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Interjurisdictional property rights discrimination and civil war: Antebellum America

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Interjurisdictional property rights discrimination and civil war: Antebellum America

by

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in partial fulfillment of the requirements for the degree of

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CHAPTER 1: INTRODUCTION

The purpose of this paper is to understand whether interjurisdictional property rights discrimination may be an impetus for civil war. I begin with an overview of literature on property rights, property rights regimes, and property rights discrimination. I then discuss the concepts of interjurisdictional and intrajurisdictional property rights discrimination. I suggest my theory that interjurisdictional property rights regime discrimination creates costs for discrimination losers from other jurisdictions. These costs affect expectations regarding relative gains, which may lead to discontent and transjurisdictional political violence.

For empirical analysis, I analyze the jurisdictionally bifurcated property rights regime regarding slavery that existed between free and slave states in antebellum America. I assess the importance of the labor resource (slaves) to the Southern economy, the nature and costs of the jurisdictionally bifurcated property rights regime that developed regarding property rights in that resource, and how conflict over property rights in slaves spilled into secession and civil war. I conclude by drawing together the main points and the mechanism by which interjurisdictional property rights discrimination may serve as an impetus for civil war.

CHAPTER 2: LITERATURE REVIEW ON PROPERTY RIGHTS

2.1 DEFINITION OF TERMS

Property rights in some resource means that one has the right to gain from, exclude others from, and exchange the resource. Property rights are sometimes referred to as a “bundle of sticks” in that owners have a handful of rights regarding the use of the resource (Anderson and McChesney 2003, 1).

Property rights regimes, which consist of the “implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge” concerning issues of property ownership, govern property rights over resources (Krasner 1982, 186). Such regimes take up the governance tasks of providing “a mechanism for assigning to particular individuals the authority to choose how specific resources will be employed, given a class of permissible uses. In particular (they) specify the rights that individuals may hold to the use and transferability of resources (including themselves) and the services they yield. The resulting system of property rights determines, via actual or imputed prices, how the benefits and harms flowing from a decision are allocated between the decision maker and other individuals. Thus, it determines the expectations that individuals can form in their dealings with others (Alessi 2003, 90).”

Property rights regimes are defined and enforced formally (publicly) by the state as well as informally (privately) through social norms. The state does not get involved in every issue of property rights, and does not always literally define a person’s ownership – social norms, or conventions, play an important role. Rather the state acts as a 3rd party source of definition and enforcement of rights. People rely on conventions for their transactions in

stable and strong property rights regimes, but know that they have recourse through political institutions to settle disputes – their property rights are well defined and enforced by the state. Individuals must protect their property, for the loss of property incurs costs, but the individual's "burden is inversely related to how well the state and society define and defend the rights (Eggertsson 2003, 75)."

2.2 COASE: ECONOMIC RIGHTS, EFFICIENCY, AND PROPERTY RIGHTS

The pricing system is an important aspect of whether and how property rights are defined and enforced. Coase demonstrated this point with his example of a farmer whose land is adjacent to a cattle-raiser. Sometimes the cattle-raiser's cattle stray onto the farmer's land and destroy some of his crops, costing the farmer income. The farmer has a choice to build a fence or to live with cattle straying onto his land and destroying his crops. If the cost of building the fence is greater than the cost of allowing cattle to occasionally stray onto his land, then it is not economical to build the fence. But, the farmer might also find that the situation could be resolved if he persuaded the cattle-owner to make a payment to him in exchange for either not cultivating the land that the cattle damaged or as compensation for the damaged crops. Coase states, "...if the cattle-raiser is liable for damage caused and the pricing system works smoothly, the reduction in the value of production elsewhere will be taken into account (Coase 1960, 5)." In the absence of transaction costs, the farmer's production will be reduced and he will be compensated sufficiently for the lost production at a rate slightly above the price of the farmer's optimal level of the utilization of the land. Coase summarizes, "whether the cattle-raiser pays the farmer to leave the land uncultivated or he rents the land by paying the land-owner an amount slightly greater than the farmer would pay (if the farmer was himself renting the land), the final result would be the same and would

maximize the value of production (Coase 1960, 6).” If the pricing system works without cost, the “ultimate result (which maximizes the value of production) is independent of the legal position.”

Coase’s argument emphasizes the importance of transaction costs in the bargaining process. The solution to the problem of the use of the farmer’s land could be decided in a smooth pricing system (zero transaction costs) by whether the cattle-raiser’s straying cattle adds more to the cattle-raiser’s income than it subtracts from the farmer’s (Coase 1960, 9). If the continued cultivation of the land by the farmer would cause the cattle-raiser’s income to fall by more than it increased the income of the farmer, an opportunity for a bargain would become available whereby the cattle-raiser would pay the farmer to discontinue cultivation of the land so that he could use the land.

Coase also emphasizes the reciprocal nature of the economic problem of property rights utilization.

We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A (Coase 1960, 2)?

Both actors inflict harm on each other. The farmer inflicts harm on the cattle-raiser if he builds a fence preventing the cattle-raiser from earning the higher income that he otherwise could obtain in the absence of a fence, while the cattle-raiser inflicts harm on the farmer’s crops in the absence of the fence. If the cost of building a fence is too much and the cattle often destroy his crops, the problem is reciprocal in that both inflict damage on each other.

However, when the pricing mechanism does not operate so smoothly (transaction costs exist), efficient outcomes are difficult to achieve. Courts may handle the solution to the

economic problem of liability. These third party institutions determine who is at fault and who must pay by determining who has rights to which property. Even though the problem may be reciprocal economically, as Coase says, that may not be the case in the eyes of the law because it is too costly to determine the efficient level at which one should compensate the other. The court may find that reciprocity is too difficult to determine: the cattle trespassed on the farmer's land and therefore the cattle-owner must pay some amount in damages to compensate the farmer. But, because there are transaction costs, it would be difficult to discover the precise amount at which optimal efficiency for the utilization of the land would be obtained through side payments.

In the economic universe outlined by Coase, in which property rights are fully defined and enforced, economic rights and efficient outcomes are the final consideration in determining how a resource will be used. If it is more efficient for the cattle-raiser to pay the farmer a sum of money to allow his cattle to roam on the farmer's land, then that is the best solution. The cattle-raiser pays the farmer a fair amount for the use of the land and efficiency is obtained when both parties maximize their profits.

Underlying the Coase theorem, which makes it important to this study, is the assumption of well-defined property rights. He suggests that if ownership is well defined, and the transaction costs are zero, the optimal outcome – efficiency – will result because owners will be able to costlessly evaluate the value of different outcomes regarding exchange and investment. The cattle-raiser pays the farmer to allow cattle to roam the farmer's property and the side payment is slightly larger than the farmer's next best use of the land. If transactions costs are not zero, or the property rights are not well defined or enforced, the bargaining process may not work well, and the efficient outcome may not result.

2.3 PROPERTY RIGHTS REGIMES

Property rights regimes govern the ownership of assets. They specify which property can be owned, if at all, and who, if anyone, has the rights to utilize the property for investment, exploitation, and exchange.

There are four basic types of property rights regimes: open access, government, communal, and private individual. They can be thought of in terms of the level of individualization of the ownership of, or access to, a given property: open access regimes have zero individualization and are open to everyone. Open access regimes essentially consist of unowned property: “assets for which there is no limit on access, such as a city street (Anderson and McChesney, 2003, 60).” Such regimes often result in over-exploitation (i.e., the optimal utilization of the resource, where marginal revenue and value equals the opportunity cost of utilizing more of the resource, is surpassed because more entrepreneurs will attempt to gain rents until the average revenue equals the average cost), known as common pool losses, and premature exploitation (because there is a rush to seize the gains from the resource before access to the resource is extinguished) (Anderson and McChesney, 2003, 61-65; Hardin 1968). In open access regimes, “users have neither the rights nor much incentive to manage the resource and invest in improving it (Eggertsson 2003, 76).”

Government property rights regimes fall in the interstices and cannot be easily categorized in terms of its level of individualization or access. These regimes are “regulated by bureaucrats with neither private rights to the property’s benefits nor private obligations to bear its costs, which typically accrue to the public treasury or to some non-controlling third party (Anderson and McChesney 2003, 59).” The property may be regarded as public, though utilized by an agency of the government for various reasons. Nongovernmental

actors may or may not have access to government property depending on the agency and the government's purpose for the property. Also, government property rights regimes may harness some of the benefits of reducing transaction costs, as in the case of a firm that may internalize transaction costs, and give government agents more incentive to consider the economic consequences of their decisions about how to utilize the resource. In this there are similar utilization incentives compared to the individual and communal regimes. However, who runs the state and who are its agents may be important determinants in the utilization of the resource (North 1981, 20-33).

Communal and private individual property rights regimes have similar characteristics to each other and the government regime in that they are more exclusive than open access regimes. Individual ownership is the most exclusive and allows more control over the resource for the owner. Property is strictly individually owned and all other actors are excluded from commanding the resource unless the owner grants them rights. Owners are neither necessarily concerned nor affected by others' preferences about the use of the property. Because individuals are vested in their property and all others are excluded from utilizing the property, it is more secure (assuming low enforcement costs) and their prosperity is linked more to the economic outcomes of their choices (De Alessi 2003, 109).

Communal property rights regimes are limited access regimes governed by those who control the commons, such as in the case of a park district or a community pool or a pasture for grazing animals owned by a group of farmers. A group of people owns the commons and determines how the gains from it will be distributed. As in the case of private individual regimes, communal property rights ties owners as a group (and individuals) more closely to the consequences of their decisions about how to utilize the property. However, because

there are more owners of the property, and hence more preferences with which to contend, utilization may end up suboptimal for some, though better than if they were not in the regime at all.

Communal and individual private property rights regimes incentivize owners to invest and improve the resource they own. They “promote investment in maintaining and improving resources, development of new institutions and technologies, and a faster, fuller response to changes in circumstances. Outputs and incomes are larger (in these regimes) than under alternative arrangements (De Alessi, 2003, 108).” Open access regimes tend to lead to over-exploitation and a race to exploit the resource quickly. While government regimes may internalize transaction costs and bear some of the benefits similar to how individual ownership regimes do for the individual, they are not owned by individuals or a group, but rather by the state for purposes designated by the state. Who controls the state and policy decisions, then, is an important determinant for how the resource is utilized.

2.3.1 EVOLUTION OF PROPERTY RIGHTS REGIMES

In attempting to understand how a property rights regime change may affect political stability, it is important to understand something of the evolution of property rights regimes.

