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**CONSIDERING WILLIAM AND MARY'S HISTORY
WITH SLAVERY: THE CASE OF PRESIDENT
THOMAS RODERICK DEW**

Alfred L. Brophy

*16 William and Mary Bill of Rights Law Journal 1091 (2008)
(forthcoming)*

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**CONSIDERING WILLIAM AND MARY'S HISTORY WITH
SLAVERY: THE CASE OF PRESIDENT
THOMAS RODERICK DEW**

Alfred L. Brophy*

ABSTRACT

Amidst the recent apologies for slavery from the legislatures of Virginia, Maryland, North Carolina, Alabama, New Jersey, and Florida, there is significant controversy over the wisdom of investigations of institutions' connections to slavery and apologies for those connections.¹ The divide over attitudes toward apologies falls along racial lines. This Article briefly looks to the controversy on both sides of the apology debates.

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I would like to thank the participants at Thomas Jefferson's Taking Reparations Seriously Conference and audiences at the University of Cincinnati, the University of Kentucky—Lexington Connection, the University of Hawaii Law School, the Hawaii Bar Association, the University of North Carolina, the University of Vermont, Washington University, Gettysburg College, and Southern Methodist University where I presented parts of this Article, and William and Mary School of Law, where I tried to apply the general ideas in a specific context. I owe a special thanks to Sandy Darity, David Epstein, Trina Jones, Jeannine DeLombard, Mary Sarah Bilder, Mark Brandon, Kenneth M. Rosen, Sarah Nelson Roth, Rose Cuison Villazor, Eric Yamamoto, and my friends at William and Mary, most especially Elizabeth Barnes, Joanne Braxton, Davison Douglas, Terry Meyers, Rob Parkinson, and Joy Thompson.

¹ For further information on the Virginia apology, see H.J. Res. 728, 2007 Gen. Assem., Reg. Sess. (Va. 2007); Tim Craig, *In Va. House, "Profound Regret" on Slavery: Delegates Unanimously Pass Resolution of Contrition About State's Role*, WASH. POST, Feb. 3, 2007, at A1. For further information on the Maryland apology, see H.J. Res. 4, 2007 Gen. Assem., Reg. Sess. (Md. 2007); Kelly Brewington, *House of Delegates Passes Resolution Acknowledging State's Part in Slavery*, BALT. SUN, Mar. 27, 2007, at 1A. For further information on the North Carolina apology, see S.J. Res. 1557, 2007 Gen. Assem., Reg. Sess. (N.C. 2007); *Unanimous House Vote Makes Apology for Slavery Official*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 12, 2007, at B1. For further information on the Alabama apology, see H.J. Res. 321, 2007 Leg., Reg. Sess. (Ala. 2007); David White, *Riley Signs State Apology for Slavery: Resolution Should Help Reverse Alabama Stereotypes, Governor Says*, BIRMINGHAM NEWS, June 1, 2007, at 1B. For further information on the New Jersey apology, see Assemb. Con. Res. 270, 212th Leg., Reg. Sess. (N.J. 2008); Jeremy Peters, *A Slavery Apology, but Debate Continues*, N.Y. TIMES, Jan. 13, 2008, at 14NJ; Michael Rispoli, *Despite Critics Apology for N.J. Slavery Sails Through*, COURIER-POST (Cherry Hill, N.J.), Jan. 8, 2008. For further information on the Florida apology, see Damien Cave & Christine Jordan Sexton, *Florida Legislature Apologizes for State's History of Slavery*, N.Y. TIMES, Mar. 27, 2008, at A18.

Among those questions about investigations of the past, universities occupy a special place. Efforts at recovery of their connections to slavery include a study released by graduate students at Yale University in 2001,² a report by Brown University's Steering Committee on Slavery and Justice,³ and the University of Virginia's Board of Visitors' spring 2007 apology for that institution's connections to slavery.⁴

*These efforts lead to a question about whether other schools ought to consider self-investigations. The College of William and Mary is a particularly good place to ask such questions. This Article focuses on Thomas R. Dew, first a professor, then president at William and Mary from 1828 to his early death in 1846. Dew is the author of *Review of the Debates in the Virginia Legislature of 1831 and 1832*, one of the most reprinted arguments on slavery in the years leading into the Civil War. He is also the author of one of the most comprehensive and important histories published in the United States in the nineteenth century, *A Digest of the Laws, Customs, Manners, and Institutions of the Ancient and Modern Nations*. Through Dew we can gauge the intellectual connections to slavery, and then ask the important question: what—if anything—is an appropriate institutional response today? We can use Dew's thought to begin a discussion of the virtues and pitfalls of apologies and to assess the value of talk of the connections to the past.*

INTRODUCTION

In 1836, Nathaniel Beverley Tucker, recently appointed professor of law at William and Mary, published the novel *George Balcombe* to much acclaim.⁵ It tells the story of a graduate of William and Mary, William Napier, who went to Missouri to find a lost will that would allow him to recover his inheritance.⁶ He seeks to recover

² ANTONY DUGDALE ET AL., *YALE, SLAVERY AND ABOLITION* (2001), available at <http://www.yaleslavery.org/YSA.pdf>.

³ BROWN UNIV. STEERING COMM. ON SLAVERY & JUSTICE, *SLAVERY AND JUSTICE* (2006), available at http://www.brown.edu/Research/Slavery_Justice/documents/SlaveryAndJustice.pdf.

⁴ See Susan Kinzie, *U-Va. Expresses Regret over Past Link to Slavery*, WASH. POST, Apr. 25, 2007, at B6.

⁵ GEORGE BALCOMBE (N.Y., Harper & Bros. 1836) (attributed to Nathaniel Beverley Tucker); see Book Review, *George Balcombe*, 3 S. LITERARY MESSENGER 49, 58 (1837) (attributed to Edgar Allan Poe) (“[W]e are induced to regard it, upon the whole, as *the best* American novel. There have been few books of its peculiar kind, we think, written in *any* country, much its superior. Its interest is intense from beginning to end.”). See generally SUNDQUIST, *supra* note ?, at 162–63 (discussing Tucker's pro-South and proslavery novels written in “the southern Cavalier tradition”); TERENCE WHALEN, *EDGAR ALLAN POE AND THE MASSES: THE POLITICAL ECONOMY OF LITERATURE IN ANTEBELLUM AMERICA* 112–14 (1999) (discussing the political views of and relationship between Tucker and Poe).

⁶ GEORGE BALCOMBE, *supra* note 5.

the money owed to him, but the novel is also about preserving a memory of his family and recovering connections with the past.⁷ For example, at one point George Balcombe realizes that he was once a friend of Napier's family and even knew Napier as a child.⁸ Balcombe explains, "So goes the world! We love, we toil, we fight, we give our heart, and purse, and blood for those who presently forget us, and whom we forget."⁹ Even within an individual's lifetime—to say nothing of across generations—there is the struggle to remember. Issues of truth commissions and apologies seek a similar reconciliation with the past: like the hero of Tucker's novel, they are both forward- and backward-looking, and they seek a memory and an understanding of the connections of our common humanity.

There is much talk these days of the connections between universities, businesses, and the government to the sins of slavery and Jim Crow segregation. Historians have told us much about the violence that supports claims for reparations and their modest subset, truth commissions and apologies.¹⁰ Yet there is important work that needs to be done on the moral case. Some of the issues that must still be addressed are the connections of the government to slavery, the ways those crimes continue to have an impact today, and the reasons why the entire community might have some responsibility for these crimes.¹¹

Even aside from the moral case—or perhaps because of the questions associated with it—there is substantial opposition. Poll data reveal that reparations advocates have a very long way to go to win public support. When the *Mobile Register* polled on reparations for slavery in 2002, the paper found it was the most racially divisive issue it had ever polled on.¹² Something like sixty-seven percent of black Alabamians

⁷ *See id.*

⁸ *Id.* at 69.

⁹ *Id.* at 70.

¹⁰ Many of us think of apologies as a form of reparations, as a form of attempting to make amends for historic injustice. *See, e.g.,* ALFRED L. BROPHY, *REPARATIONS: PRO & CON* (2006).

¹¹ *See, e.g.,* Roy L. Brooks, *Getting Reparations for Slavery Right: A Response to Posner and Vermeule*, 80 NOTRE DAME L. REV. 251 (2004); Alfred L. Brophy, *Reconsidering Reparations*, 81 IND. L.J. 811 (2006); Kaimipono David Wenger, *Causation and Attenuation in the Slavery Reparations Debate*, 40 U.S.F. L. REV. 279 (2006). There continues to be great skepticism about payers. *See, e.g.,* James R. Hackney, Jr., *Ideological Conflict, African American Reparations, Tort Causation and the Case for Social Welfare Transformation*, 84 B.U. L. REV. 1193 (2004); Kyle D. Logue, *Reparations as Redistribution*, 84 B.U. L. REV. 1319 (2004); Anthony J. Sebok, *Reparations, Unjust Enrichment, and the Importance of Knowing the Difference Between the Two*, 58 N.Y.U. ANN. SURV. AM. L. 651 (2003). And, more recently, there has been some recognition of the similarities of reparations claims to well-established constitutional principles of correction of past harm. *See* Daniel A. Farber, *Backward-Looking Laws and Equal Protection: The Case of Black Reparations*, 74 FORDHAM L. REV. 2271 (2006).

¹² Sam Hodges, *Slavery Payments a Divisive Question*, MOBILE REG. (Ala.), June 23, 2002, at 1A; *see also* Alfred L. Brophy, *The Culture Wars over Reparations for Slavery*, 53 DEPAUL L. REV. 1181, 1182–83 (2004).

were in favor, whereas something like five percent of white Alabamians were in favor.¹³ It is “something like,” because some white people became so enraged at the mere suggestion of reparations that they could not complete the poll.¹⁴ As a result, it was difficult to get an accurate sample.¹⁵ There have been some recent changes, however, in poll data on apologies for slavery. While in 2002 fewer than one in four white Alabamians supported an apology for slavery, by 2007 that figure had increased; apparently, more than forty percent then supported an apology.¹⁶ While fifty-six percent of white Alabamians still opposed an apology, over five years the public became more accepting of apologies.¹⁷

There is a conflict, then, in how to deal with the collective memory of slavery. Part of this relates to our self-image as Americans: do we view our country as a place of unbounded opportunity or of oppression? There is a question, then, of how to bridge this chasm. How can this discussion be effected? That leads to some very practical questions. What can schools, businesses, and individuals do now that will be most positive? How can actions be positive and still be significant?

¹³ Hodges, *supra* note 12.

¹⁴ *Id.*

¹⁵ See Brophy, *supra* note 12, at 1182.

¹⁶ Sebastian Kitchen, *Poll: Alabama Conflicted on Apology for Slavery*, MOBILE REG., May 20, 2007, at 1A.

Some of the progress in support for apologies (and presumably truth commissions) may correlate with legal academics’ seemingly changing focus from reparations to truth commissions. This changing focus appears from a comparison of searches for the term “slavery” in the same sentence as “reparations” with searches for the phrases “truth commission” and “transitional justice” in the Westlaw journals database from 2000 to 2007, as the following table reveals:

	References in Westlaw Journals Database, 2000–2007		
	slavery /s reparations	slavery /s truth commission	slavery /s transitional justice
2000	14	61	28
2001	28	70	37
2002	60	94	58
2003	81	113	65
2004	98	105	98
2005	57	116	124
2006	50	115	111
2007	52	99	132

(Search completed on Mar. 28, 2008).

So, although references to slavery reparations peaked in 2004 and declined by half since then, references to truth commissions have stayed relatively constant since 2002. References to transitional justice have also increased dramatically over this time and were twice as common beginning in 2005 as references to slavery reparations.

¹⁷ Kitchen, *supra* note 16.

I. TRUTH COMMISSIONS AND APOLOGIES PAST

We live in an age of apology and of redemption as well. Apologies from states, as well as individuals, are now commonplace. There have been apologies from the United States government for long-past events, such as from Congress for the deprivation of Hawaiian sovereignty,¹⁸ from the President for the Tuskegee syphilis experiments,¹⁹ and from the Senate for its failure to pass anti-lynching legislation.²⁰ Individual states have apologized for tragedies like the Tulsa riot of 1921,²¹ and now six states for their participation in slavery.²² There have been apologies for the actions of non-government bodies as well, such as the Southern Baptist Convention's 1995 apology for the sins of racism,²³ the Presbyterian General Assembly's apology for its connections to slavery,²⁴ the *Hartford Courant's* apology for running advertisements for the sale of slaves,²⁵ and apologies from Aetna for insuring slaves²⁶ and JP Morgan Chase for its predecessors' roles in the mortgaging of humans.²⁷

Those apologies run alongside the increasing investigations of our past by truth commissions like those established to study the Wilmington riot of 1898,²⁸ the Tulsa

¹⁸ Overthrow of Hawaii, 1993 Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (referred to by 20 U.S.C. § 7512(5) (2000)).

¹⁹ Press Release, White House Office of the Press Sec'y, Remarks by the President in Apology for Study Done in Tuskegee (May 16, 1997), available at <http://clinton4.nara.gov/textonly/New/Remarks/Fri/19970516-898.html>.

²⁰ See Sheryl Gay Stolberg, *The Senate Apologizes, Mostly*, N.Y. TIMES, June 19, 2005, § 4, at 3; Sheryl Gay Stolberg, *Senate Issues Apology over Failure on Antilynching Law*, N.Y. TIMES, June 14, 2005, at A15.

²¹ See, e.g., *Oklahoma Clears Black in Deadly 1921 Race Riot*, N.Y. TIMES, Oct. 26, 1996, § 1, at 8.

²² See *supra* note 1 and accompanying text.

²³ See Gustav Niebuhr, *Baptist Group Votes to Repent Stand on Slaves*, N.Y. TIMES, June 21, 1995, at A2.

²⁴ Presbyterian Church (USA), Commissioners' Resolution 01-3: Apology to Americans of African Descent for the Institution of Slavery, 213th Gen. Assem. (2001), available at <http://www.pcusa.org/ga213/business/cr0103.htm>.

²⁵ Jesse Leavenworth & Kevin Canfield, *Courant Complicity in an Old Wrong: Newspaper's Founder Published Ads in Support of the Sale and Capture of Slaves*, HARTFORD COURANT, July 4, 2000, at A1.

²⁶ John W. Rowe, Chairman, President, & CEO, Aetna Inc., Remarks on Slavery Reparations Issue, Annual Shareholders Meeting (Apr. 26, 2002), available at http://www.aetna.com/news/2002/slavery_reparations_issue.html.

²⁷ *JP Morgan Admits US Slavery Links*, BBC NEWS, Jan. 21, 2005, <http://news.bbc.co.uk/2/hi/business/4193797.stm>.

²⁸ Press Release, 1898 Wilmington Race Riot Commission, N.C. Dep't of Cultural Res., *Wilmington Race Riot Draft Report Offers Revelations* (2005), <http://www.ah.dcr.state.nc.us/1898-wrrc/>.

riot of 1921,²⁹ the 1979 Greensboro massacre,³⁰ and Brown University's connections to slavery.³¹ Despite setbacks in the legal case for reparations,³² there is continuing discussion of them. Much of the work has been local, such as the Chicago City Council's Slavery Era Disclosure Ordinance,³³ which led to apologies by companies including JP Morgan Chase;³⁴ the California insurance disclosure legislation, which led to the "Slavery Era Insurance Registry," a registry of the names of slaves who were insured by companies doing business in California today and the slave owners who insured them;³⁵ and Maryland legislation supporting a bill to study slavery's effect on our country.³⁶ Native Hawaiians received an apology from the federal government in 1993,³⁷ which was subsequently used as a basis for granting relief in a case involving a trust for Hawaiian children.³⁸ In 2007 and 2008, legislatures in Virginia, Maryland, North Carolina, Alabama, New Jersey, and Florida apologized for their connections to slavery.³⁹ In spring 2007, following the Virginia legislature's apology, the University of Virginia's Board of Visitors apologized for the university's connections to slavery.⁴⁰

²⁹ OKLA. COMM'N TO STUDY THE TULSA RACE RIOT OF 1921, TULSA RACE RIOT (2001), available at <http://www.ok-history.mus.ok.us/trrc/freport.htm>.

³⁰ GREENSBORO TRUTH & RECONCILIATION COMM'N, EXECUTIVE SUMMARY (2006), available at http://www.greensborotrc.org/exec_summary.pdf.

³¹ See BROWN UNIV. STEERING COMM. ON SLAVERY & JUSTICE, *supra* note 3, passim.

³² See, e.g., Richard A. Epstein, *The Case Against Black Reparations*, 84 B.U. L. REV. 1177, 1177 (2004) ("The legal case for black reparations has been rejected. The political struggle for black reparations continues."). Professor Epstein is certainly correct that the lawsuits for reparations for slavery and Jim Crow have been defeated. See, e.g., *In re African American Slave Descendants Litigation*, 471 F.3d 754 (7th Cir. 2006), *cert. denied*, 128 S. Ct. 92 (2007); *Alexander v. Oklahoma*, 382 F.3d 1206 (10th Cir. 2004), *cert. denied*, 544 U.S. 1044 (2005).

³³ Business, Corporate and Slavery Era Insurance Ordinance, CHI., ILL., MUNICIPAL CODE § 2-92-585 (2002).

³⁴ *JP Morgan Admits US Slavery Links*, *supra* note 27; see also ROY L. BROOKS, ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS 157-59 (2004) (discussing a proposal for a museum of slavery in every state capital).

³⁵ Slavery Era Insurance Policies, CAL. INS. CODE § 13810 (West 2005); CAL. CODE REGS. tit. 10, §§ 2393-98 (2001); CAL. DEP'T OF INS. REPORT, SLAVERY ERA INSURANCE REGISTRY (2002), available at <http://www.insurance.ca.gov/0100-consumers/0300-public-programs/0200-slavery-era-insur/>.

³⁶ Commission on Maryland's Slavery History and Legacy, Md. Code Ann., State Gov't § 9-701 (West 2008).

³⁷ Overthrow of Hawaii, 1993 Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (referred to by 20 U.S.C. § 7512(5) (2000)).

³⁸ See *Doe v. Kamehameha Sch.*, 470 F.3d 827, 845 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 2160 (2007).

