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The Jurisprudence of Slavery, Freedom, and Union at Washington College, 1831-1861

Alfred L. Brophy¹

Abstract

In the thirty years leading into Civil War faculty and students at Washington College and the Virginia Military Institute discussed ideas about adherence to Union, the legal justification of slavery, slaves' claims to freedom, and jurisprudence. Their discussion of jurisprudence included the need for adherence to law, and the roles of morality, sentiment, and utility in law. This article draws upon public addresses, like graduation speeches, at Washington College and VMI, to recover the sophisticated legal ideas in circulation in Lexington.

Washington College was a place of Whig values of Union, adherence to law, and concern for utility. Speakers supported common Whig ideas, including the need for republican government to check excesses of democracy and a focus on the ways that a well-ordered society and respect for property and Christianity led to moral and economic progress. It also moved from a place where faculty held Enlightenment ideas about freedom – even if circumscribed by economic reality – to a place where slavery was embraced, partly because it was part of the Constitution.

By contrast, at the Virginia Military Institute, pro-slavery and pro-secession ideas were more prevalent. The constitutional visions at moderate Washington College and pro-secession institutions at more radical places, like the University of Virginia, William and Mary, and the College of Charleston, reflected the wide range of Southern ideas about Union, slavery, utility, sentiment, Republicanism, and constitutionalism. Those ideas framed the Southern response to political changes, as Southerners discussed the mandates of jurisprudence and the Constitution in the years leading into War.

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I. The Rebel and the Debate Over Slavery

In August 1831 in Southampton County in Virginia's tidewater region, over across the Blue Ridge mountains from Lexington, Nat Turner assembled a small set of conspirators and set in motion a rebellion. Nearly seventy white people died – and so did dozens of slaves who were killed in the process of putting down the rebellion. Some were part of the rebellion; many others seem to have been innocent victims of the anger and fear set loose by the rebellion. Then followed a couple dozen more executions of the rebels and those believed to have been working in conjunction with them. One hapless slave, perhaps a rebel or a sympathizer, or maybe not, was summarily executed along the New Jerusalem road and his head placed on a pole as a warning to others. The intersection where his head was placed still bears a name of that event: Blackhead Signpost Road.²

Some were acquitted during the brief trials, but most were convicted and either required to be sold outside of the state or executed. This was Nat Turner's fate on November 11.³ The trials and executions – and the fear of rebellion – worked its ways outward, to places like northeastern North Carolina.⁴ [and to Lexington, Virginia] Intellectual reverberations followed. In December 1831 Quakers petitioned the Virginia legislature to take action against slavery. Thus, the rebel loosened a debate about the slavery. This was one of the rare moments in American history where the reaction to violence was serious reconsideration of what we were doing. And therein lies a story in which Washington College and Lexington occupy an important place. They can tell us important parts about a story of national dimensions.

The Virginia legislature debated what to do about slavery. The debates and votes of members of the House of Delegates reveal a division between the state's regions, especially between the counties across the Blue Ridge and those in the Tidewater and Piedmont. Representatives from the later counties voted repeatedly to shut down debate and to maintain slavery; those in the Valley and the trans-Appalachian counties (though out-numbered) consistently voted to at least take some further action.⁵

² HENRY IRVING TRAGLE, *THE SOUTHAMPTON SLAVE REVOLT OF 1831: A COMPILATION OF SOURCE MATERIAL* (1971).

³ What little we know about Turner comes mostly from his *Confessions*, recorded by a young lawyer, Thomas Gray, and published shortly afterwards. *See id.* at 301-21 (reprinting THOMAS R. GRAY, *THE CONFESSIONS OF NAT TURNER, THE LEADER OF THE LATE INSURRECTION IN SOUTHAMPTON ...* (Richmond, 1832)).

⁴ Robert N. Elliott, *The Nat Turner Insurrection as Reprinted in the North Carolina Press*, 38 N.C. Hist. Rev. 1-18 (1961); Patrick H. Breen, *Nat Turner's Revolt: Rebellion and Response in Southampton County, Virginia* (University of Georgia, Ph.D., 2005).

⁵ For careful discussion of the debate, see Eva Sheppard Wolf, *Race and Liberty in the New Nation: Emancipation in Virginia from the Revolution to Nat Turner's Rebellion* (2006); William Shade, *Democratizing the Old Dominion: Virginia and the Second Party System*,

The plans for abolition were not well-formed, but representatives from the Shenendoah Valley held their own in debates. James McDowell of Lexington, who studied at Washington College and later at Yale and Princeton and served for a time as trustee of Washington College, spoke eloquently about the need for action against slavery and against the arguments about the sanctity of property rights made by many delegates from the Tidewater and Piedmont. In opposition to arguments that property in slaves was sacred, McDowell advanced the idea that when property poses a danger, “the right by which [owners] held their property was gone. Society ceased to give its consent.”⁶ These were progressive ideas about the nature of property – that it was created by society and subservient to those interests rather than a natural right.⁷ And he seemed to be making some headway. Aylett Alexander of Lexington wrote in the spring of 1832, that “The public sentiment has undergone a great change in Virginia with respect to the subject of slavery. You have no doubt witnessed this change in the long and eloquent speeches addressed openly on a subject which before was scarcely touched without the greatest caution and delicacy. Among others McDowell’s speech has been mentioned as one that was deserving of superior merit. It is this subject that has created a difference between Eastern and Western Virginia; and if some method of gradual emancipation and deportation is not speedily adopted, this is the subject which will erect Virginia into two independent states.”⁸

James Gholson represented Brunswick County in the Piedmont, near Southampton County. Slavery was a key fact of life in Brunswick, where in 1830 more than sixty percent of the residents were enslaved. Gholson, who was born in Gholsonville in Brunswick County in 1798 and graduated from Princeton in 1820, responded to Moore’s invocation of natural rights with legal doctrine as well as political philosophy. The natural rights of the slaves were not a

1824-1861 (1994).

⁶ SPEECH OF JAMES M’DOWELL ... JANUARY 21, 1832 15 (Richmond, Thomas Whyte 1832). McDowell saved several letters from constituents praising his speech. One from Robert H. Rose, an abolitionist who lived at Silver Lake in Susquehanna County, Pennsylvania, suggested how a scheme of gradual abolition might work at the micro level. It proposed that owners allow their enslaved people to run plantations as they wanted. *See* Robert H. Rose to McDowell, April 10, 1832, McDowell Papers, UNC Library, Series 1.3, April 1832.