The question of how property rights regimes come about is well studied. Demsetz offers a model of individual wealth maximization to explain the evolution of property rights: “If the main allocative function of property rights is the internalization of beneficial and harmful effects, then the emergence of property rights can be understood best by their association with the emergence of new or different beneficial and harmful effects (Demsetz 1967, 350).” That is, “...property rights develop to internalize externalities when the gains of internalization become larger than the cost of internalization (Demsetz 1967, 350).” By

internalizing externalities, transaction costs are reduced. Ownership is clearer and the problem of liability, as in the Coase problem regarding cattle-raisers and farmers, may be cheaper to solve. When some jolt changes the costs and benefits of the existing property rights regime, a more efficient regime will replace the old one. For example, if the farmer's land value, and all of the farmers' land surrounding the cattle-raiser, decreases so much as to become relatively unserviceable to farm, say because of erosion, they all may find it worthwhile to leave the farmland fallow, or even abandon the land altogether, essentially turning the surrounding area into an open range (open access property rights regime) for the cattle-raiser.

However, as is well discussed in the literature, the problem with Demsetz's theory regarding benefits and costs is that it does not provide a mechanism by which property rights come about. Banner makes the point, "Property rights cannot simply be assumed, like other goods, to be produced in a pattern that responds to the changing costs and benefits of producing them. They can be produced formally by a government or informally by the cooperation of individuals in the creation of a social norm, but either way, the production of a property right is necessarily a collective endeavor (Banner 2002, S360)."

Property rights entrepreneurs may play a role in property rights regime change. Entrepreneurs are those who are alert to the possibility of accruing rents not seen by others that would become available by better-defined and enforced property rights. The entrepreneur sees and establishes "property rights that eliminate open-access dissipation of these rents (Anderson and Hill 2002, S491)." Referring to Israel Kirzner, *Competition and Entrepreneurship*, Anderson and Hill note that the allocation solution to maximizing benefits is not simply found by some kind of mechanical computation. Rather allocation decisions

require an alertness to profit opportunities - that is, alertness to “*the very perception of the ends-means framework* within which allocation and economizing is to take place (Anderson and Hill 2002, S491).”

This alertness is crucial to the discovery of shifts in the benefits and costs of property rights creation. In effect, the entrepreneur is discovering previously unowned or unpriced attributes of the resource, and it is the perception of the rents associated with ownership of scarce, unique resources that drives his incentive to define and enforce property rights to them (Anderson and Hill 2002, S492).

To prevent the dissipation of rents, the entrepreneur keeps this knowledge to himself, so as to minimize dissipation of the potential rents from his unique perspicacity, and seeks the definition and enforcement of rights over the property in which he has discovered the potential rents.

Changes in three main conditions may lead entrepreneurs to perceive an opportunity for economic advantage and to invest in property rights regime change. These three conditions “serve as shocks to prevailing equilibrium conditions regarding property institutions, where the benefits and costs of existing arrangements to politically influential parties have been in balance (Libecap 1989, 16).”

First, changing relative prices, a market force, may alter the cost-benefit function for the entrepreneur. When the value of some resource is very little, there is less incentive to protect the rights to that resource because the loss of the property does not inflict too much damage. However, if the value of the resource is very large, the incentive to protect property rights is greater. For example, Anderson and Hill point out: “As long as an incremental unit of land in the West was worth little, property rights entrepreneurs would not put effort into

restricting entry. As land values rose, however, the return on restricting entry increased and so did definition and enforcement activities. Initially, settlers simply announced their claims through newspapers and signs. Over time their efforts became more organized as they formed associations or clubs which were specific contractual arrangements with other settlers on the frontier to resolve internal conflicts over property rights (Anderson and Hill 2003, 126).”¹

The size of the price change of the property may also affect how politicians react to the demands for changes in property rights definition and enforcement. “The larger the price change, the greater will be the pressure for a redistribution of wealth and, correspondingly, the greater will be the demands by current owners for more protection of existing property rights (Libecap 1989, 18).”

The second condition that may affect entrepreneurial perception of the cost-benefit function in the formation of property rights is technology. The availability of technology for the definition and enforcement of property rights affects the opportunity to do so. Anderson and Hill point to the invention of barbed wire on the Great Plains as a cost-reducing invention for cattle raisers. Barbed wire fences produced enclosure and reduced the cost of defining and enforcing ownership over the cattle by negating the expenditure of human resources to herd cattle spread across vast areas of land (Anderson and Hill 2003, 129).

Changes in technology may also induce productivity gains. Prior to barbed wire, cattle raisers had to incur the costs of rounding up cattle twice a year for branding calves and

¹ Similar relationships between the increased value of the property and increased specification of property rights has been talked about by Randall Akee. This is alluded to in: Akee, Randall. “Checkerboards and Coase: The Effect of Property Institutions on Efficiency in Housing Markets,” *Journal of Law and Economics*, 52:2, 395-410.

marketing. The cattlemen created associations and set the dates for roundups, deciding who would participate so as to reduce duplicate roundups and for settling disputes over cattle ownership with members and nonmembers of the association. This association was a cost-reducer itself, but was still more costly than enclosure with barbed wire (Anderson and Hill 2003, 129).

A third condition includes changes in preferences and the political environment. “Shifts in the political influence of competing claimants also can lead to new contracting for property rights...All things equal, those interest groups with greater wealth, size, and homogeneity will have more resources to influence politicians regarding the assignment of property rights, more votes to attract attention to their demands, and more cohesion to be effective lobbyists (Libecap 1989, 17).”

Collective action costs and benefits affect the definition and enforcement of property rights by entrepreneurs. As exemplified in the creation of associations prior to the invention of barbed wire, “individuals can take advantage of scale economies in defending property rights and can encompass more potential spillover effects (Anderson and Hill 2003, 130).” As Anderson and Hill note, the optimal size and type of collective action is important. Transaction costs increase as the collective’s size increases. While the collective grows larger it may also have more free riders and require more monitoring of agents who are acting on behalf of the collective. Larger collectives may be better at exclusion, but will also have higher collective action costs (Anderson and Hill 2003, 130).

One of the main critiques of Demsetz’s thesis on property rights regime emergence points to the role of the state in the definition and enforcement of property rights. Sened says, “Demsetz fails to distinguish between the performance of the economy and the political

structure that allows it to perform. He overlooks the distinction between the content of property rights and the structure that protects property rights. The former can be properly exchanged in the market only if the latter are well defined (Sened 1997, 35).”

Enforcement and definition of property rights by the state is of primary focus in understanding the origins of property rights regimes. In Douglass North’s analysis in *Structure and Change in Economic History*, and emphasized by Sened, “scarcity and the need to internalize externalities, or reduce transaction costs, is neither necessary nor sufficient for the emergence of property rights. If Demsetz’s conditions were sufficient for the emergence of property rights, we would expect more uniformity across societies in the evolution of institutions that protect property rights (Sened 1997, 36).”

Political institutions affect the definition and enforcement of property rights regimes, and thus the efficiency of those regimes. Governments may control resources, as in the government property rights regime talked about above, and they may define and enforce those of others, too. While conventions (i.e., social norms) may play an important part in definition and enforcement, government can have an important discriminatory effect. Banner suggests that oligarchs who control both the resources and political institutions can in a sense act as entrepreneurs by altering the property rights regime concerning those resources. Because of the high costs of ascertaining proper valuation and compensation regarding everyone’s rights and interests, transitions led by such oligarchs tend to be distributionally favorable to the interests of the oligarchs. That is, politicians have an incentive to favor their self-interest because it is more costly not to do so. Banner’s examples come from colonial authorities changing functional, communal property regimes based on usufructuary to spatial, individual-owned regimes common to modern western property law. He concludes,

“(powerful oligarchies may) overcome the problem of administrative cost (in property rights regime transitions) simply by not being particularly rigorous in the valuation and assignment of the property rights of the majority (parentheticals added) (Banner 2002, S369).” But, as will be discussed in the following sections, discrimination may create problems, particularly against whom the distribution of the new property rights regime discriminates and how the change disrupts the status quo equilibrium of resources, which may lead to political instability.

Banner’s point is important because it introduces the role of the state and the impact that can be had on the emergence of property rights by who holds power in the political institutions. While conventions may initiate property rights, the state can impact the security and distribution of those rights. This theory essentially suggests that those who can control the political institutions can control the distributional allocation of property rights, which affects whom may do well in an economy. What is more, it is not necessarily guaranteed that those in charge of the political institutions will produce a property rights regime that is efficient. In fact, they could just as well produce a less efficient structure.

Property rights entrepreneurs within government and outside of it alter property rights regimes. It is the “alternative paths available to entrepreneurs who could create property rights or redistribute existing rights from one individual or group to another” that is important in determining whether efficient allocation of resources will be obtained (Anderson and Hill 2003, 119). Institutions may affect these alternative paths. The interests and utility functions of entrepreneurs in their pursuit of profit may not produce positive net gains; but, “by channeling their efforts into redistributing existing property rights or acting opportunistically in contractual agreements, they can play negative-sum games,” in which the outcome may

benefit some more than others, while on the whole, producing a less efficient outcome (Anderson and Hill 2003, 125).

To understand more about property rights regime evolution one needs to consider the role of coercion. In the original distribution of property rights, there is the notion of “might makes right.” Umbeck claims that “ultimately all ownership rights are based on the abilities of individuals, or groups of individuals, to forcefully maintain exclusivity (Umbeck 1981, 39).” Even if one is able to claim “finders keepers” over some resource, whether one is able to exclude others from somehow seizing or using that resource is critical to ownership. A farmer in Ethiopia may till a plot of land or participate in a communal property rights regime for most of his or her lifetime, yet if the government may seize and sell that land to the Prince of Saudi Arabia without as much as giving the farmer choice or compensation in the deal, how secure were his rights over that land in the first place (Rice 2009, MM46)? If the farmer doesn’t leave the land, the Ethiopian government may end up forcing the farmer off the land so that the Saudi Arabian prince can till the land for his own people.

In this instance, the farmer may have little power to stop the government because the government has a monopoly on the use of violence. There is no explicit agreement between the government and the farmer over the rights to the property, but because the government has the force to expel the farmer, the farmer has the unenviable choice of whether he would rather bear the costs of attempting to continue to attempt to claim exclusive right to that land or move somewhere else to restart his life and avoid the violence of the government. Libecap explains:

To maintain claims to valuable assets or to wrest control from others through the use of force, competing claimants have incentive to divert labor and capital inputs from socially valued production to predatory and defensive activities (Libecap 1989, 13).”

