

Matthew A. Axtell

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CURRENT POSITIONS

New York University School of Law, New York, N.Y.

Samuel I. Golieb Fellow in Legal History, 2013-2014 Academic Year

Princeton University, Princeton, N.J.

Doctoral Candidate in American History, PhD. Expected Aug. 2014

Dissertation: *American Steamboat Gothic: Commercial Law, Mercantile Property, and Slavery's Liquidation, 1818-1868*

Advisor: Hendrik Hartog; First Reader: Daniel T. Rodgers; Second Reader: Martha Sandweiss

Outside Reader: Carol M. Rose

EDUCATION

Princeton University, Princeton, N.J.

M.A. in History (With Distinction), Sept. 2010

General Exam Fields: Anglo-American Legal History (Hendrik Hartog); U.S. History, 1815-1920 (Sean Wilentz & Hendrik Hartog); History of Environment and Technology (Emmanuel Kreike & Emily Thompson)

Kathryn T. Preyer Scholar, American Society for Legal History, 2013

Prize Fellow, Woodrow Wilson Fellowship of Scholars, 2012-2013

Director, Modern America Workshop, 2010-2011

Graduate Associate, Program in Law and Public Affairs

Program in American Studies Summer Research Prize

Finalist, Morris L. Cohen Essay Competition, Am. Assoc. of Law Libraries, Legal Hist. Section

University of Virginia School of Law, Charlottesville, Va.

J. D., May 2002

Traynor Prize for Best Writing by Graduating Law Student

Editorial Board, *Virginia Environmental Law Journal*

Levinson Prize, Society for the History of Technology

Best Student Note Prize, *J. of L. & Politics*, Fall 2001 Issue

University of California at Berkeley, Berkeley, Ca.

B. A. in History, Highest Honors, May 1998

Phi Beta Kappa

Chancellor's Certificate of Highest Distinction

History Department Citation as Department's Most Outstanding Graduate

Dean's List, 1994-1997

Best Student Article Prize, *Berkeley Undergrad. Journal*, Spring 1998 Issue

PUBLICATIONS & MANUSCRIPTS

"Gaps in Law's White Mountain: Black Riverboat Entrepreneurs, Mercantile Property, and Slavery's Liquidation, 1832-1866" (Job Talk Paper)

"Customs of the River: Governing the Commons within a Nineteenth-Century Steamboat Economy," (under consideration by *L. & Hist. Rev.*)

- “Towards a New Legal History of Capitalism and Unfree Labor,” *Law & Social Inquiry* (Forthcoming)
- Review of *Big Muddy: An Environmental History of the Mississippi and Its Peoples from Hernando de Soto to Hurricane Katrina*, by Christopher Morris, in *Ohio Valley History* (Forthcoming)
- “Natural Law,” in *Encyclopedia of American Environmental History*, ed. Kathleen A. Brosnan (New York: Facts on File, 2010)
- “Bioacoustical Warfare: *Winter v. NRDC* and False Choices Between Wildlife and Technology in U.S. Waters,” 72/3 *The Minnesota Review* 205-218 (Fall 2009/Spring 2010)
- “Last Lake Standing: Clean Water Act Jurisdiction in the Alaskan Frontier after *Rapanos v. United States*,” 38:7 *Environmental Law Reporter* 10,473-10,479 (July 2008)
- “Garbage Can Music!: Rube Goldberg’s Three Careers,” 7 *Columbia Journal of American Studies* 30-65 (2006)
- “Parting the Waters: A *Mestizo* Perspective on the Mexico/U.S. Border,” 1.3 *Virginia Eagle* 15-17 (2002)
- “Pleasure Grounds and Iron Fences: Local and Federal Battles for Open Space in the Presidio of San Francisco, 1776-2001,” 27 *J. of Law and Politics* 797 – 852 (2001)
- “A Machinist’s Revolt,” 22 *Berkeley Undergraduate Journal* 225-96 (1998)

LEGAL EXPERIENCE

Vinson & Elkins LLP, Washington, D.C.