³⁹ See *supra* note 1 and accompanying text.

⁴⁰ See Kinzie, *supra* note 4. The action by the Board of Visitors built on a previous call by students for an apology. See Maura O'Keefe & LaQuisha Banks, *Forum Addresses History*

II. GOALS OF TRUTH COMMISSIONS AND APOLOGIES

Why is it that people and institutions engage in these difficult self-examinations? What is it that we might want from truth commissions and apologies? Perhaps there is a way to move forward, in a positive way.

At a basic level, there is a desire to address the public memory and understanding of our history which respects the contributions of African Americans and respects and understands the suffering and disability that is the legacy of slavery and Jim Crow. We have an exceedingly long way to go in bringing to the public an understanding of the basic facts of American history—like the horror that was slavery, as well as the role of slavery in impelling the South towards Civil War. To take one example, there is a dispute at Sewanee, the University of the South, about the meaning of the university's connections to the Confederacy.⁴¹ Sewanee had multiple representations of Confederate generals, including a monument for Edmund Kirby-Smith placed in the early twentieth century by the United Daughters of the Confederacy and a mace given by a donor in 1964, which features a Confederate battle flag; the mace is dedicated to Nathan Bedford Forrest, a founder of the Ku Klux Klan.⁴² Kirby-Smith was a professor at Sewanee, but Bedford Forrest had no connection with the university.⁴³

The *New York Times* provided extensive coverage of the controversies in November 2005, which included the university's downplaying of its connections to the Confederacy.⁴⁴ It no longer uses the mace.⁴⁵ Some fear that the school may go further.⁴⁶ One outraged alumnus wrote a manifesto to defend what he calls Sewanee's "provincialism."⁴⁷ Among the things that he said in defense of the Confederate symbols on the campus is that slavery was a benign Christian institution:

The Nazis had a very different relationship with the Jews than the slave owners had with their legal property, whom they fed, clothed, housed, and lovingly baptized into Christ's redeeming

of Slavery at the University: Student, Professors Debate Whether University Should Apologize for Its History of Slavery, CAVALIER DAILY (U. Va.), Apr. 20, 2006, available at <http://www.cavalierdaily.com/CVArticle.asp?ID=26901&pid=1438>.

⁴¹ See Alan Finder, *In Desire to Grow, Colleges in South Battle Their Roots*, N.Y. TIMES, Nov. 30, 2005, at A1.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *See id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Prescott N. Dunbar, *A Manifesto of Justice for Louise Claiborne-Armstrong, Benefactress of the University of the South, Sewanee, Tennessee*, Jan. 24, 2006, <http://www.justicemanifesto.net> ("Sewanee's allure is its provincialism; the students express it through the standing traditions, and the Domain advertises it through Confederate memorials.").

salvation. On the Old South plantation, the Master and his Lady and the servants and the field hands constituted an interdependent family community, and when most successful, it was noted for mutual affection and shared devotion.⁴⁸

While many slaveholders embraced such paternalistic ideals, this description has more to do with the moonlight and magnolia school and the plantation school of literature than with what happened on the plantations of the Old South. The moonlight and magnolia school has deep roots in American culture; it existed before the Civil War in proslavery sentimental novels such as Caroline Hentz's 1854 novel *The Planter's Northern Bride*.⁴⁹ Another example appears in Hentz's long-neglected short story *The Stolen Child*.⁵⁰ In that story, a college president takes action to help return a young, free black boy to his mother after he is kidnapped by a slave trader.⁵¹ In that way, Hentz portrays affluent white southerners as beneficent and concerned with the welfare of blacks, even if they have no property interest in them.⁵²

Related to the moonlight and magnolia school was scholarship that looked to the idea that Reconstruction was a disastrous result of the breakdown of the rule of law. Some examples of this are Thomas Dixon's 1902 book *The Leopard's Spots: A Romance of the White Man's Burden*⁵³ and his 1905 book *The Clansman*, which appeared about the same time that southern states were passing constitutional amendments to disenfranchise black men.⁵⁴ Dixon's books and D.W. Griffith's movie rendition of *The Clansman, Birth of a Nation*,⁵⁵ are outstanding ways to see how all these diverse ideas fit together: the charges that a foolish, blundering generation brought us into Civil War, the breakdown of the rule of law during Reconstruction, and the "redemption" of the South from those silly and corrupt Yankees and Negroes.⁵⁶

⁴⁸ *Id.*

⁴⁹ CAROLINE LEE HENTZ, *THE PLANTER'S NORTHERN BRIDE* (Kessinger Publ'g 2004) (1854).

⁵⁰ CAROLINE LEE HENTZ, *Wild Jack; or, the Stolen Child*, in *THE BANISHED SON AND OTHER STORIES OF THE HEART* 47 (Phila., T.B. Peterson 1856). *See generally* SHELDON HACKNEY, *MAGNOLIAS WITHOUT MOONLIGHT: THE AMERICAN SOUTH FROM REGIONAL CONFEDERACY TO NATIONAL INTEGRATION* (2005) (a collection of essays dispelling romanticism of the Old South).

⁵¹ HENTZ, *supra* note 50, at 47.

⁵² *See id.*

⁵³ THOMAS DIXON, JR., *THE LEOPARD'S SPOTS: A ROMANCE OF THE WHITE MAN'S BURDEN—1865–1900* (Pelican Publ'g Co. 2001) (1902).

⁵⁴ THOMAS DIXON, JR., *THE CLANSMAN: AN HISTORICAL ROMANCE OF THE KU KLUX KLAN* (Pelican Publ'g Co. 2005) (1905).

⁵⁵ *THE BIRTH OF A NATION* (D.W. Griffith Corp. 1915).

⁵⁶ *See, e.g.*, CLAUDE G. BOWERS, *THE TRAGIC ERA: THE REVOLUTION AFTER LINCOLN* (1929).

This is the kind of historical misinformation with which our nation all too often must deal. It informs and structures how voters, legislators, and judges respond to issues of race. If one thinks that Reconstruction was an era of corrupt black politicians and Yankees, then one is unlikely to have a favorable view of the Reconstruction-era amendments, or of the need for federal protection of voting rights, or of the need for civil rights legislation, or of any kind of social programs.

All of this invokes important questions about how ideology relates to action. Much could be written about the connections of college history professors to the dissemination of a false (or incomplete or incorrect) history. Southern interpretations of war and Reconstruction helped win the hearts and minds of Americans in the era of Jim Crow, such that by 1896 it was almost unthinkable for the United States Supreme Court to uphold even a limited right of integration.⁵⁷

In essence, what we need is a more complete understanding of the past. This is what one might call “applied legal history.”⁵⁸ That is, a history of law—of court decisions, statutes, and the practices of law enforcement—that is both accurate and relevant to understanding questions we have today.

III. UNIVERSITY HISTORIES

As we increasingly revisit the past, however, it is important to ask questions about the wisdom of doing so. Is discussion of the past a bad idea? It destabilizes, of course. So people who are in power are unlikely to want that discussion at all.⁵⁹ Universities, because of their function and their power and because they rely on

⁵⁷ See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁵⁸ Cf. Bernie D. Jones, *When Critical Race Theory Meets Legal History*, 8 RUTGERS RACE & L. REV. 1 (2006) (exploring ways in which legal history is useful in advocacy). Among the works that one might classify as applied legal history are such recent classics of legal-historical scholarship as Pamela D. Bridgewater, *Ain't I a Slave: Slavery, Reproductive Abuse, and Reparations*, 14 UCLA WOMEN'S L.J. 89 (2005); Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221 (1999); Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256, 258 (2005).

There has been relatively little attention focused on the intellectual monuments left in the judicial opinions—the ways that courts attempted to channel and settle disputes and to portray the scientific and moral correctness of Jim Crow.

⁵⁹ J.G.A. POCOCK, VIRTUE, COMMERCE, AND HISTORY: ESSAYS ON POLITICAL THOUGHT AND HISTORY, CHIEFLY IN THE EIGHTEENTH CENTURY 226 (1985) (commenting on the destabilizing uses of history by the people who invoked “an ancient constitutionalism”); Susan Pace Hamill, Book Review, *The Book that Could Change Alabama*, 56 ALA. L. REV. 219, 234 (2004) (reviewing HARVEY H. JACKSON III, *INSIDE ALABAMA: A PERSONAL HISTORY OF MY STATE* (2004)) (exploring ways in which “reinterpretation of Alabama’s antebellum, Civil War, and especially Reconstruction history propelled the bondage of the 1901 Constitution that disfranchised blacks, and eventually poor whites”).

tradition, are good places to discuss such issues. Brown University is the school that has accomplished the most. Its Steering Committee on Slavery and Justice, under the direction of Professor James T. Campbell, has conducted an intensive study of Brown University's connections to slavery and antislavery, as well as Rhode Island's connections to slavery.⁶⁰ Then it moved further to investigate how other institutions have dealt with legacies of violence and injustice.⁶¹ Emory University's Transforming Community Project, which is funded in part by the Ford Foundation's Difficult Dialogues Initiative,⁶² is focused on reconciliation on its campus, as well as its history.⁶³

There are substantial limitations, of course, on universities' power. They are dependent on the goodwill of many people and institutions in their community—alumni, donors, members of the legislature, and corporations, as we were reminded during the controversy over the cross in the Wren Chapel.⁶⁴ Schools' historically close connection to the powerful accounts in part for their compliance with the wishes of the powerful. But schools have an independence too, which allows them to explore alternative paths.

Ralph Waldo Emerson's 1837 Phi Beta Kappa Address, *American Scholar*, spoke of the independence of scholars.⁶⁵ Emerson assigns scholars, by which he mostly means students (and one supposes faculty if they have the ability to act the part of scholars rather than pedants), the task of looking through to the truth: The scholar

is the world's eye. He is the world's heart. He is to resist the vulgar prosperity that retrogrades ever to barbarism, by preserving and communicating heroic sentiments, noble biographies, melodious verse, and the conclusions of history. Whatsoever oracles the human heart in all emergencies, in all solemn hours has uttered as its commentary on the world of actions,—these he shall

⁶⁰ BROWN UNIV. STEERING COMM. ON SLAVERY & JUSTICE, *supra* note 3, *passim*.

⁶¹ *Id.* at 33–57.

⁶² Difficult Dialogues Initiative, Promoting Pluralism & Academic Freedom on Campus, <http://www.difficultdialogues.org/> (last visited Feb. 2, 2008).

⁶³ Leslie M. Harris, *(Re)Writing the History of Race at Emory*, ACADEME ONLINE, July–Aug. 2006, <http://www.aaup.org/AAUP/pubres/academe/2006/JA/feat/Harr.htm>. On the University of North Carolina at Chapel Hill's process, see Press Release, Kelly Ochs, UNC News Service, UNC Exhibit, Discussion Explore Early University Ties to Slavery (Oct. 7, 2005), available at <http://www.unc.edu/news/archives/oct05/slavery100705.htm>.

⁶⁴ See, e.g., Austin Wright, *Donor Pulls \$12 Million over Wren Cross Policy*, FLAT HAT (Wm. & Mary), Feb. 28, 2007, available at <http://www.flatatnews.com/news/449/new-cross-policy-costs-college-12-million-donor>.

⁶⁵ Ralph Waldo Emerson, *The American Scholar* (1837), reprinted in KENNETH S. SACKS, UNDERSTANDING EMERSON: "THE AMERICAN SCHOLAR" AND HIS STRUGGLE FOR SELF-RELIANCE 131 (2003).

receive and impart. And whatsoever new verdict Reason from her inviolable seat pronounces on the passing men and events of to-day,—this he shall hear and promulgate.⁶⁶

Scholars in the South in Emerson's time, likewise, saw their special role in society.

University of Alabama Professor Henry Tutwiler's *Address to the Erosophic Society*, delivered when he was twenty-six, urged similar activity for his audience.⁶⁷ "We must think for ourselves, and not be the mere passive receptacles of the thoughts of others."⁶⁸ That independence of thought allows a student to grow.⁶⁹ One example of the need for independence and questioning appears among readers of books, for Tutwiler thought:

Books have now become one of the most important sources of information; but they may be, and no doubt often are, productive of evil instead of good . . . so unreflecting persons . . . are disposed to believe every thing which they read, when it does not conflict with a previously formed opinion. Now to read any book and adopt what is in it as mere matter of authority, will not only lead to confirmed ignorance, but is positively hurtful to the mind.⁷⁰

Tutwiler's was an optimistic address, concluding with a celebration of moral progress.⁷¹ Tutwiler, born in 1807 in Harrisonburg, Virginia, was educated at the University of Virginia in the 1820s.⁷² He represented a final glimmer of the Enlightenment in antebellum Tuscaloosa, for he was a member of the American Colonization Society and worked with others in Tuscaloosa to end slavery while a professor at the University of Alabama from 1831 to 1837.⁷³

⁶⁶ *Id.* at 140.

⁶⁷ See [HENRY] TUTWILER, ADDRESS DELIVERED BEFORE THE EROSOPHIC SOCIETY, AT THE UNIVERSITY OF ALABAMA, AUG. 9, 1834 (Tuscaloosa, Ala., Robinson & Davenport 1834).

⁶⁸ *Id.* at 11; see also Alfred L. Brophy, *The Law of Descent of the Mind: Law, History, and Civilization in Antebellum Literary Addresses*, 20 LAW & LIT. (forthcoming 2008) (discussing Tutwiler's and other antebellum literary addresses).

⁶⁹ See TUTWILER, *supra* note 67, at 11.

⁷⁰ *Id.* at 11–12.

⁷¹ See *id.* at 14–15.

⁷² Thomas C. McCorvey, *Henry Tutwiler, and the Influence of the University of Virginia on Education in Alabama*, in V TRANSACTIONS OF THE ALABAMA HISTORICAL SOCIETY, 1904, at 83, 90–91 (Thomas McAdory Owen ed., 1905).

⁷³ Tutwiler was, along with University of Alabama trustee James Birney, a member of the American Colonization Society. See JOHN QUIST, RESTLESS VISIONARIES: THE SOCIAL ROOTS OF ANTEBELLUM REFORM IN ALABAMA AND MICHIGAN 317–18 (1998). Birney subsequently ran for President of the United States on the Liberty Party ticket in 1840 and 1844. *Id.* at 317.

There may be reason for study and action from students and faculty at other schools, such as the University of South Carolina (formerly South Carolina College),⁷⁴ the University of North Alabama,⁷⁵ Randolph-Macon College,⁷⁶ and Transylvania University,⁷⁷ to name several schools that had faculty who wrote proslavery treatises or delivered proslavery speeches in the antebellum period. Those were all schools where proslavery thought was an important part of the curriculum and the public discussion. There remains, of course, much to explore in northern schools as well. Even a cursory inspection of the speeches given at Harvard and Yale in the wake of the Fugitive Slave Act of 1850 discloses much support for the law and little sympathy for the slaves.⁷⁸ Given the connections of the powerful to proslavery interests at the time, their behavior is more than understandable. Universities were connected to the wealthy and the powerful in that era, and the idea of academic freedom had not yet even begun to emerge. Moreover, one may reasonably argue that, by supporting

⁷⁴ See Michael Sugrue, *South Carolina College: The Education of an Antebellum Elite* (1992) (unpublished Ph.D. dissertation, Columbia University) (on file with Columbia University), available at <http://digitalcommons.libraries.columbia.edu/dissertations/AA19313693/>.

⁷⁵ See R.H. RIVERS, *ELEMENTS OF MORAL PHILOSOPHY* (Thomas O. Summers ed., Nashville, A.H. Redford 1871) (containing lectures given by the president of Alabama Wesleyan College, now University of North Alabama).

⁷⁶ WILLIAM A. SMITH, *LECTURES ON THE PHILOSOPHY AND PRACTICE OF SLAVERY* (Thomas O. Summers ed., Nashville, Stevenson & Evans 1856) (containing lectures given by the president of Randolph-Macon College).

⁷⁷ Transylvania's lengthy and complex history is illustrated by an 1834 speech by law professor George Robertson, who acknowledged the immorality of slavery while employing a utilitarian calculus of the harm to society of emancipation as against the harm to individual slaves. See GEORGE ROBERTSON, *Address on Behalf of the Deinologian Society, of Centre College, Delivered at Danville on the 4th of July, 1834*, in *SCRAP BOOK ON LAW AND POLITICS, MEN AND TIMES* 160, 164 (Lexington, Ky., A.W. Elder 1855); see also *Introductory Lecture, Delivered in the Chapel of Morrison College, on the 7th of November, 1835*, in *id.* at 171, 173 ("[T]he greatest attainable good of the greatest number is the ultimate object of political association . . ."). See generally Paul D. Carrington, *Teaching Law and Virtue at Transylvania University: The George Wythe Tradition in the Antebellum Years*, 41 *MERCER L. REV.* 673, 696–98 (1990) (emphasizing ambivalence of Transylvania's law professors to slavery); Alfred L. Brophy, *Considering Transylvania University's Connections to Slavery* (unpublished manuscript, on file with author).