While it could be said that initially the farmer had rightful claim to the property, the “might makes right” argument makes the point that the distribution may be equal to the amount of force that can be weighed in protecting that right, not necessarily the distribution that is most efficient. Of course, such an argument perhaps contradicts the legal notion that those who produce and improve their resources (which otherwise would have been unused) also have a right of ownership. But, justification might be given by the Ethiopian government that the Prince of Saudi Arabia may be able to not only utilize the land more efficiently, but also provide a side payment to Ethiopia for renting the land. Their justification then is based on economic rights, not legal rights. Whether or not this side payment ends up in the hands of entrepreneurial politicians or the previous tillers of the farmland is a distributional concern largely decided by those whose might makes right – the rulers of the government. The poor farmers may be not so lucky to receive their share of the economic rights (i.e., the side payment). Thus, without the power to affect the choices made through the political institutions, ownership may be a tenuous prospect.

2.3.2 PREDATION VERSUS ECONOMIC EFFICIENCY

“The existence of a state is essential for economic growth; the state, however, is the source of man-made economic decline.” –Douglass North (North 1981, 20)

The problem of the state’s role as definer and enforcer of property rights is that if the state is strong enough to effectively enforce rights, it is also strong enough to take those rights away. If those who control the political institutions and the monopoly on violence believe that they

can profit more from predation, they may be less inclined to define and enforce property rights in a manner which minimizes transaction costs and strives for economic efficiency. They may see that predation is the more profitable route because of shortened time horizons (politicians pay the costs of developing institutions immediately, while the benefits accrue in the future), the need to accommodate support groups, and the difficulty of credibly committing to those who rely on secure property rights.

2.4 INTRAJURISDICTIONAL PROPERTY RIGHTS DISCRIMINATION

Intrajurisdictional property rights regime discrimination is an outcome of government's internally consistent and jurisdictionally delimited definition and enforcement of property rights that specifically treats some people differently than others. The discriminating property rights regime may affect the distribution of resources within its jurisdiction positively for some people and negatively for others by specifying and enforcing ownership rights of a particular resource in a way that favors the former over the latter.

2.4.1 PROPERTY RIGHTS DISCRIMINATION AND DISTRIBUTIONAL CONFLICT

Intrajurisdictionally discriminatory property rights regime changes can be the consequence of distributional conflict between parties with a stake in the outcome, who treat different people differently. Libecap refers to the specification and alteration of property rights as *contracting*. He states, "contracting includes both private bargaining to assign or adjust informal ownership arrangements and lobby efforts among private claimants, politicians, and bureaucrats to define, administer, and modify more formal property institutions (Libecap 1989, 11)." In this process, Flores suggests, "economic agents demand – and politicians can provide – *property rights discrimination*, protecting certain groups' rights while willfully

ignoring or even deliberately violating other groups' rights (Flores 2008, 3).” For example, politicians have incentives to favor support groups. Support groups may be the ones who help politicians get into power as well as retain power once it is achieved. There may be incentive to produce property rights enforcement that benefits support groups more than a broader, less discriminating enforcement regime that may increase efficiency.

Knight takes this further to suggest that actors maximize their distributional gains and argues that whether or not institutions produce economic efficiency is thus a by-product of actors asserting their strategic advantage:

Social institutions affect the distribution of benefits from the numerous interactions that constitute social life... The forms of these benefiting institutions vary across time within a particular society and across communities and societies at any particular time... What separates these distinct forms is their distributional consequences. ...Institutions are not created to constrain groups or societies in an effort to avoid suboptimal outcomes but, rather, are the by-product of substantive conflicts over the distributions inherent in social outcomes. According to this conception, the main goal of those who develop institutional rules is to gain strategic advantage vis-à-vis other actors, and therefore, the substantive content of those rules should generally reflect distributional concerns. The resulting institutions may or may not be socially efficient: It depends on whether or not the institutional form that distributionally favors the actors capable of asserting their strategic advantage is socially efficient (Knight 1992, 40).

In sum, outcomes may be the result of distributional conflict, not necessarily some desired level of efficiency: actors may seek to maximize their strategic advantage to maximize the

benefits of institutional change. Whether or not the change in the institution leads to a socially efficient outcome is dependent on the nature of the distributional conflict and the capability of the different actors to affect the change in the institution to their own benefit. Inefficiency comes from actors' self-interest and "their pursuit of a less efficient alternative that gives them a greater individual gain," not necessarily from a lack of information or imperfect knowledge (Knight 1992, 40).

Libecap supports the notion of distributional conflict and expectations as an inherent part of political interaction. Actors evaluate changes to institutions in terms of the effect of the institutional change on their productive possibilities. If the outcome is expected to lead to negative projections, they will be less likely to support the institutional change:

...the bargaining stands taken by the various parties depend upon how they view their welfare under the new arrangement relative to the status quo. Estimates of the likely net gains or losses from institutional change faced by each party require an evaluation of the overall productive possibilities with the new property rights arrangement and the distribution of rents it authorizes. The bargaining parties must see their welfare improved or at least made no worse off in order for them to support institutional change, and each party has incentive to seek as large a share of rents under the new arrangement as possible (Libecap 1989, 11).

Libecap goes on to point out that this competition among contracting parties is costly to society. The competition may alter the definition of rights, and by that also affect "the nature and size of the aggregate benefits that are possible (Libecap 1989, 11)." What is more, politicians and other societal actors may respond over concerns about how the property rights regime changes may affect distributional norms. Libecap explains:

The outcome of political bargaining over property rights will depend not only on the political power of the contesting interest groups involved, but it also may depend on how the wealth distributions associated with different interest group demands blend with prevailing distributional norms. A demand for an allocation of property that seems to be extreme relative to accepted practices may broaden the political debate by eliciting a response from other interests who have a stake in the current distribution of wealth. The entry of additional parties in political contracting over adjustments in property rights adds to the demands that must be considered and reconciled by politicians (Libecap 1989, 18).”

Changes in property rights definition and enforcement that are not consistent with prevailing expectations about distributional norms may lead to higher political costs for politicians. Not only might radical changes lead to rejection in courts, they might also lead to the offense of many interest groups that ultimately affect the politician’s job, or even cause political instability (Libecap 1989).

This description of the distributional nature of intrajurisdictional property rights discrimination is one example of how regimes may discriminate within their jurisdiction and decrease the likelihood of efficient outcomes. But, there may also be interjurisdictional property rights discrimination.

2.5 INTERJURISDICTIONAL PROPERTY RIGHTS DISCRIMINATION

Interjurisdictional property rights regime discrimination is the outcome of different jurisdictions providing different principles, norms, rules, and decision-making procedures for the specification and enforcement of rights regarding a particular resource. While jurisdictions have responsibilities to their own citizens and not necessarily to those of other

jurisdictions, citizens of one jurisdiction may feel that another jurisdiction's property rights regime discriminates against them. Interjurisdictional property rights discrimination will be the focus of analysis in answering the question of interest for the remainder of the paper.

2.6 CONSEQUENCES OF PROPERTY RIGHTS DISCRIMINATION

Discrimination creates winners and losers by altering opportunities. Losers must make a decision as to how they will respond to property rights discrimination. Discrimination will not always lead losers to protest, rebel, create insurrections, or violently attempt to alter circumstances individually or collectively; they may decide they can affect change through political institutions. They may also choose to be politically apathetic and move on to another occupation, perhaps seeing too high the costs in contesting the regime.

When the property rights regime discriminates, economic losers may be created. The distribution of property rights definition and enforcement makes them worse off. In the absence of government enforcement, which would otherwise provide affirmation for their expectations about property rights ownership, investment may become more risky and costly. There may be more costs and uncertainty about how much to expend to protect and define their rights to use, exchange, and exclude others from their property.² This negatively affects the cost-benefit calculus of investment for the excluded individual. Significant economic opportunities may be lost: they may not reap as much gain from their activities because of increased transaction costs and the decreased value of their property. They may have more

² In a laboratory study, Duffy and Kim analyzed whether individuals choose production and to defend their resources or to predate on those of others, as well as how governments that reduce the costs of defense of resources affect this decision. They come to the conclusion that "the role of the state in making and enforcing a collective choice in the level of defense can indeed lead to a substantial improvement in the welfare of agents relative to the stateless, anarchic equilibrium (Duffy and Kim 2005)."

uncertainty and be less likely to invest in human or physical capital (Galiani and Schargrodsky 2010; de Soto 1989, 2000; Acemoglu and Robinson 2000; Acemoglu, Johnson, and Robinson 2005; Akee 2009; Kimbrough 2010).

The choice of whether to rebel against property rights discrimination is an investment decision for the losers. They can expend their resources in political activity to alter the property rights regime or in entrepreneurial activity adapting to the new property rights regime. If pursuing new entrepreneurial opportunities in the new property rights regime produces less net benefits relative to engaging in political activity, political activity may be the best solution. Conflict in the form of political violence may arise when these individuals cannot affect policy through the political institutions.

CHAPTER 3: THEORETICAL DISCUSSION

I suggest that interjurisdictional property rights discrimination creates an increase in costs for property rights owners from other jurisdictions against whom the regime discriminates.

Costs come from expending more resources to define and enforce their ownership rights over that resource when coming into contact with the discriminating property rights regime.

Increased costs negatively alter owners' expectations regarding the relative gains from the resource, which may create discontent. People invest in resources with some expectations regarding the probability of gains from ownership of that resource. When those investment expectations regarding relative gains are negatively impacted by infringement on their property in another regime, those discriminated against may become discontented.

The group of discontented may attempt to end those negative effects by attempting to redress the other jurisdiction's regime through norms of the available political institutions.

If utilization of the political institutions for altering the cost function of property ownership in the other regime's jurisdiction is unsuccessful, the discontented may seek to redress the discriminating property rights regime outside of the political institutions.

Political violence may result if the discontented see no more effective option to achieve their ends outside of the political institutions.

CHAPTER 4: METHODOLOGY

In this paper, with the purpose being to understand how interjurisdictional property rights discrimination may lead to civil war, the focus will be on one case, the American Civil War. In this case, property rights discrimination between free and slave state regimes regarding slavery played an important role in the causation of the Civil War.

Determining the cause of any outcome is difficult if we do not set parameters for an acceptable explanation of the outcome. In the case of this paper, I do not look to understand every single facet of the causal mechanism that pushed the country to Civil War, but rather to understand how one particular force, interjurisdictional property rights discrimination, could lead to potentially violent political outcomes. Thousands upon thousands of pages have been written on the issue of slavery and the American Civil War and it is not my goal to develop a new history or to make a significant contribution to that history. But, my goal is to understand the key factors in the causal mechanism to elucidate the potential causal relationship between property rights discrimination and civil war.

Why choose the U.S. Civil War to understand how interjurisdictional property rights discrimination may cause civil war? The reasons behind choosing the U.S. Civil War case are:

1. The slave issue is widely believed by historians to be the fundamental political issue of the antebellum period that led to the Civil War (McPherson 1988; Conrad and Meyer 1958; Huston 1999; Blight 2008; Grunderson 1974; Ransom and Sutch 1988; Nash and Jeffrey 2001; Nevins 1947-61; Potter 1976; Ransom 1989; Link 2003; Levine 2005)..