⁷ GREGORY ALEXANDER, *COMMODITY AND PROPERTY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970* 26-42 (1999) (discussing conflicting roles of property in Jefferson’s thought); WILLIAM NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996) (depicting ways that property was subject to regulation in nineteenth century to promote public welfare).

⁸ Aylett Alexander to William Alexander, Anderson Family Papers, Box 6, Folder 53, Washington and Lee Special Collections.

declaration of the “powers of this Government or of the social obligations or rights of *society*.”⁹ The claims to natural rights were, moreover, trumped by the property rights claims of the slaves’ owners. Gholson thought that the property owners had the right to the offspring of their property. “It has always been (perhaps erroneously),” Gholson said somewhat disingenuously, “considered by that steady and old-fashioned people, that the owner of land had a reasonable right to its annual profits; the owner of orchards to their annual fruits; the owners of brood mares to their product, and the owner of female slaves to their increase.”¹⁰

Gholson mocked Valley representative Samuel Moore’s suggestion that new lights ought to guide the state. “I have heard of these lights before, but I have looked for them in vain – I have never seen them. The wretched and misguided fanatic, who excited the horrors of the late Southampton massacre, thought he saw them. It proved, however, an elusive meteor.” There were some “Northern lights,” – abolitionist pamphlets. Those ideas were breaking apart government. If the legislature followed Moore’s lead, Gholson ominously concluded, “the bands which bind society together would at once dissolve – the relations of husband and wife, parent and child, master and apprentice, and even our present deliberations would be ‘most strange and unnatural.’”¹¹

Property rights were central to Gholson’s argument. Indeed, he thought the owners’ rights absolutely dispositive. He dismissed appeals to policy. People “in pursuit of their favorite theory, have adventured on the boundless ocean of *policy*, expediency, and even *speculation* and as they have taken along with them on board, my rights and my property, I hope I shall be excused if I pursue them, though the sea is rough and the voyage dangerous.” For Gholson believed that property rights were a key foundation of society.

This sacred principle of *meum and tuum* does not derive its sanctions from conventional charters—it has its foundations laid deep in principles of justice – it is the very ligament which binds society together, and permit me, Sir, to tell gentlemen, that if they ever once sever it society itself is no longer worth preservation – nay, a state of nature would be desirable – for, then minorities (if minorities there were) would be spared the contumely and mockery of being tied, hand and foot, “*secundum legum*,” at the caprice and pleasure of triumphant and vindictive majorities. Without this principle, there is no civilization – no government.”¹²

Yet, the legislature threatened the sacred and long-standing rights of property on the basis of claims of necessity. Gholson found such justifications hollow:

⁹ *House of Delegates*, RICHMOND ENQUIRER January 21, 1832, at 2 (reprinting speech of James Gholson).

¹⁰ *Id.* at 2, column 2.

¹¹ *Id.* at 2, column 3.

¹² RICHMOND ENQUIRER January 21, 1832, at 2, column 1.

Gentlemen, in the heat of their own intemperance, and by the aid of their own disturbed and distempered fancies, raise spirits and spectres at pleasure—gaze at them with horror, and then set about to show their skill in exorcism. These spirits and spectres they call “necessity,” “self-preservation,” “public safety.” The exorcism is the simple process of taking eighty or one-hundred millions of private property for public use, without compensation.¹³

The plans for gradual abolition were, of course, defeated. Many of those who had supported action left the legislature. Meanwhile, the defenders of slavery advanced their arguments outside the legislature. At William and Mary, young history professor Thomas Roderick Dew reviewed the debate and consolidated the proslavery case. His lengthy pamphlet argued that abolition was impractical – there was no possibility of replacing the slaves’ labor; there was not enough money to transport the freed slaves to Africa; the idea of emancipation within the state was unthinkable, even by most advocates of gradual abolition. His final assessment was there is not “a merrier being on the face of the planet than the slave of the U. States.”¹⁴

After Dew wrote, there were some counter-responses, though the Virginia colonization movement was declining in influence. Former president James Madison expressed skepticism of Dew’s work in a letter to him, but even Madison seems to have understood that abolition was unlikely. Jesse Harrison, a young lawyer and graduate of Hampden Sydney attempted to show that emancipation and colonization might still be feasible and emphasized the economic problems that slavery involved for white people.¹⁵ But the status quo was not going to give up easily. And though the day of reckoning was approaching with a speed few expected, the side of slavery and slave-owners began more powerful. This was especially true after 1835, when abolitionists became more strident and so did the proslavery side. A Presbyterian minister in North Carolina wrote to the president of Washington College in 1837 about the hardening of attitudes toward emancipation:

On the slavery question a few years ago we thought slavery an evil or at least a source of much evil and were anxious to be rid of it. But now we set about to defend it against the very charges which we all once brought against [it]. There seems to me to be much

¹³ RICHMOND ENQUIRER, January 24, 1832, at 2, second column.

¹⁴ See *Professor Dew on Slavery*, in *THE PRO-SLAVERY ARGUMENT: AS MAINTAINED BY THE MOST DISTINGUISHED WRITERS* 287, 459 (1852) (reprinting Thomas R. Dew, *Abolition of Negro Slavery*, 12 *AMERICAN QUARTERLY REVIEW* 189-265 (1832)).