⁷⁸ See, e.g., DANIEL LORD, *ON THE EXTRA-PROFESSIONAL INFLUENCE OF THE PULPIT AND THE BAR: AN ORATION DELIVERED AT NEW HAVEN, BEFORE THE PHI BETA KAPPA SOCIETY OF YALE COLLEGE AT THEIR ANNIVERSARY MEETING, JULY 30, 1851* (N.Y., S.S. Chatterton 1851); TIMOTHY WALKER, *THE REFORM SPIRIT OF THE DAY: AN ORATION BEFORE THE PHI BETA KAPPA SOCIETY OF HARVARD UNIVERSITY, JULY 18, 1850* (Boston, James Munroe & Co. 1850); see also Alfred L. Brophy, *The Rule of Law in Antebellum College Literary Addresses: The Case of William Greene*, 31 *CUMB. L. REV.* 231 (2001) (exploring William Greene's 1851 address at Brown University which supported the Fugitive Slave Act of 1850).

the Fugitive Slave Act, emancipation became more likely a decade later.⁷⁹ These are all issues worth substantial discussion.⁸⁰

Support for the status quo came to popular fruition in Senator James Henry Hammond's "mud-sill" theory of slavery, which taught that there must be a class of people who did the work to make it possible for others to do the thinking.⁸¹ It has particular relevance to apologies and reparations for universities:

In all social systems there must be a class to do the mean duties, to perform the drudgery of life. That is, a class requiring but a low order of intellect and but little skill. Its requisites are vigor, docility, fidelity. Such a class you must have, or you would not have that other class which leads progress, refinement and civilization. It constitutes the very mud-sills of society and of political government; and you might as well attempt to build a house in the air, as to build either the one or the other, except on the mud-sills. Fortunately for the South, she found a race adapted to that purpose to her hand. A race inferior to herself, but eminently qualified in temper, in vigor, in docility, in capacity to stand the climate, to answer all her purposes. We use them for the purpose, and call them slaves.⁸²

⁷⁹ See Carrington, *supra* note 77, at 696–98 (suggesting contributions of Transylvania University's law school to the rule of law and thus to emancipation). As Professor David Potter explained, in what remains the leading work on the coming of the Civil War, *The Impending Crisis*, the Compromise of 1850 gave the Union enough time to become both strong enough and resolved enough to fight slavery, therefore allowing our nation to end slavery, though that result was not so predictable in 1850. DAVID M. POTTER, *THE IMPENDING CRISIS, 1848–1861*, at 118 (Don E. Fehrenbacher ed., 1976). As Potter phrased it:

Even as for antislavery, it is difficult to see that the Compromise ultimately served the purpose of the antislavery idealists less well than it served those who cared primarily for peace and union, though it is easy to see why antislavery men found the medicine more distasteful. If, as Lincoln believed, the cause of freedom was linked with the cause of Union, a policy which dealt recklessly with the destiny of the Union could hardly have promoted the cause of freedom.

Id. at 119.

⁸⁰ See, e.g., Alfred L. Brophy, *The University and the Slaves: Apology and Its Meaning*, in *THE AGE OF APOLOGY: FACING UP TO THE PAST* 109 (Mark Gibney et al. eds., 2008); Monica Chowdry & Charles Mitchell, *Responding to Historic Wrongs: Practical and Theoretical Problems*, 27 *OXFORD J. LEGAL STUD.* 339 (2007).

⁸¹ James Henry Hammond, Speech to the U.S. Senate (Mar. 4, 1858), in *CONG. GLOBE*, 35th Cong., 1st Sess. 962 (1858).

⁸² *Id.*

Although Hammond is speaking in general terms, this sentiment gained particular force in intellectual and literary contexts—as in the inaugural issue of the *Southern Literary Messenger*—where the South was seen, ideally, as better positioned than the North to contribute to Western civilization because its thinking members—white men and women—were released from menial labor and freed to pursue higher intellectual and artistic callings.⁸³ If, as antebellum southerners argued, the intellectual and cultural pursuits that define universities were underwritten, indeed made possible, by slave labor, then certainly there is an acknowledgment to be made, if not a debt to be paid.⁸⁴

Some of the story that remains to be recovered is of opposition to slavery at antebellum colleges. North Carolina Supreme Court Justice William A. Gaston openly questioned slavery in an 1832 address to two student literary societies at the University of North Carolina.⁸⁵ For he told the students:

Disguise the truth as we may, and throw the blame where we will, it is Slavery which, more than any other cause, keeps us back in the career of improvement. It stifles industry and represses enterprize—it is fatal to economy and providence—it discourages skill—impairs our strength as a community, and poisons morals at the fountain head. How this evil is to be encountered, how subdued, is indeed a difficult and delicate enquiry, which this is not the time to examine, nor the occasion to discuss. I felt, however, that I could not discharge my duty, without referring to this subject, as one which ought to engage the prudence, moderation and firmness of those who, sooner or later, must act decisively upon it.⁸⁶

At Brown University, President Francis Wayland served as a staunch supporter of the antislavery cause.⁸⁷ These stories need much further exploration.

And, as we look deeply at our history, we see how complex it is. For example, at the University of Mississippi, Chancellor Frederick Barnard expelled a student who assaulted one of his female slaves and was subsequently investigated by the Board of Trustees for taking the testimony of the slave against the student.⁸⁸ Barnard's

⁸³ H., *Southern Literature*, 1 S. LITERARY MESSENGER 1–3 (1834) (attributed to James E. Heath).

⁸⁴ I am deeply indebted to Jeannine DeLombard for this point. See JEANNINE MARIE DELOMBARD, *SLAVERY ON TRIAL: LAW, ABOLITIONISM, AND PRINT CULTURE 180–81* (2007).

⁸⁵ See WILLIAM GASTON, *ADDRESS DELIVERED BEFORE THE PHILANTHROPIC AND DIALECTIC SOCIETIES AT CHAPEL-HILL, JUNE 20, 1832* (Raleigh, N.C., Jos. Gales & Son 1832).

⁸⁶ *Id.* at 14.

⁸⁷ See *DOMESTIC SLAVERY CONSIDERED AS A SCRIPTURAL INSTITUTION: IN A CORRESPONDENCE BETWEEN THE REV. RICHARD FULLER, OF BEAUFORT, S.C., AND THE REV. FRANCIS WAYLAND, OF PROVIDENCE, R.I.* (N.Y., Lewis Colby & Co. 5th ed. 1847).

⁸⁸ *RECORD OF THE TESTIMONY AND PROCEEDINGS, IN THE MATTER OF THE INVESTIGATION*

relationship with slavery is complex. While a professor at the University of Alabama, he gave a Fourth of July speech on the virtues of union, which many took to be anti-slavery.⁸⁹ Yet, he also owned a number of humans.⁹⁰ Thus, universities' problematic relationship to slavery and the enslaved cannot be reduced to one of exclusion. Far from being outside universities, slaves did much of the physical labor that kept them running. Far from needing to be "reincorporated" into such institutions, it is African Americans' very presence that needs acknowledgment.

We need to be careful to make the moral and political case and to be measured in our rhetoric and our demands. In that process of consideration we must examine whether a college apology makes sense, which involves a careful consideration of and respect for the case against truth commissions and apologies. Universities have both an ability and a duty to discuss such issues. And the need for discussion is illustrated by the extraordinary response to initial newspaper reports that William and Mary students are asking for investigation.⁹¹

IV. THE BENEFITS AND PITFALLS OF AN APOLOGY?

Amidst the apologizing and talk of apologies, it is important to ask: what good are apologies? And that question is particularly apt now, when other schools are considering them. Proponents have the burden of proof here. They must suggest

BY THE TRUSTEES OF THE UNIVERSITY OF MISSISSIPPI, ON THE 1ST AND 2ND OF MARCH, 1860, OF THE CHARGES MADE BY H.R. BRANHAM, AGAINST THE CHANCELLOR OF THE UNIVERSITY (Jackson, Miss., Miss. Office 1860).

⁸⁹ See F.A.P. BARNARD, NO JUST CAUSE FOR A DISSOLUTION OF THE UNION IN ANY THING WHICH HAS HITHERTO HAPPENED, BUT THE UNION THE ONLY SECURITY FOR SOUTHERN RIGHTS: AN ORATION DELIVERED BEFORE THE CITIZENS OF TUSCALOOSA, ALA., JULY 4TH, 1851 (Tuscaloosa, Ala., J.W. & J.F. Warren 1851).

⁹⁰ See JAMES B. SELLERS, 1 HISTORY OF THE UNIVERSITY OF ALABAMA, 1818–1902, at 236–37 (1953) (citing University of Alabama President Basil Manly's diary).

⁹¹ See, e.g., Posting of Africa Joe to <http://www.topix.net/forum/source/hampton-roads-daily-press/TEJQONDVJ2CMF9V3K> (Dec. 2, 2007) ("You are attending W&M because of the efforts of your parents who are paying for you to attend. You are still too young to be involved in something you can not possibly understand. Remember no one today is in any way responsible for or had anything to do with any perceived wrongs to any person, race or ethnic group."); Posting of Africa Joe, *quoted in* posting of East Ender to <http://www.topix.net/forum/source/hampton-roads-daily-press/TEJQONDVJ2CMF9V3K> (Dec. 3, 2007) "Good God! Where did these 'students' at W&M with non-american [sic] sounding names come up with this crap. Apparently the needs of today's [sic] issues are not enough to keep them busy so they are embarking down the slippery slope of trying to make white europeans [sic] feel guilty about something they never had anything to do with. I don't and don't know anybody that owns slaves. If they really want to get on somebody's case about slavery they need to address it to the slaves ancestors in Africa who sold them into slavery. There's where the blame is. Blacks themselves operated the slave business."). Those brief excerpts suggest that there is a lot to discuss.

some reasons why we should dredge up unpleasant acts from our past, particularly acts that hold the potential to misrepresent our culpability. This is particularly so when we are talking about investigations of an institution's past. For by talking about a single institution's history—and only a piece of that history at that—we run the risk of distorting the past. We may also anger people upon whose goodwill we depend. A discussion for an apology will likely meet with two key arguments: the current generation is not responsible for prior crimes and an apology is, therefore, meaningless; and an apology dishonors the memory of the college or the South more generally, or at least distorts the role of slavery in the college's history. Such a problem with historical context is particularly great with a school like William and Mary, where William Small taught Thomas Jefferson moral philosophy and where the humanitarian George Wythe (who was also Jefferson's law teacher) held our country's first chair in law.⁹² The Enlightenment ideas that helped free our nation were nurtured here.⁹³ St. George Tucker, a leading antislavery advocate, lawyer, and judge, taught at William and Mary.⁹⁴ Tucker's edition of Blackstone's *Commentaries* included his proposed plan for the gradual abolition of slavery.⁹⁵ Yet Tucker's son, Nathaniel Beverley Tucker, who began teaching law at William and Mary in 1834, criticized Blackstone's treatment of slavery.⁹⁶ There was a world of possibility, which was overwhelmed

⁹² See, e.g., Wythe Holt, *George Wythe: Early Modern Judge*, 58 ALA. L. REV. 1009 (2007); Gillian Hull, *William Small 1734–1775: No Publications, Much Influence*, 90 J. ROYAL SOC'Y OF MED. 102 (1997).

⁹³ See, e.g., Paul D. Carrington, *The Revolutionary Idea of University Legal Education*, 31 WM. & MARY L. REV. 527 (1990).

⁹⁴ See Michael Kent Curtis, *St. George Tucker and the Legacy of Slavery*, 47 WM. & MARY L. REV. 1157 (2006); Davison M. Douglas, *Foreword: The Legacy of St. George Tucker*, 47 WM. & MARY L. REV. 1111 (2006); Paul Finkelman, *The Dragon St. George Could Not Slay: Tucker's Plan to End Slavery*, 47 WM. & MARY L. REV. 1213 (2006).

⁹⁵ WILLIAM BLACKSTONE, 2 COMMENTARIES app. at 31–85 (Lawbook Exchange, Ltd. 1996) (St. George Tucker ed., 1803).

⁹⁶ *Note to Blackstone's Commentaries, Vol. 1, Page 423*, 1 S. LITERARY MESSENGER 227 (1835) (attributed to Nathaniel Beverley Tucker). An anonymous response the next month expressed surprise at Tucker's argument that slavery was correct and natural and expressed skepticism about Dew's statement that people could sell themselves into slavery. A Virginian, *Remarks on a Note to Blackstone's Commentaries, Vol. 1, Page 423*, 1 S. LITERARY MESSENGER 266, 269 (1835).

The transition from George Wythe to St. George Tucker to Nathaniel Beverley Tucker correlates with the changes in legal thought more generally, from an Enlightenment republicanism of the late eighteenth century to proslavery philosophy. See Paul Finkelman, *Exploring Southern Legal History*, 64 N.C. L. REV. 77, 91 (1985) (“Virginia gradually moved toward slavery on a case-by-case basis, with little planning or forethought.”). The changes at William and Mary track changes in the southern courts—from Judges Wythe and Roane to Judges Carr, Brockenbrough, and Ruffin. See, e.g., *Phalen v. Commonwealth*, 40 Va. (1 Rob.) 713 (1842); *Tuckahoe Canal Co. v. Tuckahoe & James River R.R. Co.*, 38 Va. (11 Leigh) 43 (1840); *James River & Kanawha Co. v. Turner*, 36 Va. (9 Leigh) 313 (1838); *Crenshaw v. Slate River Co.*, 27 Va. (6 Rand.) 271 (1828).

in the grim years leading into the Civil War.⁹⁷ The institution's enormous contributions to the cause of antislavery are in danger of being lost amidst talk of slavery at William and Mary.

There are other arguments against apologies as well, including that they inappropriately portray African Americans as victims and are, therefore, divisive.⁹⁸ One of the most dispassionate editorials opposing apologies came from University of Georgia History Professor James Cobb.⁹⁹ He said that apologies distract legislatures and those who ask for them from more pressing business.¹⁰⁰ Such politically divisive measures may end up costing more than the good they produce.¹⁰¹

Opponents of the University of Alabama's 2004 slavery apology urged that the university move on instead of looking backward to past injustices; they felt that the current university was not responsible for the crimes of the university in the past.¹⁰² The most prominent faculty opponent of the apology argued that those asking for an apology were using the apology for political purposes.¹⁰³ In fact, the desire to be freed of responsibility for the past is the central feature of the opposition.¹⁰⁴ Thus, fear of permanent loss of political power, however unlikely in practice, underlay a refusal to apologize.¹⁰⁵

⁹⁷ See, e.g., EVA SHEPPARD WOLF, *RACE AND LIBERTY IN THE NEW NATION: EMANCIPATION IN VIRGINIA FROM THE REVOLUTION TO NAT TURNER'S REBELLION* (2006) (examining manumission and abolitionist thought and debate before 1832).

⁹⁸ On arguments against apologies and truth commissions, see Epstein, *supra* note 32, passim.

⁹⁹ James C. Cobb, *Official Slavery Apologies Are Bad for Blacks*, *NEW REPUBLIC*, Apr. 9, 2007, excerpt available at <http://hnn.us/roundup/archives/11/2007/4/#37474> (“[T]he vague, half-hearted expressions of regret that the apology initiatives have thus far managed to extract hardly bespeak significant influence, and black leaders run the risk of expending their political capital on an issue that will have little tangible effect.”).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See, e.g., Marvin Johnson, *Groups Should Encourage Each Other*, *CRIMSON WHITE* (U. Ala.), Apr. 26, 2004, available at <http://media.www.cw.ua.edu/media/storage/paper959/news/2004/04/26/Opinions/Groups.Should.Encourage.Each.Other-2861490.shtml> (writing in response to George S. Williamson, *Apology a Step in the Right Direction*, *CRIMSON WHITE* (U. Ala.), Apr. 22, 2004, available at <http://media.www.cw.ua.edu/media/storage/paper959/news/2004/04/22/Opinions/Apology.A.Step.In.The.Right.Direction-2861473.shtml>).

¹⁰³ *Id.* For more on the University of Alabama's slavery apology, see Alfred L. Brophy, *Reparations Talk in College*, 11 *MICH. J. RACE & L.* 195, 198 n.12 (2005) (reviewing DAVID HOROWITZ, *UNCIVIL WARS: THE CONTROVERSY OVER REPARATIONS FOR SLAVERY* (2002)).

¹⁰⁴ See CHARLES S. MAIER, *THE UNMASTERABLE PAST: HISTORY, HOLOCAUST, AND GERMAN NATIONAL IDENTITY* (1988); JOHN TORPEY, *MAKING WHOLE WHAT HAS BEEN SMASHED: ON REPARATIONS POLITICS* 82 (2006); Charles S. Maier, *Overcoming the Past? Narrative and Negotiation, Remembering, and Reparation: Issues at the Interface of History and the Law*, in *POLITICS AND THE PAST: ON REPAIRING HISTORICAL INJUSTICES* 295 (John Torpey ed., 2003).

¹⁰⁵ Johnson, *supra* note 102 (noting that demands for an apology “are meant to beguile us into a false sense of comradeship that we may be led down the garden path to admitting fundamental flaws, incurable weakness and permanent unworthiness of citizenship”).

So truth commissions and the apologies attendant to them must be justified and thought through extremely carefully. Anyone seeking one will need to be able to answer in fairly concise terms and to various audiences, why? Particularly when offered in the wake of a thorough historical investigation, they promise a point of reconciliation. They are places where people who have been left outside of the memory of our country's institutions can be reincorporated. One person descended from people who had been enslaved wrote in response to a *Montgomery Advertiser* editorial that criticized the apology,

I find your editorials devaluing the importance of an apology to descendants of African-Americans whose forebears were forced into slavery at the University of Alabama dehumanizing. I have traced my paternal family history from 1835. My forebears without a doubt were forced into slavery. An apology from the descendants and institutions who "owned" my ancestors would mean much to me. Much could come from this contemporary reconciliation as a pledge that present white descendants will not engage forever white-skin privilege of the horror of racism, exploitation, discrimination, injustice, inequality and the variations thereof that we still, unfortunately, experience today.¹⁰⁶

Apologies are part of recognizing and honoring the contributions of people who have been left outside of (or misrepresented by) our historical narratives. They are part of rebalancing our historical narrative; they offer a form of honesty and a basis for making forward-looking decisions about what other corrective action (if any) is appropriate. One of the classic grounds for race-based affirmative action is evidence of past discrimination by the institution taking action.¹⁰⁷

I am less convinced than Cobb¹⁰⁸ that apologies are distracting. I see little evidence that if a legislature—or school—abandoned a truth commission that it would use that energy and time for some more worthwhile purpose. The cost may be relatively small, just as the benefit may be relatively modest. Apologies are not a cure for all that ails us. They may, however, have some beneficial effects. More important than an apology, however, is the discussion of the connections of the past to the present.

Truth commissions and apologies that may follow in their wake are part of shifting the framework of thinking and discussion. President Bush's 2003 speech at

¹⁰⁶ See, e.g., Gwendolyn M. Patton, Letter to the Editor, *Apology Not Meaningless*, MONTGOMERY ADVERTISER (Ala.), May 3, 2004, at A7.

¹⁰⁷ See Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497, 502–03 & n.23 (2003) (discussing the difficulty of meeting the requirement of linking race-based affirmative action to specific evidence of past discrimination by the actor against the group being benefitted).

¹⁰⁸ See *supra* notes 99–101 and accompanying text.

