves, equal protection, and anti-miscegenation laws were interpreted in Alabama courts during and after the war. This analysis is limited to the years of 1861 to 1901, encompassing the Civil War and the ratification of Alabama's 1901 Constitution.

I. SETTING THE SCENE: ALABAMA'S POLITICAL AND LEGISLATIVE HISTORY

Historian Robert J. Norrell notes, "[t]he state judiciary in Alabama has historically been tied closely to the will of its powerful people. . . . The Alabama political culture continually has celebrated the efficacy of the popular majority and has extended the majority's authority over the judiciary."[14] In order to understand the judicial decisions that came out of late nineteenth-century Alabama courts, one must first understand the political backdrop of the era—and the era's legislative and constitutional decisions. The state's judges interpreted these legislative and constitutional provisions to reflect the will of the state's majority population. As the details of this period are recounted, the Civil War's unquestionably large role in shaping the cultural and social understandings underlying the state's powerful political alliances becomes apparent.

A. Secession and Civil War

In 1860, as tensions mounted between northern and southern states, the crisis over secession in Alabama reached a critical point.[15] In December 1860, the governor called for a statewide convention on the issue, and delegates were elected from every county.[16] Following the already-existing geographical divisions in the state, northern Alabama elected almost all non-secessionist delegates, and the southern counties elected delegates in favor of secession.[17] Despite their differences in opinion on secession, the delegates were a rather homogenous group.[18] Most of them were middle-aged men, either lawyers or planters.[19] Seventy-nine out of the one hundred delegates were slaveowners.[20] Overall, they were wealthy white men, and the secessionists were slightly more affluent than the others, since they repre-

Ferguson, 163 U.S. 537 (1896). Many legal historians address parts of these questions, but few place the memory of the war at the center of their analysis. *See, e.g.*, Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992 (2003).

14. Robert J. Norrell, *Law in a White Man's Democracy: A History of the Alabama State Judiciary*, 32 CUMB. L. REV. 135, 135 (2001-2002).

15. ROGERS ET AL., *supra* note 9, at 183.

16. *Id.*

17. *Id.*

18. *Id.* at 184.

19. *Id.*

20. *Id.*

sented the rich agricultural regions of central and south Alabama.[21] A vote was held in Montgomery on January 11, 1861, and the convention delegates voted for secession by a margin of 61-39.[22] Next, the delegates revised the state constitution to reflect Alabama's change in status and the elimination of federal power over the state.[23]

As the trend of secession continued across the South, southern states began to organize; the first meeting of the Confederate states was held in Montgomery in February of 1861.[24] Jefferson Davis was elected to be the leader of the Confederacy,[25] and Montgomery continued to serve as the capital of the Confederacy for the next few months.[26] In April of 1861, the military conflict officially began with the attack on Fort Sumter, just off the coast of South Carolina,[27] and in May the capital was moved from Montgomery to the older and more powerful location of Richmond, Virginia.[28]

Alabama's largest contribution to the war came in the form of manpower.[29] About 127,000 white males in the state were eligible for military duty during the four years of the war, and between 90,000 and 100,000 actually served in the Confederate military.[30] During the war years of 1861-1865, nearly everyone in the state suffered incredible hardship—from the soldiers on the battlefields to the men, women, and children left behind to keep homes, farms, and businesses running.[31] By the war's end in 1865, "Alabama society had collapsed under the strain of wartime conditions."[32] Money was scarce; schools, churches, and newspapers had closed; cotton was destroyed; the slave-labor system had broken down; and people struggled to find food and shelter, to bury their dead, and to cope with the immense losses wrought by the war as the remains of their state smoldered in the aftermath of defeat.[33]

B. The Reconstruction Years

David Blight describes Reconstruction as:

> [O]ne long referendum on the meaning and memory of the verdict at Appomattox. . . . During Reconstruction, many Americans increasingly realized that remembering the war, even the hatreds and deaths on a hundred battlefields—facing all those graves on Memo-

21. *Id.*
22. *Id.*
23. *Id.* at 188.
24. *Id.* at 189.
25. *Id.*
26. *Id.* at 192.
27. *Id.* at 193.
28. *Id.* at 192.
29. *Id.* at 197.
30. *Id.*
31. *See id.* at 198-222.
32. *Id.* at 222.
33. *Id.*

> rial Day—became, with time, easier than struggling over the enduring ideas for which those battles had been fought.[34]

In 1865, Alabama, like other former Confederate states, had to face a drastic transition in the midst of considerable chaos. In 1861, nearly half of the state's population were slaves; in 1865, they were—at least in name—free citizens.[35] Emancipation was a major victory in the struggle for black civil rights, but it was also a significant economic loss for Alabama. The state lost $200 million in capital investments when slavery was abolished.[36] In addition to coping with this economic crisis, the citizens of Alabama faced the indignity of occupation by federal troops immediately following the war.[37] Republicans at the national level controlled the beginning reconstruction efforts—including appointing provisional governors to southern states and implementing procedures by which the former Confederate states could regain official statehood status in the Union.[38] In the immediate aftermath of the war, "white Southerners faced utter defeat as perhaps no other Americans ever have."[39]

While federal rule may have been tolerated in Alabama, it was certainly not welcomed. According to Alabama historians William Warren Rogers and Robert David Ward, "Alabama accepted the war's political verdict but rejected its social judgment. It built a postbellum society in the incredible likeness of what had gone before. It did not accept the idea or the law that blacks were free and equal and independent citizens."[40] Blight notes that, during these years, a "struggle ensued not only over whose understanding of the Civil War would determine the character of Reconstruction, but also over whose definition of regeneration would prevail in the emerging political culture of the postwar era."[41] In August of 1865, Alabamians elected delegates to a state constitutional convention in order to rewrite the constitution to reflect the political changes of the war and to define their own postwar political culture.[42] Of the ninety-nine delegates elected, thirty-three were lawyers.[43] The delegates accepted the reality that slavery had been abolished in the state, but refused to further acknowledge the rights of black citizens.[44] A group of blacks from Mobile submitted a petition asking for the right to vote, but the convention decided unanimously to table the issue.[45] This fear of putting political power into the hands of black voters

