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### Land, Slaves, and Bonds: Trust and Probate in the Pre-Civil War Shenandoah Valley

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## **Land, Slaves, and Bonds:**

### **Trust and Probate in the Pre-Civil War Shenandoah Valley**

**Alfred L. Brophy<sup>1</sup> and Douglas Thie<sup>2</sup>**

#### **Abstract**

“Land, Slaves, and Bonds” samples wills probated in Rockbridge County in Virginia’s Shenandoah Valley from 1820 to 1861, to detail the changes in testamentary devises and the technology of wills and trusts during that era of market revolution. We report the gender, familial status, distributions, and incidence of trusts for the 128 testators sampled. Their choices frequently involved leaving part of their property to their surviving spouses for their lives, then outright to their sons and in trust to their daughters. Nearly forty percent owned enslaved human property and distributed their slaves among their children. Occasionally testators freed their enslaved human property. This study also traces changes in the sophistication of wills and accompanying trusts over time. Thus it provides a window into how Rockbridge County residents used the legal process to transmit wealth between generations and to preserve it within families.

The forty years leading into Civil War were ones of extraordinary expansion in the economy, communication, transportation, and technology of the United States; the legal technology studied here reflects that growth in wealth and sophistication. At the same time, as the vigorous market economy was expanding -- as testators’ wealth was increasingly reflected in personal property such as stocks and bonds, rather than real property -- there were problems with identifying reliable agents (executors and trustees). Thus, testators continued to place a premium on family members to manage their wealth; and they also took extraordinary means, such as use

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of sophisticated trust documents and marriage settlements, to maintain property within their families. This study shows that testators turned frequently to legal technology to manage property and keep it within their families. They used the vehicles to keep property out of the hands of creditors, especially the creditors of their sons-in-laws, Legal technology helped respond to the impersonal market revolution.

The data have several implications. They reveal how people reacted to the expanding, impersonal economy where property owners frequently had to rely on trust, even if it was dangerous to do so because it was difficult to police the actions of agents. That era of the breakdown of “trust” was a central impetus to the turn to trust documents to protect a family’s wealth. The data show the importance of legal technology in adapting to a rapidly changing economy and a rapidly expanding world. They also demonstrate the rapid rise in sophistication of trusts and relocate the roots of modern trust law, such as the spendthrift trust, to the pre-Civil War era, even though it is frequently written about as a device of the post-War era.

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## I. Inheritance and Slavery in Literature of the Shenandoah Valley

Sometime around the early 1840s the Irvine family of the Shenandoah Valley lost much of their inheritance. The agent who managed the inheritance, Thomas Bryson, had invested it in a bank, which failed. Lawrence Irvine, the only male child in the family of a widowed mother and four sisters, had inquired of the agent a few months before about the financial soundness of the bank and the agent reassured the family that their money was safe.<sup>3</sup> Yet, that assurance proved ill-founded. A few months after the failure, the family lost their home to a fire; little was left, not even the painting illustrating a scene from Dante's *Inferno*. The painting showed the imprisonment of Count Ugolino, who sat in jail with his family for financial crimes and later occupied the second ring in the lowest circle of inferno, the area reserved for those who betray family and friends.<sup>4</sup> Then the agent, Thomas Bryson, stole the family's remaining funds, declared bankruptcy,<sup>5</sup> and finally fled with his family to Europe.<sup>6</sup>

The bank failure and the journey towards poverty began through the negligence of the trustee and the bank's managers. It was made worse through outright fraud. The Irvine family suffered through no fault of their own. When there were rumors that the bank might fail, Lawrence Irvine wrote to Bryson and received assurances that the bank was fine. Lawrence recalled his thinking that "as a great merchant," Bryson "ought to know what stocks were unsafe."<sup>7</sup> Even after Bryson's poor investment choice in the bank was revealed, they again entrusted him with their finances.<sup>8</sup> The Irvines made the mistake of trusting an agent, a common

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<sup>3</sup> [MARGARET JUNKIN PRESTON,] SILVERWOOD: BOOK OF MEMORIES 20 (New York, Derby & Jackson 1856).

<sup>4</sup> *Id.* at 30-31 (describing destruction of family estate, including picture); *id.* at 9-10 (describing picture with scene of Count Ugolino from the *Inferno*; perhaps Preston had Joshua Reynolds' 1773 *Count Ugolino and His Children* in mind).

<sup>5</sup> *Id.* at 153-54.

<sup>6</sup> *Id.* at 259-60.

<sup>7</sup> *Id.* at 21.

<sup>8</sup> PRESTON, *supra* note 3, at 180-81 ("Dealings With a Man of Business").

problem and an increasing one as the traditional personal connections were breaking down.<sup>9</sup> Apparently Bryson “put it into his own pocket, possibly intending, when he had used it as a little help to himself in his embarrassments . . . to invest it, and then patch up some story to cover the failure of the interest.”<sup>10</sup> But things were even worse than that, for when news came that Bryson had misappropriated the family’s remaining money, they also learned that the Bryson family’s assets were settled in his wife’s hands, so that his creditors could not reach them.<sup>11</sup> Edith Irvine went to plead with Bryson for help, even though she knew that she had no legal claim. When he refused, she turned to his wife, hoping that the wife would give up some of her assets to help Irvine family.<sup>12</sup> All to no avail. For when Edith went to visit with Mrs. Bryson to ask for satisfaction, she appealed to her as a woman and mother. “Legally, I know,” Edith said, “we can compel nothing from *you*; but you are a women--you have a mother’s heart--you will not see my widowed mother, with none to stand between her and the unpitying world, driven out in the afternoon of her life....”<sup>13</sup> Edith did not have a claim beyond that of the other creditors; that is, there would be little satisfaction for the losses they sustained when Mr. Bryson used his power of attorney to drain the assets entrusted to him into his wife’s hands. It was fraud, but there was little recourse; Mrs. Bryson refused satisfaction and stated, “A man can’t be expected to be kinder to other people, than to his own family.”<sup>14</sup>

Or so this scene of fraud, loss of inheritance, and decline in honor was imagined by

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<sup>9</sup> CHARLES SELLERS, *THE MARKET REVOLUTION: JACKSONIAN AMERICA, 1815-1846* (1992).

<sup>10</sup> PRESTON, *supra* note 3, at 180-81.

<sup>11</sup> 1 HENRY ST. GEORGE TUCKER, *COMMENTARIES ON VIRGINIA LAW* 116 (Winchester, Office of the Republican 1837) (discussing creation of trusts that keep property free from claims of husband).

<sup>12</sup> PRESTON, *supra* note 3, at 219-20.

<sup>13</sup> *Id.* at 219.

<sup>14</sup> *Id.* at 218.

Margaret Junkin Preston of Lexington, Virginia<sup>15</sup> in her 1856 novel *Silverwood*.

*A. Inheritance in the Literature of the Shenandoah Valley*

Though the story of the Irvine family was fictional, it tapped into several important themes of the era, such as the vulnerability of families to the honor and trust of strangers and the inability of trust beneficiaries to protect themselves through the legal system. The moral claims that might have prevailed in an earlier generation were not effective in the impersonal market-oriented 1840s and 1850s.<sup>16</sup> The characters in the novel -- the victims of Bryon's misappropriation -- understood the settlement in his wife as grossly unfair. "You see, sir, what roguery that unjust law leads to," said Dr. DuBois, who was in love with one of the Irvine daughters. "That [law] allows the property a man may choose to make over to his wife, to be free from all the liabilities of the husband; thus holding out a bribe to commit fraud. Now this woman, in the eye of common justice, is a swindler; yet she transgresses no law of the commonwealth."<sup>17</sup> What saved the Irvine family was marriage of one of the daughters into another wealthy and pious family and also an inheritance from the widow's uncle in Scotland. But even then other family members threatened a lawsuit to challenge the will and the Irvines sent a trusted cousin to Scotland to represent their interests.<sup>18</sup>

The growing commercial nature of the nineteenth century, in which a family's wealth was increasingly held in corporate stock and notes rather than land, left many families injured by bad luck and the misdeeds of strangers.<sup>19</sup> The nation was tied together with a national economy and a

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<sup>15</sup> SARAH GARDNER, *BLOOD AND IRONY: SOUTHERN WHITE WOMEN'S NARRATIVES OF THE CIVIL WAR, 1861-1937* 16 (2006); STACEY JEAN KLEIN, *MARGARET JUNKIN PRESTON: POET OF THE CONFEDERACY: A LITERARY LIFE* 36-38 (2007).

<sup>16</sup> *See, e.g.*, LAWRENCE KOHL, *THE POLITICS OF INDIVIDUALISM* (1989) (emphasizing the impersonal market of the 1840s and 1850s).

<sup>17</sup> *Id.* at 260. Dr. DuBois' statement was not quite correct under Virginia law. A husband had to receive adequate compensation for property conveyed to the wife in trust. *See, e.g.*, *Bullock v. Gordon*, 18 Va. (4 Munf.) 450 (1815).

<sup>18</sup> PRESTON, *supra* note 3, at 389.

<sup>19</sup>

population in motion from their lives on farms and in rural areas to cities.<sup>20</sup> When a bank, manufacturing company, or turnpike company, for instance, failed, the loss of capital could affected many families -- sometimes those even in distant states. This was a story on the minds of people who feared for the security of their family's inheritance and about their own place in the market economy of the rapidly changing nineteenth century.<sup>21</sup> Testators increasingly turned to law to impose additional duties on trustees and to secure their family's fortune, to the extent that they could.<sup>22</sup>

Trust was necessary, but it often failed because in the impersonal world people did not abide their obligations and there was little morally or legally that could be done to compel people to meet their obligations.<sup>23</sup> As trusts were increasing in popularity -- and as the law of trusts was developing -- a parallel change took place in ideology about trusts. In the wake of the Revolution the idea was that the rules of inheritance should be largely equal.<sup>24</sup> That was a key legislative reform in Virginia in the 1780s. Then affluent families tried to protect their children from creditors by use of trusts the limited beneficiaries' rights to property or kept property out of hte hands of sons-in-law (and thus out of the hands of their creditors).<sup>25</sup> Where we had been suspicious of inherited wealth at the time of the Revolution, we increasingly embraced it. It was also likely a reaction to the realities of the market, just as was the growth of proslavery

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<sup>20</sup> DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848* 211-26 (2007) (discussing increasing migration and the transportation revolution).

<sup>21</sup> OLIVER BALDWIN, *ADDRESS DELIVERED AT THE DEDICATION OF THE HOLLY-WOOD CEMETERY: ON MONDAY, THE 25TH JUNE, 1849* 13 (Richmond, Macfarlane & Fergusson 1849).

<sup>22</sup> *See, e.g.*, *Harvard College v Amory*, 26 Mass (9 Pick) 446 (1830).

<sup>23</sup> GREGORY ALEXANDER, *COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970* 127-57 (1998) (discussing commercialization in antebellum era); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977) (discussing rise of commercial law in nineteenth century).

<sup>24</sup> THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 198-99 (Boston, David Carlisle 1801) (discussing reform of inheritance law to give absolute right in slaves and property that had been entailed); 3 *ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES* Appendix B, at 13.

<sup>25</sup> CHRISTOPHER CURTIS, *JEFFERSON'S FREEDHOLDERS AND THE POLITICS OF OWNERSHIP IN THE OLD DOMINION* (2013) (tracing changing ideas of Republicanism to those of promotion of slavery in Virginia from Revolution to Civil War).



sentiments despite the legacy of statements of equality during the Revolution.<sup>26</sup>

Trusts were part of the response to the market; they helped protect families from creditors.<sup>27</sup> One response to impersonal credit relations was to put property in trust to keep it within the family and outside of the hands of creditors.<sup>28</sup>

Even when the property was kept within the family, as *Silverwood* showed, the family had to rely on the services of a professional trustee to manage the property. Thus, in addition to the growth of trusts as a form of property, the common law developed extensive rules policing trustee behavior.<sup>29</sup> The legal constraints on trustees emerged as Americans increasingly emphasized duties to oneself and to others.<sup>30</sup> This was a particularly strong theme in Lexington, where students at both Washington College and the Virginia Military Institute heard a lot about duty.<sup>31</sup> Americans needed to emphasize duties, for trust was essential to a well-functioning economy.<sup>32</sup> Trust was an important value when one needed to rely on strangers. The theme of trust, consequently, appeared frequently in the fictional literature of the era.

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<sup>27</sup> ALEXANDER, *supra* note 23, at \_\_\_.

<sup>28</sup> 1 REVISED STATUTES OF THE STATE OF NEW YORK 727, 730 sec. 63 (Albany, Packard and Van Benthuyzen 1829) (1828 New York statutory provision for what we now call a spendthrift trust). The statute provided:  
No person beneficially interested in a trust for the receipt of the resnts and profits of lands, can assign or in any manner dispose of such interest; but the rights and interest of every person whose benefit a trust for the paymen of a sum in gross is created, are assignable.  
The spendthrift trust had the effect, however, of also disadvantaging people on the other side of those relations. Instead of equality -- or even allowing creditors to recover -- the rights of the beneficiaries were protected.

<sup>29</sup> 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 300-13, (5<sup>th</sup> ed., New York 1840) (discussing trust law), *id.* at 314-52 (discussing powers of appointment and revocation for trusts). Regarding the martial settlement trust, Kent wrote that "it is not unusual to convey or bequeth property to a trustee in trust to pay the interest or income thereof to the wife for her separate use, free form the debts, control, or interference of her husband." *Id.* at 161.

<sup>30</sup> *See, e.g.*, WILLIAM GASTON, ADDRESS DELIVERED BEFORE THE PHILANTHROPIC AND DIALECTIC SOCIETIES AT CHAPEL HILL, N.C. JUNE 20, 1832 (Richmond, Thomas W. White 1832) (discussing importance of duties to oneself and to nation). The talk of duties was central to the well-functioning market economy, for such much had to rest on trust that others would abide their obligations. *See* Heidi Rickes, *Jurisprudence at Davidson College Before the Civil War*, forthcoming N.C. L. REV. (2015) (discussing the meaning and utility of references to duties).

<sup>31</sup> *See* Christopher Lawton, *The Pilgrim's Progress: Thomas J. Jackson's Journey Towards Civility and Citizenship*, 116 VA. MAG. HIST. & BIO. 2-41 (2008).

<sup>32</sup> Alfred L. Brophy, *The Road to the Gettysburg Address: Constitutionalism and the Antebellum Cemetery* (unpublished mss.).

Two other novels published in this era and set in the Shenandoah Valley also testified to the centrality of family, economic development, and of slavery, to the people of the Valley. William Caruthers' *The Kentuckian in New York*, published in 1834, explored the ways to resolve sectional tensions as it provided a character study of friends who had studied at Washington College and their acquaintances who moved from New York to Philadelphia, Virginia, and South Carolina.<sup>33</sup> Caruthers was a native of Rockbridge County, though he had married a young woman from South Carolina, and wrote the novel while living in New York.<sup>34</sup> The novel was about the gradually increasing tensions between North and South. It was mildly anti-slavery, for many characters looked forward to a time when slavery was as rare in tidewater Virginia as it was in western Virginia.<sup>35</sup> Though parts of the book were proslavery. One character spoke about the economic and social reasons slavery cannot be ended<sup>36</sup> as another spoke of the harsh nature of slavery in the deep south, where hundreds of slaves labored on plantations and did not know their owners.<sup>37</sup> The threat of slave insurrection loomed over the narrative,<sup>38</sup> which makes sense given that the book came out three years after the Nat Turner rebellion.<sup>39</sup> Family and marriage, and especially inherited plantations, were central to the story.<sup>40</sup> So was the sense that the world of New York was an impersonal one of credit relations, which

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<sup>33</sup> WILLIAM CARUTHERS, *KENTUCKIAN IN NEW YORK* (New York, Harper Brothers 1834).