Goree Island, a main point of embarkation for slave ships bound for the Americas, acknowledged the hard work our country still has ahead of it.¹⁰⁹ President Bush also cited the progress made possible by the human spirit's desire for freedom:

For 250 years the captives endured an assault on their culture and their dignity. The spirit of Africans in America did not break. Yet the spirit of their captors was corrupted. Small men took on the powers and airs of tyrants and masters. Years of unpunished brutality and bullying and rape produced a dullness and hardness of conscience. Christian men and women became blind to the clearest commands of their faith and added hypocrisy to injustice. A republic founded on equality for all became a prison for millions. And yet in the words of the African proverb, "no fist is big enough to hide the sky." All the generations of oppression under the laws of man could not crush the hope of freedom and defeat the purposes of God.¹¹⁰

President Bush's speech may be a product of the movement for apologies and reparations for the eras of slavery and Jim Crow. While many will see it as too little, it may be a positive step towards acknowledgment of work left undone and a promise towards trying to do more.

So as we begin to think about moving forward in small steps, we ought to think about the footholds and pitfalls of apologies. We ought to proceed with modest steps and in an effort to listen and to understand. This is a goal of William and Mary,¹¹¹ and if anyone can have a dialogue and can talk about the connections of the past to the present and their meaning, it ought to be those in the academy. Moreover, even some of the staunchest opponents of reparations for slavery are proponents of apologies.¹¹²

¹⁰⁹ President George W. Bush, Remarks by the President on Goree Island, Senegal (July 8, 2003), transcript available at <http://www.whitehouse.gov/news/releases/2003/07/20030708-1.html> ("My nation's journey toward justice has not been easy and it is not over. The racial bigotry fed by slavery did not end with slavery or with segregation. And many of the issues that still trouble America have roots in the bitter experience of other times. But however long the journey, our destination is set: liberty and justice for all.").

¹¹⁰ *Id.*

¹¹¹ See Andy Garden, *SA Bill Apologizes for Slavery*, FLAT HAT (Wm. & Mary), Dec. 7, 2007, available at <http://www.flatatnews.com/news/1656/sa-bill-apologizes-for-slavery> (discussing William and Mary Student Assembly's passage of a bill to initiate research into the College's connection with slavery in order to encourage the Board of Visitors to issue an apology).

¹¹² See, e.g., Carol M. Swain, *An Apology for Slavery*, WASH. POST, July 16, 2005, at A17. Professor Swain has argued passionately against reparations for slavery. In *New White Nationalism*, she states, "Current reparations talk inflames the white electorate, undermines the bridge-building process across racial lines, fuels white nationalist sentiments, and is insuffi-

V. CONSIDERING THOMAS RODERICK DEW

There are, then, some things that may warrant discussion in regard to Thomas Roderick Dew. President Dew is identified on the William and Mary website as “Graduate of William and Mary. Political economist; educator; author; professor of history and political law.”¹¹³ But that does not begin to do justice to Dew’s importance to antebellum thought. He was born in 1802 in King and Queen County, Virginia, then educated at William and Mary beginning in 1818.¹¹⁴ Following his graduation with a master’s degree, he spent several years studying in Europe.¹¹⁵ He returned home in 1826 and was appointed a professor at William and Mary.¹¹⁶ He ascended to the presidency in 1836.¹¹⁷ He died, prematurely, while visiting France in 1846 on his honeymoon.¹¹⁸

Dew’s first book, *Lectures on the Restrictive System*, published in 1829, is a work of political economy emphasizing both the virtues of the market and the greed of humans.¹¹⁹ His second book, *Review of the Debate in the Virginia Legislature of 1831 and 1832 (Review)*, was his most influential.¹²⁰ It purported to be a review

ciently targeted in its aims to help those members of minority groups who are most in need. . . . [T]he whole matter should be dropped.” CAROL M. SWAIN, *THE NEW WHITE NATIONALISM IN AMERICA: ITS CHALLENGE TO INTEGRATION* 181 (2002).

¹¹³ The College of William and Mary in Virginia: Presidents of the College in the 19th Century, <http://www.wm.edu/president/past/nineteen.php> (last visited Jan. 15, 2008). The College’s official history discusses Dew’s *Review* in detail. SUSAN H. GODSON ET AL., *1 THE COLLEGE OF WILLIAM & MARY: A HISTORY, 1693–1888*, at 250–54 (1993).

¹¹⁴ Stephen S. Mansfield, *Thomas Roderick Dew: Defender of the Southern Faith* 2, 5 (Aug. 1968) (unpublished Ph.D. dissertation, University of Virginia) (available from Univ. Microfilms, Inc., Ann Arbor, Mich.).

¹¹⁵ *Id.* at 12–22.

¹¹⁶ *Id.* at 23–24.

¹¹⁷ *Id.* at 117.

¹¹⁸ *Id.* at 196.

¹¹⁹ THOMAS R. DEW, *LECTURES ON THE RESTRICTIVE SYSTEM, DELIVERED TO THE SENIOR POLITICAL CLASS OF WILLIAM AND MARY COLLEGE (Richmond, Va., Samuel Shepherd & Co. 1829)*; see also JOSEPH DORFMAN, *2 THE ECONOMIC MIND IN AMERICAN CIVILIZATION, 1606–1865*, at 897 (1946); John K. Whitaker, *Early Flowering in the Old Dominion: Political Economy at the College of William and Mary and the University of Virginia*, in *BREAKING THE ACADEMIC MOULD: ECONOMISTS AND AMERICAN HIGHER LEARNING IN THE NINETEENTH CENTURY* 15, 34–36 (William J. Barber ed., 1988).

¹²⁰ The essay appeared as a pamphlet, THOMAS R. DEW, *REVIEW OF THE DEBATE IN THE VIRGINIA LEGISLATURE OF 1831 AND 1832* (Richmond, Va., T.W. White 1832), and later was printed as THOMAS R. DEW, *AN ESSAY ON SLAVERY* (Richmond, J.W. Randolph 1849); *Professor Dew’s Essays on Slavery*, 10 *DE BOW’S REV.* 658–65 (1851), 11 *DE BOW’S REV.* 23–30 (1851); Thomas R. Dew, *Professor Dew on Slavery*, in *THE PRO-SLAVERY ARGUMENT; AS MAINTAINED BY THE MOST DISTINGUISHED WRITERS OF THE SOUTHERN STATES* 287 (Charleston, Walker, Richards & Co. 1852) [hereinafter Dew, *Professor Dew on Slavery*], available at <http://quod.lib.umich.edu/cgi/t/text/text-idx?c=moa;idno=ABT7488.0001.001>.

of several works on the Virginia legislature's debate over a plan for the gradual abolition of slavery, which it considered in the wake of the August 1831 Nat Turner Rebellion.¹²¹ Turner and a few of his band of co-conspirators gathered together and killed his owner and several members of his owner's family in the early morning of August 22, 1831, in Southampton, Virginia.¹²² The rebellion did not last long. Turner and his co-conspirators killed fewer than sixty white people before being stopped less than two days after the rebellion began.¹²³ Turner eluded capture until October when he was caught,¹²⁴ and then sentenced to death; he was executed on November 11, 1831.¹²⁵

That short-lived rebellion led to a serious rethinking in Virginia about what to do with the institution of slavery. It opened an extraordinary debate in the Virginia House of Delegates in December 1831 about a resolution regarding the expediency of terminating slavery through a gradual abolition bill; by the end of January, the resolution on a gradual abolition plan became a plan for deportation of African Americans freed since 1806.¹²⁶ It was indefinitely postponed in the Senate.¹²⁷ But more important

An earlier, shorter version appeared in *Abolition of Negro Slavery*, 12 AM. Q. REV. 189 (1832), and was summarized in *Professor Dew's Article on Slavery*, RICHMOND ENQUIRER, Mar. 12, 1833, at 2. It was reprinted in *THE IDEOLOGY OF SLAVERY: PROSLAVERY THOUGHT IN THE ANTEBELLUM SOUTH, 1830–1860*, at 23 (Drew Gilpin Faust ed., 1981). Subsequent references in this Article are to the 1852 edition, *supra*, because it is conveniently available on the Internet.

¹²¹ The *Review*, in fact, purported to be a review of legislative debate and THE LETTER OF APPOMATTOX TO THE PEOPLE OF VIRGINIA (Richmond, Va., Thomas W. White 1832) (attributed to Benjamin Watkins Leigh). Dew, *Professor Dew on Slavery*, *supra* note 120, at 287. The latter also appeared in the *Richmond Enquirer*. See Appomattox, *The Two Communications*, RICHMOND ENQUIRER, Feb. 4, 1832. Leigh graduated from William and Mary in 1802. Joseph B. Dunn, *Benjamin Watkins Leigh*, in 7 *LIBRARY OF SOUTHERN LITERATURE* 3205 (Edwin Anderson Alderman et al. eds., 1909) (1907). In fact, one antislavery correspondent of the *Richmond Enquirer* pointed out that the Appomattox letter was written by a William and Mary graduate. See York, *Communication for the Enquirer to Appomattox*, RICHMOND ENQUIRER, Mar. 3, 1832.

For information on the Nat Turner Rebellion, see SCOT FRENCH, *THE REBELLIOUS SLAVE: NAT TURNER IN AMERICAN MEMORY* (2004); Thomas R. Gray, *The Confessions of Nat Turner* (Baltimore, Lucas & Deaver 1831), reprinted in FRENCH, *supra*, at 283; NAT TURNER: A SLAVE REBELLION IN HISTORY AND MEMORY (Kenneth S. Greenberg, ed. 2003); HENRY IRVING TRAGLE, *THE SOUTHAMPTON SLAVE REVOLT OF 1831: A COMPILATION OF SOURCE MATERIAL* (1971). Dew, like many other Virginians, read *The Confessions*; he found evidence in it of "beyond a doubt, mental aberration." Dew, *Professor Dew on Slavery*, *supra* note 120, at 289.

¹²² See Gray, *supra* note 121, at 293.

¹²³ *Id.* at 297, 301; FRENCH, *supra* note 121, at 3.

¹²⁴ Gray, *supra* note 121, at 298.

¹²⁵ *Id.* at 301; FRENCH, *supra* note 121, at 49–50.

¹²⁶ See FRENCH, *supra* note 121, at 56–58.

¹²⁷ WOLF, *supra* note 97, at 232–33; see also JOSEPH CLARKE ROBERT, *THE ROAD FROM MONTICELLO: A STUDY OF THE VIRGINIA SLAVERY DEBATE OF 1832* (1941).

than what the House voted on was the nature of the debate: what should be done about slavery?

Dew's *Review* was more than a recitation of the debates, however; it was an attack on the idea of abolition. It was a book-length treatment of the history of slavery and a defense of its place in Virginian society.¹²⁸ That famous debate marked the final point in the Old South of the viability and efficacy of the institution of slavery.¹²⁹ Afterwards, slavery was no longer questioned so openly in public in the South.¹³⁰ Particularly after abolitionists employed the United States mails to distribute literature throughout the South in 1835, southerners no longer abided public abolition talk.¹³¹

The *Review* was one of the leading proslavery works in the forty years leading into the Civil War. The *Review* (also known as Dew's *Essay on Slavery*) was reprinted numerous times, including in 1849 as a freestanding pamphlet and again in the 1852 volume, *The Pro-Slavery Argument*.¹³² Shortly thereafter, Dew published several pamphlets and numerous periodical articles.¹³³ In the 1850s, other Virginians took up the proslavery argument—President William A. Smith of Randolph-Macon College,¹³⁴ Albert Taylor Bledsoe of the University of Virginia,¹³⁵ George Frederick

¹²⁸ See Dew, *Professor Dew on Slavery*, *supra* note 120, at 287.

¹²⁹ See ALISON GOODYEAR FREEHLING, DRIFT TOWARD DISSOLUTION: THE VIRGINIA SLAVERY DEBATE OF 1831–1832, at 203 (1982) (“Historians have traditionally cited Dew’s 1832 *Review* as a crucial watershed in Virginia history—a turning away from avowed anti-slavery principles of the revolutionary generation to adoption of a thoroughgoing ‘pro-slavery’ philosophy.”).

¹³⁰ *Id.*; FRENCH, *supra* note 121, at 67.

¹³¹ FRENCH, *supra* note 121, at 72.

¹³² See *supra* note 120.

¹³³ THOMAS R. DEW, ESSAY ON THE INTEREST OF MONEY, AND THE POLICY OF LAWS AGAINST USURY (Shellbanks, Va., Robert Ricketts 1834); THOMAS R. DEW, THE GREAT QUESTION OF THE DAY: LETTER FROM PRESIDENT R. DEW, OF WILLIAM AND MARY COLLEGE, VIRGINIA, TO A REPRESENTATIVE IN CONGRESS FROM THAT STATE; ON THE SUBJECT OF THE FINANCIAL POLICY OF THE ADMINISTRATION, AND THE LAWS OF CREDIT AND TRADE (D.C., Thomas Allen 1840); see also Thomas R. Dew, *An Address Delivered Before the Students of William and Mary, at the Opening of the College, on Monday, October 10th, 1836*, 2 S. LITERARY MESSENGER 760 (1836) [hereinafter Dew, *An Address Delivered Before the Students of William and Mary*]; Thomas R. Dew, *An Address on the Influence of the Federative Republican System of Government upon Literature and the Development of Character*, 2 S. LITERARY MESSENGER 261 (1836) [hereinafter Dew, *Influence of the Federative Republican System*]; *Professor Dew’s Address*, 2 S. LITERARY MESSENGER 721 (1836) (attributed to Edgar Allan Poe) (reviewing Dew, *An Address Delivered Before the Students of William and Mary*, *supra*).

¹³⁴ See WILLIAM A. SMITH, LECTURES ON THE PHILOSOPHY AND PRACTICE OF SLAVERY AS EXHIBITED IN THE INSTITUTION OF SLAVERY IN THE UNITED STATES (Thomas G. Summers ed., Nashville, Stevenson & Evans 1856); Karen Ruffle, *William A. Smith (William Andrew), 1802–1870*, DOCUMENTING THE AMERICAN SOUTH, <http://docsouth.unc.edu/church/smith/bio.html> (last visited Apr. 3, 2008).

¹³⁵ See ALBERT TAYLOR BLEDSOE, AN ESSAY ON LIBERTY AND SLAVERY (Phila., J.B. Lippincott & Co. 1856); Bledsoe, *Albert Taylor*, DOCUMENTING THE AMERICAN SOUTH,

Holmes of the University of Virginia (also of William and Mary and the University of Mississippi),¹³⁶ and Thornton Stringfellow¹³⁷—more forcefully than Dew. Dew's largest work, *A Digest of the Laws, Customs, Manners, and Institutions of the Ancient and Modern Nations*, his lectures to his students at William and Mary,¹³⁸ was published posthumously, though major pieces of it appeared in the southern periodical press during his life and much of his thinking on property, feudalism, and the market appeared in the *Review*.¹³⁹ It stands as one of the most comprehensive interpretations of history in the entire nineteenth century, a great window into Dew's thought and that of his contemporaries.¹⁴⁰

VI. UNDERSTANDING DEW'S THOUGHT

It is Dew's *Review* that probably ought to concern us most for present purposes, for it gives us a window into Dew's mind, a sense of the proslavery ideas in circulation at antebellum William and Mary, and shows the contributions that William and Mary made to the defense of slavery. William and Mary Law Professor Nathaniel Beverley Tucker told students that "[i]n this reading age . . . 'he who writes a people's books, need not care who makes their laws.'"¹⁴¹ And in the years leading into the

<http://docsouth.unc.edu/global/getBio.html?type=bio&id=pn0003026&name=Bledsoe,+Albert+Taylor> (last visited Apr. 3, 2008).

¹³⁶ See Harvey Wish, *George Frederick Holmes and Southern Periodical Literature of the Mid-Nineteenth Century*, 7 J. S. HIST. 343 (1941) (discussing the life and largely anonymous publications of Holmes).

¹³⁷ See THORNTON STRINGFELLOW, A BRIEF EXAMINATION OF SCRIPTURE TESTIMONY ON THE INSTITUTION OF SLAVERY (Locust Grove, Va., Culpeper Co. 1841), *republished in* THE RELIGIOUS HERALD; A HOUSE DIVIDED: ANTEBELLUM SLAVERY DEBATES IN AMERICA 1776–1865, at 63 (Mason I. Lowance, Jr., ed., 2003).

¹³⁸ THOMAS DEW, A DIGEST OF THE LAWS, CUSTOMS, MANNERS, AND INSTITUTIONS OF THE ANCIENT AND MODERN NATIONS (N.Y., D. Appleton & Co. 1870) [hereinafter DEW, A DIGEST].

¹³⁹ See *French Revolution*, 5 S.Q. REV. 1 (1844) (attributed to Thomas R. Dew); Dew, *Professor Dew on Slavery*, *supra* note 120, at 287.

¹⁴⁰ See ELIZABETH FOX-GENOVESE & EUGENE GENOVESE, THE MIND OF THE MASTER CLASS: HISTORY AND FAITH IN THE SOUTHERN SLAVEHOLDERS' WORLDVIEW (2005); EUGENE GENOVESE, THE SLAVEHOLDERS' DILEMMA: FREEDOM AND PROGRESS IN SOUTHERN CONSERVATIVE THOUGHT, 1820–1860 (1992); Michael O'Brien, *Conservative Thought in the Old South: A Review Article*, 34 COMP. STUD. SOC'Y & HIST. 566 (1992) (book review of GENOVESE, *supra*). Genovese originally presented his ideas in a lecture. Eugene Genovese, Andrew Mellon Lecture at Tulane University, *Western Civilization Through Slaveholding Eyes: The Social and Historical Thought of Thomas Roderick Dew* (1986).

The responses to Dew and the 1832 debate remind us how controversial his view was even within Virginia at the time and how many alternative, though not triumphant, visions appeared in Virginia. See, e.g., Jefferson, *To the People of Eastern Virginia*, RICHMOND ENQUIRER, Feb. 16, 1832 (responding to Appomattox, *supra* note 127); Jefferson, *To the People of Eastern Virginia*, RICHMOND ENQUIRER, Mar. 10, 1832 (same); York, *supra* note 121 (same).