34. BLIGHT, RACE AND REUNION, *supra* note 5, at 31.
35. ROGERS ET AL., *supra* note 9, at 227.
36. *Id.* at 228-29.
37. *Id.*at 229.
38. *Id.* at 230-31.
39. BLIGHT, RACE AND REUNION, *supra* note 5, at 39.
40. ROGERS ET AL., *supra* note 9, at 226.
41. BLIGHT, RACE AND REUNION, *supra* note 5, at 32.
42. ROGERS ET AL., *supra* note 9, at 231.
43. *Id.*
44. *See id.* at 232.
45. *Id.*

would become "the basic political equation in Alabama until 1901."[46] Many blacks found themselves working under similar conditions after the war's end as they had before the war—as agricultural laborers on large farms.[47] The state's economic system remained agriculturally-based, and a need existed for plentiful and cheap labor.[48] In 1866, the Alabama legislature enacted a series of laws—collectively known as Alabama's "black code"—to regulate black citizens.[49] Laws concerning "vagrancy" (unemployment), "apprenticeships" (involuntary servitude), and high taxes on guns and knives were designed to maintain white power and control.[50] Rogers and Ward note that "[t]his early, in matters of race, Alabama legislators began the process of obscuring reality. It was not necessary for laws to spell out discrimination to be discriminatory."[51] The ways in which the laws were applied—or selectively applied—carried out the intent of the legislature.[52]

The status quo would not survive for long. It was at least temporarily interrupted, beginning in 1866, when the era known as "Radical Reconstruction" was ushered into the South.[53] In that year, Congress passed the Civil Rights Act and proposed the Fourteenth Amendment, guaranteeing equal protection to citizens of all states.[54] Under Radical Reconstruction, the "unreconstructed" states of the South were divided into military zones under the command of federal military officers.[55] States were required to hold constitutional conventions, to implement voting rights for newly-emancipated blacks, and to disfranchise former Confederate supporters.[56] Due to this reversal in voting rights, ninety-six out of one hundred delegates elected to the 1867 Alabama Constitutional Convention were Republicans, and eighteen were black.[57] The state accepted the rewritten constitution in 1868, the third since Alabama voted to secede.[58] According to historian Wayne Flynt, the 1868 Constitution reflected the change in political power and the ideals of emancipation and civil rights for blacks.[59] The "Reconstruction Constitution" provided for direct election of state judges by the people,[60] and between 1868 and 1874, the Republicans elected judges who were sympathetic to issues of equality for Alabama's black citizens.[61]

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46. *Id.*
47. *Id.* at 237.
48. *Id.*
49. *Id.* at 238.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 241.
54. *Id.*
55. *Id.*
56. *Id.* at 242.
57. *Id.* at 245.
58. *Id.* at 246-47.
59. Wayne Flynt, *Alabama's Shame: The Historical Origins of the 1901 Constitution*, 53 ALA. L. REV. 67, 68-69 (2001).
60. Norrell, *supra* note 14, at 137.
61. *Id.*

C. The Bourbon Democrats

Although Republicans retained political control of the state through the late 1860s and early 1870s, economic control remained in the hands of the wealthy Democratic landowners and planters.[62] Eight years after the beginning of Radical Reconstruction, the federal government had begun to loosen its grip on the South, and Alabama Democrats had not lost sight of the powerful role they once played in state politics.[63] As the 1874 elections approached, Democrats worked to regain control.[64] The Republicans began to divide along racial lines; black Republicans pushed for civil rights legislation, and white Republicans' racial prejudices simply ran too deep to tolerate the passage of such laws.[65] The climate of division among Republicans allowed the Democrats to regain control of state politics.[66] The years following the 1874 elections were known as the period of "Bourbon" Democrats, a reference to the House of Bourbon that was restored to power in France after the defeat of Napoleon.[67]

With a return to Democratic control, white Alabamians joined the majority populations of the other former Confederate states in embracing and perpetuating the myth of the "Lost Cause"—a view that interpreted the Southern defeat "as a victorious triumph of spirit and principle."[68] Rogers and Ward describe it this way:

> The myth of the Lost Cause opened with a picture of the beneficent life that slavery had brought. Next, the myth created an uncritical gospel of heroic sacrifice by Confederate soldiers and composed a litany of the indignities suffered under the "invading army." The triumphal climax came when Southerners gained redemption under the banner of the Democratic party and reclaimed the promised land.
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> . . . There was rarely a public admission, and never a consensus, that slavery was a vicious system of exploitation; almost never was there recognition that secession and war had produced not only heroes but an appalling and wasteful loss of life. . . . In the South and in Alabama, whites—always with exceptions and degrees of intensity, certitude, and conviction—built a regional identity based on pride, prejudice, and an abiding sense of persecution.[69]

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62. ROGERS ET AL., *supra* note 9, at 259-60.
63. *Id.* at 260.
64. *Id.*
65. *Id.* at 261.
66. *Id.* at 263-64.
67. *Id.* at 264.
68. *Id.* at 259.
69. *Id.* at 259-60.

This myth represented "an attitude toward the past"[70] rooted in the memory of the South's defeat. Blight points out the necessary racial implications of the Lost Cause mythology; he notes that no one could tell the "story of a heroic, victimized South without the images of faithful slaves and benevolent masters."[71] This theme of racial division continued to play a major role in Alabama's political and social development for decades to come.

With a change in power, there was a call for yet another statewide constitutional convention.[72] Although a contentious issue, the Democrats prevailed, and delegates were again elected to rewrite Alabama's Constitution.[73] Many delegates were Confederate veterans, and more than half were lawyers.[74] The resulting document provided for a decentralized government, lower taxes, and segregated schools; it was, according to Rogers and Ward, "a Black Belt victory."[75] However, Flynt notes, the 1875 delegates carefully drafted a constitution that the federal government would not force them to overturn (as had happened immediately following the war in 1865).[76] Their efforts yielded a regressive constitution, but one which did not explicitly restrict things such as voting rights or interracial marriages.[77]

The new constitution changed the election of state judges. Instead of direct election through a popular vote, judges were first nominated at a party convention and could then run in a general election.[78] According to Robert Norrell, "[e]ntrenched Conservative judges protected the local autonomy that many whites wanted in order to establish a white supremacist and labor repressive social order."[79] In the following decades, elected judges shared several common traits: they were overwhelmingly Democratic; they had almost all been "born in Alabama"; many of them had been educated at the University of Alabama—"an all-white institution" attended primarily by the children of wealthy city and town-dwellers; and nearly every man "who had been old enough . . . had served in the Confederate army."[80] Surely the judges' common experiences of the Civil War and Reconstruction shaped their memories and played a role in their judicial decision-making.