2. The two regimes were separated jurisdictionally as free and slave states yet were forced into contact with each other because a) the jurisdictions were adjacent or proximate and b) the jurisdictions operated under the legal superjurisdiction of the United States government. The Federal government provided an opportunity to ameliorate the interjurisdictional property rights regime discrimination, but also served as a battleground for the competing interests (e.g., Fugitive Slave Laws, Supreme Court Decisions, and the admittance of new free or slave states). Free soil and slave interests were able to compromise through the political institutions during the antebellum period until the election of Lincoln in 1860, when the slave state interests felt they could no longer compromise through the federal political institutions.
3. Westward expansion of the country and the admittance of new states in the western territories provided a political extrainstitutional battleground for those who had a stake in either regime. The conflicting expectations of free soilers and slave-owners regarding the ownership of labor converged in these battleground territories and arguably erupted into localized civil wars.
4. The U.S. Civil War case may provide generalizeable conclusions regarding the theory to be tested. Since property rights discrimination was between state jurisdictions, there maybe generalizeability regarding the relationship between interstate wars property rights regime discrimination among nation-states.

This is not to say that the U.S. Civil War is a perfect case. Interjurisdictional property rights discrimination and the effects it has on costs of ownership, expectations of future outcomes, and the psychology and resultant actions of those discriminated against, is but one possible line of reasoning to understand and predict civil war. Other variables may have had an impact. Was it slave power, “unctuous fury,” a clash of civilizations, Northern or Southern aggression, states’ rights? Greed or grievance? Perhaps a bit of all of that is true. But, as pointed out in reason number one for choosing this case, few modern historians deny that the sectional issue of slavery was the primary divisive issue of the time that led to the war. So, this case should provide a good opportunity to test the theory.

CHAPTER 5: EMPIRICAL EVIDENCE: ANTEBELLUM AMERICA, 1789-1861

When Eli Whitney invented the cotton gin in 1793, cotton was still yet a small-time crop in the South. Prior to the cotton gin, separating seeds from cotton was done by hand, which was slow and inefficient. However, over the next sixty-eight years after the invention, cotton boomed and became the staple product of the South. But, the gin was not enough by itself. Slavery provided the cheap manpower necessary to produce economies of scale in cotton production. With the increase in economies of scale, large cotton plantations grew across the South, spreading westward and taking slavery with it. The boom of the cotton economy in the first sixty years of the 19th century would prove significantly important for the institution of slavery. While at the Constitutional Convention some Northerners believed that the institution of slavery would peter out as it appeared to be doing in the Northern states, with the growing profitability of cotton and slavery in the 19th century, the institution became ever more important to the South. Total slave value rose from about \$250 million in 1805 to over \$3 billion by 1860. The year before the Civil War slaves, as an asset category, were worth more than all of the country's manufacturing and railroads combined; only the land itself was more valuable than slaves.

As profitability rose, so too did irritability. The institution of slavery became a more contentious political issue as the 19th century wore on. Much land was available for westward expansion, but as more Americans began to occupy this land, territories were pressed into statehood. The fundamental question to be answered was: would slavery be legalized or outlawed in these new states? The question most importantly had implications for the ownership of slaves; the very notion of outlawing slavery in a state challenged the

legitimacy of the property rights institution. Yet, the question had important implications for the political power of slave owners as well: while outlawing slavery challenged their property rights in slaves, it also meant more free soil politicians would run the country, ultimately reducing the power of Southern interests, who would defend the institution of slavery. This consideration of political power is important for understanding the causes of the Civil War because it tied back to the issue of property rights ownership in slaves.

How did property rights in slaves become a source of conflict? If slavery had not been so widespread in the South and if it had not been so profitable, how likely would have been civil war? Would the south have not compromised instead of waging a costly war; would it have been able to accept westward expansion of free states?

One might expect that the value of slaves had something to do with the Southern interest in secession. As we will see, owning and trading slaves was a highly profitable business. But, it was the recognition of property rights in humans that was the foundation of this value. For, without this recognition – the regime that defined and enforced ownership of humans – the viability of slave ownership would have been on shaky grounds for existence because of the ease with which slaves could “steal” themselves in an environment that did not protect ownership of humans. Definition and enforcement of property rights in humans by the local, state, and federal governance institutions of the United States was critical to the continuance of the institution.

But, importantly, there was interjurisdictional property rights discrimination regarding slavery among the states. While in the South slave ownership was buttressed by social norms and legal procedures supporting property rights definition and enforcement of slave ownership, in the North social norms and legal procedures worked against the

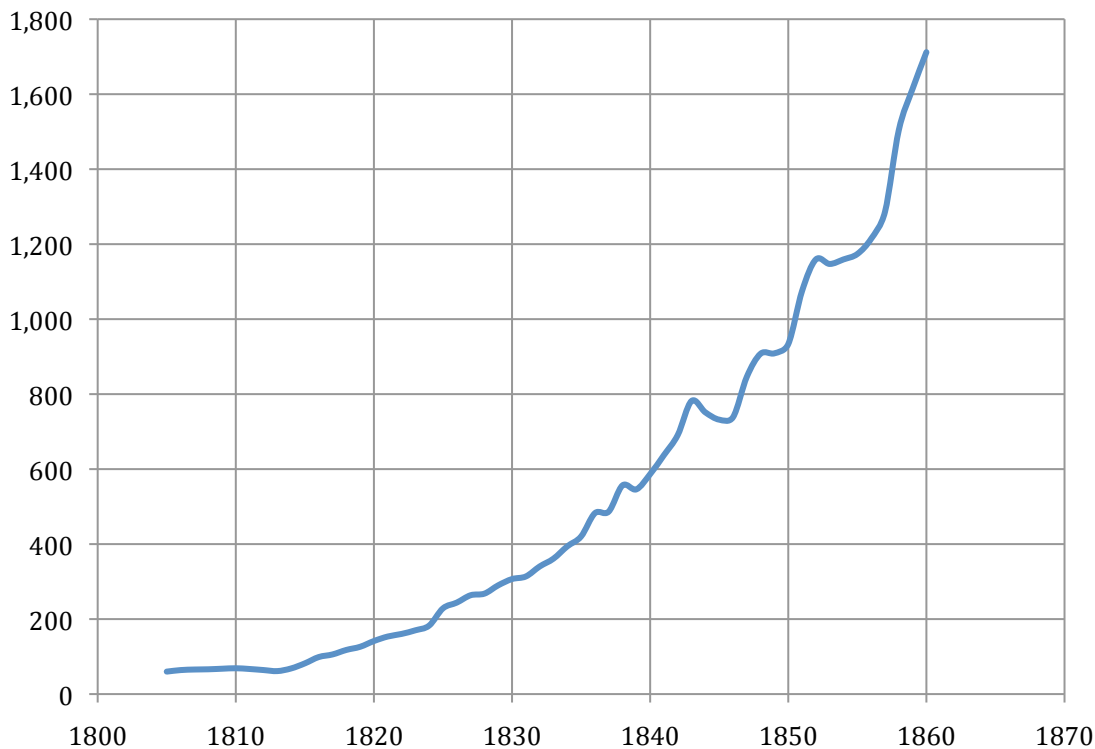
definition and enforcement of Southern slave ownership. This bifurcation of the property rights regime, which in one region discriminated against slave owners and in the other discriminated against blacks as slaves, was a key issue in the onset of the Civil War.

5.1 THE SOUTHERN ECONOMY: COTTON AND SLAVES

Slavery was a vital and viable institution for the Southern economy in the antebellum period (Wright 1987; Yasumba 1971; Aitken 1971; Lee and Passell 1979; Fogel and Engerman 1974; Johnson 1999). Facilitated by the slave trade, slavery spread westward across the southern part of the country. As the cotton economy boomed, the value of both cotton and slaves increased. By the decade before the Civil War, slave prices were rising at a faster rate than cotton prices and whites in the Cotton South were deriving a significant portion of their income from slaves. By 1860, slaves were the second most valuable asset in the nation, next to the land itself.

In 1790 the Southern states produced less than 50,000 bales of cotton. By 1820, they produced about 500,000 bales; 1830, 1,000,000 bales; 1840, 2,000,000 bales; 1850, 3,000,000 bales; and, in 1855, nearly 4,500,000 bales (Fogel 1974, 90).

FIGURE 1 – Quantity of Cotton Output (mil. lbs.), 1805-1859



Sources: Roger L. Ransom, *Conflict and Compromise*, (Cambridge University Press, 1989). *U.S. Census Bureau, Historical Statistics of the United States, Colonial Times to 1970*, part 1 (U.S. Census Bureau, 1976), series K-551, p. 517.

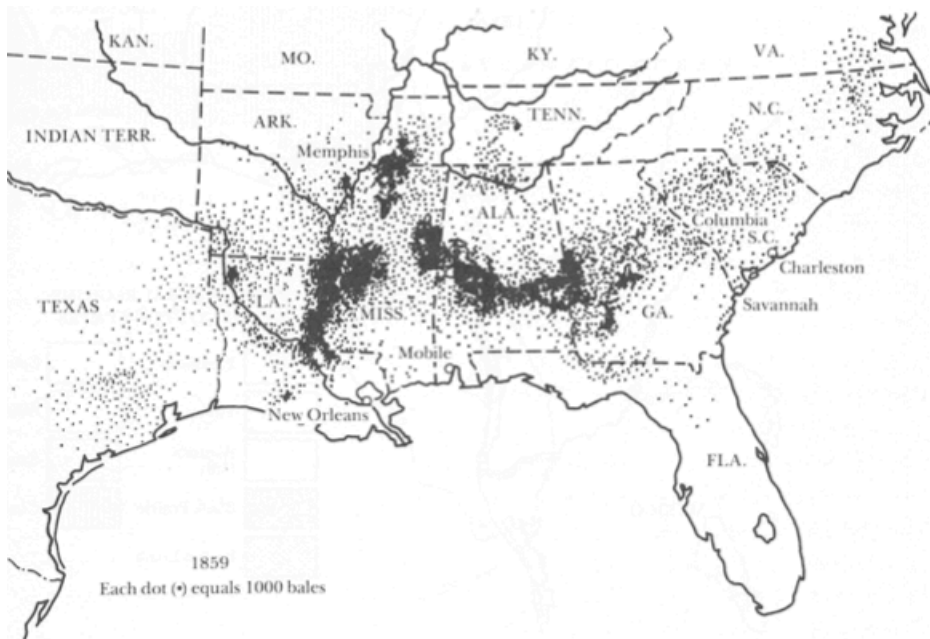
Figure 1 shows the rise of cotton output from 1805 to 1859 in millions of pounds of cotton. In 1805, the South produced 60 million pounds of cotton, whereas, by 1859 1.712 billion pounds of cotton were produced.