¹⁴¹ N. BEVERLEY TUCKER, A SERIES OF LECTURES ON THE SCIENCE OF GOVERNMENT, INTENDED TO PREPARE THE STUDENT FOR THE STUDY OF THE CONSTITUTION OF THE UNITED

Civil War, southerners frequently spoke of the need for southern literature, particularly in southern colleges.¹⁴² Dew is proof of the utility of such literature and of the phenomenon that Tucker described.

Dew's *Review* harnessed fear of change—the impracticality of change—along with a narrative of the benefits of slavery for the slaveowners, non-slaveowners, and the slaves, too. We learn that slavery is central to America in the very first line: “In looking to the texture of the population of our country, there is nothing so well calculated to arrest the attention of the observer, as the existence of negro slavery throughout a large portion of the confederacy.”¹⁴³

In a countermove to the classic works that undermine order and hierarchy, like Thomas Paine's *Common Sense* which began by de-legitimizing the British crown (“A French bastard landing with an armed banditti, and establishing himself king of England against the consent of the natives, is in plain terms a very paltry rascally original—It certainly hath no divinity in it.”),¹⁴⁴ Dew began his task by legitimizing slavery. He found the origins of slavery in response to war—conquered people were enslaved rather than killed.¹⁴⁵ And he even, surprisingly, invoked Voltaire for that proposition; although Voltaire said “slavery is as ancient as war, and war as human nature,” Dew thought Voltaire did not do slavery justice, “for many wars have been too cruel to admit of slavery.”¹⁴⁶ In that way, slavery joined self-interest to help conquer the spirit of revenge. Thus, Dew found that slavery, even at its origins, was

STATES 416 (Lawbook Exch., Ltd., photo. reprint 2005) (1845) [hereinafter TUCKER, LECTURES ON THE SCIENCE OF GOVERNMENT]; see also ROBERT J. BRUGGER, BEVERLEY TUCKER: HEART OVER HEAD IN THE OLD SOUTH (1978). While Dew, not Tucker, is the central focus of this Article, Tucker provides additional opportunity for assessing antebellum William and Mary. In addition to his *Lectures on the Science of Government*, one ought to assess his other writings, both fictional and non-fictional. See, e.g., GEORGE BALCOMBE, *supra* note 5 (novel); N. BEVERLEY TUCKER, *An Essay on the Moral and Political Effect of the Relation Between the Caucasian Master and the African Slave*, in LECTURES ON THE SCIENCE OF GOVERNMENT, *supra*, at 290; N. BEVERLEY TUCKER, *Importance of the Study of Political Science, as a Branch of Academic Education in the United States*, in LECTURES ON THE SCIENCE OF GOVERNMENT, *supra*, at 5; NATHANIEL BEVERLEY TUCKER, THE PARTISAN LEADER (Carl Bridenbaugh ed., Alfred A. Knopf, Inc. 1933) (novel); B. TUCKER, THE PRINCIPLES OF PLEADING (Boston, Charles C. Little & James Brown 1846) (doctrinal, not ideological); Beverley Tucker, *A Discourse on the Genius of the Federative System of the United States*, 4 S. LITERARY MESSENGER 761 (1838).

¹⁴² See, e.g., JNO. R. THOMPSON, EDUCATION AND LITERATURE IN VIRGINIA: AN ADDRESS DELIVERED BEFORE THE LITERARY SOCIETIES OF WASHINGTON COLLEGE, LEXINGTON, VIRGINIA, 18 JUNE, 1850, at 32 (Richmond, Va., H.K. Ellyson 1850) (asking for a southern literature “of our own, informed with the conservative spirit, the love of order and justice, that constitutes the most striking characteristic of the Southern mind”).

¹⁴³ Dew, *Professor Dew on Slavery*, *supra* note 120, at 287.

¹⁴⁴ THOMAS PAINE, COMMON SENSE 18–19 (Bantam Classic ed. 2004) (1776).

¹⁴⁵ Dew, *Professor Dew on Slavery*, *supra* note 120, at 300–01.

¹⁴⁶ *Id.* at 304.

about civilization: “[s]lavery was established and sanctioned by divine authority,” and its near universal nature are signs of its growth in conjunction with civilization.¹⁴⁷

Dew began with emphasis on “reason”¹⁴⁸ (however much we may now see things differently). He tried to slow emancipation talk and action by simply noting that slavery would require enormous—and likely insurmountable effort—to end.¹⁴⁹ “The evil of *yesterday’s* growth may be extirpated *to-day*, and the vigor of society may heal the wound; but that which is the growth of *ages*, may require *ages* to remove.”¹⁵⁰ One only needed to look around to other emancipation—Haiti—to see the destruction that would come to the white community.¹⁵¹ He urged calm in response to Nat Turner’s rebellion.¹⁵² He asked for the return of the “empire of reason” to govern subsequent policy.¹⁵³ Dew wrote of reason and mathematical proofs.¹⁵⁴ He concluded that emancipation was “*totally* impracticable.”¹⁵⁵ Impracticability ended debate and might have masked Dew’s ideas about slavery.

But he saw emancipation plans as increasing the problems—increasing misery. “[T]he great question of abolition,” Dew thought, would come down to emancipation and then allowing the newly freed people to stay in Virginia.¹⁵⁶ “[W]e think,” he concluded, such a plan “can easily be shown to be utterly subversive of the interests, security and happiness of both the blacks and whites, and consequently, hostile to every principle of expediency, morality, and religion.”¹⁵⁷ Because he thought that even discussion of such a plan was improvident, he had avoided it “in consequence of the injurious effects which might be produced on the slave population.”¹⁵⁸ That is, Dew and others understood that the mere discussion of freedom might open the minds of enslaved people to the idea of freedom and spur additional bloodshed.¹⁵⁹ And they could not run the risk of such possibilities. Yet, in the wake of the Virginia legislature’s discussion, Dew turned to the question of abolition, for “[t]he seal has now been broken,”¹⁶⁰ and Dew pushed aside prudential concerns against discussion of emancipation:

¹⁴⁷ *Id.* at 295.

¹⁴⁸ *Id.* at 290.

¹⁴⁹ *Id.* at 288.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 288–89.

¹⁵² *Id.* at 290.

¹⁵³ *Id.* at 291.

¹⁵⁴ *Id.* at 292.

¹⁵⁵ *Id.* at 291–92.

¹⁵⁶ *Id.* at 293.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 289–90.

¹⁶⁰ *Id.* at 293.

[W]e shall . . . waive all considerations of a prudential character, which have hitherto restrained us, and boldly grapple with the abolitionists and this great question. We fear not the result, so far as truth, justice and expediency alone are concerned. But we must be permitted to say that we do most deeply dread the effects of misguided philanthropy, and the marked, and, we had like to have said, impertinent intrusion in this matter, of those who have no interest at stake, and who have not intimate and minute knowledge of the whole subject, so absolutely necessary to wise action.¹⁶¹

Dew invoked common phrases used against antislavery advocates. He spoke of their “misguided philanthropy” and then spoke of his own to look to calculations of “truth, justice and expediency.”¹⁶² The rest of the *Review* was organized around three themes: (1) “Origin of Slavery, and its Effects on the Progress of Civilization”—by which Dew meant the multiple ways in which slavery was recognized throughout human history, how slavery was recognized by the Bible, and how slavery contributed to the growth of civilization;¹⁶³ (2) “Plans for the Abolition of Negro Slavery,” including “The Impossibility of Colonizing the Blacks;”¹⁶⁴ and (3) “Injustice and Evils of Slavery,” which Dew discussed in order to minimize them.¹⁶⁵

Let us turn, then, to those three components of his *Review*, with the goal of understanding Dew’s mind and the contributions he made to the cause of support for slavery—the origins of slavery and its effect on civilization, the impracticality of plans for abolition, and a critique of arguments on the evils and injustice of slavery.

A. “*Origin of Slavery, and its Effects on the Progress of Civilization*”

The longest section was on the origin of slavery and its effects on civilization, which demonstrated the biblical support for slavery, as well as slavery’s origins in war.¹⁶⁶ It portrayed slavery as a humane alternative to war and, indeed, as a civilizer itself.¹⁶⁷ Two pieces of the argument are particularly important for understanding Dew’s thought. First is the centrality of property and of the market to purchasing freedom. Dew believed that the protection of property was central, for he stated that “[t]he character of the government, in spite of all its forms, depends more on the condition of property, than on any one circumstance beside.”¹⁶⁸ How we moved from

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 294.

¹⁶⁴ *Id.* at 355, 392.

¹⁶⁵ *Id.* at 451.

¹⁶⁶ *Id.* at 294–355.

¹⁶⁷ *Id.* at 300–01.

¹⁶⁸ *Id.* at 312.

feudalism to capitalism was a major component of his argument (though it was not indispensable to it), and it presaged a major section of his *Digest of the Laws, Customs, Manners, and Institutions of the Ancient and Modern Nations*, which emphasized the centrality of property rights in breaking down feudalism by allowing the middle class to purchase its independence from the English monarchy.¹⁶⁹ Property (and particularly property in humans) was central to Dew's world, for it was necessary for the progress of civilization. Slavery was perhaps divinely intended, Dew declared, as "the principal means for impelling forward the civilization of mankind."¹⁷⁰

Dew went on to establish the virtues of slavery in bringing about civilization. It led people to go from a state of hunter-gatherers to farmers, for slavery

necessarily leads on to the taming and rearing of numerous flocks, and to the cultivation of the soil. Hunting can never support slavery. Agriculture first suggests the notion of servitude, and, as often happens in the politico-economical world, the effect becomes, in turn, a powerfully operating cause. Slavery gradually fells the forest, and thereby destroys the haunts of the wild beasts; it gives rise to agricultural production, and thereby renders mankind less dependent on the precarious and diminishing production . . . ; it converts the idler and the wanderer into the man of business and the agriculturist.¹⁷¹

So, slavery brings about civilization. Dew even saw this among the Native Americans who adopted slavery. "[W]hat are the causes of this dawn of civilization among the Cherokees?" he asked.¹⁷² Why, the adoption of slavery, of course, which allowed the tribes to indulge their natural laziness.¹⁷³ It was an extraordinary acknowledgment of the benefits that slavery conferred on a people—the ability to have someone else to do their labor for them. And this argument in particular resonated with later arguments regarding slavery, like South Carolina Senator James Henry Hammond's 1858 "mud sill speech."¹⁷⁴

But here, as elsewhere, Dew cautioned against abstract theories of right or justice like "all men are born equal," "slavery in the abstract is wrong," and "the slave has a natural right to regain his liberty."¹⁷⁵ "No set of legislators ever have," he thought, "or ever can, legislate upon purely abstract principles, entirely independent of circumstances, without the ruin of the body politic."¹⁷⁶

¹⁶⁹ See DEW, *A DIGEST*, *supra* note 138, at 515.

¹⁷⁰ Dew, *Professor Dew on Slavery*, *supra* note 120, at 325.

¹⁷¹ *Id.* at 326–27.

¹⁷² *Id.* at 335.

¹⁷³ *Id.* at 335–36.

¹⁷⁴ See *supra* notes 81–82 and accompanying text.

¹⁷⁵ Dew, *Professor Dew on Slavery*, *supra* note 120, at 354–55.

¹⁷⁶ *Id.* at 355.

B. “Plans for the Abolition of Negro Slavery”

Having spent so much time discussing the benefits of slavery, Dew then turned to the impracticality of abolition.¹⁷⁷ The value of humans as property simply would not allow it.¹⁷⁸ Some had proposed elaborate colonization schemes, but they were doomed to failure.¹⁷⁹ Virginia’s 470,000 enslaved people were worth approximately \$100,000,000—about one-third of the state’s wealth.¹⁸⁰ Slavery was simply too important economically to contemplate its end:

Now, do not these very simple statistics speak volumes upon this subject? It is gravely recommended to the State of Virginia to give up a species of property which constitutes nearly one-third of the wealth of the whole State, and almost one-half of that of Lower Virginia, and with the remaining two-thirds to encounter the additional enormous expense of transportation and colonization on the coast of Africa. But the loss of \$100,000,000 of property is scarcely the half of what Virginia would lose, if the immutable laws of nature could suffer (as fortunately they cannot) this tremendous scheme of colonization to be carried into full effect. Is it not population which makes our lands and houses valuable? Why are lots in Paris and London worth more than the silver dollars which it might take to cover them? Why are lands of equal fertility in England and France, worth more than those of our Northern States, and those again worth more than Southern soils, and those in turn worth more than the soils of the distant West? It is the presence or absence of population which alone can explain the fact.¹⁸¹

And if slaves were emancipated and sent away, there would be no one left to do the work of the laboring class.¹⁸² Dew grimly concluded, after more pages of argument, “Virginia will be a desert.”¹⁸³

¹⁷⁷ *Id.* at 355–450.

¹⁷⁸ *See id.*

¹⁷⁹ *Id.* at 356.

¹⁸⁰ *Id.* at 357.

¹⁸¹ *Id.* at 357–58.

¹⁸² *Id.* at 365–66 (“And thus do we find, by an investigation of this subject, that if we should introduce, by any means, free labor in the stead of slave labor deported to Africa, that it will be certain to deteriorate by association with slave labor, until it sinks down to and even below its level.”).

¹⁸³ *Id.* at 384.

At this point, having established the practical reasons for the impossibility of abolition, Dew turned to “the most dangerous of all the wild doctrines advanced by the abolitionists in the Virginia Legislature”: “*that property is the creature of civil society, and is subject to action, even to destruction.*”¹⁸⁴ By singling out the attack on property as the “most dangerous” of the abolitionists’ arguments, Dew connected political theory regarding property in a concrete way to proslavery thought.

Dew was responding to abolitionists who argued that slavery was not constitutionally protected private property, that the state could regulate or even abolish property rights in slaves.¹⁸⁵ Representative McDowell, from western Virginia,¹⁸⁶ provided in a speech acclaimed by some as the best one favoring abolition, a forceful statement of the power of the state to abolish slavery without paying compensation, based on the harm that slave property caused:

[W]hen [property] loses its utility, when it no longer contributes to the personal benefits and wants of its holders in any equal degree with the expense or the risk, or the danger of keeping it, much more when it jeopard[sic] the security of the public,—when this is the case, then the original purpose for which it is authorized is lost, its character of property in the just and beneficial sense of it is gone, and it may be regulated without private injustice, in any manner which the general good of the community, by whose laws it was licensed, may require.¹⁸⁷

McDowell’s argument, advanced by other speakers as well,¹⁸⁸ was a restatement of the common law doctrine that the state may regulate dangerous property, like gunpowder.¹⁸⁹ In this case, the analogy was that human property was dangerous to society and thus subject to extensive regulation.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 384–86.

¹⁸⁶ See McDowell, James (1795–1851), Biographical Directory of the United States Congress, 1774–Present, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=M000419> (last visited Mar. 12, 2008). McDowell was from Rockbridge County. *Id.*

¹⁸⁷ Dew, *Professor Dew on Slavery*, *supra* note 120, at 386 (quoting McDowell’s *Speech*, RICHMOND WHIG, Mar. 24, 1832) (alteration in original).

¹⁸⁸ See *id.* at 384 (“[P]roperty is the creature of civil society. So long as that property is not dangerous to the good order of society, it may and will be tolerated. But, sir, so soon as it is ascertained to jeopardize the peace, the happiness, the good order, nay the very existence of society, from that moment the right by which they hold their property is gone, society ceases to give its consent, the condition upon which they are permitted to hold it is violated, their right ceases.” (quoting Representative Faulker of Berkeley)); see also WILLIAM W. FREEHLING, 1 THE ROAD TO DISUNION: SECESSIONISTS AT BAY, 1776–1854, at 139 (1990) (discussing the argument that slaves are property and slavery is, therefore, constitutionally protected).

¹⁸⁹ See WILLIAM J. NOVAK, THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 20 (1996).

Dew's vision of political theory did not treat property so lightly. "The doctrine of these gentlemen," Dew thought, "so far from being true in its application, is not true in theory."¹⁹⁰ Property is the foundation of government, and the "object of government is the protection of property;—from the days of the patriarchs down to the present time, the great desideratum has been to find out the most efficient mode of protecting property."¹⁹¹ Contemporary history supported Dew's argument: "There is not a government at this moment in Christendom, whose peculiar practical character is not the result of the state of property."¹⁹² In Dew's view, it was property that preceded and created government, not the other way around: "The great difficulty in forming the government of any country arises almost universally from the state of property, and the necessity of making it to conform to that state"¹⁹³ As the recent state constitutional convention demonstrated, Virginia's government was constituted and affected by slavery.¹⁹⁴

Certainly eminent domain might be used to take property "for the general weal,"¹⁹⁵ but that required at least just compensation, which the abolitionists in the Virginia legislature did not appear willing to pay.¹⁹⁶ They reasoned that slave property was a nuisance, which should be abated without compensation.¹⁹⁷ The common law reasoning of the abolitionists, Dew thought, was flawed.¹⁹⁸ Despite the argument that a state could abate a nuisance,¹⁹⁹ slaves were not nuisances, as their value in the marketplace testified.²⁰⁰ Dew concluded that the interests of all white Virginians were related to slave property:

[A]ll the great interests of society, are really interwoven with one another—they form an indissoluble chain; a blow at any part quickly vibrates through the whole length—the destruction of one interest involves another. Destroy agriculture, destroy tillage, and the ruin of the farmer will draw down ruin upon the mechanic, the merchant, the sailor and the manufacturer—they must all flee together from the land of desolation.²⁰¹

¹⁹⁰ Dew, *Professor Dew on Slavery*, *supra* note 120, at 386–87.

¹⁹¹ *Id.* at 387.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *See id.*

¹⁹⁷ *Id.* at 384–85.

¹⁹⁸ *Id.* at 385.

¹⁹⁹ *Id.* at 385–86.

²⁰⁰ *See supra* notes 178–81 and accompanying text.

²⁰¹ Dew, *Professor Dew on Slavery*, *supra* note 120, at 391.