D. The Turn of the Century

In the quarter-century that followed, industrialism grew in Alabama, and along with it, numerous political reform groups.[81] However, the state's

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70. BLIGHT, RACE AND REUNION, *supra* note 5, at 258.
71. *Id.* at 260.
72. ROGERS ET AL., *supra* note 9, at 258.
73. *Id.*
74. *Id.* at 267.
75. *Id.*
76. Flynt, *supra* note 59, at 68.
77. *Id.*
78. Norrell, *supra* note 14, at 138.
79. *Id.*
80. *Id.*
81. *See generally* ROGERS ET AL., *supra* note 9, at 288-304 (explaining the development of Ala-

Democrats managed to retain control—through both legal and illegal means—as the state moved from an agrarian economy to one increasingly dependent on the growing coal and steel industries.[82] In the late 1890s, the changing economic and demographic landscapes of the state outgrew the 1875 Constitution, and political leaders called for another constitutional convention.[83] The old constitution not only imposed heavy restrictions on local growth, stifled improvements in infrastructure, and perpetuated an inadequate education system, but it also officially allowed black citizens to vote.[84] Though the wealthy landowners in the Black Belt controlled the black vote, the fear lingered that if blacks and poor whites began voting together, power could be taken out of the hands of the rich white landowners and businessmen.[85] Racial tension grew increasingly strong during this time period, as well.[86] In the 1890s alone, white Alabamians committed 177 lynchings—more than in any other state during the same decade.[87] A new constitution denying blacks the right to vote would provide a way for whites to ensure their continued political and social control.[88] In November of 1900, the state legislature voted to call a constitutional convention, and in April of 1901, the people of Alabama elected 155 delegates to draft the modern state constitution.[89] None of the delegates were black, and 141 of them were Democrats.[90] Ninety-six of the delegates were lawyers, and thirty-eight (approximately one-fourth of the delegates) were Confederate veterans.[91]

II. A LOOK AT THE LEGAL ISSUES

In the decades following the Civil War, the Alabama Supreme Court decided more than one hundred cases involving claims arising out of the war, pre-war and wartime contracts for the sale of slaves, property disputes involving the inheritance rights of free blacks and former slaves, interpretation of the new federal constitutional amendments, and enforcement of the state laws governing interracial marriage and relationships.[92] These cases show that the individual memories of particular judges, as well as the collective memory of Alabama's dominant white culture, played a role in shaping the state's legal history during the years from 1861 to 1901.

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bama's numerous political and labor reform groups).

82. *See generally id.* at 305-19 (discussing the Democratic control of Alabama politics from 1889 through the gubernatorial election of 1896). *See also* Flynt, *supra* note 59, at 69 (detailing the Democratic control of power in Alabama during the 1890s).

83. ROGERS ET AL., *supra* note 9, at 335.

84. *Id.*

85. *Id.* at 336.

86. Flynt, *supra* note 59, at 70.

87. *Id.*

88. *Id.*

89. ROGERS ET AL., *supra* note 9, at 345.

90. Flynt, *supra* note 59, at 72.

91. *Id.* at 73.

92. *See infra* Part II.

A. Litigation Arising Out of the War

During the Civil War, disputes arose over the conscription of Confederate soldiers, requiring courts to interpret the relationship between the state courts and the Confederate government.[93] In at least one case, *Ex parte Hill*,[94] the Alabama Supreme Court drew a distinction between state and federal powers—federal, in this case, meaning the Confederate States of America.[95] The court decided, among other issues,[96] whether state courts had jurisdiction over habeas corpus questions involving confederate soldiers.[97] Chief Justice Walker, concluding that state courts do not have jurisdiction over such questions, argued that this was a national issue and therefore subject to the jurisdiction of the federal government:

> This power of executing the law is delegated by all the States, for their common good; and it would be a usurpation for the judge of one State to assume to control the government in the exercise of that power. If such control can be exerted by the judge in one State, it might result, that a power conferred for the good of all, when performed in manner approved by the judges of all the States except one, would be thwarted by the interference of the judge in the single State who differed in opinion from the judges in the other States. The States gave the power, without qualification. This gift is the surrender of all right to control the government in the exercise of it.[98]

Chief Justice Walker analogized the situation to the cases that arose out of the Fugitive Slave Act of 1850, giving slaveowners the right to seize and capture slaves who had escaped into non-slaveholding states.[99] He noted that:

> State court[s] had no power to interfere with the owner or marshal engaged in executing that law; and the South applauded the decisions, as asserting the only principle by which an execution of the law could be had in a community made, by fanatical opposition to slavery, unmindful of constitutional duty.[100]

Though decided during the war, evidence of a developing collective memory of the war is present. The court, in its reference to the North's "fanatical

93. *See, e.g.*, *Ex parte* Barton, 39 Ala. 452 (1864); *Ex parte* Starke, 39 Ala. 475 (1864); *Ex parte* Tate, 39 Ala. 254 (1864).
94. 38 Ala. 458 (1863).
95. *Id.* at 460.
96. *Id.*
97. *Id.*
98. *Id.* at 479.
99. *Id.* at 485.
100. *Id.*

opposition to slavery,"[101] not only vilified the "unconstitutional" conduct of the Union, but also reinforced the lawfulness of the Confederacy. During the war, the court's defense of the Southern cause was a necessary mindset that evolved into a powerful memory in the years following the war and Reconstruction.