Environmental Law Associate, 2006-2008: Lead defense counsel for Kansas power cooperative in federal climate change lawsuit. Managed the legal interpretation of scientific evidence on tundra wetlands in support of jurisdictional defense in Clean Water Act enforcement case. Developed cost recovery claims against third parties in Superfund cleanup of industrial river in New Jersey.

Office of the Chief Counsel, U.S. Army Corps of Engineers, Washington, D.C.

Assistant Counsel for Environmental Law, 2002-2006: Enforced wetland permits under the Clean Water Act. Managed environmental compliance during Hurricane Katrina response and Florida Everglades restoration. Represented Department of Defense during Superfund cleanup of former Naval bombing range in Puerto Rico.

- Commander’s Award for Outstanding Civilian Service, U.S. Department of the Army, 2006
- Kimbel Award for Early Career Legal Achievement, 2005

TEACHING & RESEARCH EXPERIENCE

Preceptor, *History 385: The Role of Law in American Society*, Princeton University, Fall 2010

Research Assistant, Federal Judicial Center Office of History, Washington, D.C., 2009-2010

Attorney Resource Fellow, StreetLaw U.S. Supreme Court Institute for High School and Elementary School Social Studies Teachers, Silver Spring, Md., 2004-2005

Faculty Instructor, ALI-ABA Course of Study on Inverse Condemnation and Related Government Liability, Washington D.C., 2004

Research Apprentice for Professor Marvin Rosenberg, U.C. Berkeley, in support of *Masks of Antony and Cleopatra* (Univ. of Delaware: 2006)

FELLOWSHIPS & GRANTS

Fellow, J. Willard Hurst Summer Institute in Legal History, Univ. of Wisconsin-Madison, 2013

Institute for New Economic Thinking Grant, Harvard-Cambridge (U.K.) History Project, 2013

Everett Helm, Jr. Visiting Research Fellow, Indiana University-Bloomington, 2013
Filson Fellow, Filson Historical Society, Louisville, Kentucky, 2012
Scholarly Research Fellow, Kentucky Historical Society, Frankfort, Ky., 2011-2012
Alfred D. Chandler, Jr. Travel Fellowship in Business History, Harvard Business School, 2011
Graduate Student Fellow, Smithsonian Institution, 2010-2011

CONFERENCE & PAPER PRESENTATIONS

- “Gaps in Law’s White Mountain: Black Riverboat Entrepreneurs, Commercial Law, and Slavery’s Liquidation, 1832-1866,” Golieb Legal History Colloquium, NYU School of Law, Sept. 2013
“A Plundered Province: Steamboats, Commerce, and the Lawful Destruction of Property in the U.S West, 1835-1858,” Paper Presentation, Harvard History Project Conference on “Commerce, Corporations, and the Law,” Princeton, N.J., Sept. 2013
“Customs of the River: Legal Change and Shifting Hydrology in the 19th-Century Steamboat Economy,” Paper Presentation, American Society for Environmental History, Toronto, Ontario, April 2013
“Down the River with Roger B. Taney: Private Property, Public Movement, and *Strader v. Graham* (1851),” Paper Presentation, American Society for Legal History Annual Conference, Atlanta, Ga., Nov. 2011
“The History of Oil in America: Before and After the Gulf Spill,” Symposium Organizer, Modern America Workshop, Princeton University, October 2010
“American Steamboat Gothic: Policing the Ohio River Zone, 1830-1861,” Paper Presentation, Social Conflict and Environmental Change in Comparative Perspective Conference, Yale University, April 2010
“*Habeas Porpoise*: Mimicking the Dolphin Voice in *Winter v. Natural Resources Defense Council*,” Paper Presentation, Dialogues on Animality Symposium, University of Pennsylvania, Oct. 2009
“The Unfinished Division: The James River and Kanawha Canal and Myths of Modernization in Antebellum Virginia,” Paper Presentation, Southern Forum on Agricultural, Rural, and Environmental History, Appalachian State University, Boone, N.C., April 2009
“The Role of State and Local Governments in Wetlands Protection,” Workshop Facilitator, Am. Soc. of Civil Engineers’ Coasts, Oceans, Ports, and Rivers Institute, Rice Univ., Houston, Tx., 2008
“The Application of State Water Quality Standards to Federal Facilities,” Lecture, Kaskia-Kaw River Conservancy/Corps of Eng. Environ. & Natural Resources Conference, St. Louis, Mo., 2005
“Historic Preservation and the Federal Wetlands Permitting Process,” Lecture, Roger Williams University School of Law, Bristol, Rhode Island, 2004