<sup>34</sup> WILLIAM R. TAYLOR, *CAVALIER AND YANKEE: THE OLD SOUTH AND AMERICAN NATIONAL CHARACTER 184-90* (1961) (discussing Caruthers' background, education, marriage, and indebtedness); Elizabeth Preston Allen, *Notes on William Alexander Caruthers*, 9 *WILLIAM AND MARY QUARTERLY*, Second series 294-297 (1929). John Caruthers, William Alexander's father, is included in our sample. See John Caruthers, Rockbridge County Wills Book 8, at 419 (1840).

<sup>35</sup> 1 CARUTHERS, *supra* note 33, at 76-77 (abolitionist sentiments); 1 *id.* at 115-16.

<sup>36</sup> 2 CARUTHERS, *supra* note 33, at 71-73.

<sup>37</sup> *Id.*; KEITH CARTWRIGHT, *READING AFRICA INTO AMERICAN LITERATURE: ETHICS, FABLES, AND GOTHIC TALES* (2002).

<sup>38</sup> 1 CARUTHERS, *supra* note 33, at 69-71.

<sup>39</sup> Alfred L. Brophy, *The Nat Turner Trials*, 91 *N.C. L. REV.* 1817 (2013).

<sup>40</sup> JOHN L. HARE, *WILL THE CIRCLE BE UNBROKEN?: FAMILY AND SECTIONALISM IN THE VIRGINIA NOVELS OF KENNEDY, CARUTHERS, AND TUCKER, 1830-1845* (2002).

was quite different from Washington College in Lexington, Virginia.<sup>41</sup> The progress of the age – a phrase often used to talk about the constellation of economic, technological, and moral changes of the 1820s and 1830s<sup>42</sup> – was working, as one character acknowledged near the end of the volume, “a gradual revolution which will sweep away the melancholy vestiges of a former and more chivalrous and generous age.”<sup>43</sup> This was a recognition of the shift to an impersonal market economy from the world of personal connections.

There is more background to this story, though; for as Caruthers was writing about a marriage between a Washington College graduate and a woman from South Carolina in *Kentuckian in New York*,<sup>44</sup> he was a Washington College graduate married to a woman from South Carolina. His wife’s family had, moreover, placed her slaves in trust for her, in an attempt to place them beyond the reach of Caruthers’ creditors. That led to a lengthy and unsuccessful lawsuit in 1838 by Rockbridge County merchants who wanted to attach some of those slaves for the Caruthers’ extensive debts.<sup>45</sup>

Another novel, published nearly a decade before *The Kentuckian in New York* had similarly focused on the declining fortunes of an affluent family in the Valley and the shifting attitudes towards slavery. George Tucker’s *The Valley of the Shenandoah* published in three volumes. deals with the declining fortunes of the Grayson family set around the end of the eighteenth century in Virginia.<sup>46</sup> The novel, published towards the end of the period when

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<sup>41</sup> See, e.g., 1 Caruthers, *supra* note 33, at 151-52; *id.* at 192-200 (discussing characteristics of businessmen in New York); 2 *id.* at 54-55 (discussing moral philosophy).

<sup>42</sup> Alfred L. Brophy, *The Republics of Liberty and Letters: Progress, Union, and Constitutionalism in Graduation Addresses at the Antebellum University of North Carolina*, 89 N.C. L. REV. 1916-19 (2011) (discussing references to the “spirit of the age”).

<sup>43</sup> 2 CARUTHERS, *supra* note 33, at 194.

<sup>44</sup> 2 CARUTHERS, *supra* note 33, at 71-72.

<sup>45</sup> Kennedy v. Shaw, Rockbridge Chancery Records, 1833-002; Admx. John Glasgow v. Exr. Arthur Glasgow; William Caruthers Trst, Isabella Kerr v. Jones & Kerr, 1838-023; Cumings and Barclay v. Caruthers and Wife, 1838-013, Rockbridge County Chancery Court (suit by creditors of the Caruthers seeking to attach Mrs. Caruthers’ equitable interest in slaves given at the time of their marriage for payment of a debt).

<sup>46</sup> GEORGE TUCKER, *THE VALLEY OF THE SHENANDOAH* (New York, C. Wiley 1825).

Virginians still clung to anti-slavery beliefs, offered a subtle critique of slavery. The transition to a market economy was well underway in the novel – one of the particularly greedy minor characters was always on the “lookout for good bargains in land, negroes, or bonds.”<sup>47</sup> But there were other values on display there, too. Early in the novel the Grayson family’s scion, Edward, presented a mild defense of slavery as less bad than the alternatives.<sup>48</sup> Edward, in keeping with the prevailing sentiments of the 1820s, thought slavery worse for white people because it led them to avoid work, than for the enslaved.<sup>49</sup> Soon the family realized it was in too much debt because their deceased father had been too generous in acting as a surety. The estate’s debts required them to sell their plantation and their enslaved human property in the piedmont and moved to their remaining plantation in the Shenandoah Valley.<sup>50</sup> The sale of slaves provided an anti-slavery bent to the novel, as a heart-rending episode of slavery.<sup>51</sup> The family’s tragedy continued and Edward was killed in a duel in New York with one a man who had hounded his father’s estate.<sup>52</sup>

Tucker, who was a lawyer, had been born in 1775 and moved to the University of Virginia as a faculty member in 1824, the year *Valley of the Shenandoah* appeared. A number of vignettes in the novel reveal the role of the legal system – from probate through criminal trials – in the lives of Virginians. For it reveals the ways that the estate’s creditors pursued the Graysons, the difficulties of lawyers representing clients, and the acquittal of one of Edward Grayson’s

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<sup>47</sup> 1 *Id.* at 21.

<sup>48</sup> *Id.* at 61-63.

<sup>49</sup> *Id.* at 69-70. He made standard arguments against emancipation, such as the enslaved people would be worse off in freedom than slavery – and certainly white people would be.

<sup>50</sup> 3 *Id.* at 127, 179; 1 *id.* at 115 (discussing estate’s debts and limited options to pay them).

<sup>51</sup> *Id.* at 179.

<sup>52</sup> *Id.* at 246-47.

friends who fought with a social inferior who had offended Grayson's sister.<sup>53</sup> The semi-autobiographical novel critiqued the increasingly materialistic aspects of Virginia society. The novel suggested that though families might lose their inheritance – in part through their efforts to assist their neighbors and friends in need and in part because they cared for enslaved humans – they might maintain their genteel status. But that in the end the story was one of declining fortunes.<sup>54</sup> It set the stage for later novels to explore in more detail the ways that the market upended Virginia society and left many without assets, even as some others might gain them.

*B. Inheritance in Southern Literature Beyond the Shenandoah Valley*

Other fictional literature that dealt with areas of the south outside of the Shenandoah Valley expanded on the insecurity that heirs faced, particularly their dependence on the honor of lawyers, executors, and trustees after a beneficiary died. Two years before the publication of *Silverwood*, Thomas B. Thorp's novel *The Master's House* told of a young college graduate, Graham Mildmay, who lost his inheritance.<sup>55</sup> Though he had grown up in affluent surroundings, the family's money was gone by the time that Mildmay graduated from college. He then had to go out to Mississippi to make his fortune and redeem the family's estate in North Carolina. Much of *The Master's House* critiques the system of slavery in Louisiana. For instance, the main character in the novel delivers a literary address while still in college on the importance of sectional compromise, while his counterpart delivers an address on the utility of slavery and the need for southern rights.<sup>56</sup> A second piece of evidence suggests that *The Master's House* was anti-slavery. Mildmay, who was forced by financial necessity to sell a slave, criticized a lengthy contract for sale. When he complained about the contract, Mildmay was told it was copied from

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<sup>53</sup> 1 *id.* at 230-34 (portraying criminal trial and acquittal). The incident that led to the fight, a dispute between a wagon driver and a carriage driver regarding passage on a narrow road, was described at *id.* at 128-30.

<sup>54</sup> 3 *Id.* at 251.

<sup>55</sup> THOMAS B. THORP, *THE MASTER'S HOUSE: A TALE OF SOUTHERN LIFE* (New York, T.L. McElreath 1854).

<sup>56</sup> *Id.* at 25.

a precedent drafted by one of the best lawyer around.<sup>57</sup> This reveals one way that ow legal knowledge was transmitted – by the copying of forms from sophisticated lawyers. Nevertheless, there was a lawsuit over the slave in which the buyer lost. Thus, *The Master’s House* portrays the limited rights of a buyer of a “defective” slave.<sup>58</sup> All of this was set in motion by Mildmay’s move to Louisiana, which was necessary because of the family’s loss of their fortune. But that move to Louisiana is also what caused him to attempt to make slavery more humane. Perhaps in that novel is the lesson that the impersonal market that caused the loss of Milday’s fortune also causes slavery to be inhumane. That is, that as slavery became more commercial it became more inhumane. That theme certainly fits with a lot of the anti-slavery fictional literature. Tucker’s *Valley of the Shenandoah* portrayed the breakup of a plantation because of debt and alluded to the harshness and the uncertainties that awaited the enslaved people who were sold.<sup>59</sup> And the tragic odyssey of Uncle Tom in Harriet Beecher Stowe’s *Uncle Tom’s Cabin* was started when he was sold south down the Mississippi river because of the debt owed by Master Shelby. Debt and law cast a long shadow over the events of the novel.<sup>60</sup>

The problems set loose in the wake of a beneficiary’s demise were a central part of *Uncle Tom’s Cabin*. One important plot twist was that Augustine St. Clare was killed trying to stop a fight shortly after promising to emancipate Uncle Tom.<sup>61</sup> Because Augustine had not completed the emancipation papers when was killed, Tom descended to Augustine’s parsimonious wife, Marie, and he was then sold to Simon Legree.<sup>62</sup>

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<sup>57</sup> *Id.* at 178 (lawsuit regarding breach of warranty for slaves and for the sale of a slave, which was a precedent copied from a leading lawyer).

<sup>58</sup> ARIELA GROSS, *DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM* 122-52 (2000).

<sup>59</sup> 3 TUCKER, *supra* note 46, at 127, 179.

<sup>60</sup> HARRIET BEECHER STOWE, *UNCLE TOM’S CABIN; OR, LIFE AMONG THE LOWLY* (Boston, John P. Jewett 1852), in HARRIET BEECHER STOWE, *THREE NOVELS* 12-13, 19 (Library of Am. 1982).

<sup>61</sup> *Id.* at 368.

<sup>62</sup> *Id.* at 377, 388.

Another somewhat less clearly anti-slavery novel, *The Guardian Slave*, was also published in Boston in 1853.<sup>63</sup> Even the title reflected the influence of trusts and estates laws – the guardian slave of the title was Hatchie, a loyal slave who protected the central character, an heiress named Emily Dumont.<sup>64</sup> The novel was set in motion when Emily’s loving and protective father, Dumont, died. An unscrupulous lawyer and one of Emily’s uncles conspired to steal her father’s will, then replace it with a forged will.<sup>65</sup> The new will, instead of leaving Emily her father’s vast estate, claimed that she was a slave and it ordered that she be taken from her home in Louisiana to Ohio, freed there and given a modest annuity.<sup>66</sup> In the process of replacing the real will with a fake one, Hatchie, Dumont’s loyal and trusted slave, was apparently killed.<sup>67</sup>

The uncle who had replaced the real will with the forgery and presumably killed Hatchie testified that Emily was, indeed, the daughter of a slave on Dumont’s plantation, whom Dumont raised as his own daughter after his wife and infant daughter died in childbirth.<sup>68</sup> Some immediately suspected that the unscrupulous uncle, Jasper, had a hand in forging the will. But given its legal language, they also understood that Jasper had help.<sup>69</sup>

Though Emily was white and there was no other evidence that she was the daughter of a slave, that was insufficient evidence. For as Emily recalled, there were many pale skinned slaves in New Orleans.<sup>70</sup> Emily then went north on a riverboat, headed for Cincinnati with the intent to seek fulfill the instructions of her father’s will and then to seek vindication. But along the way

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<sup>63</sup> WARREN T. ASHTON [W.T. ADAMS], *HATCHIE, THE GUARDIAN SLAVE; OR, THE HEIRESS OF BELLEVUE* (Boston, B.B. Mussey and Company 1853).

<sup>64</sup> *Id.* at 20.

<sup>65</sup> *Id.* at 31-32.

<sup>66</sup> *Id.* at 49.

<sup>67</sup> *Id.* at 46-47.

<sup>68</sup> *Id.* at 51-53.

<sup>69</sup> *Id.* at 59.

<sup>70</sup> *Id.* at 151-52.

Hatchie reappeared – he was hidden in a coffin on the riverboat – and compelled a confession from the attorney.<sup>71</sup> Thus, the loyal slave outwitted the lawyer and uncle and helped restore Emily to her rightful place as heir of the plantation, after a few more improbable plot twists. Though the author denied any antislavery intent,<sup>72</sup> the antislavery implications of the novel were clear. It suggested that white people might be mistakenly enslaved on slight evidence, so it put readers into the position to realize that they, too, might be subject to slavery. It also portrayed an enslaved person as an intelligent and honorable person and thus humanized him, which again worked to undermine support for slavery.<sup>73</sup>

### C. *Controversy Over Slavery in the Shenandoah Valley*

As southern novels increasingly spoke about the benefits of slavery to the enslaved in sentimental terms in the response to *Uncle Tom's Cabin*, their legal and legislative literature increasingly spoke about the economic importance of slavery to southern society. The Virginia legislature debated the future of slavery in the commonwealth in the spring of 1832, in the wake of the Nat Turner rebellion and calls by some Virginians to gradually end slavery. Those calls did not go far, but many in the legislature and the public re-affirmed their commitment to enslaved humans as property. The debates made clear that property in humans served important functions for the state and for individual owners. Yet, some in the Shenandoah Valley saw the calculations differently from those in the heavily enslaved portions of eastern Virginia.

James McDowell of Lexington, who studied at Washington College and later at Yale and Princeton and served for a time as trustee of Washington College, spoke eloquently about the need for action against slavery and against the arguments about the sanctity of property rights

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<sup>71</sup> *Id.* at 110.

<sup>72</sup> *Id.* at 5 (“The tale was written before ... negro literature had become a mania .... It was not designed to illustrate the evils or the blessings of slavery. It is, as its title-page imports, *a tale*; and the author has not stepped out of his path to moralize upon Southern institutions.”).