After the war, many lawsuits involved wartime contracts executed under the laws of the Confederacy.[102] *Patton v. Gilmer*[103] illustrates the difficulty courts encountered when deciding whether these contracts were enforceable.[104] Alabama governor Robert Patton sued the Alabama Arms Manufacturing Company over an 1862 contract for firearms.[105] The defendants filed a demurrer questioning the contract's legality since it was for the purpose of aiding a war against the United States government.[106] The Alabama Supreme Court declined to provide a clear answer, and ruled on the more narrow issue of whether the lower court should have overruled the demurrer.[107] The court held that the lower court should have overruled the demurrer because "the question of the illegality of the contract is not so clearly apparent on the face of the complaint as to authorize a court to sustain a demurrer on that ground."[108] Therefore, the 1867 court was not as willing to defend the existence of the Confederacy as the 1864 court, but neither was it willing to declare void any contract entered into for the purpose of furthering the war. It is possible that during the beginning of the Reconstruction period, reactions to the war and the harsh reality of defeat were too recent to have developed into a coherent or meaningful memory. The court's unwillingness to take a definitive stand on these issues illustrates the chaotic nature of the immediate post-war climate in Alabama. In later cases posing similar questions regarding the illegality of wartime contracts—where members of the court had more time to process the outcome and memory of the war—the court reached more definitive decisions.[109]

One example, *Chisholm v. Coleman*,[110] concerned a former judge seeking a writ of mandamus to compel the state comptroller to pay him the salary he claimed for his past service.[111] The court clearly found that the Confederate government was not a legitimate government. Chief Justice Peck considered the "nature and character of the government of the so-called Confederate States, and the government of this State, during the existence of the late rebellion,"[112] and found that they were "rebel governments, and

101. *Id.*
102. *See, e.g.*, Van Hoose v. Bush, 54 Ala. 342 (1875); Todd v. Neal's Adm'r, 49 Ala. 266 (1873).
103. 41 Ala. 176 (1867).
104. *Id.* at 176.
105. *Id.* at 177.
106. *Id.* at 180.
107. *Id.* at 182.
108. *Id.*
109. *See infra* notes 110-13 and accompanying text.
110. 43 Ala. 204 (1869).
111. *Id.* at 205
112. *Id.* at 212.

nothing more—governments in hostility to, and not parts of, the government of the United States."[113] This definitive statement concerning the legality of the Confederate government shows that the memory of the war, at least among the Reconstruction-era judges on the Alabama Supreme Court, was beginning to take shape. The Republican justices were chosen through federally-mandated popular elections, and their memories were informed by the South's recent defeat. Future courts, comprised of justices chosen by the powerful Democratic party, would adopt different memories altogether.

B. Slavery

In the aftermath of the war, the Alabama Supreme Court faced unprecedented questions of law based on the sudden change in status of Alabama's black population. The court confronted issues such as: When did slavery actually end? Must contracts involving slaves be honored after slavery has been abolished? Should a slave charged with a crime still be punished as a slave after emancipation? The court had little or no precedent for answering such questions, and some of the back-and-forth decisions in the late 1860s and early 1870s regarding questions of race and slavery are evidence of how difficult—and often personal—these decisions were. Certainly the individual justices who wrote the court's opinions brought with them their own memories of slavery and war, and were influenced by the state's growing collective memory of the war.

1. Race & Identity

One of the difficult issues for the court in 1866 and 1867 was the transitional status of newly-freed blacks. In *Eliza v. State*,[114] the defendant, described as a "freedwoman," was convicted of theft.[115] She argued that because she was charged under laws that, when written, did not apply to slaves, the laws did not apply to her.[116] Referring to former slaves, the court noted:

> Emancipation changed their servile *status*; but, on becoming freedmen, they remained as persons; and as persons they are amenable to the existing laws. The fact that this class have not become free by their own seeking, but by a political convulsion, in which they took no part, can not affect their amenability to the laws.[117]

113. *Id.* at 214.
114. 39 Ala. 693 (1866).
115. *Id.* at 694.
116. *Id.* at 695.
117. *Id.* at 695-96 (emphasis added).

The court held that Eliza could be charged under laws that did not apply to her at the time they were written and relied on an argument implying that slaves were actually persons capable of the same rational behavior and responsibilities as non-slaves, and therefore were just as responsible for upholding the law.[118]

In *Burt v. State*,[119] also decided in 1866, the court faced the question of whether a former slave could be punished under a statute applicable only to slaves.[120] The law carried an automatic death sentence for any slave convicted of murdering a white man.[121] The court held that, because slavery had been officially abolished, this crime could no longer exist, and the defendant could not be punished.[122] Discussing why there had previously been a separate crime for slaves, Chief Justice Walker explained:

> This discrimination is not bottomed upon his color or race; for, if it depended upon the peculiarity of color and race, free negroes would have been placed in the same category with slaves. It grew out of the servile *status*, and has its justification, in the view of justice and humanity, in the necessity and expediency produced by that *status*. The enslaved negro could not be so well deterred from the commission of crime by the penitentiary punishment, for he was taught from infancy to regard involuntary labor as his duty, and to cheerfully submit to the immediate personal control of another.[123]

This characterization fits well with the myth of the Lost Cause, discussed in Part I. The court acknowledged that a freed person could no longer be subject to the same punishment reserved solely for slaves who committed murder, while at the same time offering a justification—in the wake of recent emancipation—for this wholly disparate treatment. The collective memory of slaves as cheerfully submissive under the control of another person allowed the court to reconcile Alabama's history with its present—that is, it turned emancipation into a matter-of-fact change in the status of some of the state's citizens, rather than a dramatic liberation of thousands of people.

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118. *See id.* at 695 (finding "that every person who might commit crime, no matter to which of the different classes of persons in the State he might belong, should not escape punishment for the want of a law to reach his case"). Interestingly, in later decades, the court would rely on a seemingly opposite argument to hold that there was no such thing as a legal marriage between slaves because slaves were incapable of entering into contracts. *See* Woods v. Moten, 30 So. 324 (Ala. 1900); Washington v. Washington, 69 Ala. 281 (1881); Cantelou v. Doe, 56 Ala. 519 (1876).

119. 39 Ala. 617 (1866).

120. *Id.* at 617.

121. *Id.* at 618.

122. *Id.* at 622.

123. *Id.* at 620.

2. A Line of Demarcation

The matter-of-fact attitude is found in another 1866 case, *Ferdinand v. State*.[124] A lower court found the defendant, a freedman, guilty of obtaining goods under false pretenses.[125] The court addressed the question of whether the defendant was a slave at the time the offense was committed, on September 16, 1865.[126] On April 12, 1865, United States forces captured Mobile, and the defendant, who had been a slave for twenty years, left his masters without permission; on September 22, 1865, the State of Alabama passed an ordinance that officially declared slavery to be abolished in the state.[127] The court held that the September 22 ordinance was a mere formality, and that slavery was abolished when Alabama was captured by Union forces.[128] Therefore, the defendant was not a slave on September 16 and was eligible to be charged with the crime of obtaining goods under false pretenses.[129] Again, the court's language belies little or no emotion regarding the abolition of slavery: "It is a historical fact, that the consummation [of emancipation] was effected by the act of war, anterior to the action of the State convention; and whether justly or unjustly, legally or illegally, are not now practical questions."[130] In the midst of the South's recent and painful defeat, the court was not willing to take a strong stand on the righteousness of slavery or the Confederate cause, yet it also was not willing to acknowledge the justice or legality of emancipation.