¹⁵ See [Jesse Burton Harrison,] *The Slavery Question in Virginia*, 12 *AM. Q. REV.* 379, 382 (Dec. 1832) (reviewing *THE SPEECH OF THOMAS MARSHALL IN THE HOUSE OF DELEGATES OF VIRGINIA, ON THE ABOLITION OF SLAVERY, FRIDAY JANUARY 20, 1832* (Richmond, Thomas White, 1832)).

recklessness on both sides. There is one distressing circumstance about the matter, i.e., that the excitement on the subject has either paralyzed or entirely stopped the few efforts formerly made to benefit the coloured population.¹⁶

Even those who had been on the side of gradual abolition were changing their ideas. James McDowell delivered an address at Princeton in 1838 and he was wary of abolitionists at that point.¹⁷ His address was an eloquent appeal to Union and to the virtues of democracy. Despite the common Whig argument that democracy would lead to licentiousness, McDowell argued that political legitimacy grew out of “popular sovereignty.”¹⁸ He urged the Princeton audience to cast aside “every prejudiced conception of the popular capacity.”¹⁹ McDowell took a moderate Democrat stance and minimized the party conflicts. “The party excesses which now and then have distinguished our political contests, have thus far broken and exploded upon our system, only as the meteoric lights which glade and terrify for a moment, and then break and explode upon the earth, without jostling or impeding in the least its onward and its massive movement.”²⁰ McDowell spoke of the empire of democracy that was part of an ancient tradition of self-government. The United States was “a sort of providential decree, universal, enduring, baffling all efforts of man to check or limit its control.” And only in the United States had principles and that hope reached their “full development.” McDowell predicated that the United States’ democracy would spread around the world. “The spirit of our laws, let superstition and ignorance and power do what they like to destroy it, will abide upon the earth as the redeeming spirit of after times, and shall pass from hand to hand, like the inextinguishable fire of the Grecian temples, till all the nations be filled with its brightness.”²¹

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

¹⁶ J.S. McCutchan to Henry Ruffner, January 3, 1837, Trustee Papers, Folder 117, Washington and Lee Special Collections.

¹⁷ JAMES MCDOWELL, ADDRESS DELIVERED BEFORE THE ALUMNI ASSOCIATION OF THE COLLEGE OF NEW JERSEY, SEPTEMBER 26, 1838 34-36 (Princeton, John Bogart 1838).

¹⁸ *Id.* at 33.

¹⁹ *Id.* at 35.

²⁰ *Id.* at 37.

²¹ *Id.* at 43.

excluded slavery from territory acquired from Mexico during the Mexican-American war, McDowell returned to the theme of his Princeton address – about the way that the United States provided hope to the rest of the world and how disunion would be the end of that hope. He thought that the maintenance of southern rights regarding slavery was critical to the Union. “Ours ... is the high duty of replacing and maintaining the Union in which that country, as a whole, consists, not upon the hesitating consent – not upon the broken confidence—not upon the discounted but quelled spirit, and not upon the surrendered safety of any of its parts, but upon the honorable conciliation, the responding forth, and the cordial agreement of them all.”²² McDowell feared that the abolitionists had unleashed a subject – “with a wild and explosive energy” – that would call into question “the very body and being of the state.”²³ The abolitionists, in short, threatened the “happy and united country” with disunion and war.²⁴

This points up a distinction between Whigs who emphasized the commercial aspects of Union with Democrats like McDowell who emphasized the democratic aspects of union and empire. Both were pleading for Union over abolitionists and those who urged a separate southern nation.

This article turns to the graduation addresses and other addresses given at Washington College and by Washington College faculty, as well as those at the Virginia Military Institute to see the ideas about political economy, and anti- and pro-slavery thought that circulated in Lexington from the 1830s to the outbreak of the Civil War. Often large segments of the community assembled to participate in graduation ceremonies, where graduating students,

²² See *Speech of James McDowell, of Virginia, on the Wilmot Proviso, Delivered in the House of Representatives, Tuesday, September 3, 1850*, CONG. GLOBE, 31st Cong, 1st Sess., 1678, 1684. McDowell’s shift from the 1832 Virginia legislative debates, where he opposed slavery because of its harmful effects, through to the debate on the Wilmot Proviso in the early 1850s, suggests something about how attitudes in the south in general shifted over that time. Though McDowell was more anti-slavery than many at the start of his career – and less proslavery at the end of it – we can see how within one person the shift towards proslavery took place. McDowell’s moderate proslavery position of the Princeton address was an opposition to abolitionists and his thought that their radicalism was injuring the prospects of gradual termination. At the Wilmot Proviso debate in 1850, McDowell emphasized the ways that exclusion of slavery from the territories would subordinate the South and lead to disunion. Even there he acknowledged what seems to have been some questioning of slavery when he said that “whatever the opinions I ... entertain upon the institution of slavery in the abstract, I have never doubted for a moment that as the white and the black races now live together in the southern States, it is an indispensable institution for them both.” *Id.* at 1678.

²³ MCDOWELL, *supra* note 17, at 45.

²⁴ *Id.* at 48-49.

alumni, visiting dignitaries, and sometimes faculty spoke.²⁵ Graduation addresses were such a part of popular culture that Thomas B. Thorp's 1854 novel *The Master's House* featured a chapter about two southern students at a Northern college who gave opposing addresses. Reynolds Calhoun delivered an extreme pro-southern address entitled "The Defense of the South," while Graham Mildmay chose a less controversial topic, "The Importance of a Liberal Education to the American Student."²⁶ We see those contrasting ideas at Washington College as well.

This paper traces the shift from Enlightenment ideas of anti-slavery, which was based in notions of universal equality, to an economically-grounded argument in the superiority of free over enslaved labor, to a proslavery argument based on economic, religious, and social arguments. All the while, there were competing visions of the Union as a supporter of commercial development and also as a vehicle for democracy. In fact, considerations of utility and the economic and moral progress of the 1830s and 1840s were key parts of the thought in Lexington. These arguments about the economic and moral ideas of progress were independent of some argued that citizens should tolerate slavery because the Constitution protected slavery and because threats to slavery would jeopardize the Union.

In the last decade before war, some people in Lexington and many throughout the south saw the Union as a threat to slavery. A key part of the ideology of secession linked the belief in the importance of slavery to the Constitution. As Southerners calculated the value of the Union in the 1850s, they frequently told themselves that Northerners had violated the Constitution by failing to support slavery and, thus, urged secession as a solution. Such arguments about slavery, utility, the Constitution, and jurisprudence reveal the diversity of ideas in circulation in the South in the years leading into Civil War and how jurisprudence and economics combined with constitutional thought. This paper seeks two major contributions. First, in terms of methodology to sketch ways to recover legal ideas from public addresses and thus show the importance of oratory to legal thought. Second, to recover the constitutional and legal culture of the pre-Civil War South, to understand the ways that Whig and Democrat ideas interacted and also how constitutional arguments and jurisprudence evolved in the thirty years leading into Civil War.²⁷

II. Washington College – Republicanism, Progress, and Sentiment

A. Henry Ruffner's Inauguration

In Lexington Henry Ruffner had recently ascended the presidency, though he had been on

²⁵ See, e.g., LEXINGTON GAZETTE, July 7, 1855 (estimating the 500 to 600 participated in graduation celebration and listing student and alumni speakers).