FIGURE 2 - Distribution of cotton production in the South, 1821



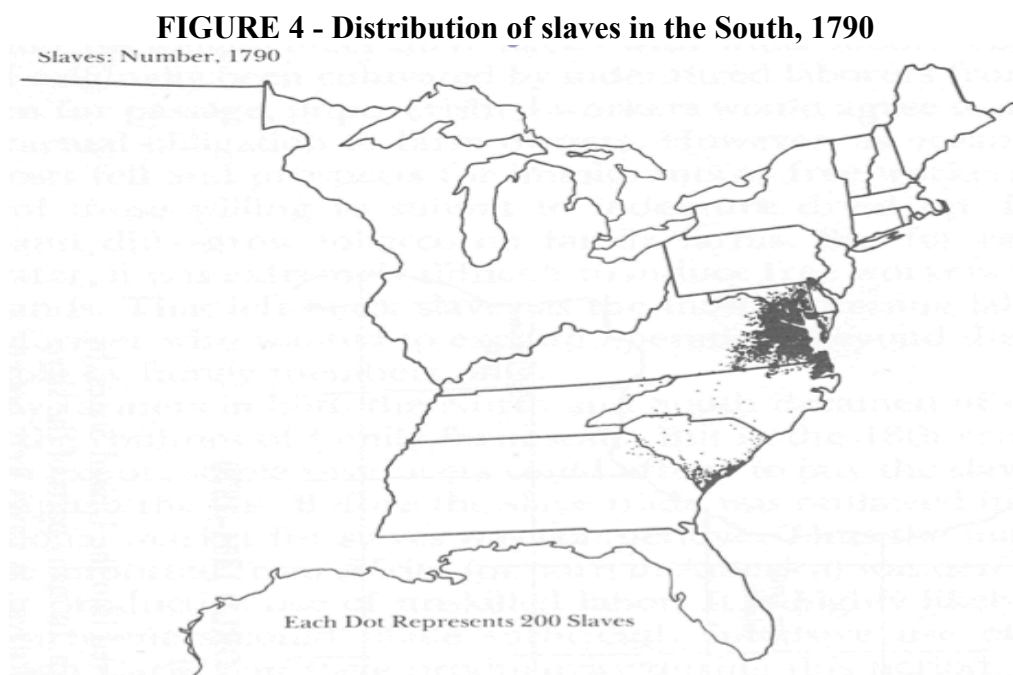
Source: Lee and Passell, *A New Economic View of American History*, 157-164.

FIGURE 3 - Distribution of cotton production in the South, 1859

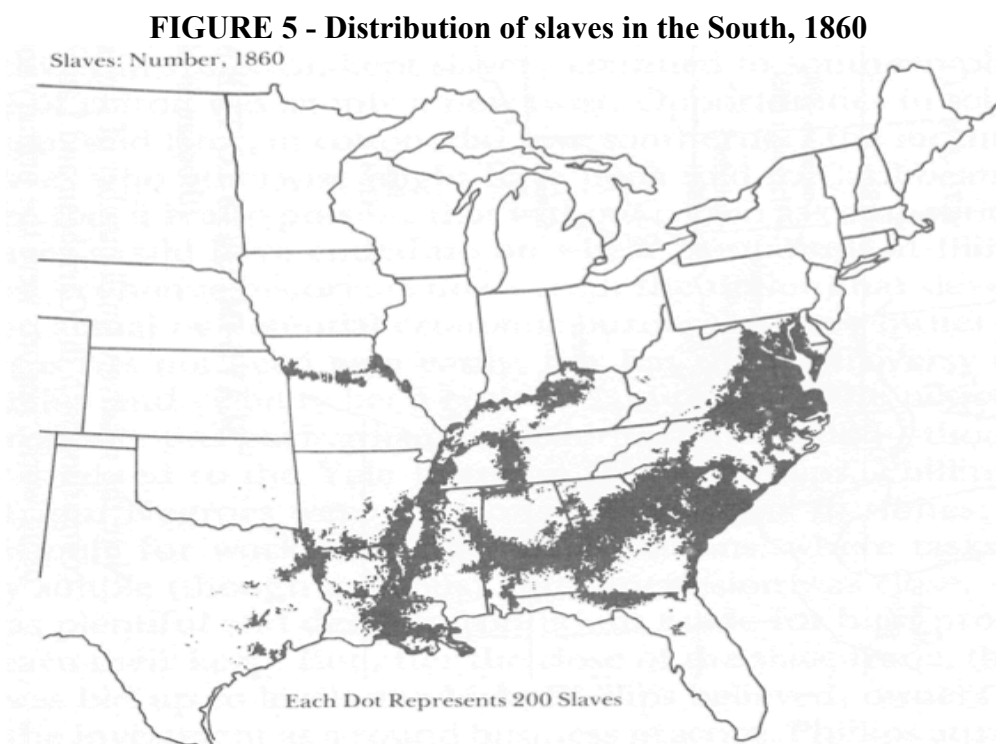


Source: Lee and Passell, *A New Economic View of American History*, 157-164.

In 1821, as seen in Figure 2, cotton production was scarcely scattered across the South, with a band of production across South Carolina into Georgia, and isolated groupings of production along the Mississippi River bordering Louisiana and Mississippi, and sparsely distributed about Tennessee, Alabama, North Carolina, and Virginia. By 1859 (Figure 3), cotton production was densely distributed across the Deep South, thickly along the Mississippi River bordering Louisiana and Mississippi, as well as with a thick band spreading from central-eastern Mississippi through Georgia to South Carolina. By this time, cotton production was also significant in eastern Texas and parts of Arkansas and Tennessee (Lee and Passell 1979, 157).



Source: Lee and Passell, *A New Economic View of American History*, 157-164.



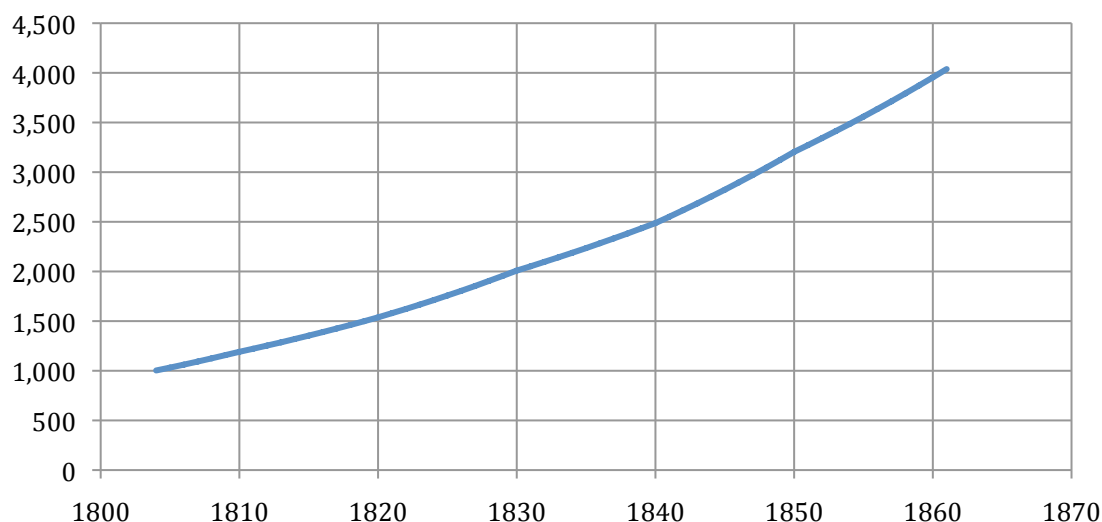
Source: Lee and Passell, *A New Economic View of American History*, 157-164.

Slavery followed this spread of the cotton economy across the South (Figures 4 and 5). As can be seen from Table 1, slaves were exported from the southeast coast states during this period to supply the demand for cheap labor to the west. The main net exporters of slaves were at first Delaware, Virginia, and Maryland, later on the Carolina's, District of Columbia, and Kentucky, and in the last decade before the war, Tennessee and Kentucky. The enslaved population of the South was a self-reproducing population (see Growth Rate in Table 1) and its population increased during the antebellum period, as can be seen in Figure 6. The total population grew from about one million in 1804 to over 4 million by the year of the civil war.

TABLE 1 - Estimates of net interstate slave movements, 1790-1859

	1790-1799	1800-1809	1810-1819	1820-1829	1830-1839	1840-1849	1850-1859
Alabama			35,500	54,156	96,520	16,532	10,752
Arkansas			1,000	2,123	12,752	18,984	47,443
Delaware	(4,523)	(3,204)	(817)	(2,270)	(1,314)	(912)	(920)
D.C.		(1,123)	(576)	(1,944)	(2,575)	(2,030)	(1,222)
Florida			1,000	2,627	5,833	5,657	11,850
Georgia	6,095	11,231	10,713	18,324	10,403	19,873	(7,876)
Kentucky	21,636	25,837	18,742	(916)	(19,907)	(19,266)	(31,215)
Louisiana		1,159	20,679	16,415	29,296	29,924	26,528
Maryland	(22,221)	(19,960)	(33,070)	(32,795)	(33,753)	(21,348)	(21,777)
Mississippi		2,152	9,123	19,556	101,810	53,028	48,560
Missouri			5,460	10,104	24,287	11,406	6,314
N. Carolina	3,671	(407)	(13,361)	(20,113)	(52,044)	(22,481)	(22,390)
S. Carolina	4,435	6,474	1,925	(20,517)	(56,683)	(28,481)	(65,053)
Tennessee	6,645	21,788	19,079	31,577	6,930	4,837	(17,702)
Texas						28,622	99,190
Virginia	(22,767)	(41,097)	(75,562)	(76,157)	(118,474)	(88,918)	(82,573)
Total Exports	49,511	65,791	123,386	154,712	284,750	183,902	250,728
Total Imports	42,482	68,641	123,221	154,882	287,831	188,863	250,637
Natural Growth Rate of Whole Slave Population (%)	27.0	27.0	30.5	31.2	23.8	27.8	23.4

Source: Michael Tadman, *Speculating and Slaves: Masters, Traders, and Slaves in the Old South*, 12.

FIGURE 6 - Slave population in the South (in thousands), 1804-1861

Source: Ransom and Sutch, "Capitalists Without Capital: The Burden of Slavery and the Impact of Emancipation," *Agricultural History* (Summer 1988), Tables A.1 and A.4.