Post-war contractual disputes over pre-emancipation slave sales reflect the same attitude. In *Rose v. Pearson*,[131] an 1868 case, the court compared an owner's loss of the value of his slaves due to emancipation to the loss that would occur if the slaves had simply died rather than been freed.[132] The defendant used the value of his slaves as security for a loan; the court found that the plaintiff was entitled to recover the value of the slaves even though they were no longer considered property.[133] The court refrained from any discussion of the institution of slavery and rendered a matter-of-fact verdict with regard to property values; even engaging in some discussion of whether or not it was necessary for the original contract to have fixed the value of each individual slave in question, or if it was acceptable to simply estimate the value of the whole group.[134] This language reinforces the notion that slavery was not inherently evil, and therefore no reason existed to change the way people spoke of it or described it. The court's unwillingness

124. 39 Ala. 706 (1866).
125. *Id.* at 707.
126. *Id.* at 708.
127. *Id.* at 706.
128. *Id.* at 708.
129. *Id.*
130. *Id.*
131. 41 Ala. 687 (1868).
132. *Id.* at 690.
133. *Id.* at 692.
134. *Id.* at 692-693

to acknowledge emancipation's enormous moral and legal impact illustrates the need—even among Reconstruction judges—to hold on to a vision of pre-war Alabama as equal to, if not superior to, the Reconstruction era.[135]

In *Weaver v. Lapsley*,[136] involving a contract dispute over the sale of slaves in February 1865, the court again reinforced this vision.[137] Faced with the question of whether a contract existed, the court had to decide when slavery was legally abolished in Alabama.[138] The defendant argued that the Emancipation Proclamation, issued by President Lincoln in 1863, marked the end of slavery.[139] The court disagreed, finding that the proclamation was "manifestly nought but a war-measure, and of no operative effect, until carried into execution by force of arms."[140] Again, the court used objective and straightforward language to describe slavery and it abolition, as if these were merely contract terms rather than matters of life and death.

All of these decisions, of course, were decided in the midst of a massive reconstruction effort on the part of the federal government. While Alabama's wealthy planter class may have maintained its social control, the pro-Confederacy Democrats had been temporarily stripped of their political power during Reconstruction, and Republicans had been installed in statewide political offices.[141] By 1870, Republican members of the court began to make more political statements concerning the war—prompted by the outspoken, anti-Confederacy views of Justice Peters. A series of cases involving contract and property disputes exemplify these competing points of view. *Ex parte Norton & Shields*,[142] *McElvain v. Mudd*,[143] and *Noble & Bros. v. Cullom & Co.*,[144] contain colorful language and vivid descriptions of the war absent from previous opinions.[145] However, it is worth noting that even Republican justices, for the most part, were not willing to attack the institution of slavery or denounce its evils. Even among the white men who espoused fairly democratic and populist ideals, the question of race was still a sticking point.

Ex parte Norton & Shields[146] concerned an action for breach of warranty regarding the soundness of a slave sold in 1863.[147] The court addressed the validity of a default judgment rendered by a Confederate court before the war's end.[148] Justice Peters wrote the opinion, and declared that

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135. *See* Fitzpatrick v. Hearne, 44 Ala. 171, 175 (1870).
136. 42 Ala. 601 (1868).
137. *Id.* at 601.
138. *Id.*
139. *Id.* at 613.
140. *Id.* at 614.
141. *See supra* Part I.B.
142. 44 Ala. 177 (1870).
143. 44 Ala. 48 (1870).
144. 44 Ala. 554 (1870).
145. *See supra* Part II.
146. 44 Ala. 177 (1870).
147. *Id.* at 177.
148. *Id.* at 179.

the Confederate government was illegal—and that by implication all of its branches were as well.[149] He stated:

> [T]he courts were as much a part of the machinery of the rebellion as any other department of the insurrectionary administration. . . . They were not established to prevent anarchy, but to aid the rebellion. They were utterly forbidden by law, and were destructive usurpations of the powers of the rightful government . . . .[150]

Additionally, the court referenced an ordinance passed at the 1867 state convention declaring that: "in all cases where judgment or decrees have been rendered since the 11th day of January, 1861, to this date (Dec. 6, 1867,) [sic] the party against whom such judgment or decrees have been obtained shall be entitled to a new trial upon affidavit showing a meritorious defense."[151] The ordinance essentially gave the ability to seek a new trial or judgment to anyone involved in a lawsuit decided during the war.[152]

The court used a noticeably different tone in *McElvain v. Mudd*,[153] also involving a contract for the sale of slaves.[154] The opinion, written by Chief Justice Peck, approaches the subject of the war delicately, with a sympathetic point of view. The contract was formed in 1864—after the Emancipation Proclamation, but before the end of the war—and relied on Confederate currency for consideration.[155] The court faced two issues: whether the contract was valid (whether slavery was still legal in 1864) and whether an ordinance invalidating contracts that relied upon Confederate money for consideration was valid.[156] The court found that the Emancipation Proclamation, a wartime proclamation by the President, was not enforceable until the Union had possession of Alabama, and therefore was contingent upon military victory.[157] Because the proclamation had no legal effect in 1864, the contract was valid.[158] The court then found that the ordinance, also enacted during the 1867 convention, was unconstitutional because it "impaired the obligation of contracts."[159] The opinion contains none of the fiery language or anti-war rhetoric of *Ex parte Norton & Shields*. There is no condemnation of rebellion or secession; rather, there is an almost defensive attitude regarding the existence and legality of slavery during the war, and a practical discussion of the need to respect contracts formed during the war.

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149. *Id.* at 186.
150. *Id.* at 181.
151. *Id.* at 186-187 (quoting 1868 Ala. Acts No. 39).
152. *See id.*
153. 44 Ala. 48 (1870).
154. *Id.* at 48.
155. *Id.*
156. *Id.* at 51-52.
157. *Id.* at 57-59.
158. *Id.*
159. *Id.* at 62.