²⁶ [Thomas Bangs Thorpe,] *THE MASTER'S HOUSE: A TALE OF SOUTHERN LIFE* 25 (New York, T.L. McElrath 1854).

²⁷ See Alfred L. Brophy, *The Republics of Liberty and Letters: Progress, Union, and Constitutionalism in Graduation Addresses at the Antebellum University of North Carolina*, 89 N.C. L. REV. 1879-1964 (2011) (using graduation addresses to gauge constitutional thought).

the faculty since 1819.²⁸ His inaugural address worked from the individual outward to society – he spoke of the problems of self-indulgence and the need for discipline in students.²⁹ He focused on the need for classical education and instruction in religion. Then he spoke of the role of the educated in bringing light and progress – and the benefits the education could bring to everyone, even though only a small number could afford a college education.³⁰

There was also a partisan theme hidden behind Ruffner’s talk of education, of improvement over nature through science, and of moral uplift. Ruffner hoped that education would help control democratic passions.

Our literary institutions, from the lowest to the highest, should be adapted to rear virtuous citizens, and wise and patriotic statesmen. If we would avoid the degeneracy which has heretofore ruined all popular governments, we must shed the influence of science and religion over whole communities; and beware of the popular vice and ignorance, which will banish the wise and modest statesman from our public councils, and subject this blessed country to the misrule of a tumultuous populace, instigated by brawling demagogues.³¹

Moreover, Ruffner invoked the specter of retrenchment from civilization if education was neglected:

[E]very thing connected with civilization would retrace its steps; the awful gloom of the dark ages would again settle over the face of society; & mankind would again sink down into the barbarism from which they had emerged. ... government would be converted into lawless violence; insecurity of rights would destroy industry; agriculture, manufactures and commerce, would no longer support a numerous & thriving population; misery in all the shapes of famine, robbery and war, would desolate the earth and reduce the fair

²⁸ Ruffner’s initial appointment was fraught with controversy. One trustee, Andrew Davidson, wrote an explanation of Ruffner’s hiring and the reasons for opposing it. One reason was that Ruffner was insufficiently disciplined. Another was that even Ruffner admitted that he was not competent to teach Greek. His hire would also have left his pulpit without a minister. *See* Andrew Davidson, "Reason for Opposing the Rev. Henry Ruffner as Professor of Languages at Washington College," 4 June 1819, Folder 4, Andrew B. Davidson Sermons, 1811-1847 Accession Number 13944, Library of Virginia.

²⁹ HENRY RUFFNER, INAUGURAL ADDRESS ... DELIVERED ON THE TWENTY-SECOND OF FEBRUARY, 1837 6, 7 (Lexington, C.C. Baldwin 1837). *See also Ruffner Inaugural Address*, 45 N. AM. REV. 250-51 (1837) (expressing unqualified approbation).

³⁰ RUFFNER, *supra* note 29, at 16, 21-22.

³¹ RUFFNER, *supra* note 29, at 16.

realms of civilization to a wilderness of scattered barbarians.³²

This was the danger that Ruffner thought the United States faced. “Such backward movements of society have occurred; and would occur again, if a civilized people could be so unwise as to neglect their institutions of learning.”³³ For it was learning that had redeemed Europe from the dark ages. Ruffner was both an advocate of widely dispersed education and a believer in the power of the better educated to influence the rest of the community. “Learning is the light of society; which being collected in the well-educated, is by them diffused more or less, through all classes of the community.”³⁴ Or, as he said less than a year later in the Franklin Society’s annual address, through religious and literary institutions “our country [may] yet be saved from the ruinous effects of the licentious principles and ferocious passions, that so often manifest themselves in outrage and murder through the land.”³⁵

The next year Ruffner expanded on these themes in his Cincinnati Address. This was named after one of the major nineteenth century donors to Washington College, the Cincinnati Society of Virginia, an organization of officers from Virginia who fought in the Revolutionary War, and whose goal was to “preserve the memory of the American Revolution” and “maintain the rights of man.”³⁶ Ruffner sought to vindicate the Society from the charges that they were instituting an aristocracy. Instead, he thought that the excessive democratic sentiments might lead to an aristocracy – “through the anarchy of a lawless and violent democracy, disunion and civil war among the states, and their inevitable consequence, a resort to military despotism, as the only remaining refuge for a harassed and ruined people.”³⁷ Ruffner identified a series of threats to the Union, from lawlessness and abolitionism in the North to Nullification in the South.³⁸ This was a call for a powerful government that would control such problems. “We

³² *Id.* at 21.

³³ *Id.*

³⁴ *Id.*

³⁵ HENRY RUFFNER, ANNUAL ADDRESS DELIVERED BEFORE THE FRANKLIN SOCIETY OF LEXINGTON ... 16 (Richmond, T.W. White 1838). In an essay a little more than a dozen years later, Ruffner was still pessimistic about the prospects for continued forward progress. *See* H.R., *Essay on The Slow Progress of Mankind*, 18 S. LIT. MESSENGER 403-11 (1852).

³⁶ *See Cincinnati Address*, 4 S. LIT. MESSENGER 792, 792 (Dec. 1838).

³⁷ *Id.* at 795.

³⁸ *Id.*:

The frequent out-breakings of lawless violence—the sympathy felt for all manner of land-pirates and adventurers who call themselves patriots—above all the fanatical spirit of abolition in the north, and the fiery threats of civil hostility and separation in the

should then feel how much better it was to submit to a government, able to control the elements of discord, than to suffer the terrors of mobocratical violence, the horrors of civil war, and the furies of fanatical rage let loose.”³⁹

Ruffner concluded his talk with a call for more monuments to the Revolution – and especially ones to George Washington. In fact, he praised the efforts then under-way to construct the Washington Monument in the District of Columbia. Ruffner saw monuments as piece of the constitutional culture – something that, like education – helped create patriotic sentiments. He urged Americans to:

Build now their monuments. Let our citizens look upon them, and remember the times that tried the very soul of patriots. Rear in the city of Washington the great revolutionary monument. Lay deep its foundation of rock; let art and genius try their utmost skill to raise it high above the dome of the capitol; to adorn it with the choicest sculpture, and to inscribe on its walls the story of the revolution, in letters and emblems to be read by a hundred generations. There, let the chiselled forms of the revolutionary heroes and sages meet the national eye. ... There, in fine, let the embodied spirit of the revolution stand displayed, in the presence of the national government; to admonish our representatives, and to frown into shame and silence, the paltry selfishness of the day, and the impious threats of disunion.⁴⁰

The Society of Cincinnati’s endowment funded a mathematics chair and also provided for an annual lecture on the Revolution’s heritage. Ruffner’s inaugural Cincinnati lecture provided an attack on democracy and urged control and Union. This is a contrast to McDowell’s speech at Princeton, which praised the virtues of democracy. There was a vibrant battle between parties over the virtues of democracy in these years and while both supported Union, there were different reasons for doing so. Ruffner spoke about the common Whig idea of commerce, while McDowell spoke about the typically Democratic idea of promotion of self-government. Ruffner singled out abolitionists as well as South Carolina Nullification as threats to the Union.⁴¹ And it urged more monuments to Washington – for this was an age that saw the importance of monuments as a creator of constitutional culture.

south—are fearful omens of a trial at hand; which if not met by the sound part of our citizens with wisdom and firmness, will yet extinguish all our patriotic hopes in sectional feuds and mutual destruction.

³⁹ *Id.* About the same time that Ruffner was making this call, Lexington resident James McDowell gave a similar speech at Princeton. *See, e.g.,* MCDOWELL, *supra* note 17, at 27-30.

⁴⁰ *Cincinnati Address, supra* note 36, at 796.

⁴¹ *See, e.g.,* HENRY LAURENS PINCKNEY, "THE SPIRIT OF THE AGE": AN ADDRESS DELIVERED BEFORE THE TWO LITERARY SOCIETIES OF THE UNIVERSITY OF NORTH CAROLINA (Raleigh, J. Gales & Son 1836) (criticizing South Carolina nullification movement).

Ruffner linked patriotic sentiments and national culture together to promote a government that controlled passions of the people. It was a world of order, of protection of property, and of the educated leading the rest.

B. Whig and Democrat Ideas on Law and Constitutionalism

The Whig Party emphasized the rule of law and rule of courts, rather than bare democratic majorities. The Whigs were a party of property and of order; the Democrats were a party of less concern with established property and more with power. Andrew Jackson was the symbol of the Democratic party – his desire to remove the Cherokee Indians, in defiance of the Supreme Court; Roger Taney, his appointee to the Supreme Court construed vested property rights narrowly in such cases as the *Charles River Bridge*, with the idea that such a construction would be beneficial to the people. This Whig vision of progress through private corporations came by the 1830s to be opposed to the Democratic vision of progress, of good springing up from the many.⁴² A classic statement of the conflict comes in the *Charles River Bridge Case*, in which Justice Story’s vision of broad respect for a charter to a private corporation conflicted with Chief Justice Roger Taney’s vision of narrow construction of that charter, to protect the public’s right against monopoly. This conflict played out frequently in cases at the federal and state level through the Civil War, with oscillation between broader construction of charters by Whigs and narrower constructions by Democrats. But the pages of appellate reports were not the only places where such conflicting visions of the Constitution appeared. The contest appeared in Congress and state houses, as well as newspapers, in a period when there was dramatic evolution of ideas about the proper role of the government, private corporations, and individual conceptions of morality in the evolution of constitutional ideas.⁴³

Whigs, by contrast, wanted to construe charters broadly to protect property and given an incentive to invest. *Dartmouth College* illustrated the desire to protect private charitable corporations and private power and private money to advance the causes of the state – like education. Many of the leading lawyers were Whigs, including Daniel Webster, Joseph Story, James Kent, and Abraham Lincoln. They were representatives of established order and concerned by the breakdown of authority. North Carolina Supreme Court Justice William Gaston, for instance, alluded to recent lawlessness in his address at Princeton in 1835, including

⁴² JOHANN N. NEEM, *CREATING A NATION OF JOINERS: DEMOCRACY AND CIVIL SOCIETY IN EARLY NATIONAL MASSACHUSETTS* 141 (2008). *See also* PETER CARMICHAEL, *THE LAST GENERATION: YOUNG VIRGINIANS IN PEACE, WAR, AND REUNION* (2005) (discussing “progressives all” in antebellum Virginia colleges); DAN R. FROST, *THINKING CONFEDERATES: ACADEMIA AND THE IDEA OF PROGRESS IN THE NEW SOUTH* chap. 1 (2000); Timothy J. Williams, *Intellectual Manhood: Becoming Men of the Republic at a Southern University, 1795-1861* (Ph.D. dissertation, University of North Carolina, 2010).

⁴³ *See* LAWRENCE F. KOHL, *THE POLITICS OF INDIVIDUALISM: PARTIES AND THE AMERICAN CHARACTER IN THE JACKSONIAN ERA* (1989).

the burning of the Charleston convent, riots in cities, and dueling.⁴⁴ Gaston was direct and forceful in his prescription for order through law. “Order is heaven’s first law, and there can be no order without subordination. A deliberate breach of law shows profligacy and folly, the ferocity of an untamed, or the ignorance of an uninformed nature; but a cheerful submission to wise rule is the highest evidence of that reasoning energy and decision of purpose which are among the noblest attributes of an intellectual being.”

One way of illustrating the differences between Whigs and Democrats is the address given by Lucian Minor – soon to be a law professor at William and Mary – at Hampden Sydney in 1835. He looked to recent Kentucky legislation that he allowed squatters to maintain land they were on as an example of the problems with excessive democracy, instead of a republican government, in which judges exercised substantial control over the population. This was an era of democracy – of the decreasing property requirements for voting, of increased election of judges – and of the breakdown of traditional bonds holding society together as many people moved, often to the frontier or to the city and as people feared the lack of law on the frontier.⁴⁵

The college addresses operated at a high level of generality and collected a constellation of ideas –about individuals, the community, slavery, art, nature, Christianity, and charitable organizations–that worked together to form constitutional culture. For constitutional thought was more than a written Constitution; it was a set of ideas, of patriotic impulses, of sentiments in favor of Union. The vision of constitutionalism in these addresses is of virtue, community, public rights as well as collective private action, and morality, and not much on legal cases. They reveal how well-educated people in the nineteenth century spoke about their relationship to the nation and each other; about the bonds that held us together and how we tried to achieve a common core of principles that helped as the United States expanded the nation.