BAR MEMBERSHIPS

U.S. District Court for the District of Columbia
District of Columbia Bar

TEACHING & RESEARCH INTERESTS

Property, Environmental Law, Legal History,
Commercial Law, Administrative Law,
Federal Income Taxation, Energy Law

REFERENCES

Primary References

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RESEARCH AGENDA

My scholarship uses the methods of the professional historian to study how property rights have structured power relations between people over time. Through a close study of the relationships between property law doctrine, legal theory, and living social practices, I explore creative tensions between U.S. democratic liberal capitalism and working class history. Having been an environmental lawyer for six years prior to pursuing a doctorate in legal history, I maintain a deep interest in studying contemporary American law in light of the ecological conditions that embed and interact with commercial institutions.

Current Research

American Steamboat Gothic: Commercial Law, Mercantile Property & Slavery's Liquidation along the Ohio River, 1818-1866

I am presently completing a dissertation within Princeton's history department on the legal history of the nineteenth-century steamboat economy on the Ohio and Mississippi Rivers, a project which I intend to expand into a book. My dissertation manuscript, still in progress, reveals how Americans seeking economic opportunities in a particular place and time indirectly eroded discriminatory norms of property ownership through the formal structures of everyday commercial law. Along the Ohio River, I argue, liberal concepts about commercial property and contracts, initially designed to expedite the exchange of goods on nineteenth-century waterfronts during a period of rapid economic expansion, quickly spread beyond their initial bounds, creating space for social change to occur from below. Rather than threatening individual liberty, routine transfers of property on western waterfronts, even when involuntary, empowered private actors in a way that sometimes upset social hierarchies between buyers and sellers, banks and laborers, masters and slaves.

Using state and federal case files, the private papers of judges, attorneys and their clients, and federal administrative records, my dissertation studies the working legal consciousness that steamboat owners, commission merchants, riverboat laborers, and commercial lawyers shared as they leveraged easy credit opportunities to break down, split apart, and reconstruct mercantile property interests along western river waterfronts in efforts to take control of their own lives. As such, I situate my dissertation along a continuum of work by influential legal historians that has analyzed how legal concepts and actors have shaped (and been shaped by) markets, geography, and economic reasoning in the American past. Rather than seeing nineteenth-century law as merely the product of capitalist superstructure or reflecting an aggregate collective will, however, my dissertation explores the empowering potential that contractarian principles had across American society, particularly among the waterfront's working poor.

During the 1830s and 1840s, I argue, the bustling nature of the steamboat economy eventually joined with its multijurisdictional nature, its undercapitalization, its compatibility with Jacksonian "equal rights" ideology, and its everyday legalization to place lasting clouds over property titles within the Ohio River basin. At this particular moment, the seizure, forced sale, and transfer of steamboat vessels, a

widely-held species of property central to the operation of a competitive market economy in America's inland west, seemed to democratize the experience of taking possessions out of private hands in a way that eroded exclusionary ownership claims elsewhere in the law, legitimating government entry into hitherto private commercial space. Over time, the forced transfer of steamboat property in the Ohio Valley in fact sharpened summary legal processes eventually used to liquidate slave economies in the lower Mississippi Valley in a manner that resembled an organized bankruptcy proceeding.