With the end of the transatlantic slave trade in 1809, the interstate slave trade became the grease in the wheels for the expansion of the cotton and slave economy. Approximately sixty to seventy percent of the interstate slave traffic between 1820 and 1860 was through transactions in the slave trade (Tadman 1989, 11-46).

Slave trading in the exporting states became a significant contributor to the Southern economy. Slave sales in the “principal exporting states”³ amounted to as much as 15.4%-19.6% of the value of staple crops in the South (Tadman 1989, 131). At times slave traders could make as much as \$120,000 in profit a week from selling slaves (Blight 2008).⁴ In one city, Richmond, during 1858 slaves sales “netted” over \$4 million (Blight 2007).

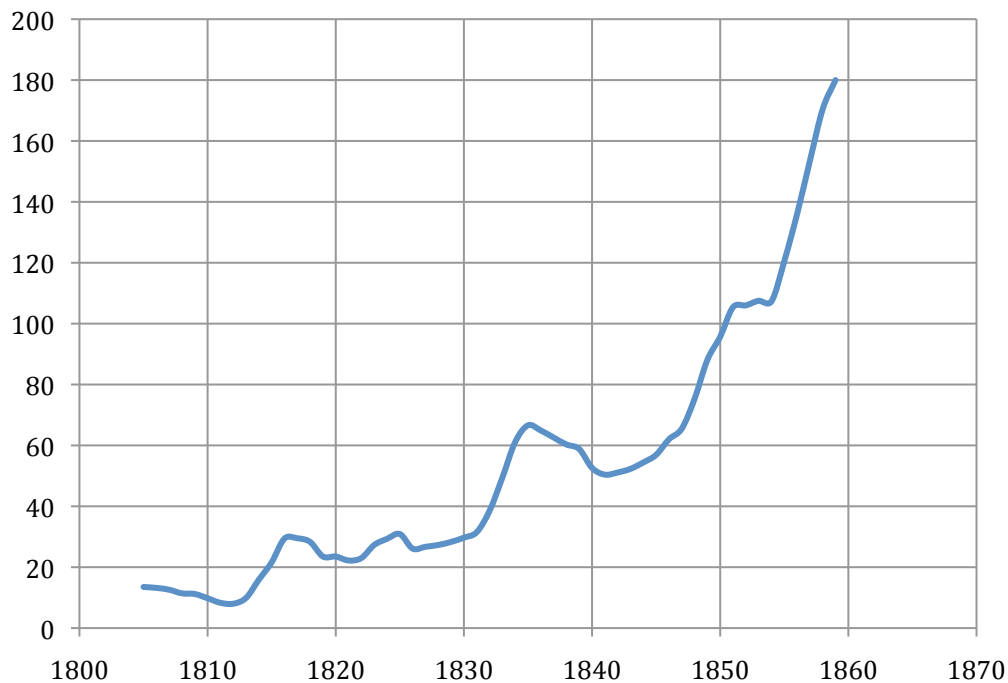
³ In Tadman’s analysis the principle exporting states are defined as Delaware, Kentucky, Maryland, the Carolinas, Virginia, and the District of Columbia.

⁴ Blight points out that a prime slave hand worth \$1,000 in 1860 would be equivalent to the price of a new Toyota Camry today. Roughly, \$1,000 in 1860 money would be equal to about \$27,000 today using the CPI.

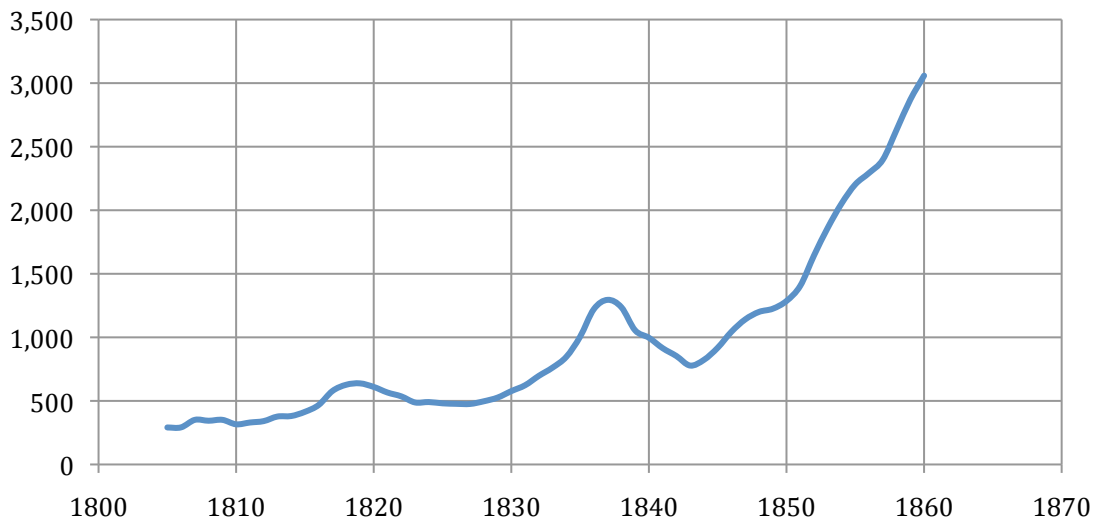
The value of cotton and slaves rose significantly in the antebellum period. Overall, cotton's value went up more than 9 times between 1805-1859. The main growth periods were between 1812-16, 1830-35, 1841-51, and 1854-59. As can be seen in Figures 7 and 8, slave and cotton prices were correlated; however, slave prices increased at a greater rate than cotton prices in the last decade before the war, as slave speculation increased (Johnson 1999).⁵ The price of a "prime field hand" ranged between \$700 and \$1,300 until the 1850's, during which such slaves were acquired at an average price between \$1,122 and \$1,564. The average price of all slaves in the South in 1805 was about \$308, while in 1861 it was \$742 (Figure 9).

The weight of the value of slaves in the U.S. economy was immense by the time of the Civil War. The value of all slaves in the United States by 1860 was approximately \$3 billion (Table 2). This was more than investment in manufacturing and railroads combined. The only asset category worth more than slaves were farms.

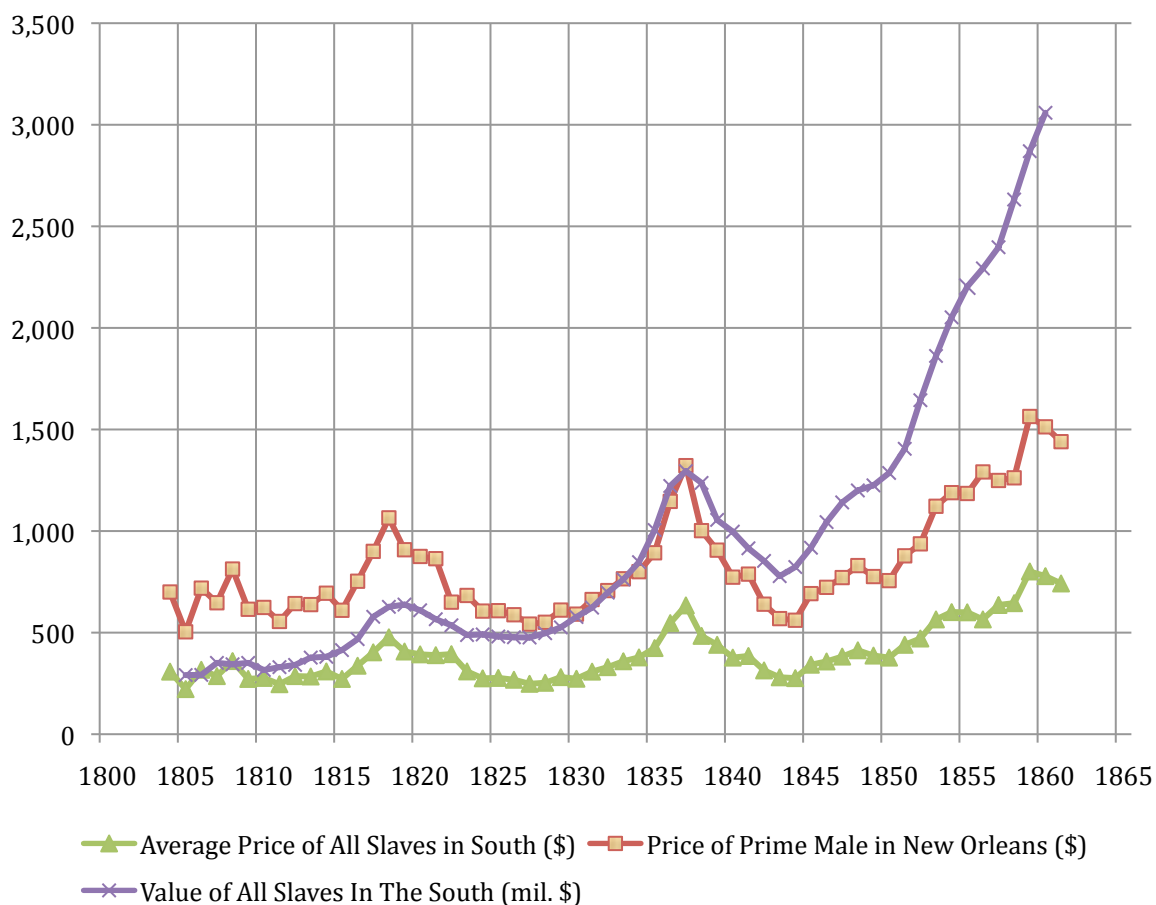
⁵ See Walter Johnson, *Soul By Soul*, Cambridge: Harvard University Press, 1999, 78-116.

FIGURE 7 - Value of cotton output (mil. \$), 1805-1859

Source: Roger L. Ransom, *Conflict and Compromise*, (Cambridge University Press, 1989).

FIGURE 8 - Value of all slaves (mil. \$), 1805-1859

Source: Roger L. Ransom and Richard Sutch, "Capitalists without Capital: The Burden of Slavery and the Impact of Emancipation," *Agricultural History* (Fall, 1988), table A.1.

FIGURE 9 - Comparison of slave prices, 1805-1860

Source: Roger L. Ransom and Richard Sutch, "Capitalists without Capital: The Burden of Slavery and the Impact of Emancipation," *Agricultural History* (Fall, 1988), table A.1.

TABLE 2 - Wealth in the U.S. by economic category, 1860

	Estimated Value (mil. 1860 \$)
Slaves	3,000
Farms	6,638
Farm Implements	246
Investment in Manufacturing	1,050
Investment in Railroads	1,166
Bank Capital	227
Home Productions	27
Livestock	1,099
Total	13,452

Source: James Huston, "Property Rights in Slavery and the Coming of the Civil War," *J. of Southern History*, 1999 (2), 254.