For, as people at the time understood, the Constitution was more than a document interpreted by the Supreme Court that defined and limited federal and state power. The Constitution provided a framework for public debate about a series of abstract but important ideas of law, individualism, the state, and how to hold together a Christian republic. In a series of addresses in the 1820s and 1830s Daniel Webster helped establish the boundaries of constitutional culture, which drew on appeals to patriotic sentiment with backward glances towards the heroism of the Revolutionary generation, to the common culture of the United States, to Protestant religious doctrine that emphasized individual choice and responsibility, to the importance of individual freedom generally, and to the commercial benefits of the United

⁴⁴ WILLIAM GASTON, AN ADDRESS DELIVERED BEFORE THE AMERICAN WHIG AND PHILOSOPHIC SOCIETIES OF THE COLLEGE OF NEW JERSEY, SEPTEMBER, 29, 1835 27 (Princeton, John Bogart 1835).

⁴⁵ See, e.g., G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835 71-72, 76-77 (1988) (using James Fenimore Cooper’s *The Pioneers* as a way of understanding the rule of law on the frontier and concern over the breakdown of law).

States.⁴⁶

The Constitution helped structure the beliefs of individuals throughout the country on issues of the market, the role of the state in promotion of the economy and of morality, and of the likely future course of the country. Though there were often areas of agreement across political parties, there were frequently issues of disagreement on the proper lessons to draw from the Constitution about federal intervention in the economy, about the power and desirability of the market, and about the relationship of individuals to the community.

Artist Charles Fraser spoke in 1828 at the placement of a corner-stone of a building on the College of Charleston's campus. Fraser explained the effect education could have on supporting the Constitution and breathing life into the values of the Constitution.⁴⁷

The Constitution is an admirable effort of the human intellect. Foreigners passing through our country, and observing the result of the giant invisible agent in the uniform, peaceful, and harmonious operations of society, emphatically ask, where is your government? We might as emphatically reply, that it exists in the hearts and minds of its citizens -- that its energies are derived from public opinion -- that a rational respect for the laws and institutions of our country, impart to them that vital principle which pervades and regulates every part of the republican system. ... If we would preserve the ark of our covenant in its original sagacity, let "Wisdom, judgment, and Understanding," be the lamps that burn before it.⁴⁸

Fraser spoke of the public nature of the Constitution -- not as something that existed only as interpreted by the United States Supreme Court and state courts, but as something that existed in the minds of American citizens. This Constitution was an idea, something created in the hearts and minds of Americans -- and supported by our national action and by our culture.

Addresses at Washington College, neighboring VMI, and at schools around the South, often delivered by lawyers, judges, legally trained politicians, and professors who taught moral

⁴⁶ In his 1825 address on the laying of the cornerstone for the Bunker Hill monument, Webster appealed to reason, imagination, and sentiment for the purpose of "national independence." See DANIEL WEBSTER, AN ADDRESS DELIVERED AT THE LAYING OF THE CORNER STONE OF THE BUNKER HILL 8 (4th ed. Boston, Cummings, Hilliard 1825). See generally PAUL NAGEL, ONE NATION INDIVISIBLE: THE UNION IN AMERICAN THOUGHT, 1776-1861 (1964).

⁴⁷ CHARLES FRASER, AN ADDRESS ... AT THE LAYING OF THE CORNER STONE OF A NEW COLLEGE EDIFICE ... 12TH JANUARY, 1828 1 (Charleston, J.S. Burges 1828).

⁴⁸ *Id.* at 11-12. Fraser's statement illustrates the centrality of constitutional culture -- as opposed to constitutional text -- for nineteenth century Americans. As legal historians from G. Edward White to Johann Neem are increasingly recognizing, the Constitution was a set of ideas and values that were held by Americans. Those values shaped the response of voters and politicians and also the interpretation of the Constitution that was accepted by courts.

philosophy and politics, illuminate key ideas about constitutionalism and jurisprudence. They operate on a number of themes, at varying levels of generality. Often they deal with the conflicts between democracy and republicanism. Those conflicts appeared in a more specific context as a conflict between public rights and private charters. Orators spoke about the sources of law, sometimes as God-given (natural law) and at others as derived from experience (empiricism). In formulating law one should turn to considerations of utility as well as sentiment.⁴⁹ Those sometimes conflicting impulses also appeared in conflicts between the market and sentiment. Running alongside all of these ideas, there was also a shift from grand Enlightenment ideas to a specific, contextual focus characteristic of Romanticism. The romantic era also looked longingly back at history and forward to a distant future, with a focus on individualism and sentiment. By the end of this period, there was also an emerging focus on empiricism. Such ideas appear in varying degrees in addresses and help us understand what orators were appealing to and how law helped hold their world together. As the last several generations of historians of the Civil War have demonstrated, the war itself was about how to weigh the relationship of property, the market, individual humanity, and the state.

C. The Whig World at Washington College, 1837-1848

Turning, then, to Washington College, we see a series of traditionally Whig ideas about progress through education and religion, about restraints of the rule of law, and the protection of property, respect for Union, corporations and private action.

1. Morality versus Utility and the Danger of Party Spirit

Washington College Classics Professor George E. Dabney delivered an address on classical education in 1838. The classics curriculum was increasingly under attack by those who urged a more practical, utilitarian curriculum.⁵⁰ This was part of the larger the sweep of utilitarian thought in America – which many agreed was in an age of utility, where what was practical was valued. Dabney, though, appealed to classics because of their power in teaching morality and sentiment, in addition to reason.⁵¹

The steamboat, the safety-lamp, the magnetic needle, with innumerable other

⁴⁹ GEORGE DABNEY, LECTURE ON THE STUDY OF THE CLASSICS, WASHINGTON COLLEGE SEPTEMBER 10TH, 1838 20 (Lexington, 1838).

⁵⁰ See JENNIFER R. GREEN, MILITARY EDUCATION AND THE EMERGING MIDDLE CLASS IN THE OLD SOUTH (2008) (discussing shift to scientific and mathematics curriculum in antebellum era).