Justice Peters, a vigorous dissenter in *McElvain v. Mudd*,[160] wrote the 1870 opinion for *Noble & Bros. v. Cullom & Co.*[161] Justice Peters vehemently argued that the Alabama courts during the war were illegal institutions whose decisions may be invalidated.[162] He wrote: "An attempt to overthrow the government of the United States in any portion of its territory by its own citizens, is rebellion and treason. . . . And all the political machinery organized to support or carry on such an attempt is traitorous and illegal."[163] Chief Justice Peck concurred in the holding, but not necessarily in the reasoning.[164] Justice Saffold dissented, his weariness almost tangible in his writing:

> It has now been nearly ten years since the commencement of event evolving misfortunes which have penetrated into every household, and demoralized our entire population. The point of greatest depression seems at last to be reached, and our people are beginning to recover from their deep distress, reconciled to what has transpired, and hopeful of repairing their shattered fortunes. During all this past time these judgment have been treated as valid . . . .[165]

Justice Saffold also offered this explanation for why the wartime judgment of Confederate courts should not be found to be illegal:

> In the first place, the rebellion was one of great proportions, embracing at least one-half the territory and one-third the population of the Union. It organized and conducted for four years a government complete in all its forms and functions, dealing with the lives, liberties, and property of all its people. The United States exercised towards it belligerent rights, in exchange of prisoners, the establishment of blockades, and the capture and condemnation of prizes in the prize courts. After its suppression, none of its adherents were dealt with criminally, which would have been an imperative duty if it had been merely a popular commotion or seditious obstruction of the laws.[166]

These three 1870 cases are evidence that the justices were beginning to form coherent memories of the war. Even during the height of the Republican-controlled Reconstruction, not all justices were willing to completely denounce the Southern cause. Although Justice Peters, seemingly the strongest Republican on the court, often used the Unionist rhetoric of sedi-

160. *Id.* at 63-81.
161. 44 Ala. 554 (1870).
162. *Id.* at 554.
163. *Id.* at 562.
164. *Id.* at 566.
165. *Id.* at 567.
166. *Id.* at 568.

tion and treason, Justices Peck and Saffold echoed the court's dominant view. They stressed that the war need not be remembered as a tragic defeat, but something more akin to a political experiment gone wrong—offering a memory of slavery as an objective social and economic structure rather than an institution built on the back of human degradation. This mindset allowed for the development of a collective memory that viewed war as a political setback rather than a moral defeat.

3. The Marriage Contract

Slave marriages created another slavery-related cause of action after the war. Disputes over the legality of marriage contracts and inheritance rights caused judges to struggle with the most basic privacy property rights guaranteed to all citizens.[167] This category of cases provides perhaps the best chronological overview of how the memory of the war evolved during and after the Reconstruction period.

In the 1870 case of *Stikes v. Swanson*,[168] the court addressed whether or not the children of a former slave could inherit property.[169] The question turned on whether or not the children were legitimate offspring of a legal marriage—in other words, whether or not slaves could be legally married.[170] Justice Peters wrote the opinion for the court and concluded, not surprisingly, that slave marriages were valid under common law, and therefore the former slave's children could rightfully inherit his property.[171] Of the "*quasi* marriage"[172] between the two slaves in question, Peters wrote, "[s]lavery out of the way, [it] would have been legal at common law. Certainly the parties intended to marry, and did all that they were able to do to carry this intention into effect; they were then legal slave marriages."[173] Using slightly more opinionated language, he went on to state:

> The unfortunate claimants of the proceeds of their father's toil, should not be made to suffer for a wrong committed, against their mothers, their father and themselves. This would be adding wrong to wrong, without any necessity to vindicate it, except, perhaps, an old prejudice, the basis of which is now swept away forever.[174]

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167. *See* Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221 (1999).
168. 44 Ala. 633 (1870).
169. *Id.* at 635.
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* at 637.

Justice Peters' characterization of slavery as "wrong" is a rare occurrence in the nineteenth-century *Alabama Reports*, and one that would not be accepted by his fellow justices for long.

Cantelou v. Doe,[175] an 1876 case, raised essentially the same question, but the Democrat-controlled court ruled there was no such thing as a legal marriage between slaves.[176] The court found that the cohabitation of two slaves could not "legitimate the offspring" of that cohabitation, "or impart to them the capacity to inherit" from their father.[177]

In *Washington v. Washington*,[178] decided in 1881, the court extended its analysis of slave marriages.[179] This case concerned a slave marriage that continued until 1866 when the man left his slave wife and legally married another woman.[180] The wife from the first marriage sought to claim the inheritance of her former husband.[181] The court acknowledged that slaves were not legally capable of entering into such a contract; however, the marriage was valid because the Alabama Constitutional Convention of 1865 declared that men and women who had been living together as husband and wife while slaves and continued to do so after emancipation were legally recognized as married couples.[182] Therefore, the wife was entitled to inherit from her former husband.[183] The opinion contains a more matter-of-fact attitude than the accusatory tone found in *Stikes*.[184] Chief Justice Brickell stated that "[t]he slave was incapable of contracting, of yielding the assent, of incurring the obligations, and performing the duties, because of the paramount rights of the master to which his will and ability were subordinated."[185]

In 1901, the court confronted a similar issue in *Woods v. Moten*.[186] The descendants of a former slave sued to recover land that had belonged to their father.[187] The defendant claimed that the descendants had no legal right to inherit the property because they were not legitimate offspring.[188] There was no question that the descendants were the *natural* offspring of the deceased and his slave wife; rather, the question was a *legal* one. The defendant claimed the marriage was illegal because the children's mother, the former slave wife of the deceased, died before the war ended.[189] The plaintiffs argued that the woman died in 1866, after emancipation, and that the

175. 56 Ala. 519 (1876).
176. *Id.* at 522.
177. *Id.*
178. 69 Ala. 281 (1881).
179. *See id.* at 281.
180. *Id.* at 282.
181. *Id.* at 282-83.
182. *Id.* at 284-85.
183. *Id.* at 286.
184. *See supra* note 174 and accompanying text.
185. *Id.* at 283.
186. 30 So. 324 (Ala. 1901).
187. *Id.* at 325.
188. *Id.*
189. *Id.*

conventional ordinance passed in 1865 legitimized the marriage.[190] Rather than rule on the facts, the court affirmed that this was the correct question of law.[191]

These cases illustrate not only an evolving memory of the Civil War among the justices, but also which memory was to become the dominant one. While Justice Peters, an outspoken Union sympathizer, may have been able to interject some criticism of slavery into his 1870 opinions, these critiques were quickly replaced by the more tempered and seemingly objective memories of Alabama's pre-war society. Between 1870 and 1901, the court's opinions went from characterizing slavery as "wrong" to coldly applying the law to slave marriages. Although the *Woods* court acknowledged that there was no dispute over the plaintiffs' lineage or the fact that their natural mother and father had lived as husband and wife, the court would not acknowledge the injustice in denying the plaintiffs their inheritance. This cold and matter-of-fact discussion of slave marriages indicates that the 1901 justices had memories of a rational, stable society that happened to include slavery. In keeping with the dominant Lost Cause mythology that developed in the aftermath of Reconstruction, their memories gave credence to the validity of a way of life that had been destroyed, but not forgotten.