Moreover, slaves were unfit for freedom, economically and morally.²⁰² Dew looked around to other countries and times and found that emancipation would lead to the degradation of blacks and whites: “It is always easier to descend than ascend, and nothing will prevent the *facilis descensus* but slavery.”²⁰³ And even the discussion of abolition would lead to further revolts.²⁰⁴ Dew did not believe that they would be successful—“[p]ower can never be dislodged from the hands of the intelligent, the wealthy, and the courageous, by any plans that can be formed by the poor, the ignorant, and the habitually subservient; history scarce furnishes such an example”—but the revolts would lead to much bloodshed.²⁰⁵ When Dew looked to the West Indies, he found that the “slave cannot be converted into free labor without imminent danger to the prosperity and wealth of the country where the change takes place.”²⁰⁶ And, in the aftermath of the French Revolution, as slavery was reasserted in some of the West Indies, “generally the re-establishment of slavery was attended with the most happy consequences, and even courted by the negroes themselves, who became heartily tired of their short-lived liberty.”²⁰⁷

Slavery is a step on the way to civilization and is important as a piece of progress.²⁰⁸ This view of slavery as part of progress appears in the writings of some southern judges. Justice Henry Lumpkin of the Georgia Supreme Court, for instance, linked continued slavery with the happiness of both slaves and owners.²⁰⁹ In limiting a gift of humans to the American Colonization Society and thus keeping those people in continued slavery, Lumpkin wrote that efforts at the abolition of slavery had been a failure and would continue to be:

I was once, in common with the great body of my fellow citizens of the South, the friend and patron of this enterprise. I now regard it as a failure, if not something worse; as I do every effort that has been made, for the abolition of negro slavery, at home or abroad. Liberia was formed of emancipated slaves, many of them partially trained and prepared for the change, and sent thousands of miles from all contact with the superior race; and given a home in a country where their ancestors were natives, and supposed to be suited to their physical condition. Arrived there, they

²⁰² *Id.* at 422–23; see also DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* 31–32 (1991) (discussing Dew’s economic thought).

²⁰³ Dew, *Professor Dew on Slavery*, *supra* note 120, at 443–44.

²⁰⁴ *Id.* at 444.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 424–25.

²⁰⁷ *Id.* at 426.

²⁰⁸ GENOVESE, *supra* note 140, at 10–20 (discussing Dew’s and other nineteenth-century southern intellectuals’ views on slavery).

²⁰⁹ See, e.g., *Am. Colonization Soc’y v. Gartrell*, 23 Ga. 448 (1857).

have been for a number of years in a state of pupilage to the Colonization Society, in order that they might learn “to walk alone and by themselves.” And at the end of a half a century what do we see? A few thousand thriftless, lazy semi-savages, dying of famine, because they will not work! To inculcate care and industry upon the descendants of Ham, is to preach to the idle winds. To be the “servant of servants” is the judicial curse pronounced upon their race. And this Divine decree is unreversible. It will run on parallel with time itself. And heaven and earth shall sooner pass away, than one jot or tittle of it shall abate. Under the superior race and nowhere else, do they attain to the highest degree of civilization; and any experiment, whether made in the British West India Islands, the coast of Africa, or elsewhere, will demonstrate that it is a vain thing for fanaticism, a false philanthropy, or anything else, to fight against the Almighty. His ways are higher than ours; and humble submission is our best wisdom, as well as our first duty! Let our women and old men, and persons of weak and infirm minds, be disabused of the false and unfounded notion that slavery is sinful, and that they will peril their souls if they do not disinherit their offspring by emancipating their slaves!²¹⁰

While some may see the linking of technological and economic progress with the institution of slavery as in some ways contradictory, it made sense to Dew. He linked progress, the market, and slavery, so in his worldview all of those went together; progress was made possible through respect for property.²¹¹

C. “*Injustice and Evils of Slavery*”

The final major section, then, returned to the topic of the supposed evils of slavery.²¹² Dew brought the argument back home with the suggestion that slavery was not so bad.²¹³ This was an attempt to minimize the problem. He looked around, for instance, to Haiti where slaves had freed themselves in the 1790s, and found horrible destruction of slaveholders, but he also thought that freedom had not benefitted the formerly enslaved: “The negroes have gained nothing by their bloody revolution.”²¹⁴

And in doing so he formulated an important statement on the virtues of slavery. It was a bold statement of the positive goods that sprung from slavery—the benefits

²¹⁰ *Id.* at 464–65.

²¹¹ See GENOVESE, *supra* note 140, at 17–18.

²¹² Dew, *Professor Dew on Slavery*, *supra* note 120, at 451–90.

²¹³ *See id.*

²¹⁴ *Id.* at 440.

to the enslaved as well as the slaveholder—and he happily concluded that “we have no doubt but that [slaves] form the happiest portion of our society. A merrier being does not exist on the face of the globe, than the negro slave of the U. States.”²¹⁵

For one who believed slaves happy, then, it made sense to oppose the termination of such a system that brought so much good. Why should there be this abolitionist agitation—this false philanthropy? Dew asked,

Why, then, since the slave is happy, and happiness is the great object of all animated creation, should we endeavor to disturb his contentment by infusing into his mind a vain and indefinite desire for liberty—a something which he cannot comprehend, and which must inevitably dry up the very sources of his happiness.²¹⁶

More talk of abolition would just court further insurrections.²¹⁷ In closing, Dew wrote that he believed he had proven his case “almost as conclusive[ly] as the demonstrations of the mathematician . . . that the time for emancipation has not yet arrived, and perhaps it never will.”²¹⁸ Our country had preserved liberty for some while still employing slavery:

We must recollect . . . that our own country has waded through two dangerous wars—that the thrilling eloquence of the Demosthenes of our land has been heard with rapture, exhorting to death, rather than slavery,—that the most liberal principles have ever been promulgated and sustained, in our deliberate bodies, and before our judicial tribunals—and the whole has passed by without breaking or tearing asunder the elements of our social fabric.²¹⁹

His final words in the *Review* were those of opposition to change: “Let us . . . learn wisdom from experience; and know that the relations of society, generated by the *lapse of ages*, cannot be altered in a *day*.”²²⁰

D. Dew's Thought After the Review

Dew expanded on the themes of his *Review* in his 1836 address to the Virginia Historical Society, *The Influence of the Federative Republican System of Government upon Literature and the Development of Character*.²²¹ In that speech, he explored in

²¹⁵ *Id.* at 459.

²¹⁶ *Id.* at 459–60.

²¹⁷ *See id.* at 467.

²¹⁸ *Id.* at 489.

²¹⁹ *Id.* at 490.

²²⁰ *Id.*

²²¹ Dew, *Influence of the Federative Republican System*, *supra* note 133; *see also* SHEARER

greater depth than in the *Review* slavery's virtues for stabilizing American society.²²² Dew told of the threat of excessive democracy—perhaps a topic better suited to the Virginia Historical Society than the wider audience of the *Review*.²²³ He saw slave societies as capable of warding off the dangers of democracy, for they had a class of people who would labor but not vote:

[T]he frame work of our Southern society is better calculated to ward off the evils of this agrarian spirit, which is so destructive to morals, to mind and to liberty, than any other mentioned in the annals of history. Domestic slavery, such as ours, is the only institution which I know of, that can secure that spirit of equality among freemen, so necessary to the true and genuine feeling of republicanism, without propelling the body politic at the same time into the dangerous vices of agrarianism, and legislative intermeddling between the laborer and the capitalist.²²⁴

The institution of slavery made republicanism workable.²²⁵ Far from corrupting masters, as Thomas Jefferson had charged in the *Notes on the State of Virginia*,²²⁶ slavery gave a certain equality.²²⁷

This provides perspective on the dilemma of slavery and freedom. Slavery may have taught slaveholders about the evils of slavery and dependence and thus made them more jealous of freedom.²²⁸ It also facilitated a sort of hierarchy, which placed white male voters at the top.²²⁹ There was enough hierarchy that there could then be a subset of freedom and equality.²³⁰ From that he concluded that “[e]xpediency, morality and religion, alike demand [slavery’s] continuance; and perhaps I would not hazard too much in the prediction that the day will come when the whole confederacy will regard it as the sheet anchor of our country’s liberty.”²³¹

DAVIS BOWMAN, *MASTERS & LORDS: MID-19TH-CENTURY U.S. PLANTERS AND PRUSSIAN JUNKERS* 146–47 (1993) (discussing Dew’s expansion of the themes from the *Review* in his 1836 address to the Virginia Historical Society and especially the formulation of the thesis that slavery makes democracy among whites feasible).

²²² Dew, *Influence of the Federative Republican System*, *supra* note 133.

²²³ *See id.*

²²⁴ *Id.* at 277.

²²⁵ *Id.*

²²⁶ THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 170 (Boston, Lilly & Wait 1832) (1787).

²²⁷ Dew, *Influence of the Federative Republican System*, *supra* note 133, at 277.

²²⁸ *Note to Blackstone’s Commentaries, Vol. 1, Page 423*, *supra* note 96, at 230.

²²⁹ *See id.* at 278–79.

²³⁰ *See id.* at 278.

²³¹ *Id.* at 279. A more limited version of this appeared in the *Review*. *See Dew, Professor Dew on Slavery*, *supra* note 120, at 461–62.

Dew presented a similar—though not as developed—theme in his inaugural lecture to students at William and Mary in 1836.²³² He used his place as president to nurture his students as defenders of slavery.²³³ He told the students at William and Mary about the special place that they occupied in Virginia slave society and the role their education could play in helping them defend slavery:

You are slaveholders, or the sons of slaveholders, and as such your duties and responsibilities are greatly increased. He who governs and directs the action of others, needs especially intelligence and virtue. . . . Then can we exhibit to the world the most convincing evidence of the justice of our cause; then may we stand up with boldness and confidence against the frowns of the world; and if the demon of fanaticism shall at last array its thousands of deluded victims against us, threatening to involve us in universal ruin by the overthrow of our institutions, we may rally under our principles undivided and undismayed—firm and resolute as the Spartan band at Thermopylae; and such a spirit, guided by that intelligence which should be possessed by slaveholders, will ever insure the triumph of our cause.²³⁴

Dew's vision in that inaugural address led to confrontation with others in the state who thought the College's emphasis should be less on teaching moral and political philosophy than the physical sciences.²³⁵ That conflict reminds us that many in Virginia sought a very practical education, whereas political and moral philosophers like Dew sought to make themselves more relevant. It also testifies to the centrality of Dew's advocacy for slavery. Although Dew rarely appears in Drew Faust's study of antebellum southern intellectuals, *A Sacred Circle*, he certainly fits with her picture of intellectuals employing the proslavery argument to make themselves more relevant.²³⁶ But I have often thought that is a rather sad portrait of Old South intellectuals, one that denies them agency. It is not so clear to me that Dew turned to proslavery because he wanted to make himself relevant. Rather, Dew was relevant because he was a spokesman for slavery.²³⁷

²³² Dew, *An Address Delivered Before the Students of William and Mary*, *supra* note 133.

²³³ *See id.*

²³⁴ *Id.* at 765.

²³⁵ *See, e.g., Review of President Dew's Address*, 3 S. LITERARY MESSENGER 130 (1837). *But see To Our Readers: "Review of President Dew's Address,"* 3 S. LITERARY MESSENGER 268 (1837) (perhaps by Edgar Allan Poe) (defending the teaching of moral and political philosophy).

²³⁶ *See* DREW GILPIN FAUST, *A SACRED CIRCLE: THE DILEMMA OF THE INTELLECTUAL IN THE OLD SOUTH, 1840–1860* (1977).

²³⁷ William Freehling makes a parallel point about Abel Upshur. FREEHLING, *supra* note 188, at 607 n.8.

Dew's work extended well beyond the *Review*. In 1852, Appleton published, posthumously, Dew's William and Mary lectures on world history under the title *A Digest of the Laws, Customs, Manners, and Institutions of the Ancient and Modern Nations*.²³⁸ That work provides important insight into Dew's worldview—what he called “the whole system.”²³⁹ Slavery occupied a subordinate role in the picture, for the work set out to illustrate the springs behind the growth (and decline) of great nations, as well as the reasons why some do not progress.²⁴⁰ Slavery was a piece of that picture, as were property rights more generally.²⁴¹

VII. TRYING TO UNDERSTAND DEW

Dew's *Review* serves as something of a Rorschach inkblot test: some see him as the transition to the argument that slavery is a positive good;²⁴² others link him

²³⁸ DEW, A DIGEST, *supra* note 138.

²³⁹ *Id.* at 78.

²⁴⁰ *See id.* passim.

²⁴¹ *Id.* at 78.

²⁴² CLEMENT EATON, THE FREEDOM-OF-THOUGHT STRUGGLE IN THE OLD SOUTH 30 & n.95 (Harper & Row 1964) (1940) (stating Dew was “one of the first big guns in the proslavery argument that held slavery to be a positive good” but also “[t]he significance of Dew's work has probably been overemphasized”). Herbert Baxter Adams's earlier assessment gave Dew more credit. *See* HERBERT B. ADAMS, 1 CONTRIBUTIONS TO AMERICAN EDUCATIONAL HISTORY: THE COLLEGE OF WILLIAM AND MARY, WITH SUGGESTIONS FOR THE NATIONAL PROMOTION OF HIGHER EDUCATION 55–56 & n.1 (D.C., Gov't Prtg. Office 1887) (“John Quincy Adams regarded Dew's argument on domestic slavery (1833) as inaugurating a new era in the history of this country. It is said to have prevented emancipation in Virginia. . . . No unprejudiced student can examine this work without coming to the conviction that the author, in his use of the scholastic method of treating history in distinct theses, in well-rounded periods and compact sentences, knew precisely what he was about and lectured in such a way that students could catch his points De Bow, in his *Industrial Resources of the Southern States*, iii, 454, touches another side of President Dew's influence, when he says that his ‘able essay on the institution of slavery entitles him to the lasting gratitude of the whole South.’ The future historian will need to study the teaching and preaching, the political philosophy and the sociology of the South, before he can understand De Bow's honest opinion.”).

For secondary commentary, see PETER S. CARMICHAEL, THE LAST GENERATION: YOUNG VIRGINIANS IN PEACE, REUNIONS (Gary W. Gallagher ed., 2005) (discussing the moral philosophical teachings at antebellum Virginia schools); WILLIAM SUMNER JENKINS, PRO-SLAVERY THOUGHT IN THE OLD SOUTH (Peter Smith 1960) (1935); ALLEN KAUFMAN, CAPITALISM, SLAVERY, AND REPUBLICAN VALUES: ANTEBELLUM POLITICAL ECONOMISTS, 1819–1848 (1982); James C. Hite & Ellen J. Hall, *The Reactionary Evolution of Economic Thought in Antebellum Virginia*, 80 VA. MAG. HIST. & BIOGRAPHY 476 (1972); Harvey Wish, *Aristotle, Plato, and the Mason-Dixon Line*, 10 J. HIST. IDEAS 254 (1949); Denise A. Riley, *The Masters of the Blue Room: An Investigation of the Relationship Between the Environment and the Ideology of the Faculty of the College of William and Mary, 1836-1846* (1997) (unpublished Ph.D. dissertation, Ohio State University) (available from UMI Co., Ann Arbor, Mich.).

more to an earlier strain of reasoning, justifying slavery as necessary.²⁴³ Several recent commentators emphasize Dew's (relative) moderation. William Freehling began his discussion of Dew by noting that Dew "reiterated what had passed for 'proslavery' in the debate itself, which was never defense of perpetual slavery."²⁴⁴ That Dew did not extend to a defense of perpetual slavery is not robustly tested by the debate, for what was on the table was—at most—a plan for gradual abolition. Anything that tended to defeat the plan was useful to Dew, and much of the *Review*, thus, needed only to show that even gradual abolition was "totally impracticable."²⁴⁵

To gauge how Dew altered the intellectual landscape, it is helpful to see how his contemporaries responded to him. Jesse Harrison published a response to Dew in the December 1832 *American Quarterly Review*,²⁴⁶ the same journal where Dew published the first version of his *Review*.²⁴⁷ Harrison was, like Dew, a young man. He was twenty-seven in 1832 and had been educated at Hampden Sydney College, then Harvard Law School.²⁴⁸ His essay was ostensibly a review of Thomas Marshall's moderately antislavery speech²⁴⁹ (Marshall was the son of United States Supreme Court Chief Justice John Marshall.)²⁵⁰ Harrison characterized the debate as one about fundamental questions of slavery and policy: "Every thing tells of a spirit that is busy inspecting the very foundations of society in Virginia—a spirit new, suddenly created, and vaster in its grasp than any hitherto called forth in her history."²⁵¹ The debate

²⁴³ Mansfield, *supra* note 114, at 68–77; Kenneth M. Stampp, *An Analysis of T.R. Dew's Review of the Debates in the Virginia Legislature*, 27 J. NEGRO HIST. 380 (1942) (interpreting Dew and other proslavery writers as aiming to get support from non-slaveholding whites).

²⁴⁴ FREEHLING, *supra* note 188, at 191. Freehling further stated that "[t]he trouble with seeing Dew as transitional is that no transition took place. The professor did not lead a school of his Virginia contemporaries halfway towards the 1850s. In his state, he worked largely alone." *Id.* at 193. This follows Alison Goodyear Freehling. See FREEHLING, *supra* note 129, at 203.

²⁴⁵ See Dew, *Professor Dew on Slavery*, *supra* note 120, at 292.

²⁴⁶ *Slavery Question in Virginia*, 12 AM. Q. REV. 379 (1832) (attributed to Jesse Burton Harrison) (reviewing THOMAS MARSHALL, THE SPEECH OF THOMAS MARSHALL, IN THE HOUSE OF DELEGATES OF VIRGINIA, ON THE ABOLITION OF SLAVERY. DELIVERED, FRIDAY, JANUARY 20, 1832 (Richmond, Va., T.W. White 1832)), reprinted in 9 AFRICAN REPOSITORY & COLONIAL J. 1 (1833). Subsequent citations are to the 1832 edition.

²⁴⁷ See *supra* note 120.

²⁴⁸ Dennis Bilges et al., *Burton Norvell Harrison Family, A Register of Its Papers in the Library of Congress, Biographical Notes*, <http://www.loc.gov/rr/mss/text/harrisonb.html> (last visited Mar. 13, 2008).

²⁴⁹ *Slavery Question in Virginia*, *supra* note 246.

²⁵⁰ 1 ENCYCLOPEDIA OF VIRGINIA BIOGRAPHY 284 (Lyon Gardiner Tyler ed., 1915).