⁵¹ See DABNEY, *supra* note 49, at 20; see also GEORGE E. DABNEY, THE IMPORTANCE OF WRITING, ADDRESS TO UNIVERSITY OF VIRGINIA ALUMNI (1849); [George E. Dabney], *On the Study of Ancient Languages in the United States*, 17 S. LIT. MESSENGER 329-39 (1851).

contrivances of less importance, are gifts of science, in which every lover of humanity will rejoice. But they have a direct connection with only the physical condition of man. His moral condition is affected by them remotely and indirectly, although, in some respects, powerfully.⁵²

The natural sciences may “convince the understanding, but leave the heart and imagination, the great springs of human action, unmoved and uninfluenced.”⁵³ “Reason may govern in moments of cool reflection; but, like the reed, it is but too apt to bend before the slightest breeze of passion.”⁵⁴

John Blair Dabney’s 1841 address tapped into classic Whig legal themes with an attack on party spirit, “an evil which has grown, of late years, to a frightful and portentous magnitude in this country.”⁵⁵ Dabney presented an extreme version of the Whig skepticism of the people. In referring to politicians who spoke of “popular rights and interests,” he charged that “however monstrous the absurdities into which the multitude is betrayed by momentary passion or delusion, these plain gentlemen extol them as the offspring of profound wisdom and sagacity.”⁵⁶ Dabney thought that instead of following the dictates of the people, his audience had the “imperious duty” to “uphold the authority of the law, and the impartial administration of justice: for it is I under the shelter, and protection of those great bulwarks, that our most essential rights, and interests are secured.”⁵⁷ Other addresses supported the idea of Union, such as Reverend

⁵² DABNEY, *supra* note 49, at 18.

⁵³ *Id.* at 19.

⁵⁴ *Id.* at 20.

⁵⁵ JOHN BLAIR DABNEY, AN ADDRESS DELIVERED THE 23RD JUNE 1841 AT WASHINGTON COLLEGE ... 25 (Lexington, Gazette Office 1841). *See also* JOHN BLAIR DABNEY, AN ADDRESS BEFORE THE VIRGINIA ALPHA OF THE PHI BETA KAPPA AT THE ANNUAL COMMENCEMENT OF WILLIAM AND MARY COLLEGE, 1853 (Baltimore, J. Murphey 1854).

⁵⁶ DABNEY, WASHINGTON COLLEGE, *supra* note 55, at 23.

⁵⁷ *Id.* at 19. Several other speeches were published from this period, but they are of little help in reconstructing jurisprudence. *See* ROBERT E. CUTLER, AN ADDRESS DELIVERED ON THE 29TH OF JUNE, 1842, AT WASHINGTON COLLEGE ... (1842); THOMAS S. BOCOCK, AN ADDRESS ... ON THE 28TH JUNE, 1843 ... (1843); ARCHIBALD ALEXANDER, ADDRESS .. BEFORE THE ALUMNI ASSOCIATION OF WASHINGTON COLLEGE, VIRGINIA ... JUNE 29TH, 1843 (Lexington, Va., "Gazette" Office 1843). We know about other speeches only because they were notices of the speaker (and sometimes the title) in local newspapers. *See Washington College*, LEXINGTON GAZETTE, July 1, 1841 (listing names and titles of student addresses); LEXINGTON GAZETTE, July 8, 1847, at 2 (listing David C. Anderson, Washington College class of 1843 and sometime professor at Franklin and Marshall, as the alumni speaker and Reverend Stuart Robinson of

William S. Plumer of Richmond. Plumer's 1841 address "Our Country" appealed on sentimental and economic grounds for Union. "Destroy the brotherhood of this nation," Plumer warned those who sowed talk of sectional differences, "and it is no longer one."⁵⁸

Maybe the high point of Whig ideas and progress appeared in graduating student J.W. Holcombe's Cincinnati oration in 1847.⁵⁹ Holcombe's address drew together common understanding of the long history of "the rise and progress of modern liberty."⁶⁰ Holcombe presented a Whig history that traced the origins of the American Revolution deep into ancient Greece and Rome and then found its closer origins in the Protestant Reformation, the English Civil War, and later the American Revolution. He found the success of the American Revolution in widely distributed wealth, a sense of individualism born of the experience in the carving out an existence in the wilderness of North America, and from the Protestant Reformation.⁶¹ Holcombe spoke the language of the Enlightenment. "In America ... everything was favorable to the complete subversion of royal domination and the establishment of a new government based on the broad principle of the universal equality in social rank and political privileges of all classes and conditions of men."⁶² The Revolutionary generation had a "fierce and implacable hatred of those, who ... had trampled with ruthless violence on the inalienable rights of humanity."⁶³

Holcombe tapped into a common idea that the Protestant Reformation was a central event leading to the American Revolution. This was a common theme for orators at Virginia schools

Kentucky as the speaker for the literary societies); LEXINGTON GAZETTE, June 28, 1848, at 2 (stating that Rev. Wilmer Fincastle spoke on "Independence of Character" and J. M. Kirkpatrick of Prince Edward spoke on "Our Country and its Prospects"); LEXINGTON GAZETTE, February 3, 1842 (stating that Adam Empie spoke about individual duty to the "Lexington Military Institute").

⁵⁸ [William S. Plumer], "Our Country," Address to Alumni, June 1841, Trustee Miscellaneous Papers, Box 1, folder 5, Washington and Lee Special Collections. Like many others, Plumer dealt with ways to make slavery more functional and perhaps more humane. See WILLIAM S. PLUMER, THOUGHTS ON THE RELIGIOUS INSTRUCTION OF THE NEGROES OF THIS COUNTRY (Savannah, GA, 1848).

⁵⁹ J.W. HOLCOMBE, CINCINNATI ORATION: WASHINGTON COLLEGE, LEXINGTON, VA (Richmond, J.B. Martin 1848).

⁶⁰ *Id.* at 6.

⁶¹ *Id.* at 6-7.

⁶² *Id.* at 7.