<sup>73</sup> See generally SARAH N. ROTH, *GENDER AND RACE IN ANTEBELLUM POPULAR CULTURE* (2014) (arguing that abolitionist literature that humanized enslaved people and portrayed them as citizens helped move public attitudes away from slavery and towards emancipation).



made by many delegates from the Tidewater and Piedmont. In opposition to arguments that property in slaves was sacred, McDowell advanced the idea that when property poses a danger, “the right by which [owners] held their property was gone. Society ceased to give its consent.”<sup>74</sup> These were progressive ideas about the nature of property – that it was created by society and subservient to those interests rather than a natural right.<sup>75</sup> And he seemed to be making some headway. Aylett Alexander of Lexington wrote in the spring of 1832, that “The public sentiment has undergone a great change in Virginia with respect to the subject of slavery. You have no doubt witnessed this change in the long and eloquent speeches addressed openly on a subject which before was scarcely touched without the greatest caution and delicacy. Among others McDowell’s speech has been mentioned as one that was deserving of superior merit. It is this subject that has created a difference between Eastern and Western Virginia; and if some method of gradual emancipation and deportation is not speedily adopted, this is the subject which will erect Virginia into two independent states.”<sup>76</sup>

The headway was short-lived and by the late 1830s even those from the Shenandoah Valley were expressing reservations about further anti-slavery action. James McDowell delivered an address at Princeton in 1838 and he was wary of abolitionists at that point.<sup>77</sup> His address was an eloquent appeal to Union and to the virtues of democracy. Despite the common Whig argument that democracy would lead to licentiousness, McDowell argued that political

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<sup>74</sup> SPEECH OF JAMES M’DOWELL ... JANUARY 21, 1832 15 (Richmond, Thomas Whyte 1832). McDowell saved several letters from constituents praising his speech. One from Robert H. Rose, an abolitionist who lived at Silver Lake in Susquehanna County, Pennsylvania, suggested how a scheme of gradual abolition might work at the micro level. It proposed that owners allow their enslaved people to run plantations as they wanted. See Robert H. Rose to McDowell, April 10, 1832, McDowell Papers, UNC Library, Series 1.3, April 1832.

<sup>75</sup> ALEXANDER, COMMODITY AND PROPERTY, *supra* note 23, at 26-42 (discussing conflicting roles of property in Jefferson’s thought); WILLIAM NOVAK, THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996) (depicting ways that property was subject to regulation in nineteenth century to promote public welfare).

<sup>76</sup> Aylett Alexander to William Alexander, Anderson Family Papers, Box 6, Folder 53, Washington and Lee Special Collections.

<sup>77</sup> JAMES MCDOWELL, ADDRESS DELIVERED BEFORE THE ALUMNI ASSOCIATION OF THE COLLEGE OF NEW JERSEY, SEPTEMBER 26, 1838 34-36 (Princeton, John Bogart 1838).

legitimacy grew out of “popular sovereignty.”<sup>78</sup> He urged the Princeton audience to cast aside “every prejudiced conception of the popular capacity.”<sup>79</sup> McDowell took a moderate Democrat stance and minimized the party conflicts. “The party excesses which now and then have distinguished our political contests, have thus far broken and exploded upon our system, only as the meteoric lights which glade and terrify for a moment, and then break and explode upon the earth, without jostling or impeding in the least its onward and its massive movement.”<sup>80</sup> McDowell spoke of the empire of democracy that was part of an ancient tradition of self-government. The United States was “a sort of providential decree, universal, enduring, baffling all efforts of man to check or limit its control.” And only in the United States had principles and that hope reached their “full development.” McDowell predicated that the United States’ democracy would spread around the world. “The spirit of our laws, let superstition and ignorance and power do what they like to destroy it, will abide upon the earth as the redeeming spirit of after times, and shall pass from hand to hand, like the inextinguishable fire of the Grecian temples, till all the nations be filled with its brightness.”<sup>81</sup>

McDowell was also increasingly wary of abolition “fanatics.” And thus while his talk appealed to democracy, it warned of the conflicts that might arise from excessive party politics and a failure to compromise. This was part of McDowell’s drift away from antislavery principles and towards an embrace of slavery – which occurred with even greater amplitude after he entered the United States House of Representatives. McDowell was pleading the case of Union – and appealing to the virtues of self-government and democracy – in the face of what he saw as fanaticism. In September 1850 during debate over the Wilmot Proviso, which would have excluded slavery from territory acquired from Mexico during the Mexican-American war,

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<sup>78</sup> *Id.* at 33.

<sup>79</sup> *Id.* at 35.

<sup>80</sup> *Id.* at 37.

<sup>81</sup> *Id.* at 43.

McDowell returned to the theme of his Princeton address – about the way that the United States provided hope to the rest of the world and how disunion would be the end of that hope. He thought that the maintenance of southern rights regarding slavery was critical to the Union. “Ours ... is the high duty of replacing and maintaining the Union in which that country, as a whole, consists, not upon the hesitating consent – not upon the broken confidence—not upon the discounted but quelled spirit, and not upon the surrendered safety of any of its parts, but upon the honorable conciliation, the responding forth, and the cordial agreement of them all.”<sup>82</sup>

McDowell feared that the abolitionists had unleashed a subject – “with a wild and explosive energy” – that would call into question “the very body and being of the state.”<sup>83</sup> The abolitionists, in short, threatened the “happy and united country” with disunion and war.<sup>84</sup>

## II. Virginia Inheritance Law

Virginia law established in 1785 that property descended in equal shares to their children.<sup>85</sup> That was the rule regardless of the gender of the decedent, although married women in Virginia during the period studied here had limited rights to dispose of property at death.<sup>86</sup>

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<sup>82</sup> See *Speech of James McDowell, of Virginia, on the Wilmot Proviso, Delivered in the House of Representatives, Tuesday, September 3, 1850*, CONG. GLOBE, 31<sup>st</sup> Cong, 1<sup>st</sup> Sess., 1678, 1684. McDowell’s shift from the 1832 Virginia legislative debates, where he opposed slavery because of its harmful effects, through to the debate on the Wilmot Proviso in the early 1850s, suggests something about how attitudes in the south in general shifted over that time. Though McDowell was more anti-slavery than many at the start of his career – and less proslavery at the end of it – we can see how within one person the shift towards proslavery took place. McDowell’s moderate proslavery position of the Princeton address was an opposition to abolitionists and his thought that their radicalism was injuring the prospects of gradual termination. At the Wilmot Proviso debate in 1850, McDowell emphasized the ways that exclusion of slavery from the territories would subordinate the South and lead to disunion. Even there he acknowledged what seems to have been some questioning of slavery when he said that “whatever the opinions I ... entertain upon the institution of slavery in the abstract, I have never doubted for a moment that as the white and the black races now live together in the southern States, it is an indispensable institution for them both.” *Id.* at 1678.

<sup>83</sup> MCDOWELL, *supra* note 77, at 45.

<sup>84</sup> *Id.* at 48-49.

<sup>85</sup> 1 TUCKER, *supra* note 11, at 189, 194 (discussing “titles by descent”). When decedents did not have issue, their property ascended to their fathers, mothers, then siblings and issue of siblings. *Id.* at 195.

<sup>86</sup> Richard Chused, *Married Women's Property Law, 1800-1850*, 71 GEORGETOWN LAW JOURNAL 1359 (1983); ALEXANDER, *supra* note 23, at 158-64 (discussing passage of married women’s property acts); Peggy A. Rabkin *The Origins of Law Reform: The Social Significance of the Nineteenth-Century Codification Moment and Its Contribution to the Passage of the Early Married Women’s Property Acts*, 24 BUFFALO L. REV. 683 (1974). MARYLYNN SALMON, *WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA* (1986). The married women’s

This limitation on the rights of married women helps explain why property was left to daughters in a legal life estate or in an equitable life estate. Thus, when the daughters passed away they had no property interest and the property went immediately to their issue.<sup>87</sup> Sometimes particularly affluent and sophisticated parents left property in trust to a daughter with a power of appointment.<sup>88</sup> Affluent fathers might also create a trust prior to a woman's marriage in which the husband would have only limited rights.<sup>89</sup> Thus, trusts were used to manage a wife's separate property.<sup>90</sup> While Virginia intestacy law made no provision for a surviving spouse, another part of the Virginia code provided that surviving widows were entitled to dower, which was a one-third interest in the real property decedent owned at any time during the marriage, unless she had released her dower right in that property.<sup>91</sup>

The legal treatise literature on trusts grew in size and sophistication from the 1820s to the Civil War. Though the literature was often published in New York and Philadelphia, there was also a robust and sophisticated literature focused on Virginia trust and estates law.<sup>92</sup> This literature followed the growth in sophistication of Virginia trust and estates law. For instance, one case in the Virginia Court of Appeals arose from an intestate who passed away in Rockbridge County in 1851. In that case, the decedent's widow claimed a one-third share of

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property acts were in essence making available in statutory form what was already available to those who could afford a marriage settlement. Just as with the general incorporation statutes of the era, the married women's property acts made a legal relationship available to the entire community without the need for a special legal form.

<sup>87</sup> See, e.g., Will of Sally Moore, Rockbridge County Probate Book 15, at 404-05 (1860), available at Library of Virginia (establishing trusts for life for both son Andrew and daughters Sally, Mary, and Magdalene that lasted for life and then went to their children).

<sup>88</sup> See, e.g., 2 KENT, *supra* note 29, at 170-71 ("though a married woman cannot be said strictly to make a will, yet she may devise, by way of execution of a paper, which is rather an appointment than a will").

<sup>89</sup> 1 TUCKER, *supra* note 11, at 111 (discussing marriage settlement).

<sup>90</sup> 1 TUCKER, *supra* note 11, at 116 (discussing trusts for wife's separate property to be protected from the husband).

<sup>91</sup> 1 THE REVISED CODE OF THE LAWS OF VIRGINIA chap. 107, sec. 1, at 403 (Richmond, Thomas Ritchie 1819).

<sup>92</sup> See, e.g., 1 TUCKER, *supra* note 11; 2 JOHN TAYLOR LOMAX, LAW OF ADMINISTRATORS AND EXECUTORS (Richmond, 2nd ed. Adolphus Morris 1857).

property put into trust for the widow's benefit (rather than a one-third share of his estate after the satisfaction of creditors). The Court upheld the widow's claim and thus extended the protection of the widow's dower rights to property put into trust during life. Had the Court ruled otherwise, it would have allowed creditors to reach property that they could not have reached had the property remained in the hands of the decedent at the time of his death.<sup>93</sup> Similarly, in 1855 in *Ruffners v. Perry* the Virginia Court of Appeals interpreted and validated a trust that limited the use of trust property to be used to pay Ruffner's debts.<sup>94</sup> Ruffner was the beneficiary of what we now call a spendthrift trust. John Tayloe Lomax' *Law of Administrators and Executors*, which was published in Richmond and focused on Virginia law, covered of the rights of beneficiaries of marriage settlements and other trusts.<sup>95</sup>

Similarly, Virginia cases upheld some devises to slaves. For instance, *Elder v. Elder*,<sup>96</sup> upheld a provision that allowed a slave to have several acres for the remainder of his life, but a more generous treatment moved towards a status between slavery and freedom and was declared invalid<sup>97</sup> The Virginia courts allowed enslaved people to sue for their freedom.<sup>98</sup> The trust form was used to both manage slaves and to provide for freedom, but substantially more for managing them than for freedom. Lomax' treatise also discussed the emancipation of slaves via will and how to handle those cases.<sup>99</sup> Thus, the cases and legal literature addressed the growing

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<sup>93</sup> *Poindexter v. Jeffries*, 56 Va. (15 Gratt.) 363 (1859).

<sup>94</sup> *Ruffners v. Perry*, 53 Va. (12 Gratt.) 551 (1855).

<sup>95</sup> *See, e.g.*, LOMAX, *supra* note 92, at 421, 448 -51 (marriage settlement), 506-07.

<sup>96</sup> *Elder v. Elder's Ex'or*, 31 Va. (4 Leigh) 252 (1833) (interpreting trust to free a slave and send her to Liberia).

<sup>97</sup> While Virginia courts limited the rights of slaves to be given freedom, see, e.g., *Wynn v. Carrell*, 43 Va. (2 Gratt.) 227 (1845), other states, slaves were allowed some control over their lives. For instance, in 1859 the Missouri Supreme Court upheld a will provision that allowed a slave to chose her owner. *See* *Beaupied v. Jennings*, 28 Mo. 254 (1859).

<sup>98</sup> *Brewer v. Harries*, 46 Va. 285 (1848) (allowing a free woman of color to file habeas corpus petition to get three children from her husband's owner).

<sup>99</sup> LOMAX, *supra* note 92, at 320-43.

sophistication of testators.

### III. Probate in Rockbridge County

#### A. *The Setting: Rockbridge and the Shenandoah Valley*

Rockbridge County, in the center of Virginia's Shenandoah Valley, was first settled by Europeans in the 1730s, and it grew substantially following the American Revolution.<sup>100</sup> The county is named for the famous "Natural Bridge," a natural formation in the county's south, which had attracted visitors as early as the middle of the eighteenth century. Thomas Jefferson described the Natural Bridge in his *Notes on the State of Virginia*:

The Natural Bridge, the most sublime of Nature's works, . . . must not be pretermitted. It is on the ascent of a hill, which seems to have been cloven through its length by some great convulsion. . . . Though the sides of this bridge are provided in some parts with a parapet of fixed rocks, yet few men have resolution to walk to them and look over into the abyss. . . . It is impossible for the emotions arising from the sublime to be felt beyond what they are here: so beautiful an arch, so elevated, so light, and springing as it were up to heaven, the rapture of the spectator is really indescribable.<sup>101</sup>

In fact, Jefferson owned the land on which the bridge stood and in 1815 that he viewed the bridge as a public trust "and would on no consideration permit the bridge to be injured, defaced, or masked from public view." But in the late 1840s, because of a lawsuit, the property was up for auction. This led one romantic Virginian, John Rueben Thompson, editor of the *Southern Literary Messenger*, to wonder how the property could be sold. He wrote of the sublime beauty of the bridge:

[W]e confess we were greatly surprised to learn that the Natural Bridge was to be sold. Such a thing had never occurred to us. Somehow—we know not how—we had taken up the idea that it belonged to nobody, that it was a sort of nullius status, that it was indeed incapable of transfer from one person to another. . . . If we had looked upon it as property at all, we should have rather considered it an "incorporeal hereditament" as affecting the imagination, and we should as soon have thought of buying a rainbow or a sunset, evanescent as they are, as becoming the owner of the Natural Bridge. The magnificent phenomena of nature everywhere—Alps, torrents, cataracts, illimitable prairies,—seem to us in their eternal grandeur to mock the efforts of man to reduce them into possession. . .

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<sup>100</sup> CHARLES A. BODIE, REMARKABLE ROCKBRIDGE: THE STORY OF ROCKBRIDGE COUNTY, VIRGINIA 34-35 (2011). See also OREN FREDERIC MORTON, A HISTORY OF ROCKBRIDGE COUNTY, VIRGINIA (1920).

<sup>101</sup> THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 35 (London, John Stockdale 1787).

The population of Rockbridge County in 1820, the first year of this study, was 11,945, of whom 2612 (21.9 %) were enslaved. By 1860, the population was 7,248, of whom 3985 (23.1%) were enslaved. Rockbridge thus provides an important counter-example to the more heavily enslaved counties of eastern Virginia. Rockbridge was home to some moderate anti-slavery advocates, which may help explain some of the behavior towards enslaved people displayed by testators. As Mark Neely's recent study reveals, somewhere around 5% of Rockbridge's enslaved population was freed via will in the pre-Civil War era.<sup>103</sup>

Though agriculture was the primary occupation of most of the county's residents, the county seat of Lexington was an important urban center in the Shenandoah Valley. Among the indicators of growth in the late eighteenth century was the founding of a school, Liberty Hall, in Lexington. The school was later renamed Washington College in honor of a bequest of canal stock made by George Washington.<sup>104</sup> In 1839 the Virginia Military Institute was chartered by the state and located in Lexington. The town of Lexington developed as an important intellectual center of the Valley, because of the schools and churches there, and because of the county government. It supported several newspapers and a literary society, where radical ideas like the gradual abolition of slavery were discussed into the 1840s.