²⁵¹ *Slavery Question in Virginia*, *supra* note 246, at 379. Harrison's literary address to Hampden Sydney College in 1827, delivered two years after he graduated from Harvard Law School, displayed a working knowledge of a range of literature and also celebrated the increasing democracy in Virginia politics since the Revolution, while lamenting a decline in classical studies in colleges. See J.B. HARRISON, A DISCOURSE ON THE PROSPECTS OF LETTERS AND TASTE IN VIRGINIA, PRONOUNCED BEFORE THE LITERARY AND PHILOSOPHICAL SOCIETY

became a question of gradual emancipation and then expulsion of the newly freed people from the state.²⁵² Moreover, Dew's contemporaries believed that he occupied a central position in opposing slavery—and supporting its necessity. Jesse Harrison's direct response to Dew in the *American Quarterly Review* alluded to how far Dew had migrated from the usual position of Virginians.²⁵³ While most Virginia masters believed slaves should be emancipated if "it could be done to the advantage of the slave, and without greater injury to the master than is implied in the continuance of the bondage,"²⁵⁴ Dew held another more positive view of slavery. Harrison urged the rejection of Dew's views and noted how extreme they were:

[I]f an anti-abolitionist who regards domestic slavery as the optimum among good institutions, while asserting the benign and sacred character of the relation of master and slave as observed in Virginia, should boast that Virginia is "in fact a *negro raising* State for other States," and that "she produces enough for her own supply and six thousand for sale," we must say that this is a material subtraction from the truth of his picture of the sanctity of the relation. It would be well to recall it and thrust it out of view.²⁵⁵

Michael O'Brien's magisterial two volume history of intellectual thought in the Old South makes Dew out to be a clerk, calculating the value of slavery and abolition and thus showing why abolition is impossible.²⁵⁶ Dew concentrated on the "practical

OF HAMPDEN-SYDNEY COLLEGE, AT THEIR FOURTH ANNIVERSARY, IN SEPTEMBER, 1827 (Cambridge, Ma., Hilliard & Brown 1828).

Others continued to support Harrison's antislavery argument. In 1847, Washington College President Henry Ruffner published a pamphlet arguing that gradual abolition was practicable. *See A SLAVEHOLDER OF WEST VIRGINIA, 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* 38–40 (Lexington, Ky., R.C. Noel 1847) (attributed to Henry Ruffner). Ruffner, like Harrison, was concerned with the effects of slavery on the white population, particularly slavery's corruption of republican values. *See id.*

²⁵² *Slavery Question in Virginia*, *supra* note 246, at 400 ("We are fully persuaded ourselves that the emancipation of the slaves, and their transportation out of the limits of the State, will be the only mode of action on the subject which will be beneficial either to the blacks or the whites.").

²⁵³ *See id.* at 403.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 404 (quoting without attribution and with alterations Dew, *Professor Dew on Slavery*, *supra* note 120, at 359).

²⁵⁶ MICHAEL O'BRIEN, 2 CONJECTURES OF ORDER: INTELLECTUAL LIFE AND THE AMERICAN SOUTH, 1810–1860, at 944–46 (2004). For an extensive discussion of Dew's thought, see Erik S. Root, All Honor to Jefferson? The Virginia Debate over Slavery and the Development

in morals," as Harriet Beecher Stowe called it²⁵⁷—what we call utilitarianism. Dew,

of the Positive Good Thesis (unpublished Ph.D. dissertation, Claremont University, 2006) (focusing on Dew's philosophy and locating him as a romantic and follower of Hegel, emphasizing historical contingency in Dew's thought and individual setting more than the universal truths).

²⁵⁷ HARRIET BEECHER STOWE, *1 DRED: A TALE OF THE GREAT DISMAL SWAMP* 31 (AMS Press 1970) (1856); Alfred L. Brophy, *Humanity, Utility, and Logic in Southern Legal Thought: Harriet Beecher Stowe's Vision in Dred: A Tale of the Great Dismal Swamp*, 78 B.U.L. REV. 1113 (1998) (discussing utilitarian, proslavery views); see also Harper on Slavery, in *THE PRO-SLAVERY ARGUMENT*, *supra* note 120, at 1, 17–18 ("If, after the most careful examination of consequences that we are able to make, with due distrust of ourselves, we impartially, and in good faith, decide for that which appears likely to produce the greatest good, we are free from moral guilt. And I would impress most earnestly, that with our imperfect and limited faculties, and short-sighted as we are to the future, we can rarely, very rarely indeed, be justified in producing considerable present evil or suffering, in the expectation of remote future good—if indeed this can ever be justified.").

Chancellor Harper acknowledged the differences between utility as he and other southerners employed it and the idea of utilitarianism as commonly employed:

If we should refer to the common moral sense of mankind, as determined by their conduct in all ages and countries, for a standard of morality, it would seem to be in favor of Slavery. The will of God, as determined by utility, would be an infallible standard, if we had an unerring measure of utility. The utilitarian philosophy, as it is commonly understood, referring only to the animal wants and employments, and physical condition of man, is utterly false and degrading. If a sufficiently extended definition be given to utility, so as to include every thing that may be a source of enjoyment or suffering, it is for the most part useless.

Id. at 17.

George Robertson wrote to refute such utilitarian, proslavery arguments:

Domestic slavery cannot be suddenly abolished in all the States, consistently with the welfare of either the black man or the white. A premature effort of inconsiderate humanity, might be disastrous, and would certainly tend to defeat or retard the ultimate object of every good and wise man—universal emancipation. . . .

But these slight blemishes . . . are but the spots on the sun; and though the microscopic vision of misanthropy may magnify them, they are lost in the great panorama which our country presents to the eye of an instructed and comprehensive patriotism. Could Boone and Harrod and Logan—when, in this once "land of blood," they first trod in the tracks of the Indian and the Buffalo—have dreamed that what we now behold in this smiling West, would so soon have succeeded their adventurous footsteps, how would such a vision have cheered them amidst the solitude and perils which they encountered in aiding to plant civilization in the wilderness!

ROBERTSON, *supra* note 77, at 164. For more on the multiple meanings of utility, see DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770–1823*, at 353–55 (1975).

like many others in his day, would not condone an act if it led to greater harm.²⁵⁸ But we perhaps should also consider that the centerpiece of Dew's argument is that slavery ought not to be terminated now—and perhaps never should be. Pieces of his argument went well beyond the argument against gradual abolition to conclude that slavery was a sign of civilization and that it was the best state of society possible for the enslaved.²⁵⁹ And so, while others were arguing for gradual abolition through, for instance, colonization,²⁶⁰ Dew was using his intellectual might to argue against any change in the institution of slavery.

Dew was present at a crossroads at a time when there were many in his state who proudly and openly defended an antislavery spirit, while others, who would live until the Civil War, were also robustly defending slavery. Dew drew upon other proslavery arguments—including Chancellor Harper's 1828 essay in the *Southern Review*.²⁶¹ Sometimes, as with Harper's essay, the influence appears from circumstantial evidence; Dew employed similar arguments.²⁶² In other cases, we can see many of the influences on Dew because he credited his sources.²⁶³

²⁵⁸ See Dew, *Professor Dew on Slavery*, *supra* note 120, at 422 (referring to John Stuart Mill); *id.* at 451 (“[A]ny question must be determined by its circumstances, and if, as really is the case, we cannot get rid of slavery without producing a greater injury to both the masters and slaves, there is no rule of conscience or revealed law of God which *can* condemn us.”).

²⁵⁹ See *supra* Part VI.

²⁶⁰ See *supra* notes 126–27 and accompanying text.

²⁶¹ Colonization Society, *The Tenth Annual Report of the American Society, for Colonizing the Free People of Colour of the United States*, 1 S. REV. 219 (1828) (attributed to William Harper).

²⁶² See O'BRIEN, *supra* note 256, at 946 n.19 (“Many of the arguments in this essay anticipate Dew, whom Harper seems to have known and worked with.”).

²⁶³ Dew made surprising use of contemporary histories, including Wallace's *Dissertation on the Numbers of Mankind*, Dew, *Professor Dew on Slavery*, *supra* note 120, at 294, 447, 485; Hallam's *Middle Ages*, *id.* at 295, 313–14; William Robertson's *Histories* (of England and the Americas), *id.* at 295, 297–99, 302, 313–16, 326–29, 337–38, 350, 393, 425; Bryan Edwards's *West Indies*, *id.* at 303, 331–32, 350, 369, 456; Mitford's *Greece*, *id.* at 305, 340; Walsh's *Appeal*, *id.* at 353–54; Park's *Travels into the Interior of Africa*, *id.* at 320, 323–24, 395–96; Humboldt's *New Spain*, *id.* at 333–35; Marshall's *Life of Washington*, *id.* at 343, 472; Brougham's *Colonial Policy*, *id.* at 423–24; Clarkson's *Slavery*, *id.* at 426; Dunn's *Sketches of Guatemala*, *id.* at 445; Poinsett's *Notes on Mexico*; *id.* at 487; and the *American Colonization Society Fifteenth Annual Report*, *id.* at 398, 404–05.

Dew used the sources that were readily available, as is shown by his reference of two volumes in publishers' inexpensive collections. He used a volume in Harper's Family Library on *Discovery and Adventure in Africa*, *id.* at 308, 330; and volume five in the Library of Entertaining Knowledge, *The New Zealanders*, *id.* at 337.

Dew also used more common texts in political thought, including Voltaire, *id.* at 304; Jefferson's *Notes on Virginia*, *id.* at 454–55; Tucker's *Blackstone*, *id.* at 310–11, 321; Locke's *On Civil Government*, *id.* at 309; Gilbert Stuart's *History of Society*, *id.* at 458; *View of Society*, *id.* at 340; Jones's *Political Economy*, *id.* at 365–66; Josiah Child's *Discourse on Trade*, *id.* at 403; McCulloch's edition of Smith's *Wealth of Nations*, *id.* at 403; Cooper's *Political*

VIII. SEEKING EVIDENCE OF DEW'S IMPACT

Others, in turn, read Dew. When former President James Madison spoke about slavery, he commented on the adverse effects of antislavery agitation.²⁶⁴ The agitation led southerners to fasten the shackles of slavery more firmly and to adopt a more firmly proslavery position.²⁶⁵ Madison spoke of South Carolina Governor McDuffie's proslavery speech, as well as Dew's.²⁶⁶ While Madison praised Dew's mind, he was somewhat skeptical of his conclusions.²⁶⁷ Former President John Quincy Adams was substantially more critical.²⁶⁸ In 1833, Adams and his granddaughter read Dew's pamphlet.²⁶⁹ He recorded his thoughts in his diary.²⁷⁰ While Adams found much disturbing ("It is a monument of the intellectual perversion produced by the existence of slavery in a free community. To the mind of Mr. Dew, slavery is the source of all virtue in the heart of the master."²⁷¹) and implausible ("Mr. Dew's argument, that the danger of insurrection among the slaves is diminished in proportion as their relative numbers increase over those of the white masters, is an ingenious paradox, in which I have no faith."²⁷²), Adams also found pieces of it that rang true:

His argument against the practicability of abolishing slavery by means of colonization appears to me conclusive This pamphlet deserves grave meditation, and has in it the seeds of much profitable instruction. Slavery is, in all probability, the wedge which will ultimately split up this Union. It is the source of all the disaffection to it in both parts of the country—a disaffection deeply pervading Mr. Dew's pamphlet.²⁷³

Economy, *id.* at 478; Aristotle's *Politics*, *id.* at 306; Plutarch's *Lives*, *id.*; Malthus's *Essay on the Principle of Population*, *id.* at 345, 395, 400–01; and Hume's *Essay on the Populousness of Ancient Nations*, *id.* at 371, 383.

²⁶⁴ *Visit to Mr. Madison*, NEW-BEDFORD MERCURY, Sept. 16, 1836.

²⁶⁵ *Id.* (discussing Madison's knowledge of McDuffie and Dew); *see also supra* text accompanying note 125.

²⁶⁶ *Visit to Mr. Madison*, *supra* note 264.

²⁶⁷ *Id.*; *see also* DREW R. MCCOY, *THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY* 302–03 (1989) (discussing Madison's opinion of Dew). On February 23, 1833, Madison had written a letter to Dew emphasizing the attainability of emancipation through voluntary emancipation. Letter from James Madison to Thomas R. Dew (Feb. 23, 1833), *in* 9 *THE WRITINGS OF JAMES MADISON, 1819–1836*, at 498 (Gaillard Hunt ed., 1910).

²⁶⁸ 9 *MEMOIRS OF JOHN QUINCY ADAMS, COMPRISING PORTIONS OF HIS DIARY FROM 1795 TO 1848*, at 23 (Charles Francis Adams ed., Phila., J.B. Lipincott & Co. 1876).

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*; *see also* William Jerry MacLean, *Othello Scorned: The Racial Thought of John Quincy Adams*, 4 *J. EARLY REPUBLIC* 143 (1984). Adams wrote about Dew publicly in 1839.

Dew's facile prose crept into other works as well. When abolitionists began to use the United States mail to distribute abolitionist literature in 1835,²⁷⁴ proslavery writers responded. One widely discussed tract, *The South Vindicated from the Treason and Fanaticism of the Northern Abolitionists*, quoted from Dew's *Review*:

Let the wily philanthropist but come and whisper into the ear of such a slave that his situation is degrading and his lot a miserable one—let him but light up the dungeon in which he persuades the slave that he is caged—and that moment, like the serpent that entered the garden of Eden, he destroys his happiness and his usefulness.²⁷⁵

Dew's contemporaries frequently praised his contribution to the debate—as the person whose work stopped the movement for emancipation with colonization and for colonization entirely. As Chancellor Harper said, “After President Dew, it is unnecessary to say a single word on the practicability of colonizing our slaves.”²⁷⁶ Whatever else people now think of him, Dew's work came to stand for the proposition that slavery contributed much to Virginia. “President Dew,” Chancellor Harper wrote at the beginning of his essay, “has shewn that the institution of Slavery is a principal cause of civilization.”²⁷⁷ Harper's next sentence then extended Dew: “Perhaps nothing can be more evident than that it is the sole cause.”²⁷⁸

Mr. Adams' Letter: Letter II, to the Citizens of the United States, Whose Petitions, Memorials, and Remonstrances, Have Been Entrusted to Me, to Be Presented to the House of Representatives of the United States, of the Third Session of the 25th Congress, VERMONT PHOENIX, June 28, 1839.

²⁷⁴ See *supra* note 125 and accompanying text.

²⁷⁵ THE SOUTH VINDICATED FROM THE TREASON AND FANATICISM OF THE NORTHERN ABOLITIONISTS 75 (photo. reprint, Negro Univs. Press 1969) (1836) (attributed to William Drayton) (quoting Dew, *Professor Dew on Slavery*, *supra* note 120, at 460); see also *id.* at vi, vii, 74, 102–03, 110–11, 137, 245, 297–98 (mentioning Dew's *Review*).

²⁷⁶ *Harper on Slavery*, *supra* note 257, at 88.

²⁷⁷ *Id.* at 3.

²⁷⁸ *Id.*; see also A SOUTHERN FARMER, BONDAGE A MORAL INSTITUTION, SANCTIONED BY THE SCRIPTURES OF THE OLD AND NEW TESTAMENTS, AND THE PREACHING AND PRACTICE OF THE SAVIOR AND HIS APOSTLES 51 (Macon, Ga., Griffin & Purse 1837); *Slavery and the Abolitionists: Address of the Southern Delegates in Congress, January 15, 1849*, 15 S.Q. REV. 165, 215 (1849) (referring to Dew for comparisons of slavery and free white workers in the United Kingdom); *Slavery in the Southern States*, 8 S. Q. REV. 317, 320 (1845) (“The South is indebted, we believe, to Professor Dew, for the first clear and comprehensive argument on the subject of slavery.”); *White and Black Slavery*, 6 S. LITERARY MESSENGER 193, 194 (1840) (“It is not our purpose to argue the question of slavery—a subject already discussed with signal ability by Mr Paulding the present Secretary of the Navy, Professor Dew, Chancellor Harper, and last, though not least, Judge Upshur . . .”).

Nathaniel Beverley Tucker soberly—and revealingly—invoked Dew to demonstrate that slavery is, on balance, good:

Nothing is wanting but manly discussion to convince our own people at least, that in continuing to command the services of their slaves, they violate no law divine or human, and that in the faithful discharge of their reciprocal obligations lies their true duty. Let these be performed, and we believe (with our esteemed correspondent Professor Dew) that society in the South will derive much more of good than of evil from this much abused and partially-considered institution.²⁷⁹

Tucker recalled that the French Revolution's attack on property began with an attack on slaves as property.²⁸⁰ Once property in humans was attacked, other attacks on property would likely follow, a warning to others that the abolitionists were the vanguard of an attack on all property: "in that war against property, the first object of attack was property in slaves; that in that war on behalf of the alleged right of man to be discharged from all control of law, the first triumph achieved was in the emancipation of slaves."²⁸¹

Dew's work continued to influence the terms of debate even after his death. In April 1850, the *Southern Literary Messenger* published a commentary on an 1849 edition of Dew's *Review*, illustrating that people were reading Dew and drawing strength from him well after his death—even in that fateful year of the Compromise of 1850.²⁸² *De Bow's Review* reprinted pieces of it as well.

²⁷⁹ *Slavery*, 2 S. LITERARY MESSENGER 336, 339 (1836) (reviewing J.K. PAULDING, SLAVERY IN THE UNITED STATES (1836) and THE SOUTH VINDICATED FROM THE TREASON AND FANATICISM OF THE NORTHERN ABOLITIONISTS, *supra* note 275). Although sometimes attributed to Edgar Allan Poe, the better opinion seems to be that the review was written by Tucker. See WHALEN, *supra* note 5, at 116–17.

²⁸⁰ *Slavery*, *supra* note 279, at 337.