My dissertation makes three key contributions to existing property law scholarship while also adding to historical understandings of the rise of the modern American state. First, my dissertation provides historical evidence challenging the conventional wisdom that economic growth is only possible when property rights are made "secure." Specifically, I detail how the nonconsensual *transfer* of property (sometimes through court order in satisfaction for unpaid debts), rather than the voluntary *retention* of property in a single party's hands, kept capital in circulation, in fact facilitating commercial exchange and economic expansion. Second, by expanding legal history's list of commercial actors to white working class artisans and free and enslaved black riverboat entrepreneurs, my dissertation shifts the attention of property law scholars away from a mythical American past of (mostly white and wealthy) individuals defending distinct parcels of land against incursions from the state. Instead, my dissertation plunges readers into an actually-occurring, privately-ordered multiracial business world, a place where mercantile property was claimed, divided up, repackaged, and contested by private actors in the absence of a recognizable central government. Third, by revealing how state actors modeled property transfer procedures on legal concepts initially devised to adjudicate private commercial disputes, my dissertation ties a more recent history of government regulation of business activity to a longer history of private wealth redistribution, a history that starts with redistributions from farmers to banks through the procedural means of the foreclosure and that ends with transfers from masters to slaves through the related transactions of the self-purchase and unilateral self-emancipation. My dissertation explains these developments while linking defensive "substantive due process" claims back to their intellectual source, to the lower Mississippi River's planter class, people who had the most to lose.

Customs of the River: Governing the Commons within a Nineteenth-Century Steamboat Economy

This article, under submission to *Law & History Review*, uncovers a lost world indigenous to the legal history of the United States. In this world, law was "used" as an instrument not in a way familiar to readers of Willard Hurst, as a means to identify natural resources as private property to be allocated for exploitation by the highest bidder. Instead, law was used as a means to preserve landscapes as common property sustainably enjoyed by a multiplicity of actors for commercial ends. Focusing upon a single suit brought in 1854 to assign liability for a steamboat collision, where the issue became whether pilots followed the "customs of the river" at a particular bend in the Ohio River, this article relates how through the "customs of the river" inquiry, Jacksonian judges in the 1830s and 1840s permitted a wild, unimproved river to speak at trial in order to keep American environments open to the "disorganized public" as a whole. By the 1850s, pressed by insurers seeking standardized commercial rules of the road, federal administrators promoted a more uniform, state-managed vision. To maintain the river's status as a "common highway" with the "customs" inquiry now out of fashion, Humphrey Leavitt, the Jacksonian judge in this case, eventually developed new rules that shared the costs of navigation between private actors in a way that maintained the Ohio River as a privately-ordered common space.

This article makes several contributions to property and environmental law scholarship. First, by highlighting a place and time where American litigants and judges worked out and used defensible “rules for the river” in the absence of either administration by a centralized state or wholesale privatization, the article undermines essentialist claims (best seen in Garret Hardin’s “Tragedy of the Commons” article) that small U.S. communities inevitably lack institutional capacity to manage public resources on their own. Second, by tracking how Judge Leavitt transformed the “customs of the river” into a new rule that shared costs between colliding parties in cases of “inscrutable fault,” the article suggests how legal doctrines that may seem to be entirely “commercial” on their face can occasionally be used by private actors to preserve natural resources that are otherwise being primed for capitalist production.

Towards a New Legal History of Capitalism and Unfree Labor

This long-form essay, solicited by the peer-reviewed journal *Law and Social Inquiry* and currently in progress, uses the publication of *River of Dark Dreams: Slavery and Empire in the Cotton Kingdom* (2013) by Harvard historian Walter Johnson as an occasion to study the few moments when American slavery has been conceptualized as an inherently legal institution, and to interrogate why it frequently is not seen in this way. The essay also suggests ways that a revitalized interest among historians in studying linkages between slavery and capitalism may be leveraged to integrate the often disparate projects of studying unequal labor systems and American law in historical time.