Lexington and Rockbridge were the center of some antislavery advocacy. Washington College's President Henry Ruffner spoke against slavery in June 1843 in a major speech to the Rockbridge Colonization Society<sup>105</sup> and again in 1847 in a lengthy attack on the economic

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<sup>102</sup> John R. Thompson, *Advertisement Extraordinary*, 15 S. LIT. MESSENGER 664-65 (Nov. 1849).

<sup>103</sup> NEELY YOUNG, *RIPE FOR EMANCIPATION: ROCKBRIDGE AND SOUTHERN ANTISLAVERY FROM REVOLUTION TO CIVIL WAR* (2011).

<sup>104</sup> *The Will*, 4 THE PAPERS OF GEORGE WASHINGTON, RETIREMENT SERIES, APRIL - DECEMBER 1799 477 (W.W. Abbot, ed., 1999) (confirming that the "hundred shares which I held in the James River Company, I have given, and now confirm in perpetuity to, and for the use & benefit of Liberty-Hall Academy, in the County of Rockbridge").

<sup>105</sup> *Lexington Gazette*, June 7-8, 1843 (reprinting Ruffner address); see also 19 AFRICAN REPOSITORY 220-21 (1843) (mentioning address).

implications of slavery.<sup>106</sup> Ruffner employed a utilitarian argument against slavery.

Ruffner argued – following such other leading figures as James Bruce, one of the wealthiest people in Virginia at the time and an important slave-owner – that slavery was inefficient.<sup>107</sup> Ruffner focused on the economic rather than the moral argument regarding slavery. He suggested that slave labor was unproductive and thus injured agriculture; that because so much money was invested in slaves that Virginians neglected manufacturing and also transportation; and that because the white population was widely dispersed, public education was difficult. All of this led Ruffner to the conclusion that “slavery is pernicious to the welfare of states.”<sup>108</sup>

Ruffner was involved in a dispute about the economics of slavery: was slavery productive and how did it compare to free labor? Ruffner had an economic account that also focused on the effects of slavery for white people. The discussion of the efficiency of slave versus free labor correlates with twentieth century historians’ arguments about the profitability of slavery and the material lives of slaves. Because historians believed the arguments of anti-slavery southerners that slavery was unprofitable – arguments designed to show that slavery should end and thus were advocacy-oriented – they have, perhaps, been more accepting of arguments that slavery was unprofitable than they otherwise might have been.<sup>109</sup>

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<sup>106</sup> A SLAVEHOLDER OF WEST VIRGINIA[HENRY RUFFNER], ADDRESS TO THE PEOPLE OF WEST VIRGINIA: SHEWING THAT SLAVERY IS INJURIOUS TO THE PUBLIC WELFARE, AND THAT IT MAY BE GRADUALLY ABOLISHED WITHOUT DETRIMENT TO THE RIGHTS AND INTERESTS OF SLAVEHOLDERS (Lexington, R.C. Noel 1847). An abbreviated version appeared in the *Lexington Gazette*, October 28, 1847, at 1-2. See also *Valley Whig*, LEXINGTON GAZETTE, November 18, 1847, at 2 (responding to *Valley Whig* editorial criticizing Ruffner proposal and saying that “now is the time” to take up issue of gradual emancipation).

<sup>107</sup> RUFFNER, *supra* note 106, at 23 (quoting Bruce).

<sup>108</sup> RUFFNER, *supra* note 106, at 30.

<sup>109</sup> See ROBERT FOGEL & STANLEY ENGERMAN, TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY 59-67 (1972) (summarizing historians’ interpretation of the unprofitability of slavery from the early twentieth century); James Oakes, *The Politics of Economic Development in the Antebellum South*, 15 J. INTERDISCIPLINARY HIST. 305-16 (1984). Though there may have been a modernization crisis in Virginia in these years, the central tendency of debate seems to have more to do with the celebration of modernization. In the addresses, there is dispute about just how much “the utilitarian spirit of our age,” as Presbyterian minister Benjamin Mosely Smith phrased it in 1847, would crowd out all competing values. See B.L. SMITH, AN ADDRESS ON THE IMPORTANCE AND ADVANTAGE OF CLASSICAL STUDY ... WASHINGTON COLLEGE, JUNE 1849 18 (Lexington, Patton & Burgess n.d.); *Utilitarianism*, 4 VIRGINIA U. MAGAZINE 260 (1860).



Some sense of the views of VMI professor Francis Henney Smith, another of the participants in the Franklin Society debate, appear in his 1857 report to the Virginia legislature. Smith justified his Institution in part based on the support it gave to slavery:

The military discipline of the institution gives protection and efficiency to the peculiar institutions of the state and of the south. Slavery is a material element of southern power and southern polity; and to rightly defend and direct it, constitutes an important duty on the part of those who form the mind and habits of our southern youth. There is no labor so profitable, none so free from pernicious influences to society, as slave labor. Military institutions, by the order and system and responsibility which their discipline encourages, discharge a most important function in these respects. And in the enumeration of these benefits, none are more decided or more worthy of consideration than those which result from the discipline of these schools in promoting the material comfort and well being of the slave himself.<sup>110</sup>

Shortly after the Franklin Society debate Ruffner resigned the presidency.<sup>111</sup> He left Lexington shortly afterward, but that was not the end of his anti-slavery advocacy. He is credited with publishing a response to Ellwood Fisher's *Lecture on the North and the South*.<sup>112</sup>

Ruffner's arguments against slavery demonstrate the centrality of ideas about economy in the Shenandoah Valley. Economic progress appeared in some other ways in the writings of those in the Valley as well. In 1851 George Junkin, Jr., the son of the college president, delivered an address on "The Progress of the Age," at Washington College. Junkin identified an upward trajectory of human progress.<sup>113</sup>

Thus has the progressive spirit of the age tunneled mountains, filled up valleys, converted deserts into gardens, spanned the ocean as with a bridge, and enabled man to walk its depths as on dry land, supplied the most widely separate climes with their interchanged

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<sup>110</sup> REPORT OF THE BOARD OF VISITORS AND SUPERINTENDENT OF THE VIRGINIA MILITARY INSTITUTE 24 (n.p. n.p., July 1857).

<sup>111</sup> William Gleason Bean, *The Ruffner Pamphlet of 1847: An Antislavery Aspect of Virginia Sectionalism*, 61 VA. HIST. MAG. 260, 277 n.39 (1953) (attributing Ruffner's resignation to a combination of factors, including local church politics, conflict within Washington College, and the pamphlet); WILLIAM HENRY RUFFNER, WASHINGTON AND LEE HISTORICAL PAPERS, no. 6, at 77-79 (1904) (discussing factors leading to Ruffner's resignation).

<sup>112</sup> ELLWOOD FISHER, LECTURE ON THE NORTH AND THE SOUTH, ... BEFORE THE YOUNG MEN'S MERCANTILE LIBRARY ASSOCIATION ... JANUARY 16, 1849 (Cincinnati, 1849). JUSTICE, REVIEW OF ELLWOOD FISHER'S LECTURE ON THE NORTH AND THE SOUTH (Louisville, 1849). Oliver Crenshaw, *General Lee's College* at 59 (1969) and Neely Young attribute the pamphlet to Ruffner. See YOUNG, *supra* note 103, at 142.

<sup>113</sup> GEORGE JUNKIN, JR., THE PROGRESS OF THE AGE: AN ADDRESS DELIVERED BEFORE THE LITERARY SOCIETIES OF WASHINGTON COLLEGE ... JUNE 17, 1851 (Philadelphia, n.p. 1851).

productions, increased mechanic power tenfold, raised Agriculture to the dignity of a Science, reduced war to a matter of calculation, and marvelously lifted from man the weight of that curse which was pronounced upon him when driven from Eden's bliss.<sup>114</sup>

Junkin went on to describe the telegraph and photography, too. The Virginia landscape artist Edward Beyers produced a series of prints for his 1858 *Album of Virginia* that illustrate just these kinds of developments – with a tunnel emerging from the Blue Ridge, Harper's Ferry, with its industry, and Hot Springs, where there are well-ordered and fenced yards.

Such themes of progress through order also appear in the landscape sketches of Junkin's sister, Margaret Junkin Preston, whose book *Silvewood* provided the opening vignette of this article. For instance, in *Mount Ida* Margart Preston depicts a bridge in the background, a boat in the foreground, and houses at the foot of the mountain.<sup>115</sup> The landscape art celebrated the economic and moral progress of the era as well as demonstrating that through technology, like law, humans improved upon the state of nature.<sup>116</sup>

George Junkin focused on the progress that was made possible because the 1850s were the age of the "empire of the mind."<sup>117</sup> The wide diffusion of knowledge led to a general skepticism, which advanced the cause of liberty:

Wherever a gleam of light has entered and reveals to him his chains, he has instantly endeavoured to break them. Hence the perpetual struggle for freedom. There is a law of

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<sup>114</sup> *Id.* at 9. A few years later at VMI, Willoughby Newton explained the technological developments of Virginia:

Her great canal, at the cost of many millions, has wound its way far into the interior, and gives you now continuous water communication, without breaking cargo, from Lexington to Norfolk. Her railways span the Commonwealth. She has shaken hands with her sisters of North Carolina and Tennessee; she has tunnelled the Blue Ridge, scaled the Alleghanies, and with unshaken constancy, in the face of every obstacle, is pressing her way to the Ohio. In any age but this, such achievements would be deemed miraculous.

WILLOUGHBY NEWTON, *VIRGINIA AND THE UNION: AN ADDRESS, DELIVERED BEFORE THE LITERARY SOCIETIES OF THE VIRGINIA MILITARY INSTITUTE* 17-18 (Richmond, Macfarlane & Fergusson 1858).

<sup>115</sup> Margaret Preston Junkin, Sketch Book, Washington and Lee Special Collections.

<sup>116</sup> See generally Alfred L. Brophy, Property and Progress: Antebellum Landscape Art and Property Law, 40 *MCGEORGE L. REV.* 603 (2009) (discussing antebellum Americans' love of property and how that love appears in landscape art).

<sup>117</sup> JUNKIN, *supra* note 113, at 11.

political progress in the earth, the workings of which we notice with delight as we ponder the history of by-gone centuries. Most thrilling have been the scenes that the application fo this law had produced; and amid all the records of the past, no pages are more absorbing in their interest than those which tell of man’s struggles for liberty.<sup>118</sup>

The pace of political change was increasing.

In this age, kingdoms that had their origins in the distant past – dynasties, white with the age of centuries–thrones, whose foundations seemed embedded in the very structure of the societies where they were reared–governments, that had interwoven their influence into the entire web of social existence–sovereignties, allied with system of aristocracies and with forms of religious superstition, so as by reciprocal influences to strengthen each other – all these have been shaken by the swelling tide of political progress–and all shall yet be swept to destruction.<sup>119</sup>

All of this fit together for Junkin with a world of Christianity – for, as he said, “the progress of civilization and liberty, and the advancement of Christianity are nearly identical.”<sup>120</sup> This is the world of the bible as a part of liberty and order (including respect for property) as a support for liberty. That is the Whig vision. But there were dangers afoot. There was danger in all of this spirit of inquiry and in the rapid changes of the era, and in the questioning of the past. “The progress of the times, especially in our own land, seems inclined to abolish every thing that even wears the semblance of age. It would lay its sacrilegious hand upon religion itself, and forgetting that truth cannot be changed, that its applications only can be wrong, it assails the oldest and best established principles.”<sup>121</sup>

While people at Washington College were arguing against slavery and also celebrating the wealth created by the technological progress of the age, Rockbridge County residents The wealth of Rockbridge County residents was not nearly so great as other parts of Virginia and other parts of the South, so Rockbridge provides a contrast with other parts of the state and the south. In particular Rockbridge provides a comparison with the wealthy parts of the south that revealed a

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<sup>118</sup> *Id.* at 14.

<sup>119</sup> *Id.* at 15.

<sup>120</sup> *Id.* at 21.

<sup>121</sup> *Id.* at 22.

heavy a reliance upon legal technology, such as in Greene County, Alabama.<sup>122</sup> The wealth in Rockbridge was largely created through agriculture, but there was also some technology; such as iron forges.<sup>123</sup> The James River and Kanawha canal, which runs through Rockbirdge, helped lower transportation costs down the James River to Richmond, the point of departure for ocean-going vessels. Thus Rockbridge residents were familiar with and invested in bonds, as well as some industrial and extensive agricultural enterprises.<sup>124</sup> Hence, this study is about the forms of wealth in Rockbridge in that era of market revolution – largely land, slaves, and bonds – and what testators did with their property.<sup>125</sup>

### *B. The Methodology*

This study draws upon the methodology of several similar studies of both pre-Civil War and twentieth century probate.<sup>126</sup> We analyze 128 wills from Rockbridge County, Virginia, using the microfilm of the Rockbridge County probate records that are available at the Library of Virginia.<sup>127</sup> We included every complete and readable will probated in Rockbridge County at five year intervals from 1820 to 1860. We also included 1851 and 1861 to expand the samples at several key points of particular interest to us. Thus, we included wills probated in 1820, 1825,

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<sup>122</sup> Stephen Duane Davis II & Alfred L. Brophy, “*The Most Solemn Act of My Life*”: *Family, Property, Will, and Trust in the Antebellum South*, 62 ALA. L. REV. 757, 774-75 and n.68 (2011).

<sup>123</sup> BODIE, *supra* note 100, at 92-96 (reporting that agriculture reigned supreme but noting the importance of canals and iron forges to the Valley’s economy); CHARLES B. DEW, *BOND OF IRON: MASTER AND SLAVE AT BUFFALO FORGE* (1994).

<sup>124</sup> *Id.* at 103-09. *See also* American Colonization Society v. Gartrell, 23 Ga. 448 (1857) (discussing estate of testator who left his slaves to the American Colonization Society, which consisted of “lands, slaves, bank and railroad stocks, bonds, notes, and other evidences of debt...”).

<sup>125</sup> *See, e.g.*, Reid's Adm'r v. Blackstone, 55 Va. (14 Gratt.) 363 (1858) (testator disposing of bonds and slaves, with the slaves to be freed in Pennsylvania).

<sup>126</sup> *See* Davis & Brophy, *supra* note 120, at 774-75 and n.68; Lawrence Friedman, Christopher Walker, and Ben Hernandez-Stern, *The Inheritance Process in San Bernardino County, California, 1964: A Research Note*, 43 HOUSTON L. REV. 1145-73 (2006); Jason Kirklín, *Measuring the Testator: An Empirical Study of Probate in Jacksonian America*, 72 OHIO STATE L. REV. 459 (2011). *See also* YVONNE PITTS, *FAMILY, LAW, AND INHERITANCE IN AMERICA: A SOCIAL AND LEGAL HISTORY OF NINETEENTH-CENTURY KENTUCKY* (2013).

<sup>127</sup> We used the microfilm copies of the Rockbridge County probate records at The Library of Virginia: [http://www.lva.virginia.gov/public/local/results\\_all.asp?CountyID=VA249#WIL](http://www.lva.virginia.gov/public/local/results_all.asp?CountyID=VA249#WIL)  
We have modernized spelling of quotations from the wills throughout this article.

1830, 1835, 1840, 1845, 1850, 1851, 1855, 1860, and 1861. The will books are organized according to when the wills were probated rather than when they were written. Thus, a will that was executed in 1810 and probated in 1820 was included in the study,<sup>128</sup> while a will written in 1820 and probated in 1822 would not be. For many of the wills, there are additional records, such as inventories of estate. However, because our primary focus was the testator's expressions in the will and the legal technology, we made no systematic use of these additional records. After we identified the 128 usable wills probated, we coded each will for testator's and beneficiaries' gender and relationship; preference between heirs; incidence, sophistication, and purpose of trusts; incidence of bequests of and emancipation of slaves; and other peculiar provisions.