C. Equal Protection

Much as the question of marriage between slaves crystallized the court's memory of slavery, opinions on interracial marriages and relationships exemplified the court's evolving interpretation of equal protection laws.

In 1868, the court heard *Ellis v. State*.[192] The defendants, a black man and a white woman, were convicted of adultery with a person of another race.[193] At the time, Alabama had two statutes concerning adultery: the non-race-specific statute, carrying a penalty of a $100 fine and up to six months in jail; and the race-specific statute (concerning adultery between a white person and a black person), carrying a penalty of two to seven years in the state penitentiary.[194] At trial, the defendants were sentenced under the non-race-specific statute, presumably because the lower court found the race-specific statute to be inconsistent with the Civil Rights Act of 1866, prohibiting discrimination on the basis of race when imposing criminal punishment.[195] The Alabama Supreme Court found that because both defendants would be subject to the same penalty, regardless of their race, the statute did

190. *Id.* at 325-26.
191. *Id.* at 326.
192. 42 Ala. 525 (1868).
193. *Id.* at 526.
194. *Id.* at 525-26.
195. *Id.* at 526.

not violate federal law.[196] The court remanded the case and ordered the imposition of the harsher sentence.[197]

Four years later, in *Burns v. State*,[198] a justice of the peace was convicted for solemnizing a marriage between a white person and a black person.[199] The defendant challenged the statutory prohibition of interracial marriage under the Civil Rights Act of 1866, and the Republican court held that the state statute conflicted with federal law.[200] Justice Saffold wrote the opinion for the court, and objectively declared that the federal statute appeared to confer on all citizens the right to enter into a contract with any other citizen.[201] However, the justice noted the court's decision in *Ellis* and discussed the historical precedent of the *Dred Scott* decision, which declared that a "free negro" was not a citizen within the meaning of the United States Constitution.[202] Saffold noted that, "[w]hether congress, at the time it passed the civil rights bill, had authority to do so or not, which is gravely questioned in the *Dred Scott* case, there can be no doubt that its cardinal principle is now declared by the [Fourteenth] [A]mendment to the Federal constitution."[203] Through Justice Saffold's even-tempered reasoning, the court found that because the indictment failed to state a valid offense, the conviction was reversed.[204]

The 1875 case of *Ford v. State*,[205] decided after the Democrats regained control of state government, presented a claim almost identical to the claim in *Burns*, except that the defendants were charged with adultery of fornication instead of marriage between a white person and a black person.[206] In a per curiam opinion, the court held that the conviction was valid because it concerned adultery and not marriage: "Marriage may be a natural and civil right, pertaining to all persons. Living in adultery is offensive to all laws human and divine, and human laws must impose punishments adequate to the enormity of the offence and its insult to public decency."[207] In other words, the court chose not to overrule *Ellis* or *Burns*. Instead, the court held that while marriage involves contracts and may therefore be subject to regulation under civil rights laws, adultery involves no such rights and may therefore be punished as society deems necessary,[208] thus allowing Alabama to punish interracial adultery more harshly than adultery between two persons of the same race.

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196. *Id.*
197. *Id.* at 527.
198. 48 Ala. 195 (1872).
199. *Id.* at 196.
200. *Id.* at 198.
201. *Id.*
202. *Id.* at 197-98 (citing Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856)).
203. *Id.* at 198.
204. *Id.* at 198-99.
205. 53 Ala. 150 (1875).
206. *Id.* at 151.
207. *Id.*
208. *Id.*

With the exception of *Burns,* the court was clearly reluctant to invalidate any state statute prohibiting interracial marriage or more severely punishing interracial adultery. However, it was not until 1877, in *Green v. State*,[209] that the court decided to apply the logic of *Ellis* to the marriage issue.[210] The court revisited the validity of laws prohibiting interracial marriage, and overturned *Burns*, finding its holding to be "a very narrow and an illogical view of the subject."[211] In discussing the importance of the institution of marriage in creating stable homes, the court asked: "Who can estimate the evil of introducing into their most intimate relations, elements so heterogeneous that they must naturally cause discord, shame, disruption of family circles and estrangement of kindred?"[212] The court claimed that it was:

> [F]or the peace and happiness of the black race, as well as of the white, that such laws should exist. And surely there can not be any tyranny or injustice in requiring both alike, to form this union with those of their own race only, whom God hath joined together by indelible peculiarities, which declare that He has made the two races distinct.[213]

Thus, in 1877, the Alabama Supreme Court rendered a precedent that would endure for nearly a century.[214]

The rhetoric in these cases underscores the memories of the war that developed after Reconstruction, as the myth of the Lost Cause became a more dominant mindset among white Alabamians. The need to keep the races separate and to maintain white control over blacks grew out of a need to remember the cause for war and the pre-war culture as objectively good. A fervent need to assert and maintain a sense of control over an increasingly expanding and diverse culture grew from a collective memory of defeat, culminating in the court's opinions justifying anti-miscegenation laws and penalties for interracial adultery.

III. FURTHER THOUGHTS: THE 1901 CONSTITUTION

The discussion and decisions of the Alabama Supreme Court surrounding the legality of the Confederacy, the status of former slaves, the legal meaning of emancipation, the institution of slavery, and the question of equal protection in the years following the end of the Civil War illustrate a

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209. 58 Ala. 190 (1877).

210. *Id.* at 192.

211. *Id.*

212. *Id.* at 194.

213. *Id.* at 195.

214. *See* Peter Wallenstein, *Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s-1960s,* 70 CHI.-KENT L. REV. 371, 433-34 (1994) (noting that the Alabama law prohibiting interracial marriage was not struck down until 1970).

burgeoning collective memory that was informed by defeat and occupation, as well as a tenacious attempt to cling to a familiar, yet threatened way of life. This collective memory was memorialized in a document that, though significantly amended, still governs the State of Alabama today.