²⁸¹ *Id.*

²⁸² *Observations on a Passage in the Politics of Aristotle Relative to Slavery*, 16 S. LITERARY MESSENGER 193 (1850). *Observations* relied in part on a belief that slavery prevented a conflict between capital and labor because, in the slave South, agriculture and not industry was dominant. *Id.* at 199. Positions like that, developed at length by George Fitzhugh and later by Hinton Helper, have led historians to focus on the proslavery writing as anti-capitalist. See GEORGE FITZHUGH, SOCIOLOGY FOR THE SOUTH, OR THE FAILURE OF FREE SOCIETY (Richmond, A. Morris 1854); HINTON ROWAN HELPER, THE IMPENDING CRISIS OF THE SOUTH: HOW TO MEET IT (N.Y., Burdick Bros. 1857). Eugene Genovese is one of the leaders of this theory. See EUGENE D. GENOVESE, THE WORLD THE SLAVEHOLDERS MADE: TWO ESSAYS IN INTERPRETATION 165–94 (1960).

In recent years, historians who have focused on the economic views of slaveholders generally, as well as earlier (and perhaps more representative) proslavery writers, have criticized

In the 1850s, as Reverend Slaughter looked back on the history of debate in Virginia about African colonization in his history of the American Colonization Society, he credited Dew with stopping the colonization sentiment:

Genovese's interpretation. *See, e.g.*, JAMES OAKES, *THE RULING RACE: A HISTORY OF AMERICAN SLAVEHOLDERS*, at xii–xiii (1982); Jay R. Carlander, In Search of “Industry”: Slavery, Manufacturing, and the Language of Political Economy in the Antebellum South, 1820–1850, at 14–15 (2003) (unpublished Ph.D. dissertation, University of California, Santa Barbara) (on file with University of California, Santa Barbara); Riley, *supra* note 242, at 110 n.29. Peter Carmichael sees antebellum intellectual life centering around the idea of promotion of progress, which is rather different from the fear of industry and capitalism depicted by Genovese. *See* CARMICHAEL, *supra* note 242, at 19–34; *see also* Alfred L. Brophy, *God and Man at the University of Virginia*, 35 *REVS. AM. HIST.* 232 (2007) (reviewing CARMICHAEL, *supra* note 242); Cathy D. Matson, *Capitalizing Hope: Economic Thought and the Early National Economy*, 16 *J. EARLY REPUBLIC* 273 (1996) (finding optimism about market economy in antebellum United States).

One piece that remains missing here is an analysis of the views of southern jurists, for they hold out the possibility of gauging how proslavery ideas were put into action in places where they mattered. Preliminary analysis suggests those judges saw slavery as an integral part of economic and industrial advancement and that southern judges, like their northern counterparts at the time, supported the market. *See, e.g.*, TIMOTHY S. HUEBNER, *THE SOUTHERN JUDICIAL TRADITION: STATE JUDGES AND SECTIONAL DISTINCTIVENESS, 1790–1890*, at 70–98 (1999) (discussing Lumpkin's decisions that supported a market economy and his pro-industrialization views); Alfred L. Brophy, *Thomas Ruffin: Of Moral Philosophy and Monuments*, 87 *N.C. L. REV.* (forthcoming 2008). The trope of progress may be a useful organizing principle for antebellum legal history. Many wrote of progress and the law's adaptation to moral, economic, technological, and social progress. “Progress” helped antebellum judges frame their movements. The idea of “progress” provided the framework within which judges thought of what was happening, and that unified their thought and behavior, which is not so fraught with the complications of considerations of “instrumental conception” that have engaged legal historians for nearly two decades. *Compare* MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* (1977) (attributing “instrumental conception” to antebellum judges, in which they self-consciously used law to promote economic growth), *with* PETER KARSTEN, *HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA* (1997) (finding evidence of the opposite conception), *and* MARK E. STEINER, *AN HONEST CALLING: THE LAW PRACTICE OF ABRAHAM LINCOLN* (2006) (finding little evidence of instrumentalism in cases Lincoln argued). Among the many examples one might use here is Justice Withers's dissent from the release of a debtor from prison in *Breeze v. Elmore*, which employed in one sentence the classic antebellum phrases *duty, lights, progress, and reform*: “I am not prepared for this innovation, and entertain the opinion that if we are to turn from Westminster and look to New York for our lights, in this particular path of duty, we are but in the infancy of progress in this department of law reform.” 38 *S.C.L.* (4 *Rich.*) 433, 458–59 (1851) (Withers, J., dissenting).

One might also add Alabama Justice George Goldthwaite to that list. *See, e.g.*, *Petty v. Gayle*, 25 *Ala.* 472 (1854); *McNeill v. Easley*, 24 *Ala.* 455 (1854); *Alston v. Coleman*, 7 *Ala.* 795 (1845). Additionally, perhaps one could add Justice Abner Lipscomb, who served on the Supreme Courts of both Alabama and Texas. *See* Robert J. Norrell, *Law in a White Man's Democracy: A History of the Alabama State Judiciary*, 32 *CUMB. L. REV.* 135, 136 (2001).

The Richmond Whig said that the debate in the House of Delegates was marked by good quality and that the House of the classic days of Athens. The columns of the *Inquirer* and of the Whig and other newspapers were illuminated with brilliant editorials and communications. Professor Dew from his retirement at William and Mary sent forth a pamphlet in justification of Slavery marked by uncommon powers of reasoning and great wealth of illustration. The gifted Jesse [sic] B. Harrison of Lynchburg responded, in the "American Quarterly," with great eloquence of diction and in the most calm and philosophical spirit of Inquiry.

.....

The effect of the general discussion elicited by the debate upon Abolition in the General Assembly, was a powerful reaction in public opinion upon the subject of slavery. The anti-slavery tide was arrested at its flood, and began rapidly to ebb. The document which chiefly contributed to this result was an Essay upon Slavery, by Professor Dew of William and Mary College, in which the whole subject was treated with profound ability, and illustrated with great wealth of learning. In this essay the folly of a general emancipation without deportation and the impracticability of deporting so large a population were clearly demonstrated.

Soon after the publication of Professor Dew[']s pamphlet, an article of signal ability appeared in the *American Quarterly Review* based on the speech of Thomas Marshall of Fauquier, designed to shew that slavery was the essential hindrance to the prosperity of the slave-holders, with particular reference to Virginia. . . . The verdict of the people after deliberately looking at both sides of the question as exhibited by these eloquent advocates, was decidedly in favor of the general principles maintained by President Dew.²⁸³

²⁸³ P. SLAUGHTER, *THE VIRGINIAN HISTORY OF AFRICAN COLONIZATION* 64 (Richmond, MacFarlane & Fergusson 1855). Slaughter also wrote:

We do not think that any impartial person can read these discussions, (now when the heat and smoke of the contest has given way to a serene atmosphere,) without seeing that the Pro-Slavery advocates had the best of the argument. The Emancipationists utterly failed to bring forward any national and practicable scheme of Abolition.

The result was a powerful reaction in the public mind, which involved in some degree of the odium attached to Abolition every scheme touching the colored race, however innocent it may have been. . . .

The only practical effect of all this excitement to be seen in the

Reverend Slaughter had good reasons for trying to make Dew look influential and to make colonization look unworkable. So, as with all evidence of historical causation—particularly when such difficult-to-trace concepts of influence of ideas are at issue—we have cause for suspicion. In fact, as Tucker wrote in an essay about two proslavery works in the *Southern Literary Messenger* in 1836, it is perhaps impossible to trace the exact causes of the evolution of thought.²⁸⁴ Even if we cannot trace the causes, we can make some inferences about the trajectory of that thought, much as we can trace the orbit of comets:

However eccentric the orbit, the comet's place in the heavens enables the enlightened astronomer to anticipate its future course, to tell when it will pass its perihelion, in what direction it will shoot away into the unfathomable abyss of infinite space, and at what period it will return. . . .

Not less eccentric, and far more deeply interesting to us, is the orbit of the human mind.²⁸⁵

Slaughter illustrates the multiple ways that people at the time credited Dew with stopping the antislavery movement. Other writers also credited Dew's role in opposing even gradual abolition. An article in *De Bow's Review* in 1856 referred to Dew as a "pioneer," "the first able expounder of the views which now generally prevail in the southern States upon the relations of slavery to the community in which it exists, as well as with regard to the effect of that institution upon the races it subjugates."²⁸⁶ And that author wrote of Dew's logic in superlative terms: "as a pure specimen of inexorable logic, it would be difficult to find its equal or certainly its superior in the whole range of English literature."²⁸⁷

Another way to judge influence is to search beyond explicit references to the impact of ideas. These kinds of questions of influence, however, pose some of the greatest problems in historical method. How do we know that a person's ideas mattered? Even sketching answers to those kinds of questions is enormously difficult.²⁸⁸

legislation of the session was a bill for the suppression of seditious writings and curtailing the privileges of the colored population bond and free.

Let the misguided Abolitionists hear that, and learn a lesson of humility and practical wisdom and humanity from experiment.

Id.

²⁸⁴ *Slavery*, *supra* note 279, at 337.

²⁸⁵ *Id.*

²⁸⁶ *Reply to Abolition Objections to Slavery*, 20 DE BOW'S REV. 645, 645 (1856) (attributed to A.J. Roane).

²⁸⁷ *Id.* at 645–46; *see also Liberia and the Colonization Society: No. 1*, 26 DE BOW'S REV. 415, 420 (1859) (attributed to Edmund Ruffin) (calling Dew's *Review* "the earliest and also one among the ablest vindications of the institution that have yet been published").

²⁸⁸ Historians have spent more energy tracing the unfolding of antislavery than of proslavery

What may be particularly important here is that Dew's ideas helped to stop talk of gradual abolition; that is difficult to gauge, for sure. We know that after March 1832, the subject was not seriously discussed again. Part of this may be because abolitionists became more strident; however, part of it may be because people like Dew and Benjamin Watkins Leigh in the Virginia debates laid such powerful arguments (to southern minds) against gradual abolition.²⁸⁹ And then subsequent works from articles by Nathaniel Beverley Tucker, Henry Drayton, Chancellor William Harper, and Abel Upshur all appear to draw inspiration, in varying degrees, from Dew.²⁹⁰

Some sense of historians' understanding of Dew's influence and the power of his arguments comes from William E. Dodd's entry on Dew in Walter Fleming's 1909 *Economic History of the South*.²⁹¹ William Dodd was one of the leading historians of the early twentieth century.²⁹² He summarized Dew's argument, then praised it.²⁹³ You will recall that he was writing in 1909—this suggests the power and duration of Dew's argument. Dodd ably summarizes Dew's argument and his contribution:

Dew cleared the ground by doing what few other Virginians would have done then or since, publicly: he declared that the doctrine of Jefferson, that "all men are born free and equal," "that slavery is an evil," "that the slave has a natural right to regain his liberty," all "most pompously put forth," was wrong. . . . While the negro slave is property he is yet "the happiest of the human race," and finally he shows that slavery has become profitable to Virginians who can "raise cheaper than they can buy; in fact, it is one of their greatest sources of profit, for slaves multiply with

thought. See, e.g., *THE ANTISLAVERY DEBATE: CAPITALISM AND ABOLITIONISM AS A PROBLEM IN HISTORICAL INTERPRETATION* (Thomas Bender ed., 1992). Consequently, we understand less about the evolution of proslavery thought; in part, that may be because the financial justifications for slavery are so transparent. However, there is still much to understand about why non-slaveholding southerners adopted proslavery ideas. Such a project could easily expand into a book on the ideological origins of the Civil War. A more modest subset looks at works like Dew's and asks how he mapped his world—how he linked pieces of history, particularly the decline of feudalism through respect for private property, the French Revolution's attack on slavery and property, Haiti, the virtues of slavery for both the enslaved and owners, and the impracticality of emancipation. Together that helps to draw a picture of what might be called "The Market and the Proslavery Thought as a Problem in Historical Interpretation."

²⁸⁹ On the Virginia debates, see notes 126–31 and accompanying text.

²⁹⁰ See, e.g., *supra* notes 265–71 and accompanying text and *infra* note 297. For Dew's influence on Drayton, see Drayton, *supra* note 275, at 74–75, 85–87, 102–03, 245 (referring to Dew).

²⁹¹ William E. Dodd, *Contributions of the South to Economic Thought and Writing to 1865*, in 5 *THE SOUTH IN THE BUILDING OF THE NATION: SOUTHERN ECONOMIC HISTORY* 564–76 (Walter Lynwood Fleming et al. eds., 1909).

²⁹² See La. State Univ. Dep't of History, The Fleming Lecture Series at Louisiana State University, <http://www.artsi.lsu.edu/hist/flemlec.htm> (last visited Feb. 14, 2008).

²⁹³ Dodd, *supra* note 291, at 568–73.

us more rapidly than in most of the Southern states.” Not only does he show that slavery is not wrong, that the slaves are happy, but that “the institution” is an economic blessing to Virginia and the South.

The remainder of the carefully and ably constructed treatise shows easily that colonization in some portion of Africa would be silly and ridiculous, and that emancipation without colonization would be, and then was, impossible.²⁹⁴

Dew was, obviously, a very smart and well-educated man, telling other very smart and well-educated people that what they were doing was right. And in this he seemed to have convinced a lot of people—including the generation that came afterwards and were the educators during the period of Jim Crow.²⁹⁵

CONCLUSION

As Terry Meyers’s work demonstrates, Dew is representative of William and Mary’s intellectual leaders who generated the arguments to support slavery.²⁹⁶ For example, Nathaniel Beverley Tucker’s address on slavery to law students in 1835 argued that slavery makes freedom possible for whites, for they otherwise could not abide universal democracy.²⁹⁷ Moreover, it kept the laboring class laboring and thus

²⁹⁴ *Id.* at 570 (footnotes omitted).

²⁹⁵ *See id.* at 571–73.

²⁹⁶ Terry Meyers, *A First Look at the Worst*, 16 WM. & MARY BILL RTS. J. 1141 (2008).

²⁹⁷ *Note to Blackstone’s Commentaries, Vol. 1, Page 423, supra* note 101 at 230; *see also supra* notes 221–31 and accompanying text; *Slavery in the Southern States*, 8 S.Q. REV. 317 (1845) (attributed to William J. Grayson); A.P. Upshur, *Domestic Slavery*, 5 S. LITERARY MESSENGER 677 (1839).

Other addresses by William and Mary faculty include *Lecture XXII: Delivered to the Law Class of William and Mary College, June 17, 1839, Being the Last of a Course of Lectures on the Philosophy of Government and Constitutional Law*, in TUCKER, LECTURES ON THE SCIENCE OF GOVERNMENT, *supra* note 141, at 448; Robert Saunders, *Address Delivered Before the Students of William and Mary College on the 3d of July, 1839*, 5 S. LITERARY MESSENGER 595 (1839); Robert Saunders, *Baccalaureate Address Delivered to the Graduates of William and Mary College, in the College Chapel, 4th July, 1846*, 12 S. & W. LITERARY MESSENGER & REV. 540 (1846); B. Tucker, *A Lecture on Government*, 3 S. LITERARY MESSENGER 209 (1837); Beverley Tucker, *Political Science: A Discourse on the Questions, “What is the Seat of Sovereignty in the United States, and What the Relation of the People of Those States to the Federal and State Governments Respectively,” Read Before the Petersburg Lyceum on the 15th of May, 1839*, 5 S. LITERARY MESSENGER 559–65 (1839); H.A.W., *The Social System of Virginia*, 14 S. LITERARY MESSENGER 65 (1848) (attributed to Henry Augustine Washington).

Other addresses given at William and Mary include ABEL P. UPSHUR, ADDRESS TO THE LITERARY SOCIETIES OF WILLIAM AND MARY COLLEGE, VA . . . JULY 2D, 1841, at 26 (Phila., A. Waldie 1841) (warning of “the ultra-democracy of the present day”); W.H. McFarland,

made it possible to have all white people above them voting. All of this testifies to the centrality of William and Mary to the support of slavery in antebellum Virginia and, indeed, to our country.

Still, we need to think about what this all means. Most of the past apologies for slavery have been based on institutions' and businesses' ownership of people or their role in the institution of slavery, such as Aetna's apology for insuring slaves and thus reducing risk for slaveowners²⁹⁸ and the *Hartford Courant's* apology for running advertisements to help recapture fugitive slaves.²⁹⁹ However, talk of William and Mary's president's contributions to the defense of slavery raises a different issue: whether we should atone for the teachings of our predecessors? In the case of William and Mary, there is a further question of what to make of the teachings of the College's president, rather than the College's ownership of humans? Dew was, to be sure, closely associated with the College in the minds of his contemporaries, and his advocacy of slavery both assisted the College and drew assistance from the College's prestige.

In thinking about the College's role in the intellectual history of our country, the College's teachings led us towards Enlightenment at points and darkness at others.³⁰⁰ For, as Tucker told graduating students in 1847, "William and Mary is what Virginia made her. Virginia *continues* what she is in part because the spirit of her ancient chivalry *continues* to act on her through William and Mary. Each is at once cause and effect, and each is necessary to the other."³⁰¹ He asked of William and Mary students "only a *love of truth* and a *sense of honor*."³⁰² And so, the world leaves it to the goodwill and the wisdom of the students, faculty, administration, and alumni of William and Mary to consider the wisdom and efficacy of further investigations of this great institution's past and its implications for our country's future.

The Importance of a Literary Class, 13 S. & W. LITERARY MESSENGER & REV. 570, 570–71 (1847) (literary address to William and Mary, contending that the present age "estimate[s] all things by their exchangeable value"). Upshur delivered his William and Mary address in the wake of an 1839 article linking slavery with democracy for whites, as well as an 1840 book praising slavery for the way that it made democracy workable (a theme Dew employed in 1832). See ABEL P. UPSHUR, A BRIEF ENQUIRY INTO THE TRUE NATURE AND CHARACTER OF OUR FEDERAL GOVERNMENT: BEING A REVIEW OF JUDGE STORY'S COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Phila., John Campbell 1863) (1840); Upshur, *Domestic Slavery*, *supra*, *passim*.

²⁹⁸ See *supra* note 26 and accompanying text.

²⁹⁹ See *supra* note 25 and accompanying text.

³⁰⁰ I particularly appreciate the questions of Davison Douglas and Terry Meyers about the connections between Dew's writings and the College. These questions arise for Tucker as well.

³⁰¹ *Judge Tucker's Address*, 13 S. LITERARY MESSENGER 568, 569 (1847).

³⁰² *Id.*