There were several points that required judgment calls on our part. One was the equality of distribution to issue. In many instances it was difficult to determine equality. For instance, when a testator devised different parcels of land to issue, it was unclear if they were of equal or roughly equal value. Given the Virginia code's equality in intestacy<sup>129</sup> we presumed that devises were equal unless there was contrary evidence, which there often was, of preferential treatment.<sup>130</sup> There were also some instances of unequal treatment between male and female issue in when they received their devises. Thus, male issue sometimes received their portions outright while female children received that property in trust. Those were issues of equality of terms of descent as opposed to amount of property and we coded those separately.

The second area that required substantial judgment calls were the cases where property required on-going management by the executors. In cases where this appeared to invoke on-going

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<sup>128</sup> See, e.g., Mary Wilson's Will (1820), Rockbridge County Wills Book 5, at 59-60 (written in 1810 and probated in 1820).

<sup>129</sup> 1 REVISED CODE OF THE LAWS OF VIRGINIA, *supra* note 91, at 355, Chap. 96, sec. 1.

<sup>130</sup> This is also in keeping with the Virginia Supreme Court's interpretation of a will that was probated in Rockbridge County. The will provided "I will and bequeath to the children of Arthur McMaster and David McMaster and to Robert B. McKee McMaster all the funds remaining after every just claim against my estate has been satisfied, to be equally divided between them." The Court interpreted that as giving shares of equal size to each of the children Arthur McMaster, the children of David McMaster, and to Robert McMaster. *McMaster v. McMaster's Ex'rs*, 51 Va (10 Gratt.) 275 (1853).

management duties – even where the will did not use the word “trust” – we coded that as a trust.<sup>131</sup> This decision posed some problems because there are a few cases in which it is unclear where the funds for continuing support come from. For instance, we coded as an implicit trust David Potter’s instructions that left his plantation to his two sons and reserved half the crops in the ground “for the support of the family” and then required that “my daughters Nancy and Betsey [are] to be supported by the boys as long as they live single.”<sup>132</sup> Our perhaps charitable interpretation here was that the support was to come out of the plantation left to “the boys.” But whether and how such a “trust” would be enforced against them remains unclear. Some wills left what might have been classified as a legal life estate, though we often viewed it as creating an implicit trust. For instance, Jacob Dice’s 1860 will left his farm to his two sons with instructions that they farm it while his wife is alive and give her one-third of the proceeds. This appeared to us to be at least slightly more than a life estate in one-third of the property, for it seemed to impose duties on the sons with respect to the management of the property.<sup>133</sup> A similar and stronger case of imposing a duty with regard to management of property came in Thomas Greene’s 1861 will, which provided that his executor was to rent out land to pay his debts, then use the remainder “for the entire benefit of” his granddaughter “Nancy Jane Greene.”<sup>134</sup> We also included in these cases

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<sup>131</sup> JOEL TIFFANY & EDWARD BULLARD, *THE LAW OF TRUSTS AND TRUSTEES, AS ADMINISTERED IN ENGLAND AND AMERICA, EMBRACING THE COMMON LAW, TOGETHER WITH THE STATUTE LAWS OF THE SEVERAL STATES ...* 42-44 (Albany, W.C. Little 1862) (discussing forms of implied trust created via will).

<sup>132</sup> David Potter, Rockbridge County Wills Book 13, at 222.

<sup>133</sup> Jacob Dice, Rockbridge County Wills Book 15, at 443. A similar – and rather confusing – will of Archibald McClune left property to his wife and two daughters “during the lifetime of” his wife. As with Dice’s will, this might be read as a legal life estate, though again the language of “support” suggests a trust relationship and duties on the part of the widow to manage the property for the two daughters. Similarly, Henry Firebaugh’s 1861 will devised “the use of my farm” to his wife for her life for “her raising and educating my children.” Firebaugh also left the profits and his stock, stills, and tubs in the distillery at David Firebaugh’s property for “the benefit of my wife and children.” Rockbridge County Wills Book 16, at 228 (1861).

<sup>134</sup> Thomas Greene, Rockbridge County Wills Book 16, at 144. *See also* James G.W. Yonel, Rockbridge County Wills Book 16, at 231 (“I will and bequeath to my son Robert D. Yonel a good support off of my property, and it is my request for him to live with his mother.”).

where a beneficiary received an annuity that would be paid out of the estate.<sup>135</sup> In reporting this, we break out the cases of implicit trust from explicit trust.

Finally, we have not looked outside the wills for data on testators here, as some previous studies have done.<sup>136</sup> While it may have been possible to locate many of our testators in the United States' decennial censuses or in Rockbridge County tax assessments, our focus is on the employment of legal devices, such as trusts and life estates, rather than the social history of the probate process. Hence, this article focuses on the terms of the wills and testamentary trusts.

### *C. Who Were the Testators?*

In the pre-Civil War era, wills in Rockbridge County were primarily the domain of men. Of the 128 testators we studied from 1820 to 1861, 71.1% (N=91) were men. (Table 1) The predominance of male testators appeared throughout the period. Of the 67 wills we studied before 1850, 71.6% were written by men and of the 61 wills we studied that were probated from 1850 to 1861, 70.9% were written by men. The majority of male testators were married (N=56, 61.5%). (Table 2) The opposite was true for female testators. Only 1 female testator out of 37 (2.7%) was identified in her will as married. (Table 2) This is unsurprising, because married women had extremely limited rights to dispose of property. That one married female testator had a joint will executed by her and her husband and, in fact, she was widowed by the time her will was probated.<sup>137</sup>

The gender imbalance in the number of testators and the number of married testators did not translate into a disproportionate number of male family members mentioned in each will.<sup>138</sup> In

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<sup>135</sup> See, e.g., William Thompson, Rockbridge County Wills Book 13, at 368-69 (providing for implicit support trust for three elderly slaves). We need to recode Joseph Bell's will – it's not a support trust; it's an outright gift.

<sup>136</sup> See, e.g., Davis & Brophy, *supra* note 120, at 775.

<sup>137</sup> Adam Leach and Margaret Leach, Rockbridge County Wills Book 13, at 384 (1855). A wife could not generally make a will while married, even though she could exercise a power of appointment over property left in trust for her. See 2 KENT, *supra* note 8, at 170-71.

<sup>138</sup> We ascertained the gender of a testator's family members based upon whether the testator explicitly mentioned his relation to the family member (e.g., "son" or "daughter," "grandson" or "granddaughter," etc.) or by the gender generally associated with the family member's name. Similarly, we ascertained whether one was a family member

fact, slightly more female family members than male family members were mentioned in the Rockbridge County wills. On average, 6 family members were mentioned in the wills we sampled from 1820 to 1861. Of those 6 mentioned family members, on average 3.1 were female and 2.9 were male.

#### *D. What Did Testators Do With Their Wealth?*

Even though male and female family members were mentioned at nearly an equal rate in Rockbridge County wills, the distribution of property among family members by testators during this time period was anything but equal. The nature of these distributions among family members is consistent with the prevailing attitudes about gender and maintenance of family wealth during this time period, reflecting a preference for male heirs over female heirs and devising one's wife much less than the entire estate. Further, Rockbridge County testators preferred devising their wealth to family members over leaving it to non-family and charitable organizations.

##### 1. General Testamentary Practices

We took a broad approach to determining whether a testator's distribution to their issue was equal or favored, and we only labeled a distribution as favored if it obviously favored one or more issue over other issue. If we did not determine a distribution to be favored, we labeled the distribution as equal. Of the 128 testators from Rockbridge County, 66.4% (N=85) devised property to their issue. More than half (N=47, 55.3% ) of those who devised property to their issue devised property equally to them,<sup>139</sup> while 44.7% (N=38) of those who devised property to

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based upon whether the testator explicitly mentioned his relation to the person or by whether the person shared the last name of the testator or the testator's family members.

<sup>139</sup> Given Virginia intestacy law's demand for equal inheritance, in cases when it was unclear whether there was equal or unequal distribution we presumed equal distribution. Moreover, when sons and daughters received equal shares, but daughters received property in life with a remainder to their issue or in trust for life, remainder to their issue we classified this as equal. Our rationale was that the property distributed to the daughter's stock was equal to that of the son's stock, even though there were procedural differences. This classification is somewhat controversial because it remains in dispute how to interpret devises to daughters in trust. Norma Basch's study of women and property in New York state in this time period, for instance, noted the predominance of property left in trust to daughters as a sign of the restricted property rights of daughters and their relatively limited power. See NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK* 100-11 (1982). Yet, we focus on the central purpose of the trust as maintaining property within the daughter's family and freed from the creditors of her husband. Thus, our focus is on the ways this technology preserved income for the daughter rather than how it limited her rights to control the property. In fact, some trusts both attempted to protect



their issue made a favored distribution to their issue. (Table 6) When testators made a favored distribution of property to their issue, male issue were highly favored over female issue. (Table 7) Of the testators who made a favored distribution and favored male issue over female issue or vice versa,<sup>140</sup> 85.3% (N=29) favored their male issue. Only 14.7% (N=5) favored their female issue. (Table 7) Not included in these percentages are the 4 testators who made distributions that favored both male and female issue over other issue. Many of the devises to issue were outright, in a few cases devises to daughters were limited so that if they died without surviving issue the interest would shift to a sibling or the sibling's issue.<sup>141</sup>

At other times testators made outright gifts, such as David Greenlee's bequest to his son Robert of "as much money as may be necessary in the prudent use of it for outfit and attendance of medical lectures in Philadelphia for two sessions."<sup>142</sup> Other specific devises of interest? Other odd provisions – one wanted no monument and he also directed "that no badges of mourning be worn by any relations on my account."<sup>143</sup> Another ordered a specific monument (headstone)<sup>144</sup> and another set aside the family cemetery from sale with the rest of the estate.<sup>145</sup>

Almost all devises were to family members. Rockbridge County testators rarely devised their property to non-family members or charitable organizations. (Table 6) Of the 128 testators, only 18 (14.1%) devised property to people outside of the family. (Table 6) Fewer than 5% of the

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the daughter's share from her husband's creditors and give her control over its disposition. *See* 2 KENT, *supra* note 29, at 161, 170-71 (discussing trusts for married women that gave the beneficiaries control over the corpus even during life).

<sup>140</sup> We ascertained the gender of a testator's issue based upon whether the testator explicitly mentioned his relation to the issue (e.g., "son," "daughter," "grandson," or "granddaughter") or by the gender generally associated with the issue's name. In the four cases where testators favored both female and male issue over other issue we have removed them from this analysis.

<sup>141</sup> *See, e.g.*, Nancy Cunningham, Rockbridge County Wills Book 7, at 298 (1835).

<sup>142</sup> David Greenlee, Rockbridge County Wills Book 11, at 293 (1850).

<sup>143</sup> John Davidson, Rockbridge County Wills Book 7, at 366-67.

<sup>144</sup> Arthur McCluer, Rockbridge County Wills Book 13, 301-02 (1855).

<sup>145</sup> William Miller, Rockbridge County Wills Book 8, 431-32 (1840).

testators (3.9%, N=5) made a charitable devise. (Table 6) For instance, one will left money to the “Theological Seminary in Prince Edward, Virginia,” the Union Theological Seminary that was then part of Hampden-Sydney College.<sup>146</sup> Another left \$100 to the Presbyterian Church,<sup>147</sup> and another left a residuary to the Virginia Bible Society.<sup>148</sup> And one left \$300 in trust for the Ebenezer Church.<sup>149</sup> Six testators freed enslaved people and so in some sense one might say left “property” to non-family members. In the instances where they left property to non-family members it was often in return for care those others had provided. For instance, David Ford’s 1825 will left the residuary of his estate to his friend John McFadden “for the friendly care he has taken care of me in my illness.”<sup>150</sup> There were, it seems a good many agreements regarding care in Rockbridge County.<sup>151</sup>

## 2. Married Testators

The distributions that testators in Rockbridge County made to their surviving spouses are also indicative of the prevailing attitudes about gender and maintenance of family wealth during the antebellum period. The 57 married testators made 56 distributions of property to their surviving spouses.<sup>152</sup> No married testators made an outright devise of their entire estate to a surviving spouse. Only four of the married testators (7.1%) made an outright devise to their

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<sup>146</sup> Cynthia Cloyd, Rockbridge County Wills Book 6, at 450 (1830).

<sup>147</sup> Benjamin Darst, Rockbridge County Wills Book 7, at 370-71.

<sup>148</sup> William T. Hamilton, Rockbridge County Wills Book 8, at 405.

<sup>149</sup> William Harper, Rockbridge County Wills Book 12, at 45.

<sup>150</sup> David Ford, Rockbridge County Wills Book 5, at 508-09.

<sup>151</sup> Boston Temple, Rockbridge County Wills Book 6, at 492-93 (apparent inter vivos trust regarding second wife’s care during her life); John Berryhill, Rockbridge County Wills Book 6, at 21 (1825) (leaving 40 acres and a house to Amy Beverly, “a woman of colour who has kept house for me a number of years”); William Patton, Rockbridge County Wills Book 6, 487-88 (1830) (leaving farm to two sons who had laboured for the support of myself and wife and the younger children untill [sic] they left me to get trades or married and removed”); Arthur McCluer, Rockbridge County Wills Book 13, at 301-02 (mentioning 1841 agreement regarding the conveyance of a tract of land in exchange for the care of Arthur McCluer and his wife). *See also* HENDRICK HARTOG, SOMEDAY ALL THIS WILL BE YOURS: A HISTORY OF INHERITANCE AND OLD AGE (2012).

<sup>152</sup> *See infra* Table 8.

surviving spouses of property at all. (Table 5) Substantially more popular among married testators was to leave the surviving widow a life estate, an estate for widowhood, or a support trust. Forty (71.4%) of the 57 married testators devised their surviving spouses a life estate or an estate for widowhood and 21.4% (N=12) of married testators devised to their surviving spouses a support trust. (Table 5) Thus, given that 56 of the 57 married testators were male, (table 3) married men overwhelmingly left their surviving spouses a life estate or an estate for widowhood, as opposed to an outright devise of property. (Table 5) Those life estates were usually in a subset of the property. Often it appears that the testators who left property in life estates for their daughters did so to keep the property within the family. For instance, Thomas Beggs' will probated in 1840 had a codicil that altered an outright devise to his daughter to give her instead a life estate with a remainder to her heirs.<sup>153</sup>

#### **IV. Trust Incidence and Purposes**

##### *A. Changes in Trust Incidence, 1820-1861*

One of the most dramatic changes in Rockbridge County wills from 1820 through 1861 is the growth in the use of both implicit and explicit testamentary trusts. Where there were six implied trusts and no explicit trusts in the 17 wills (35%) probated in the 1820s, by the 1850s there were 4 explicit trusts and 18 implied trusts in the 39 wills (56%) probated. (Table 3) Both the incidence and sophistication of the trusts increased over the forty years under study here.