Considering the value of slaves and the value of cotton that they produced, it is not too unobvious that slaves provided a significant portion of their owners' income. As can be seen from Table 3, slaves were quite important to the income of their owners. In the cotton states slaves provided as much as 41.7 percent of whites' income, with a range of 19.4%-41.7%, while in non-cotton states slaves provided between 17.4%-19.4% of whites' income.

TABLE 3 - The fraction of Whites' Income from Slavery, 1860

	Percent of the Population That Were Slaves	Per Capita Earnings of Free Whites (\$)	Slave Earnings per Free White (\$)	Percent of Earnings Due to Slavery
Alabama	45	120	50	41.7
South Carolina	57	159	57	35.8
Florida	44	143	48	33.6
Georgia	44	136	40	29.4
Mississippi	55	253	74	29.2
Louisiana	47	229	54	23.6
Texas	30	134	26	19.4
Seven Cotton States	46	163	50	30.6
North Carolina	33	108	21	19.4
Tennessee	25	93	17	18.3
Arkansas	26	121	21	17.4
Virginia	32	121	21	17.4
All 11 States	38	135	35	25.9

Source: Computed by Roger Ransom from data in Gerald Gunderson (1974: 922, Table 1). Roger Ransom, "The Economics of the Civil War," <http://eh.net/encyclopedia/article/ransom.civil.war.us>, Accessed June 7, 2011.

Slavery was thus a vital investment component in the Southern economy. Slaves were crucial as "capital" inputs to the production of cotton and became financial assets themselves in the slave trade as speculators bought and sold slaves for profit. Slave prices

rose significantly prior to the war and were the second highest-valued asset in the nation's economy.

5.2 INTERJURISDICTIONAL PROPERTY RIGHTS DISCRIMINATION

The property rights regime regarding slavery in the antebellum period was bifurcated between the regimes of the Northern free states and Southern slave states.

In the North, ownership of slaves was illegal; nobody could own property rights in another human being. Labor was paid in wages. Human rights – e.g., personal liberties – were respected in law and preferred socially (racism and nativism notwithstanding). On the other hand, in the South, people could own human beings (specifically, blacks), who were treated in many ways similarly to any other asset for which one had a property right: slave owners could gain from, exclude others from, and exchange their slaves. For example, slaves could be utilized in the field to produce cotton, bought and sold in the local slave market in the city or with vagabond rural slave traders, and invested in to improve the slave for farm use or sale (e.g., breeding and educating future slaves).

These two regimes, one that guaranteed property rights in slaves and one that did not, had important conflictual implications. The primary problems that arose regarding the interjurisdictional discrimination of the slave state and the free state property rights regimes were threefold.

1. First, when slave-owners exited free states, they could face questions as to whether the “black he was taking with him might not be free or entitled to ultimate freedom (Morris 1974, 13).” The possibility of this question being legitimately considered increased the risk to slave-owners when bringing

slaves into the free states. A slave owner could not be certain that his property rights would be unquestioned by citizens and the courts in free states.

2. Second, when slave owners attempted to reclaim fugitive slaves, they encountered an institution that guaranteed due process regarding assertions of ownership. Slave owners could not, as they generally could in the slave states, recapture their slaves without going through the courts. This raised the costs of recapture, but was also not a guarantee of reobtaining the slave. Contrary to how slave state courts treated slaves; free state courts treated its residents as deserving civil rights (e.g., the right “to be secure in one’s person”). Common law legal procedures also jeopardized slave-owners’ chances of recapture. The most important legal procedures were the right to trial by jury - especially useful for the abolitionist cause when determining whether a black was legally a slave; and especially threatening to the slave owner who had to make the case of legal ownership of the slave in front of a jury of free state citizens, the prevalence of racism notwithstanding – the writ of *habeas corpus cum causa*,⁶ and the writ *de homine replegiando* (personal replevin) (Morris 1974, 8-13).
3. The third problem, which was more of a problem for free states, and which contributed to the passing of Personal Liberty Laws in the free states,

⁶ According to the Oxford American Dictionary: *Habeas corpus cum causa* requires a person under arrest to be brought before a judge or into court, especially to secure the person’s release unless lawful grounds are shown for their detention. Literally: You will have the body with the cause (of detention).

concerned the kidnapping of free men to be sold in slave states (Morris 1974, 13).

With these problems the fundamental contradictions caused by interjurisdictional property rights discrimination was that free states attempted to protect the civil liberties of the individuals who resided in their jurisdictions, while slave-owners demanded recognition of their property rights in slaves across jurisdictions. This clash, which played out at the state level during the ante bellum period, grew into a significant national issue by mid-century. Personal Liberty Laws were one step in the nationalization of the transjurisdictional issue of slave-owner property rights.

5.2.1 PERSONAL LIBERTY LAWS

Free states passed Personal Liberty Laws, which discriminated against slave-owner property rights, to protect free individuals and ameliorate the difficulties that were presented when claims were made on alleged fugitive slaves. One of the first of such Laws was the Pennsylvania Fugitive Slave Act of 1826. This Act was an attempt at compromise regarding: the federal Fugitive Slave Clause,⁷ which stipulated that fugitive slaves should be “delivered up” to their owners; the federal Fugitive Slave Act of 1793, which further stipulated an enforcement mechanism by which slaves should be returned to their owners; and, the free states’ “responsibility to protect the personal liberty of free blacks (Morris 1974, 46).”

Because the clause in the Constitution was vague regarding how slaves should be “delivered

⁷ Article 4, Section 2, Clause 3 of the *United States Constitution*: “No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”

up on claim” of ownership (e.g., should states assist?), the Personal Liberty Laws served as a way of clarifying free states’ positions on their interpretations of the clause.

While enhancing the interjurisdictionally discriminatory nature of the free state regime, the Personal Liberty Laws were *intra*jurisdictionally discriminatory against slave-owner interests for at least a few reasons. Some, as Pennsylvania’s Act sought to do, were indirect attempts at nullification of the federal laws as they explicitly rejected the “idea of voluntary cooperation” and denied the “general right of recaption by self-help alone (Morris 1974, 46-52).” Furthermore, in the Pennsylvania Act, slave-owners had to provide affidavits of ownership and their oaths of ownership could not be admitted as evidence; alleged slaves were given time to “obtain evidence to refute the claim;” and, in some cases, slave claimants were liable for the costs of imprisonment of the alleged slave (Morris 1974, 52). Ultimately, Acts like this raised the costs of slave reclamation.

The discriminatory issues of the Personal Liberty Laws regarding the adjudication of claims, state cooperation for rendition, and recaption by slave-owners came to the Federal Supreme Court. In *Prigg v. Pennsylvania* (1842), the high Court “invalidated the earlier state efforts to establish the procedures for adjudicating claims and... validated state noncooperation in the rendition process. At the same time by sustaining a right of recaption uninhibited by the presumption of freedom, the “opinion of the court” appeared to deprive free men of the equal protection of the laws (Morris 1974, 104).” So, while states could not interfere in the claims of slave-owners, they could also choose not to cooperate in the process of slave recapture. Moreover, states could not inhibit slave-owners who sought to take back, without legal process, their property, which was recognized as such federally. This ruling essentially favored the slave-owner in that it made the enforcement costs of slave-owner

property rights cheaper by limiting the power of free states to hinder the process of slave recapture. Conversely, it made free men less secure by limiting the state's power to protect the civil liberties of those who resided in its state (Morris 1974). Free states responded by forbidding state cooperation in fugitive slave cases.

By 1850, another attempt, which proved rancorous in the free states, was made to buttress slave-owner property rights at the federal level. The Fugitive Slave Act of 1850 created commissioners to hear fugitive slave cases in free states. Commissioners could issue a *posse comitatus*, which summoned locals to help enforce the law. The commissioner was tasked with deciding whether the claimant had ownership of the person. If he found in favor of the claimant, the commissioner was paid \$10, while if he found against the claimant, he would be paid \$5 (n.b., the commissioners were monetarily incentivized therefore to find in favor of claimants). And, “anyone who obstructed a claimant making a seizure, ‘either with or without’ a process, or rescued a runaway, or harbored one, would be subject to a one-thousand-dollar fine and imprisonment for six months (Morris 1974, 146).” This provoked discriminatory reaction in the free states with the passing of a “new series of personal liberty laws (nine between 1842 and 1850) that prohibited the use of state facilities in the recapture of fugitives (McPherson 1988, 79).”

As can be seen in this conflict over the interjurisdictionally bifurcated property rights regime regarding slaves, clashing interests highlighted the discriminatory nature of each regime. While one regime discriminated against slave ownership, the other discriminated against the civil rights of slaves as humans. The free states responded to federal Fugitive Slave Laws by passing *intra*jurisdictionally-focused Personal Liberty Laws, which had

discriminatory outcomes for slave-owners, while more federal laws were created to enforce slave-owner property rights.

5.3 DIVERGENT INTERESTS

Westward expansion of the country forced to the surface the divergent interests regarding the interjurisdictionally bifurcated property rights regime. While the Missouri Compromise had apparently settled the issue of how to admit future free and slave states, just over 25 years later the question arose fresh and created untamable tensions. This began with the war with Mexico and the Wilmot Proviso, then the California gold rush and the Compromise of 1850, the Kansas-Nebraska Act, which nullified the Missouri Compromise, and the Dred Scott Supreme Court case. By 1850 the sectional issue regarding slave-owner property rights destroyed one national party and set the stage for the rise of the free-state Republican Party. With the 1860 election of Abraham Lincoln, the Deep and Middle South southern slave states, led by slave-owners in the secession conventions, seceded from the Union.

In 1820, the Missouri Compromise was struck to develop a framework for future admission of free states. The 36°30' geographic line demarcated the division of future free and slave states. With a few issues in the 1830s, such as South Carolina's nullification attempt and the Congressional gag rule on abolitionists, the federal Union made it through the first four decades of the 19th century without sectional tensions over slavery becoming too divisive. However, as the country expanded westward and acquired territories, political tensions rose over the type of property rights regime – slave or free – that would operate in the new states.

The first major rise in tensions occurred in 1846 after the war with Mexico broke out. The Wilmot Proviso stipulated in an amendment to an appropriations bill to pay for the war

“neither slavery nor involuntary servitude shall ever exist” in the territories to be acquired from Mexico (McPherson 1988, 52).

The next major event that raised sectional tensions was California’s statehood in 1850. The number of slave and free states in the Union was significant because the more states of one kind of property rights regime or the other, the more power that particular interest may have in the federal government. The Missouri Compromise had kept the balance between slave and free states even for nearly 20 years. But, California was admitted as a free state, which tipped the balance 16:15 in favor of free states to slave states. While California was admitted as a free state, in the compromise slave states received the benefit of the Fugitive Slave Act of 1850. Also, New Mexico and Utah had to organize governments, where popular sovereignty would determine whether the state would be slave or free, and the slave trade in the District of Columbia was abolished (Nash and Jeffrey 2001, 437).