Alabama legislators desired to maintain control once they had reestablished it—what was once called the redemption of the South. In an attempt to wrest control from the carpet baggers, scalawags, and blacks who had briefly held power during Reconstruction, the powerful Black Belt leaders and other Democrats pushed for a constitutional convention that would ensure once and for all that political power rested solidly in their hands and the hands of their constituents.[215] The 1901 Constitution was the capstone of these efforts. The new constitution ensured that blacks could not vote; it also located the power of taxation in the legislature in Montgomery, rather than in local communities.[216] It is based on an understanding of government and of the relationship of whites to blacks that stretched back to an Alabama that existed before the Civil War. While it may be difficult to argue that the Civil War led in any direct way to the 1901 Constitution, they may both be viewed as points along the same line of thought.[217]

Beginning in the early 1860s, this line of thought—viewing slavery as part of an economic system that was the birthright of southern landowners and as part of a social system that strictly defined the hierarchy among black and whites—can be traced. During Reconstruction, as the myth of the Lost Cause surfaced, it became necessary to view slavery as a beneficial relationship between master and servant, under which a seamless social order existed. The laws that were passed in an attempt to maintain this social order—such as the black codes—necessarily relied on an understanding of blacks as inferior to whites, and a belief in the inherent truth of this assumption, despite amendments to the federal constitution that clearly stated otherwise. In the same way that the black codes silently but effectively maintained the status quo of white supremacy, so too did the pre-1901 voting rituals, where black votes were "counted" for whichever cause or candidate benefited the white Black Belt landowners who controlled the election mechanisms.[218] It was by a strange twist of logic that the Democrats were able to argue that by officially denying the vote to blacks, Alabama could "reform" the voting process and restore truth and integrity to an election system that, up to that point, had been characterized by fraud.[219]

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215. KOUSSER, *supra* note 11, at 165-66.

216. ROGERS ET AL, *supra* note 9, at 347-52.

217. Tracing influences is an extremely difficult task—and rightly suspect in modern social science. Legal historians are wary of acknowledging the power of ideas to influence the behavior of jurists. *See* Charles Barzun, *Common Sense and Legal Science,* 90 VA. L. REV. 1051 (2004); Alfred L. Brophy, *Reason and Sentiment: The Moral Worlds and Modes of Reasoning of Antebellum Jurists,* 79 B.U. L. REV. 1161 (1999) (addressing ways that jurists' ideas correlated with ideas about moral philosophy in American culture).

218. PERMAN, *supra* note 1, at 181.

219. *Id.*

While some have argued that equal protection rights were not explicitly written out of the 1901 Constitution, there is no doubt that the main purpose of the constitutional convention was to legally disfranchise black voters.[220] Historian Malcolm Cook McMillan describes the convention:

> Certainly the revision of the suffrage was the cardinal reason for the assembling of the convention and the committee of twenty-five on the suffrage received the constant attention of the people and the press. Its chairman, Judge Thomas W. Coleman of the Black Belt, was a graduate of Princeton, an ex-slaveholder, Civil War veteran, member of the constitutional convention of 1865, legislator, and former associate justice of the State Supreme Court. Twenty-one of the twenty-five members of the committee were lawyers.[221]

McMillan goes on to describe the other convention attendees:

> Two former governors of Alabama, two former justices of the State Supreme Court, two former attorneys-general, one member of the constitutional convention of 1865, four members of the convention of 1875, the chairman of the Democratic State Executive Committee, ninety-six lawyers, twelve bankers, four journalists, several physicians, teachers, and engineers were members of the convention. Because of the preponderance of lawyers, the 1901 convention is often referred to as "the lawyer's convention"; and some of the ablest lawyers in the state were in the convention. At least thirty-eight of the convention's members were Civil War veterans.[222]

With such a conflagration of Civil War veterans and members of the legal profession—often one and the same—present at the 1901 Constitutional Convention, it would be impossible to imagine that both individual and collective memories of the war did not play a pivotal role in drafting the new document.

Indeed, when the new constitution was drafted and ratified, it contained numerous provisions designed to keep blacks from voting and to keep power safely in the hands of wealthy whites.[223] Residency requirements, cumulative poll taxes, literacy requirements and property ownership requirements all placed significant burdens on the right to vote.[224] Unquestionably, the new constitution achieved its desired effect. In 1900, there

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220. *See* Martha I. Morgan & Neal Hutchens, *The Tangled Web of Alabama's Equality Doctrine After Melof: Historical Reflections on Equal Protection and the Alabama Constitution*, 53 ALA. L. REV. 135 (2001).

221. MALCOLM COOK MCMILLAN, CONSTITUTIONAL DEVELOPMENT IN ALABAMA, 1798-1901 267 (1955).

222. *Id.* at 263 (footnote omitted).

223. Flynt, *supra* note 59, at 73.

224. *Id.*

were 181,000 black males registered to vote in Alabama; by 1903, that number had dwindled to less than 5,000.[225]

IV. CONCLUSION

An ever-present concern in post-war litigation was that of race, and how blacks and whites in a post-slavery society were to relate to one another. The culmination of this concern—at least as it existed in the nineteenth century—can be found in the 1901 Constitution's attempt to deny blacks the ability to vote. According to historian William H. Stewart, "it is impossible to separate Alabama constitutionalism from issues of race relations. The initial motivations for the Constitutions of 1861, 1868, 1875, and 1901 pertained mostly to race."[226] By the time the 1901 Constitution was debated and drafted, forty years had passed since secession, and a collective memory of the Civil War had taken shape in the Alabama legal mind. From the chaos and uncertainty that ensued immediately following the war, to the tempered and moderate attitude during Reconstruction, to the growing idolatry of the past and regional pride that emerged under the Bourbon Democrats, Alabama judges were forced to confront the legacy of the war and with it, their own memories and interpretations. Some of these memories were justifications for slavery, and some were vilifications of it; some were sympathetic to the plight of newly-freed blacks, but most were not. All of these memories, however, grew out of the most divisive and destructive events in our nation's history, and it is these memories that have given shape to Alabama's heritage of judicial opinions.

Glory McLaughlin

225. *Id.* at 75.

226. WILLIAM H. STEWART, THE ALABAMA STATE CONSTITUTION: A REFERENCE GUIDE 5 (1994).