##### 1. Maintenance, Care, and Education of Family Members

The trusts served a number of purposes. Particularly early on, there were primarily concerned with the maintenance and care of vulnerable family members, particularly widows and daughters. An early example of a trust for support of family was John Sloane's 1830 will that left

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<sup>153</sup> See Thomas Beggs, Rockbridge County Wills Book 8, at 326 (providing a codicil that revoked "the foregoing bequest of a portion of my landed estate to my daughter Ann her heirs and assigns forever as above expressed; but give and bequeath the same to her during her natural life, and at her decease to her child or children should she have any and their heirs forever; but if she should die leaving no child or children; then I give and bequeath the said landed estate one half to my grandson William Beggs now living with me and the other half to the children of Jane McClung deceased to them and their heirs forever.").

his real property and one slave in trust for support for his wife and children for her life. Sloane ordered that his “mansion house ... with the Garden attached .. With the negro woman Hannah” would be kept for life for his wife. His other real property was to be “rented or sold as may appear most advisable by my executors” and the remaining money was put to interest to provide support.<sup>154</sup> This put a lot of control in the hands of executors, but also reveals Sloane’s sophisticated sense of the market. He wanted his property put to use to provide either rental income or interest income for his family. Hugh Buchanan’s will, also probated in 1830, had quite similar terms. It provided that when his sons reached the age of majority that they could farm the land to provide for the family; and if they could not do that, they the executors were instructed “to have the land worked to their minds for the support of the family.”<sup>155</sup>

Five wills provided trusts for the care of disabled individuals, including one that made specific reference to a Virginia statute for care of disabled individuals.<sup>156</sup> Another left an explicit trust for a son “of unsound mind.”<sup>157</sup> Another provided for support for a mentally ill wife, using money from state bonds, which was returning 6% interest.<sup>158</sup> Andrew Bogan’s 1825 will provided that his executor pay the room and boarding for his sister, whom he described as of “not a sound mind.”<sup>159</sup> John Allen’s will left the residue of his estate to one of his daughters with the expectation that she would maintain “my daughter Betsy who is insaned.”<sup>160</sup>

Obviously a lot of the testators were concerned with the maintenance of beloved family

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<sup>154</sup> John Sloane, Rockbridge County Wills Book 6, at 410 (1830).

<sup>155</sup> Hugh Buchanan, Rockbridge County Wills Book 6, at 438 (1830).

<sup>156</sup> Rachel McNutt, Rockbridge County Wills Book 8, at 334 (1840) (mentioning “An Act to Reduce Into One the Several Acts Concerning Guardians, Orphans, Curators, Infants, Masters, and Apprentices,” *Supplement to The Revised Code of Virginia* chap. 166, at 223 (Richmond, Samuel Shepherd & Co. 1833) in the will and asking her daughter, Catharine, be treated “as if she were an infant under the age of fourteen years”).

<sup>157</sup> James Dunlop, Rockbridge County Wills Book 8, at 416.

<sup>158</sup> John McClelland, Rockbridge County Wills Book 13, at 361 (1855).

<sup>159</sup> Andrew Bogan, Rockbridge County Wills Book 5, at 519 (1825).

<sup>160</sup> John Allen, Rockbridge County Wills Book 6, at 463 (1830).

members for the remainder of their lives and made a number of arrangements to make sure that other family members – often children – would take care of them. The testators frequently gave them property to assist with the support.<sup>161</sup>

Often trusts had a number of beneficiaries, such as surviving spouses and issue. The beneficiaries were disproportionately female; nearly 60% of the beneficiaries were surviving spouses; a similar number were female issue or other female relatives. A somewhat smaller percentage of beneficiaries (47%) were male issue or other male relatives. And a substantially smaller number of other people were beneficiaries – in several cases slaves and in one case a church.

One representative example of a trust to care for surviving spouses and for children comes from Michael Kirkpatrick's will probated in 1825. He provided that "the plantation in which my wife has the interest ... be not divided until [their son] Joseph comes of age and that his interest therein herein after named be worked together with his mother's and that the increase thereof be used by my wife and daughter Nancy and son Joseph as a family until Joseph ... attains the age of twenty one years and also until Nancy ... marries."<sup>162</sup> An example of an implicit trust for education came in Robert McCluer's will, which left property in his wife's "hands in such manner ... as may enable her to have my children educated." McCluer allowed his wife to invade the

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<sup>161</sup> See, e.g., Matthew Willson, Rockbridge County Wills Book 6, at 485 (1830) (leaving farm to his son, reserving a one-third interest in the profit to his wife, and providing that daughter may live with his son's family while she is single); William Patton, Rockbridge County Wills Book 6, at 487-88 (1830) (charging "my plantation with the comfortable support and maintenance of my beloved wife Nancy....").

<sup>162</sup> Rockbridge County Wills Book 5 at 514. Five years later John Sloane had a similar, but somewhat more detailed, instructions for his executors regarding maintaining some of his real property for his wife and minor children and also sale of the remaining property to provide income and then legacies for them as they reached age of majority. Sloane's will stipulated:

I leave and bequeath unto my beloved wife Polly Sloane the mansion house that I now live in with the Garden attached to the same together with the negro woman Hannah for and during my wife's natural life for the purpose of aiding and supporting my wife and family or so many of my children as may continue to live with her as a family also bedding and other furniture suitable for their comfort. It is my will and request that all the residue of my personal estate be sold as soon as may be convenient after my decease and that all my Real estate not heretofore disposed of be rented or sold as may appear most advisable by my executors hereafter to be appointed and the moneys [sic] arising from such sales or rent to be applied to the support of my family so far as necessary and the residue of said money to be put to interest reserving the privilege to each Legatee to draw his proportion of said estate when they arrive to the age of twenty one years reserving still a sufficiency for the support of the family as aforesaid"

principal if the income was insufficient.<sup>163</sup> James Johnston's 1835 will left property to his wife "to assist in supporting and educating my younger children" and the residuary was left to the wife.<sup>164</sup>

William Thompson's will left the residue of his plantation, including a mill, with instructions that his executors rent it out during his wife's life. He was careful to give instructions on the rental and the management of the property. The executors were hold the tenant "to such prudent mode of cultivation as will not impoverish" the lands and also to bind the tenant "not to waste the timber unnecessarily."<sup>165</sup> Though this was an implicit rather than explicit trust, Thompson's instructions regarding the management of the property is reminiscent of the increasing control that settlors placed on trustee investment decisions in explicit trusts.<sup>166</sup>

## 2. Protection of Beneficiaries from Creditors

Beginning in the 1830s, the trusts also increasingly took on an additional role of not just providing for support and education, but also protecting beneficiaries against creditors. This was an expansion of the use of trusts to protect property left to daughters from their husbands and their husbands' creditors. For generations before the Rockbridge testators studied here, English and then United States law permitted donors to establish trusts for women that would prohibit their husbands from having access to the trust property.<sup>167</sup> Trusts for daughters served an important purpose in keeping property within the family and providing an important source of income for the entire family and protecting the daughter's property from her husband's creditors. That technology was readily available through treatises and even form books. For instance, Benjamin

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<sup>163</sup> Robert McCluer, Rockbridge County Wills Book 7, at 317 (1835).

<sup>164</sup> James Johnston, Rockbridge County Wills Book 7, at 333 (1835). Another will included a specific provision for one of his son's medical education. David Greenlee, Rockbridge County Wills Book 11, at 293 (1850).

<sup>165</sup> William Thompson, Rockbridge County Wills Book 13, 368-69 (1855).

<sup>166</sup> See *infra* III.D.3 (discussing instructions to trustees regarding management of trust corpus).

<sup>167</sup> Allison Tait, *Unhappy Marriages and Unpaid Creditors: Chancery's Enforcement of a Wife's Right to Property within Marriage in Seventeenth- and Eighteenth-Century England*, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2007144](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2007144)

Tate's *The American Form Book*, published in Richmond in 1845, had several pages devoted to a marriage settlement.<sup>168</sup>

Perhaps even more importantly, beyond the cases of marriage settlements, trust settlors were beginning to prohibit beneficiaries from alienating their interests in the trust income. This was emerging from a couple of ways. First, court decisions increasingly recognized the rights of trustees to . Secondly, state statutes explicitly recognized the rights of settlors to protect beneficiaries' interests from creditors, such as protecting beneficiaries from alienating their interest until they received it. New York's revision in 1828 did this. Similarly, a Kentucky statute prohibited married women who were beneficiaries of family trusts from alienating their interest without permission of an equity court.<sup>169</sup>

Beginning in the 1840s several of the Rockbridge County wills we sampled included provisions to protect beneficiaries against creditors in their wills. This process of protecting beneficiaries' interests against creditors emerged rather gradually. The first sign of this came in William Miller's will probated in 1840. Miller stipulated that one of his son's share "shall remain in the hands of my executors and they are to pay it to him as they in their judgment think his necessities require it."<sup>170</sup> This suggests that his son's trustee might distribute income to him in varying amounts, which could frustrate creditors' claims. Five years later, John McFaddin's will took another even more explicit step towards a spend-thrift trust by explicitly prohibiting his sons from binding their property for any debt.<sup>171</sup> The will, probated in 1845, explicitly restrained his

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<sup>168</sup> BENJAMIN TATE, *THE AMERICAN FORM BOOK: CONTAINING LEGALLY APPROVED PRECEDENTS* 243-46 (Richmond, Drinker & Morris 1845). Tate also provided extensive will forms, including one with an annuity to a wife, *id.* at 249-53, and a will for an independent woman, *id.* at 255-58.

<sup>169</sup> TIFFANY ON TRUSTS, *supra* note 129, at 672 (citing Kentucky Revised Statute, chap. 47, sec. 17 at 395 (1856); *Daniel v. Robinson*, 57 Ky. (18 B. Monr.) 301 (1857); *Williamson v. Williamson*, 57 Ky. (18 B. Monr.) 329, 386 (1857)).

<sup>170</sup> William Miller, *Rockbridge County Wills Book 8*, 431-32 (1840).

<sup>171</sup> John McFaddin, *Rockbridge County Wills Book 10*, at 154-65 (1845) ("neither of my three sons named above can in any way sell any of the lands and houses willed to them or bind said lands and house or any part of them for any debt of their own contracting, or in the debts of any person or persons until they arrive at the age of twenty-one.")

sons from alienating their interests in trust until they reached age 21.<sup>172</sup> A decade later, Arthus McCluer's will, probated in 1855, placed a house and surrounding property at Sulphur Spring in trust for John E. McCluer and then restricted the use of proceeds or income from the property to pay "the debts of the said John E. McCluer."<sup>173</sup>

Arthur McCluer's will had an implicit trust (really a life estate) of a house and the profits from the property for his son John McCluer. He also imposed a restraint against alienation so that the land and the rents and profit would not "be subject to the debts of the said John E. McCluer."<sup>174</sup> And Frederick Read's will probated in 1855 contained yet further innovations in leaving property to his daughter, Polly, to prevent her husband, Edward Bolen, from accessing the property. Read left the property in trust, with explicit instructions that "Bolen should not in any way or manner participate in, have any benefit, use or enjoyment of the said devise made to the ... Polly his wife."<sup>175</sup> Read thus appointed his executors "as trustees to hold and dispense to ... Polly all and every part of her share of my estate for her use and benefit at such times and in such sums as she may wish or demand, she being the judge of her necessities." When Polly passed away, she had a power of appointment and in the failure of exercise, there was a reservation over to Read's other heirs.<sup>176</sup> Testators were getting more sophisticated in protecting beloved family members from their husbands and their husbands creditors. They were also getting more sophisticated in giving instructions about their wishes.

### 3. The Growth of the Explicit Trust

One of the other changes in the testamentary trusts that we observed was the grow in

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<sup>172</sup> John McFaddin, Rockbridge County Wills Book 10, at 164-65. The will provided that "neither of the three sons named above can in any way sell any of the lands and houses willed to them or bind said lands and houses or any part of them for any debt of their own contracting, or the debts of any person or persons whatsoever until they arrive at the age of twenty one."

<sup>173</sup> Arthur McCluer, Rockbridge County Wills Book 13, at 301-02.

<sup>174</sup> Arthur McCluer, Rockbridge County Wills Book 13, at 301-02.

<sup>175</sup> Frederick Read, Rockbridge County Wills Book 13, at 226-27.

<sup>176</sup> Frederick Read, Rockbridge County Wills Book 13, at 226-27.



explicit references to putting property in trust. While the majority of trusts were implicit, there were seven explicit trusts in the 128 we studied. The first explicit reference to a trust in a will studied here came in John Trimble McCluer's will, probated in 1835, which put his trust in trust with his father for the benefit of John's sister, Eglantine.<sup>177</sup> McCluer's will had relatively little on the trustee's duties, so it is quite similar to the implied trusts that appeared with great frequency in the wills we studied. But often the explicit reference to trust in a will was accompanied with detailed instructions to the trustee regarding the management of property and the distribution of income. James Dunlap's will probated in 1840 left the residue of his estate in equal portions to his three children, but left one of his son's portion "in the hands of my wife Elizabeth and my son John E. Dunlap in Trust to be used for the support and maintenance of the said James Baxter until he shall attain the age of twenty one years and after that period the said Trustees shall make such disposition of said fund as to them shall seem right." He left his daughter's portion "in the hands of my wife Elizabeth and my son John E. Dunlap in trust for the use and maintenance of the said Lyleann." But he gave the trustees the power to "pay the whole sum to ... Lyleann at any time they may think proper."<sup>178</sup> Edward Graham's will also probated in 1840 left property in North Carolina in trust for his son William and he gave the trustee, another son named Archibald, "discretion to give the rents and profits of said land to said son William or his heirs, in such sums as he may think proper."<sup>179</sup>

David Greenlee's will, probated in 1850, put property in trust with his wife and provided detailed instructions on the use of the property for the education of their children. He wrote, "I loan to my wife in Trust, until our youngest child marries or arrives at lawful age all my estate of every kind for the purpose following to wit: ... The maintenance, schooling and clothing of our children, now minors, until they marry or arrive at lawful age, in the same style and to the same

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<sup>177</sup> John Trimble McCluer, Rockbridge County Wills Book 7, at 331-32.

<sup>178</sup> James Dunlap, Rockbridge County Wills Book 8, at 416 (1840).

<sup>179</sup> Edward Graham, Rockbridge County Wills Book 8, at 435-36 (1840).

extent as give to our children now married or of lawful age.”<sup>180</sup> The distribution instructions were that when their minor children “marry or arrive at lawful age, they shall receive in money or in property (as deemed best for them by my trustee) a sum as equal as possible to that heretofore given my married daughters.”<sup>181</sup>

John Nelson’s will probated in 1851, for instance, ordered his property to be sold and the proceeds invested “in the best possible way for the benefit of my beloved wife and children so that at the same time they receive a sufficient and comfortable support.”<sup>182</sup> Nelson’s will suggests that he was thinking in economic terms. Similarly, Sara Moore, who was a widow of Revolutionary War soldier, included an explicit trust with instructions on investment to provide for her children for their lives in her will probated in 1860.<sup>183</sup> Moore included a remainder over to her children’s issue and if they had none, then a shifting interest in favor of her other issue. This was provided an explicit standard for investment of trust corpus – “good securities”<sup>184</sup> – and it was also among the most detailed trusts in any of the Rockbridge County wills we surveyed. Moore’s will provided that

One other sixth of my Estate shall be vested by my Executors in good securities, and the annual products paid over to my daughter Sally for the support of herself and her child or children during her life, and at her death, the proceeds of said share to be applied to the support of her child or children, until it or they arrive at age or get married, and the principal of said share to be then paid over to said child or children. But if my said daughter Sally shall leave no child of hers to survive her, or if she shall leave a child or children to survive her, and such child or children shall die before attaining the age of twenty one and before marriage, then the said share of my Estate hereby given to my said

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<sup>180</sup> David Greenlee, Rockbridge County Wills Book 11, at 293 (1850).