For many years, the consensus among scholars has been that U.S. Southern slavery created an alternate, relatively closed society that was not based on bourgeois, “liberal capitalist” values. This consensus has prevailed despite a brief moment in the mid-1800s when a radical antislavery critique sought to associate the “slave power” with a malignant “money power,” and despite a brief period in the 1970s, when economic historians took Southern planters seriously as commercial actors. By the early 1980s, following a Critical Legal Studies trend that presented slavery as a study in a particularized form of “legalized hegemony” that was decisively anti-capitalist in form, scholars like Eugene Genovese and Mark Tushnet momentarily found much work to be done by the law in the U.S. South. In particular, such work explained how some elite judges channeled market and social relations in “slave states” where they otherwise would not want to go, protecting slavery’s status as a preferred method of social control in the process. Over time, however, later scholars interested in documenting clearer moments of oppression or armed black resistance would give the law far less independent work to do.

Recently, through the work of historians interested in redrawing the profit-seeking links between systems of slave labor, southern commodities, and global markets, the ground has shifted. For Walter Johnson and this new cohort, slavery in the cotton-producing lower Mississippi has been rethought as the “leading edge” of expansionary American (and global) capitalism. As of now, however, the everyday commercial law of contracts and property, the engine allowing much of this capitalism to occur, has played a minor role in such new work. While today’s historians of capitalism may already excel in portraying American slavery as emblematic of a “world system” headquartered in places like London and Liverpool, a renewed look at American commercial life through the prism of the law can complicate the essentialist critique of capitalism that is implicit in much of this new historical work. Taking the commercial law of slavery seriously, I argue, can help us identify moments when bourgeois values, precisely because of their transportability across space and time, are capable of being re-appropriated and reconditioned by humbler working class members of American society for their own ends.

Future Projects

The Slaughter House Cases Revisited: Environmental Justice and Radical Reconstruction along the Mississippi, 1866-1880

A chronological and thematic successor to my dissertation, this project will pick up where that earlier project leaves off. With liberal commercial law concepts and procedures now having been successfully marshaled by Radical Republicans and working class freedmen to liquidate slave economies in the lower Mississippi River valley, this study will analyze the role that law and legal arguments played in the tumultuous Reconstruction period that immediately came next. The focus of this project will be the *Slaughter House Cases*, a famous collection of suits first decided by the U.S. Supreme Court in 1873, wherein the Court upheld a law passed by Louisiana's Reconstruction-era legislature granting an exclusive franchise to "the Crescent City Live Stock Handling and Slaughterhouse Company" to operate a single butchering facility in New Orleans, dismissing claims by white butchers that the law infringed upon their "privileges and immunities" and substantive due process rights to pursue a profession of their choosing under the Fourteenth Amendment. Unlike most historical treatments, my project will explore the environmental justice features underpinning this episode, explaining how the stated purpose of the Louisiana law – the promotion of sanitary slaughtering practices – was necessarily linked to its rumored intent of improving the economic opportunities of New Orleans' black working class.

Today, the *Slaughter House Cases* are critiqued from the left as a failure of the Supreme Court to enforce an expansive interpretation of the Fourteenth Amendment as a "charter of freedom" protecting the civil rights of African-Americans, and from the right as a failure to limit overzealous government local regulation said to threaten federally-protected private economic liberties. My project challenges both interpretations. Pushed away from arable land and towards rivers and marginal wetlands during slavery and forced to hunt, fish, and earn a living from the river itself, the lower Mississippi's free black population, in tandem with the river's poor white working class, in fact viewed equal access to an unpolluted Mississippi, something secured under state law and affirmed by the 1873 *Slaughter House* ruling, as a valuable civil right. Thus, rather than denying any rights previously claimed under federal law, *Slaughter House* placed the access rights of blacks on the same level as the existing rights of whites under state law, in fact incentivizing white butchers to practice their trade alongside black counterparts within a single facility. For Republicans, this furthered a "free labor" objective to create a postwar multiracial labor market where whites and blacks competed on equal footing.