The Kansas-Nebraska Act in 1854 increased tensions yet again. This “law may have been the most important single event pushing the nation toward civil war (McPherson 1988, 121).” Why? Because it destroyed the Whig Party, which had been held together by loyalties based on the nonsectional interests of both free state and slave state citizens. The tension over the admission of slave or free states drove a stake through the party, wedging apart the party’s sectional pro- and anti-slavery interests, and planting the seeds for an “entirely northern Republican party” that in a decade would be led to power by Abraham Lincoln (McPherson 1988, 121). The Act stipulated that popular sovereignty would determine whether a new state became a slave or free state, nullifying the 36°30’ line established in the Missouri Compromise. Two years later slaveholders and free staters marched into Kansas

and the state erupted in a mini-civil war over whether the state would choose to define and enforce property rights in humans.

In the Judiciary, the case of *Dred Scott v. Sandford* came to the Supreme Court and further increased tensions over the issue of property rights discrimination in slavery. The Court ruled that “Dred Scott was not a citizen and had no right to sue in federal courts” for his freedom (Nash and Jeffrey 2001, 451). The ruling also stated that Congress could not ban slavery in a territory and that even though the Scotts had been taken by their masters on sojourn to free states, their status as slaves was unaffected. This federal ruling further defined and enforced slave-owner rights, which contradicted the laws of the free states.

The final nail in the coffin was the election of the free soil, anti- slavery Republican Abraham Lincoln in 1860. The Lincoln election demonstrated how politically divided the United States had become over the complicated issues presented by the controversy over slave-owner and human rights. Lincoln did not win a single slave state, but he did not need to. He won 40% of the national vote and decisively in the North (Nash and Jeffrey 2001, 455).

Within three months of his election, the slave states began seceding. In the first round, South Carolina seceded in December 1861, then Mississippi, Florida, Alabama, Georgia, Louisiana, and Texas between January 9-February 1. These were the Lower South states. South Carolina’s convention vote for secession was in favor 169-0, while the rest of the first round of secession votes went in favor at an average of 80% of the vote (McPherson 1988, 235). The second round of state secessions, which occurred after the attack on Fort Sumter in April 1861, consisted of Virginia first, then Arkansas, Tennessee, and North Carolina. The Border States of Missouri, Kentucky, and Maryland did not secede. The

Lower South secession conventions were highly represented by slaveholders. Not one secession convention, which led to secession, consisted of a lower percentage of slaveholder delegates than 61% (Wooster 1962).

TABLE 4 - Percent of Slave-owning Secession Convention Delegates, 1860-1861

Secessionary States	% of Secession Convention Delegates Who Owned Slaves in 1860
<u>1st Secession</u>	
S. Carolina	90.5
Mississippi	85.0
Alabama	79.0
Florida	79.0
Georgia	86.0
Louisiana	82.0
Texas	71.8
<u>2nd Secession</u>	
Virginia	77.6
Arkansas	61.1
Tennessee	66.0
N. Carolina	82.0

Source: Wooster, Ralph A. 1962. *The Secession Conventions of the South*. Princeton: Princeton University Press.

The reasoning given in the official declaration of causes by South Carolina, Mississippi, Texas, Alabama, and Georgia highlighted the sectional issue of slavery as a primary factor, as well.

Slave-owners were a large group of individuals whose interests were tied to preserving the institution of slavery in the antebellum period of the United States. While not all slave-owners desired disunion, controversies surrounding the issue of fugitive slave laws, the expansion of slave-owner property rights into the territories, and the election of an anti-slave President proved too much for their expectations regarding slave ownership.

5.4 SUMMARY OF EVIDENCE

It appears from the evidence based on the case of slavery in the antebellum period that property rights discrimination in fact may serve as a causal force in the onset of secessionary movements and civil war.

Slave owners had a significant vested interest at stake in the question of property rights over humans. The value of slaves in the South by the time of the Civil War was over \$3 billion and represented the second largest valued asset in the nation, next to land. Slaves were necessary to the continued production of cotton and were treated as assets that could be bought and sold in the market.

The conflicts over slave-owner property rights arose in the early antebellum period regarding fugitive slaves and slaves that were brought by their masters into free territory. Free states struggled with protecting the rights of their own citizens while enforcing rights of slave owners. While the free states adopted Personal Liberty Laws and allowed the use of common law legal procedures, such as *habeas corpus* and *de homine replegiando*, slave-owners saw this as an infringement on their property rights, as it increased the costs of slave ownership.

As the nation expanded westward, the conflict over slavery intensified at the national level. While the question came to the Supreme Court over whether slave-owners who brought slaves into free territories would maintain their property rights in their slaves, the question of admitting free and slave states in the western territories raised the stakes even higher. By the early 1850s, the sectional issue of slavery destroyed the Whig party, which had served as glue holding together both slave and free states based on nonsectional interests,

and gave birth to the Republican Party of Abraham Lincoln. By the election of Lincoln in 1860, slavery had become the primary platform issue.

The election of Lincoln led to a secessionary movement in the South as Southerners believed him and the Republican Party to be against their interests. The main slave states in the Deep South seceded with slavery being the primary reasoning behind their secession. Then the Middle South states followed in the second wave of secessions after Fort Sumter. Slave-owner interests were highly represented in the secession conventions of the secessionary states. Over 90% of attendees to the South Carolina convention were slave-owners, while the lowest of any of the secessionary states was 61.8%.

While this narrative of the main events and problems that led to the American Civil War has been brief, it sheds light on just how divisive the discriminatory property rights regimes were. While one regime valued human rights and did not consider human beings as legitimate objects for another's ownership, in the other viewed property rights in humans as a norm to be protected. This jurisdictionally bifurcated property rights regime created problems as the value of slaves rose and the nation sought expansion westward.

CHAPTER 6: CONCLUSION

In this paper I have submitted for examination the question of whether interjurisdictional property rights discrimination may serve as an impetus for civil war. While not all cases of interjurisdictional property rights discrimination may lead to civil war, sometimes they do. In my theory I suggested that increased costs from interjurisdictional property rights discrimination affect the expectations of owners regarding the relative gains from their resource. This may lead to discontent, which may lead to political action through the political institutions or outside of the political institutions to improve the cost function of ownership of the resource. Political violence may result if the discontented see no other effective option to achieve their ends.

In the case of the United States in the antebellum period, the increasing value of slaves to the southern economy, the personal liberty laws of free states, and questions over the continued expansion of two different regimes regarding ownership of slaves raised to a boiling point the political tensions of the nation. As prospects for the expansion of the slave regime looked dimmer with the election of Abraham Lincoln, discontent resulted in secession of the deep and middle South slave states. Civil War erupted.

Three specific points can be taken away from this paper:

1. Ownership of property is subject to the costs of enforcing one's ownership rights. Slave-owners faced increased costs of protection of their property rights whenever their slaves entered free states. Because the free states presumed that its residents were free, they protected the civil liberties of their residents. Legal procedures and Personal Liberty Laws challenged slave-owner property rights, thus increasing costs of ownership, which ultimately affected their expectations regarding the investment.

2. Interjurisdictional property rights discrimination creates winners and losers based on the effect of the specification and enforcement of the ownership rights on the costs and expectations of relative gains of those who own or purport to own the resource.
3. Interjurisdictional property rights discrimination losers may be driven to political action outside of the institutions if the institutions appear to exclude them.

Deep and Middle South slave-owning states seceded from the Union when they found that their interests would not be sufficiently represented after the election of Abraham Lincoln. With a President against the expansion of the slave-based property rights regime, national political power shifted in favor of free states.

CHAPTER 7: EPILOGUE AND FUTURE RESEARCH

After conducting research for this paper, it became apparent late that I really had two papers to write. One would be about *interjurisdictional* property rights discrimination, which could be generalizeable to interstate conflict over property rights. That is mostly what is the resultant attempt in the paper here. The other could be about *intrajurisdictional* property rights discrimination, which could be generalizeable to intrastate distributional conflicts, such as those over the expropriation of private property for state uses, or any set of various policies that are distributionally favorable to one group at the expense of another within a jurisdiction. Further elucidating the difference between inter- and intrajurisdictional property rights discrimination would be a good place to start for future research.

Future improvements to this paper could come from making some adjustments to: the approach to variable specification; theory development; a proper review of the literature related directly to the proposed theory and the question asked; and the choice of empirical evidence.

I could make improvements to the independent and dependent variables by specifying the variables more precisely, which for starters would be aided by further improving the definitions of inter- and intrajurisdictional property rights discrimination.

I could improve the literature review by focusing directly on interjurisdictional property rights discrimination from the start. There is a large body of research on civil war causation and the role of property rights in economic growth that I would have liked to include. This would help with my theory development in understanding the relationship between jurisdictional differences in property rights regimes and changes in costs and

expectations regarding ownership rights consequent of transjurisdictional movement of the resource or jurisdictional proximity.

As for improving the empirical evidence, more could be done regarding explicit statement of the control variables. A thorough historiographical review of the causes of the U.S. Civil War and taking account of control variables in the causes of the war would have buttressed the discussion of empirical evidence and the inferences that could be made from the evidence (. Reviewing the greed and grievance literature on civil war causation would also help (Ballentine 2003, 2005, 2003; Bannon 2003; Berdal 1997, 2000; Blattman 2010; Brubaker 1998; Collier 2000, 2002, 2003, 2004, 2005; Fearon 1995, 2003; Gurr 1971; Johnson 2003; Jok 2001; Jung 2003; Kalyvas 2001, 2003a, 2003b, 2006, 2007, 2011; Keen 2000; Klare 2001; Richards 1996; Ross 2003, 2006; Safford 2002; Sambanis 2001, 2003, 2004).

Moreover, stronger inferences could have been made from the U.S. Civil War case with different evidence from the antebellum period that could more directly speak to the relationship of interjurisdictional property rights discrimination and civil war causation. For one, I would have liked to show that changes in property rights discrimination at the national level affected slave prices, but I found the results to be spurious, possibly because of specification issues. Further research would need to be done to look for correlation. Another option would have been to look at how changes in the free states' regime regarding slave ownership (e.g., personal liberty laws, abolitionist presence in different localities, etc.) affected slave values in the contiguous border areas of slave and free states. Finding significant correlation in the relationship between changes in interjurisdictional property rights discrimination and the value of slaves would have provided direct evidence of the price

effect of discrimination. Perhaps one of these two routes would provide a future avenue for research on the cause-effect relationship of interjurisdictional property rights discrimination and civil war.

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My future plans are to attend a doctoral program in political science, where I would like to continue to study political economy and international relations.