<sup>181</sup> *Id.*

<sup>182</sup> John Nelson, Rockbridge County Wills Book 12, at 50 (1851).

<sup>183</sup> Sally Moore, Rockbridge County Will Book 15, at 404-05 (1860).

<sup>184</sup> Moore’s “good securities” language, *id.* at 404-05, is popular language in trusts at the time. *See, e.g.,* Perin v. McMicken’s Heirs, 15 La. Ann. 154, 1860 WL 5534 (La. 1860); Titus v. McLanahan, 2 Del. Ch. 200, 1859 WL 2013 Del. Ch. 1859; Lewis v. Lusk, 6 George 401, 1858 WL 4592 (Miss. Err. App. 1858); McDonogh’s Ex’rs v. Murdoch, 56 U.S. 367, 1853 WL 7640 U.S. (charitable devise of up to \$3 million); Barney v. Saunders, 57 U.S. 535, 1853; King v. Rundle, 15 Barb. 139 (N.Y. Sup. 1853); Niles v. Stevens, 4 Denio 399 (N.Y. Sup. 1847); Vidal v. Girard’s Ex’rs, 43 U.S. 127 (1844); Maury’s Adm’r v. Mason’s Adm’r, 8 Port. 211 (1838) (Goldthwaite opinion on trustee duties). *See also* TIFFANY ON TRUSTS, *supra* note 129, at 630-31 (discussing investment instructions to trustees regarding bonds).

daughter Sally is to be distributed amongst the residue of my children or their descendants.<sup>185</sup>

### ***B. Increasing Sophistication of Trusts, 1820-1861***

The increase in use of testamentary trusts in Rockbridge from 1820 to 1861 is reflected in the treatises and case law as well. One good gauge of sophistication of trust law is the discussion in Kent's *Commentaries*.<sup>186</sup>

Other treatises detailed in even greater detail the sophistication of trusts. There was close parsing of the language necessary for a trust to keep property out of the hands of a beneficiary's creditors. The 1862 edition of *Tiffany on Trusts*, for instance, noted that a trust must evince intent to vest entire interest in the wife in order to keep it free from a husband's creditor. Thus, a trust that provided that the wife was "to have use and benefit of the said slaves and all the proceeds thereunder during life" was not enough to protect from husbands' creditors. For the wife had control over the property and thus it was reachable by creditors.<sup>187</sup> Though as Tiffany's treatment made clear, if the property was in trust "where there is a limitation to trustees to the separate use of a married woman, the courts will strive to adopt a construction which is not advantage." The creation of a trust that allowed the wife to have only rents and profits of real property for "sole use during life" would give the wife the sole power over them and also prohibit her from alienating them ahead of time.<sup>188</sup> A more robust limitation, such as wife has benefit and creditors can't reach, was needed.

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<sup>185</sup> Sally Moore, Rockbridge County Will Book 15, at 404-05 (1860).

<sup>186</sup> The secondary literature also has identified the sophistication and prevalence of trusts in the pre-Civil War North. See, e.g., Gregory Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1198-1200 (1985) (identifying New York's support for spendthrift trust in the 1820s); Chused, *supra* note 86, at 1383 (finding trusts common even in 1820s in New York); Lawrence Friedman, *The Dynastic Trust*, 73 YALE L.J. 547, 576 (1964) (discussing spendthrift trusts in the pre-Civil War era).

<sup>187</sup> TIFFANY ON TRUSTS, *supra* note 129, at 670 n.3 (citing *Hale v. Stone*, 14 Ala. 803 (1848)).

<sup>188</sup> TIFFANY ON TRUSTS, *supra* note 129, at 671-72 n.1 (citing New York code); 2 REVISED STATUTES OF NEW YORK 15 sec. 63 (3<sup>rd</sup> ed., Albany, Weare C. Little and Co. 1846) (providing that "no person beneficially interested in a trust for the receipt of the rents and profits of lands, can assign or in any manner dispose of such interest; but the rights and interest of every person for whose benefit a trust for the payment of a sum in gross is created, as assignable.")

A decade earlier James Hills' *A Practical Treatise on the Law Relating to Trustees: Their Powers, Duties, Privileges, and Liabilities: With Notes and References to American ...* provided instructions on the creation of trust for separate estate.<sup>189</sup> Tiffany and Hill both make clear – as did the sophisticated English literature on trusts – that judges were parsing trust language very closely. And by the early 1850s testamentary trusts had grown in sophistication. New Orleans businessman John McDonogh left a will that ran to nearly thirty printed pages that provided for the emancipation of all of his slaves. Some were freed outright and immediately; others were ordered freed and sent to Liberia; and others were to be freed after they had worked for his heirs for fifteen years.<sup>190</sup> Later in his will McDonogh left detailed instructions for the establishment of a school for New Orleans children.

The technology of the trust was brought to the masses – or at least some affluent testators – by form books such as Benjamin Tate, *The American Form Book: Containing Legally Approved Precedents*, published in Richmond in 1845. Among its forms were several wills and even a deed of manumission.<sup>191</sup> Tate's *American Form Book* is an expanded version of *The Form Book: Containing Three Hundred of the Most Approved Precedents* published in Philadelphia in 1836.<sup>192</sup>

The Rockbridge County wills depict a part of the larger story of the growth of the sophistication of trusts. The documents in Rockbridge tell that story and though the Shendanoah

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<sup>189</sup> JAMES HILLS, *A PRACTICAL TREATISE ON THE LAW RELATING TO TRUSTEES: THEIR POWERS, DUTIES, PRIVILEGES, AND LIABILITIES: WITH NOTES AND REFERENCES TO AMERICAN ...* (Philadelphia, Lea and Blanchard 1846) (very similar to Tiffany) at 420. Hills treatise gave instructions on the need for clear prohibition on anticipation of income, *id.* at 423, and the adoption of spendthrift trust. *Id.* at 422, as well as the duties of trustees for married women. *Id.* at 405.

<sup>190</sup> *THE LAST WILL AND TESTAMENT OF JOHN MCDONOGH, LATE OF MACDONOGHVILLE, STATE OF LOUISIANA, ALSO HIS MEMORANDA OF INSTRUCTIONS TO HIS EXECUTORS* (1851) (providing extensive instructions to executors and also property left in trust to the American Colonization Society).

<sup>191</sup> TATE, *supra* note 166, at 161-69.

<sup>192</sup> *THE FORM BOOK: CONTAINING THREE HUNDRED OF THE MOST APPROVED PRECEDENTS* (Philadelphia, Barrington & Geo. D. Haswell 1836). *The Form Book* has forms for manumission. *Id.* at 251-52. The wills in those books, *id.* at 279-87, were less sophisticated than many wills that were already appearing in litigation. For instance, *Public Administrator of New York v. Watts*, 1 Paige Ch. 347, rev'd 4 Wend. 168 included the entire text of will from New York that had a provision for emancipation as well as several explicit trusts. The will was successfully excluded as un-executed. *See also* *Clarke v. Fisher*, 1 Paige Ch. 171 (1828) (lack of capacity); *Den v. Vancleve*, 5 N.J.L. 589, 1819 WL 1272 (N.J. 1819) (elderly man's will challenged on lack of capacity).

Valley seems to lag behind other more affluent areas, such as New York, the Rockbridge wills illustrate the development of statutes, treatises, and documents elsewhere. This is a story of the growth of protections of family members amidst the impersonal market. What is less clear is how to account for this development. Gregory Alexander attributes the evolution of trust law to an intellectual development – the departure from a law/equity distinction and the growth of a contract-based way of seeing the world.<sup>193</sup> In the age of the market revolution contracts were increasingly respected. This gave individual decisions preference over collective decisions made by the common law or by legislators. Those earlier doctrines had hard rules, such as the rule of *Brandon v. Robinson*<sup>194</sup> that a trust could not establish a universal rule of a spendthrift trust. But it could establish that a trust interest terminated when a beneficiary went into bankruptcy. Some American courts followed this for a while. Then the age of contract eventually allowed greater flexibility and so legislatures beginning with the 1829 New York code allowed settlors to establish trusts that prohibited beneficiaries from alienating their interest (and thus protected beneficiaries from creditors).<sup>195</sup>

Where Alexander frames this as an issue in how property rights are conceptualized, we approach the recognition of what is now known as the spendthrift trust from a different level of generality, one focused on the reality of the marketplace. The impersonal marketplace placed families at grave disadvantages. They had to rely upon people not known well to them and who could not be constrained by tradition norms of community behavior. Settlor's strong desire to preserve their family fortunes amidst the market economy and that was reflected in their increasing resort to trusts, especially where family members served as trustees. Before the 1830s in Rockbridge County wills gave instructions to family members. They provided guidance to how

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<sup>193</sup> Alexander, *supra* note 184, at 1199.

<sup>194</sup> *Brandon v. Robinson*, 34 Eng. Rep. 379 (1811) (discussed in Alexander, *supra* note 184, at 1198-99).

<sup>195</sup> 1 REVISED STATUTES OF THE STATE OF NEW YORK at 730 sec. 63 (Albany, Packard and Van Benthuysen 1829).

beneficiaries were to use property for the care of other vulnerable family members. Thus, the will was used to protect one family member against another. Later, beginning in the 1830s and going forward, wills and trusts they contained protected against the world. They protected the vulnerable family members against creditors outside the family. The trust was increasingly employed as a device to preserve the family – particularly the affluent family – against the market.

This invites a hypothesis about the nature of legal change in this case. That is, what we have traced in small detail for Rockbridge was apparently happening nationwide. And there is the question of what is cause and effect and what is merely correlation. Marriage settlements were well-recognized and already existed as a device to protect wealth within families. Hence, the New York state validating spendthrift trusts may have been more a movement to make law accessible, than a change in how trust property was conceptualized. That movement to make law accessible led to a number of reforms in the pre-Civil War era, such as the general incorporation statute.

## **V. Enslaved People in Rockbridge County Wills**

Given the importance and value of slaves in the antebellum South, the presence of enslaved people in Rockbridge County wills deserves close attention. While slavery was not as prevalent in Rockbridge as in many Virginia counties, still more than one in five people in the county were enslaved from 1820 to the 1860. Forty-four of the 128 wills (34.4%) made specific mention of slaves. While obviously important, this is substantially lower than many other southern counties at the time. For instance, nearly eighty percent of testators in Greene County, Alabama, in the 1830s and 1840s devised at least one person.<sup>196</sup>

Rockbridge County testators often devised their human property to their surviving spouse and children; they sometimes put their human property in trust, again often for their surviving spouse and children.<sup>197</sup> Sometimes, however, they put their human property in trust as a step

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<sup>196</sup> Davis and Brophy, *supra* note 120, at table 2 (reporting 78% of wills in Greene County, Alabama, over this period devising humans).

<sup>197</sup> *See infra* Table 14.

towards freedom and in a few cases they freed their slaves outright. Thus, Rockbridge testators used the technology of wills and trusts for everything from managing their enslaved humans to freeing them. They used trusts for slavery and for freedom.

*A. Distribution of slaves among family members*

Of the forty-four wills that devised enslaved people, 17 left enslaved people to a surviving spouse. Sometimes these were outright gifts and at other times they were left only for life. (Table 10) For example, Edward Graham's will probated in 1840 left all his slaves and the rest of his personal property to his wife "for the support of her and her family including my daughters Nancy and Elizabeth during the life of my said wife," then the remainder went outright in equal portions to his children.<sup>198</sup> Twenty-three of the 44 wills that devised enslaved people left enslaved people to issue. For example, Samuel S. Campbell left one slave – named George Washington – to his wife and another slave – named John Adams – to his daughter Sally.<sup>199</sup> In other cases, slaves were given to family member. For instance, Hannah Moore gave three slaves her nephew's son.<sup>200</sup>

*B. Emancipating Slaves*

Not only were slaves less prevalent in Rockbridge wills than in many other places in the south, the testators were also more likely to provide for their freedom than in many other parts of the South.<sup>201</sup> Beginning just after the Revolution, Virginia law allowed owners to emancipate slaves via will,<sup>202</sup> although before freeing the slaves all the testators' debts had to be paid, or the

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<sup>198</sup> Rockbridge County Wills Book 8, at 435-36 (1840).

<sup>199</sup> Samuel S. Campbell, Rockbridge County Wills Book 8, at 419-29 (1840).

<sup>200</sup> Hannah Moore, Rockbridge County Wills Book 8, at 320 (1840) (Providing that "I give and bequeath to said James Barclay my black boy Eli my black girl Louisa and also my girl Magdalen").

<sup>201</sup> See Ellen Eslinger, *Free Black Residency in Two Antebellum Virginia Counties*, 79 J. SOUTH. HIST. 261–98 (2013) (discussing free people in Rockbridge and Albemarle Counties).

<sup>202</sup> VIRGINIA REVISED CODE, *supra* note 91, chap. 111, sec. 53, at 433-44. The first version of this Act was passed in 1782. See *id.* at 434 n. r.

slaves would be used to satisfy them.<sup>203</sup> Moreover, the Virginia code required testators who freed young slaves (those under 18) or older slaves (those over age 45) had to provide for their maintenance or their estate would be charged for it.<sup>204</sup>

Some Rockbridge testators took advantage of this law to free their enslaved human property. This reflects the attitudes of people in the Shenandoah Valley, which where slavery was less economically important than in many other parts of the south and also where proslavery thought was less thoroughly entrenched than in other parts of the south. Testators provided for emancipation in 6 of the 44 wills (13.6%) that mentioned enslaved people.<sup>205</sup> That represented just under 5% of the total wills surveyed here.

John McEune's will probated in 1820 illustrates such provisions for freedom. McEune provided that "my negroe girl Cate ... be set free." He also provided that one of his bonds with \$600 be used to provide for her support if that was necessary.<sup>206</sup> McEune, thus, provided not just for freedom but for support for the newly freed Cate. The most extensive instructions regarding emancipation of slaves came in William Miller's will, which put the humans he owned in trust with instructions regarding the pay they were to receive until they were freed.<sup>207</sup> This is what was

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<sup>203</sup> *Id.* at chap. 111, sec. 54, at 434. Moreover, surviving widows could elect a one-third interest in the slaves a husband tried to emancipate via will. *Id.* at sec. 60, at 435.

<sup>204</sup> *Id.* at chap. 111, sec. 55, at 434. Emancipated people were required to leave the state within 12 months. *Id.* at sec. 61, at 436. It remains unclear how frequently local courts enforced that requirement. See KIRT VON DAACKE, *FREEDOM HAS A FACE* (2012).

<sup>205</sup> John McEune, Rockbridge County Wills Book 5, at 57 (1820) (freeing slave, Cate); John Davidson, Rockbridge County Wills Book 7, at 366-67 (1835) (freeing slave and her daughter at wife's death); William Miller, 8, at 431-32 (paying slave Becky until her children are of age and then freeing them); John McClelland, Rockbridge County Wills Book 13, at 361 (1855) (freeing two male slaves and one female slave and any children she had and providing them with some money and personal property); Isaac Davis, Rockbridge County Wills Book 16 at 223 (1861) (freeing slaves on wife's death and providing for their transportation to Liberia); Polly Bailey, Rockbridge County Wills Book 16 at 238 (1861) (freeing slave, Caroline).

<sup>206</sup> Rockbridge County Wills Book 5, at 57 (1820).