Only after this objective began to be achieved along the Mississippi, with the Crescent City facility itself becoming a site for cross-racial economic dealing and economic empowerment following the 1873 ruling, did that facility become a genuinely actionable threat to the property interests of a more powerful group of whites, many of whom came to associate with the Republican party. By the late 1870s, this group would fight to ensure that the erosion of racial divisions along the Mississippi River would not expand into the political arena, supporting the demise of the Crescent City facility as a way to block the emergence of a united working class capable of asserting its own property claims under the law.

Democracy, Collective Action, and Economic Development in the American Past: Rewriting the Legal History of a "Failed" Public Works Project

To what extent is the ability to think up and complete a grand development project like the Erie Canal a unique triumph of American democracy? In the 1940s, while working in the shadow of fascism

and Stalinism across the Atlantic, the Rockefeller Foundation, a private philanthropy organization headquartered in New York, founded a Committee on Economic History whose task was to chart the many ways that such public works necessarily flowed from state-backed “democratic capitalist” institutions. What was produced by the Committee, however, were monographs telling a more complex story, with elected judges emerging as opponents to proto-Keynesian projects designed to use government resources to “prime the pump” of economic growth like early versions of the World Bank.

Challenging many of the assumptions of the initial Rockefeller committee, a group that effectively created a new field of “economic history” in the 1940s, this project focuses on one of the studies commissioned by that group but that was never finished: a study of the economic development experience of pre-Civil War Virginia. Featuring a canal that was never completed, the Virginia development story was regarded at the time as a story of “failure.” My project returns to archival legislative records, litigation case files, and the business papers of the state-backed James River and Kanawha Canal Company to reveal how the inability of Virginia’s canal to reach its final destination actually was the product of an emerging folk democracy helmed by merchants in Virginia’s pre-Civil War trans-mountain West, people who sought economic development on their own terms by challenging the state’s right of eminent domain. An early paper stemming from this larger project received awards from the University of Virginia School of Law and the Society for the History of Technology.

Nature’s Day in Court: The Citizens’ Suit Moment and the Transformation of U.S. Environmental Law, 1965-1992

Bringing the insights of my work into a contemporary context, this project will track the rise and fall of the citizens’ suit in the field of environmental law from its origins in *Scenic Hudson Preservation Conference v. Federal Power Commission* (1965) to its judicial restriction by the U.S. Supreme Court in the “standing” case of *Lujan v. Defenders of Wildlife* (1992). Rather than portray this story as the de-radicalization of “progressive” claims by bureaucrats or a “conservative” Supreme Court, this project will explain how the idea of the citizen suit, of giving the “disorganized public” a private common law right of action to halt industrial activity in the interests of a healthy environment, arose from a particular moment in American legal history, namely the Civil Rights era, but quickly lost its way. By the 1970s, with some founding-era environmental lawyers passing from trial advocacy to the corridors of public office, and with new statutes enforced by the EPA moving the private citizens’ suit to the realm of federal administrative law, what started as an outsider’s challenge to industrial capital and wealthy property holders was quickly transformed into an insider’s bargaining chip, with more suits being threatened by repeat-playing advocacy groups as a way to force regulatory action than being actually filed. By relying on the EPA (a government agency easily targeted by industry lobbyists) to shoulder its litigation burden, and by supporting the Coasian idea of a tradable “property right to pollute” as a policy insider, such founding environmental organizations, I argue, gradually ceded their role as sovereign private actors under the law. This would leave poor communities to fill the citizens’ suit vacuum, fighting uphill battles to revive the argument that a clean environment was a basic civil right in the Age of Reagan and beyond.