<sup>207</sup> William Miller, Rockbridge County Wills Book 8, at 431-32 (1840).



known as a trust for quasi-freedom or “qualified state of bondage,”<sup>208</sup> which was generally regarded with suspicion if not outright prohibited.<sup>209</sup> Isaac Davis’ will, probated in 1861, left his slaves to his wife for her life and then ordered them freed and sent to Liberia on her death. “After the death of Mary M. Davis the three black girls and boy named Mary and Mariah and Sareh and the boy Scout to be free and at liberty to go to Liberia.” He repeated the instruction that “at the death of my wife Mary M. Davis the negroes are not to go back to any other owner ... but be free and to have fifty dollars each ... out of the estate....” He further provided that the personal property, money, and bonds were to be used to send the slaves to Liberia.<sup>210</sup>

A few of the wills did not free enslaved people, had some other provision to provide for enslaved people in some way. John McFaddin’s will, probated in 1845, instructed that the slaves were to be distributed in “Christian manner.”<sup>211</sup> That opens up an issue of what Christian manner meant regarding the treatment of slaves. Henry Hardy’s will dictated that several slaves were to be paid wages until they reached what one might call retirement age – or became disabled – and

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<sup>208</sup> Lemmond v. Peoples, 41 N.C. (6 Ired. Eq.) 137, \*2 (1849) (referring to “qualified state of bondage”); Campbell v. Smith, 54 N.C. (1 Jones Eq.) 156, \*1 (1854) (rejecting claim that there was a secret trust to hold slaves in a “qualified state of bondage”). In South Carolina such “nominal servitude” was prohibited by statute as well as case law. *See* 11 South Carolina Statutes 155; Belcher v. McKelvey, 32 S.C. Eq. (11 Rich. Eq.) 9, \*5 (1859) (charging that the slave George earned money used to buy his freedom while being held in “nominal servitude”).

<sup>209</sup> *See, e.g.*, Sorrey v. Bright, 21 N.C. (1 Dev. & Bat. Eq.) 113, 115 (1835) (invalidating a trust for quasi-freedom or quasi-slavery); Thompson v. Newlin, 38 N.C. (3 Ired. Eq.) 338, 341 (1844) (discussing trust for quasi-freedom); Lemmond v. Peoples, 41 N.C. (6 Ired. Eq.) 137, \*2-\*3 (1849) (refusing to enforce outright conveyance of slaves because it was a secret trust to continue hold slaves in a “qualified state of bondage”); Green v. Lane, 43 N.C. (8 Ired. Eq.) 70, 74-76, 78 (1851) (interpreting will providing for quasi-freedom); Hurdle v. Outlaw, 55 N.C. (2 Jones Eq.) 75 (1854) (noting that there was no claim that the slaves were given to beneficiary to be held “nominally as slaves”). This is a somewhat separate issue from a secret trust in which slaves were conveyed outright to a donee with the understanding that the donee would free the slaves. *See, e.g.*, Thompson v. Newlin, 38 N.C. (3 Ired. Eq.) 338 (1844) (requiring donee of slaves to answer whether there was a secret trust regarding slaves or whether there was an outright gift of them with no agreement regarding slaves); Thompson v. Newlin, 41 N.C. (6 Ired. Eq.) 380, (finding that secret trust to take slaves out of state and emancipate them is lawful); Thompson v. Newlin, 43 N.C. (8 Ired. Eq.) 32, \*8-\*9 (1851) (same); Campbell v. Smith, 54 N.C. (1 Jones Eq.) 156, \*2 (1854) (finding rebuttal of allegations of a secret trust to hold slaves in “qualified state of bondage”); Thomas v. Palmer, 54 N.C. (1 Jones Eq.) 249 (1854) (finding “it is against public policy to ... allow negroes to remain among us in a qualified state of slavery”); Huckaby v. Jones, 9 N.C. (2 Hawks) 120 (finding devise invalid because it was premised on secret promise that slaves be held in “qualified state of bondage”); Miller v. Gaskins, 11 Fla. 73, \*4 (1864). *See also* Alfred L. Brophy, Thomas Ruffin: Of Monuments and Moral Philosophy, 87 N.C. L. REV. 799, 819-24 (2009).

<sup>210</sup> Isaac Davis, Rockbridge County Wills Book 16, at 223 (1861).

<sup>211</sup> Rockbridge County Wills Book 10, at 164-65.

then they were to be provided basic care.<sup>212</sup> Hardy's will also prohibited the sale of the slaves.<sup>213</sup> William Thompson's will probated in 1840 instructed his executors to "make such arrangements with my wife and children for the support of my three old slaves, Mary, Venus, and Patsy, as they may be able without charge to the Estate." It went on to provide that if those slaves ever "become a charge to the estate it is my will and direction that each of my children be required to constitute an equal proportion towards the expense of supporting them." Thus, Thompson, like Hardy, bound his estate to take care of the elderly slaves. It would be a grave mistake to make too much out of these provisions for enslaved people who had contributed decades of labor to their owners. But perhaps such will provisions testify to the differences in the nature of slavery in the Shenandoah Valley from the more impersonal plantations in Virginia's tidewater and piedmont regions.

Though it does not feature in our sample because of the date it was probated, one of the most sophisticated wills and largest estates probated in Rockbridge County was that of bachelor John Robinson, who died in 1826. Though his will is not in our sample, because it was not one of the years in our study, it provides an important example of the sophistication of legal technology in Rockbridge in the 1820s and also how an affluent testator left his property to a charity, Washington College. Robinson left nearly eighty people in trust to the college. He placed a restraint on alienation of both his plantation, Hart's Bottom, and his enslaved human property.<sup>214</sup>

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<sup>212</sup> Henry Hardy, Rockbridge County Wills Book 11, at 254-55 (1850).

<sup>213</sup> Henry Hardy, Rockbridge County Wills Book 11, at 254-55 (1850) (restraining sale of one slave and ordering that other slaves be paid and taken care of by beneficiaries). *See also* YOUNG, RIPE FOR EMANCIPATION, *supra* note 103, at 176 (listing several wills from the 1850s where testators imposed restraint on sale of human beings).

<sup>214</sup> *See* John Robinson Will, April 26, 1825 (probated 1826) paragraph 10, Rockbridge County Will Book 6, at 78-82, Virginia State Library. The restrictions on alienation appeared in two paragraphs of the will, that relating to the plantation, Hart's Bottom, and that related to the slaves:

8<sup>th</sup> It is my will and desire that Harts Bottom together with all my other Lands in its neighborhood shall not be subject to alienation or transfer, but shall be held by the trustees of Washington College for its use and benefit as an inalienable estate. ... The cultivation and management of the estate is to be under the discretion of the trustees....

9<sup>th</sup> It is also my will and desire that all the negroes of which I may die possessed together with their increase shall be retained for the purposes of labor upon the above lands for the space of fifty years after my decease,

## VI. Conclusion

Recent trusts and estates scholarship has explained how economic considerations are central to statutes<sup>215</sup> and judicial decisions.<sup>216</sup> Other scholarship explores how slavery's centrality to the southern society and economy drove legislators and judges to limit testators' rights to free their slaves.<sup>217</sup> Later, similar considerations affected the treatment of inheritance via intestacy from freed people.<sup>218</sup> Other scholarship studies the significance of language of testators<sup>219</sup> as well as what testators actually did with their property.<sup>220</sup> The studies of doctrine in history reveal the centrality of gender, marriage, and considerations of family wealth protection were central to the

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always saving the rights of hiring out, within that time, such and as many of them as the aforesaid shall consider so far necessary on the [terms?] and of selling such others as may render themselves by their crimes or by mutinous habits, unsafe or injurious in their connections with their fellows. This right is to be exercised upon a sound discretion and in such manner as to give the negroes who are allotted for hire the alternative of being sold to masters of their own choice. In any disposition which may be made of these slaves and also in their treatment it is my earnest desire that the strictest regard be paid to their comfort and happiness as well as the interest of the Estate. At the expiration of these fifty years, the Trustees aforesaid are released from all restraint as to the disposal of the negroes and may sell or retain them as the results of their labor shall demonstrate to be best.

An inventory of Robinson's slaves appears in *id.* at 404. The will also appears in Trustee Papers, Folder 79, Washington and Lee Special Collections and two inventories appear in the Reid Papers, "A List of Negroes Belonging to the Estate of John Robinson .... at death," [circa 1826] 027A-3, folder 52, and "A List of Slaves Belonging to Washington College, July 30, 1834," Reid Papers, 027A-3, folder 56. An earlier version of the will appears in Trustee Papers, folder 77. Another apparently earlier, though undated (and perhaps incomplete) version appears in the James McDowell Papers, Southern Historical Collection, UNC, in folder 111 (on Washington College). The earlier version has somewhat different and shorter instructions regarding the treatment of the enslaved humans. Robinson's 1820 will instructed the college to keep the slaves together but did not impose a restraint on alienation. John Robinson Will, folder 71, Washington and Lee Special Collections.

<sup>215</sup> Daniel B. Kelly, *Toward Economic Analysis Of The Uniform Probate Code*, 45 U. MICH. J.L. REFORM 855 (2012).

<sup>216</sup> Robert Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621 (2004).

<sup>217</sup> See, e.g., BERNIE JONES, *FATHERS OF CONSCIENCE: MIXED-RACE INHERITANCE IN THE ANTEBELLUM SOUTH* (2009).

<sup>218</sup> Adrienne Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221 (1999).

<sup>219</sup> Karen Sneddon *Speaking for the Dead: Voice in Last Wills and Testaments*, 85 ST. JOHN'S L. REV. 683 (2011); Deborah S. Gordon, *Reflecting on the Language of Death*, 34 SEATTLE U.L. REV. 379 (2011).

<sup>220</sup> See, e.g., BARRY LEVY, *QUAKERS AND THE AMERICAN FAMILY* (1988) (detailing patterns of devise among Quakers in the Delaware Valley in the eighteenth century); LORENA WALSH, *MOTIVES OF HONOR, PLEASURE, AND PROFIT: PLANTATION MANAGEMENT IN THE COLONIAL CHESAPEAKE, 1607-1763* 15-19 (2010) (describing use of probate inventories to reconstruct the plantations in colonial Chesapeake and the transition from servant to slave labor in the latter part of the seventeenth century).

evolution of wills law.<sup>221</sup> Law – as statutes, as court procedure and doctrine, and as will and trust documents – were dictated by economic and social reality.

The Rockbridge wills surveyed here show how testators turns to wills and trusts to distribute property and protect their families. Residents of the Shenandoah Valley were not as wealthy as other parts of the south, yet in the forty years leading into Civil War their wills and trusts increased in sophistication. The wills and trusts had increasing detail in instructions to executors and trustees about the management and distribution of property. These invite further, more finely grained studies of the wealth of testators who use trusts and how different levels of wealth relate to distribution patterns to family members. For instance, how affluent are testators who use explicit trusts and how does that compare to those who do not use explicit trusts; how settlors' investment and management instructions relate to their wealth; and how distribution patterns differ according to testators' wealth. The data here invite further work that links wealth, age, and familial status, and the particular types of technology and to particular distributions.

We have traced the uses of the probate system to transfer property between generations and to keep it largely within the family of testators. Much of the story is about the ways that dispositions reflect the desires of testators and how those testators were increasingly sophisticated about the . Sometimes, though, the language of the will itself reflects the testator's mindset. Such was the case for William J. Thompson, who wrote his will before departing for service in the Confederate Army. His will read in its entirety:

I William J. Thompson of the County of Rockbridge and State of Virginia being now upon the eve of leaving my native country as a volunteer to assist in the defence of the rights of the Southern Confederacy, desire to dispose of all my estate, which I bequeath and will to my two sisters, viz. Nancy J. Moore wife of N.G. Moore and Sallie Thompson, to be equally divided between them or their legal representatives. Given under my hand and seal this 27th day of May 1861.<sup>222</sup>

Thompson's will was probated on January 6, 1862; Thompson, like so many other people of his

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<sup>221</sup> BASCH, *supra* note 137.

<sup>222</sup> William J. Thompson, Rockbridge County Wills Book 16, at 277 (1862).

generation both North and South, had perished in the War.

Table 1  
Testators by Gender by Decade

	1820s	1830s	1840s	1850s	1860s	Total (%)
Female	5	7	7	9	9	37 (28.9)
Male	12	18	18	30	13	91 (71.1)
						128

Table 2  
Married Testators by Gender By Decade

	1820s	1830s	1840s	1850s	1860s	Total
Female	0	0	0	1	0	1
Male	4	15	13	12	8	56
% Male Testators	25%	83.3%	72.2%	40%	61.5%	43.7%

Table 3  
Testamentary Trusts by Gender of Testator by Decade

	1820s	1830s	1840s	1850s	1860s	Total
Female	0	2	2	2	1	7
Male	6	11	10	20	9	56
						63

Table 4  
Sophistication of Testamentary Trusts by Decade

	1820s	1830s	1840s	1850s	1860s	Total (% Total Wills)
Implicit	2	12	10	18	10	56 (43.8%)
Explicit	0	1	2	2	0	5 (3.9%)
Explicit/Detailed	0	0	0	2	0	2 (1.6%)
						63 (49.2%)

Table 5  
Distributions by Married Testators to Surviving Spouse by Decade\*

	1820s	1830s	1840s	1850s	1860s	Total	
Outright to SS		0	0	1	2	1	4
LE/Widowhood for SS		4	13	10	7	6	40
Trust for SS		0	2	0	9	1	12

\* Some of the wills have overlapping distributions. For instance, wills sometimes included has devises to a surviving spouse as well as a trust for a surviving spouse.

Table 6  
Distributions by Testators by Decade\*

	1820s	1830s	1840s	1850s	1860s	Total	
Equal Distribution to Issue		6	7	8	16	7	47
Favored Distribution		5	7	8	10	6	38

Devise to Non-Family Member	2	3	4	3	4	4	18
Charitable Devise (emancipation?)	0	0	2	1	1	1	5

1. Equal distribution or no reason to know of favored distribution.
2. Is this non-family member or non-issue?

Table 7  
Favored Distributions to Issue by Gender by Decade\*

	1820s	1830s	1840s	1850s	1860s	Total (% of wills favoring issue)
Female Issue Favored	1	0	2	1	1	5 (14.7%)
Male Issue Favored	3	8	6	9	3	29 (85.3%)

Table 8  
Wills Devising Enslaved People by Decade

Number of Slaves Devised in Will	1820s	1830s	1840s	1850s	1860s	Total
1	5	2	2	8	2	19
2-5	0	3	3	6	2	14
6-10	2	2	3	2	0	9
11+	1	0	0	0	0	2
Number of slaves	48	46	40	40	11	185

Table 9  
Trust Beneficiaries

	1820s	1830s	1840s	1850s	1860s	Total (% wills with trusts)
Surviving Spouse	2	6	3	8	5	26 (59%)
Female Family/Issue	4	8	6	5	3	26 (59%)
Male Family/Issue	1	8	6	4	2	21 (47.7%) ?
Slaves	1	0	0	3	1	5 (11.3%)
Charity	0	0	0	1	0	1 (2.3%)
Unknown Relationship	0	1	2	4	3	10 (22.7%)

Of the trusts for male family members, how many are for minor male children?

Table 10  
Objects of Devise of Slaves by Testators by Decade\*

	1820s	1830s	1840s	1850s	1860s	Total (% wills devising slaves)
Surviving Spouse	2	6	3	8	5	17 (38.6%)
Children	2	5	5	11	0	23 (52.3%)
Other Relatives	0	0	0	1	1	2 (4.5%)
Emancipation	1	1	1	1	2	6 (13.6%)