⁶³ *Id.* Holcombe also linked to romantic-era literature with an invocation of Samuel Taylor Coleridge's wonder at beholding "the shadow of approaching humanity, the sun rising from behind, in the kindling morn of creation!" *Id.* at 11 (quoting Coleridge's *Table Talk* (July 9, 1827)).

in this period,⁶⁴ particularly at the liberal Hampden Sydney, which had educated a number of people who were skeptical of slavery.⁶⁵ This theme resonated throughout the period, including in Charleston Minister Christopher Gadsden's address at VMI in 1859.⁶⁶

Running parallel to the Whig ideas about how Republican virtue and protestant religion created and sustained America was a fear: that there would be a decline if the republic did not maintain its virtue. If party spirit became too strong, if the passions of the people were not restrained, if the nation lost its adherence to protestant values, the nation would decline. It had happened before, this cycle and the decline.⁶⁷ The arguments about duty and virtue came together in the Whig mind, for the Republic was fragile and could be undermined by individuals or by political faction. The Whig world was one of law, of respect for property, of duty. When those were undermined, the republic was threatened. This appeared in Ruffner's inaugural address, as he hypothesized about the possibility of retrogression.

This appears in the landscape art of the era as well, for art often parallels political theory. Thomas Cole's 1837 series of five paintings, *Course of Empire*, illustrate the Whig theme of cycles of history. Cole depicts the five stages of civilization, moving from the savage state, to the pastoral, then the consummation of empire, followed by decline, and desolation. The five images, which span aeons, depict a cycle and ultimately decline. This was at least what many Whigs, including Henry Ruffner, feared might happen with the United States. Those who viewed Cole understood some of the depressing story he was trying to convey. United States Supreme Court Justice Levi Woodbury referenced Cole's *Course of Empire* in an address on

⁶⁴ See, e.g., T. V. MOORE, THE REFORMATION THE SOURCE OF AMERICAN LIBERTY. AN ADDRESS, DELIVERED BEFORE THE UNION SOCIETY OF HAMPDEN-SYDNEY COLLEGE, JUNE 9TH, 1852 (Richmond, C.H. Wynne, 1852). Moore, even more than Holcombe, saw the Reformation as introducing a conservative revolution. See T. V. MOORE, THE CONSERVATIVE ELEMENTS OF AMERICAN CIVILIZATION: AN ADDRESS BEFORE THE PHILO AND FRANKLIN SOCIETIES OF JEFFERSON COLLEGE 9-11 (Pittsburgh, 1853) (expressing concern over the dominant utilitarian spirit of the day and suggesting that Protestant religion offers a counter to the market). Moore, like many at Washington College, was walking a line between materialism on one side and what they saw as religious zealotry on the other. He thought there were "no conservators of law and right in a popular government as the inwrought principles of justice, honesty and integrity in the popular heart." *Id.* at 9.

⁶⁵ S. J. P. ANDERSON, THE INFLUENCE OF THE BIBLE ON LIBERTY: AN ADDRESS, DELIVERED BEFORE THE UNION SOCIETY OF HAMPDEN SYDNEY COLLEGE, SEPTEMBER 18, 1845 (Richmond, H.K. Ellyson 1845).

⁶⁶ CHRISTOPHER PHILIP GADSDEN, THE BIBLE, THE ONLY SAFE DIRECTOR OF THE ACTIVITY OF THE DAY: AN ADDRESS DELIVERED BEFORE THE CADETS' BIBLE SOCIETY OF THE VIRGINIA MILITARY INSTITUTE, JUNE 3RD, 1859 (1859).

⁶⁷ See, e.g., RUFFNER, INAUGURAL ADDRESS, *supra* note 29, at 21.

Progress at Dartmouth College in 1851.⁶⁸ Woodbury, a Democrat, linked Cole to his mission of democracy and progress in both individuals and society: “In no mode has the course usual with particular nations, been more finely shadowed forth than in Cole’s imaginative landscapes; starting first in the rudeness of nature; then maturing to high refinement and grandeur, till, amid the ravages of luxury, time and war, sinking into utter desolation.”⁶⁹

Yet, for Democrats like Woodbury – and increasingly others as well – there was a sense of ever more economic and moral progress. That there would be no retrenchment, no decline, but only more progress.

2. Progress

Many addresses at colleges at this time – though less at Washington College than elsewhere – emphasized the extraordinary technological accomplishments and the moral and economic progress that went along with them.⁷⁰ The 1843 Washington College address by Reverend Elias L. Magoon operated in similar terms by focusing on Eloquence and Liberty. He spoke about ways that oratory – eloquence – was dependent upon liberty and also how it contributed to the spirit of liberty. This was a partly cultural explanation of the progress. Magoon later expanded on these themes in an 1854 book *Westward Course of Empire*, which focused on the ways that Protestant religious beliefs had led to a culture of individual rights and property rights and thus led the way for the American Revolution. Moreover, in 1851 George Junkin, Jr., the son of the college president, delivered an address on “The Progress of the Age,” at Washington College. Junkin identified an upward trajectory of human progress.⁷¹

Thus has the progressive spirit of the age tunneled mountains, filled up valleys, converted deserts into gardens, spanned the ocean as with a bridge, and enabled man to walk its depths as on dry land, supplied the most widely separated climes with their interchanged productions, increased mechanic power tenfold, raised Agriculture to the dignity of a Science, reduced war to a matter of calculation, and marvelously lifted from man the

⁶⁸ Levi Woodbury, *On Progress: An Oration Before the Phi Beta Kappa Society of Dartmouth College* 8 (Hanover, Dartmouth Press 1844), reprinted in 3 WRITINGS OF LEVI WOODBURY 75 (Boston, Little, Brown & Co. 1852).

⁶⁹ *Id.* at 77.

⁷⁰ WILLIAM C. RICHARDS, THE CLAIMS OF SCIENCE: AN ADDRESS DELIVERED BEFORE THE EUPHEMIAN AND PHILOMATHIAN SOCIETIES OF ERSKINE COLLEGE, S.C. ... AUGUST 13TH, 1851 (Charleston, Walker and James 1851); JOHN Y. MASON, ADDRESS BEFORE THE ALUMNI ASSOCIATION OF THE UNIVERSITY OF NORTH CAROLINA ... JUNE 2, 1847 (Washington, J. & G.S. Gideon 1847).

⁷¹ GEORGE JUNKIN, JR., THE PROGRESS OF THE AGE: AN ADDRESS DELIVERED BEFORE THE LITERARY SOCIETIES OF WASHINGTON COLLEGE ... JUNE 17, 1851 (Philadelphia, n.p. 1851).

weight of that curse which was pronounced upon him when driven from Eden's bliss.⁷²

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

Such themes of progress through order also appear in the landscape sketches of Junkin's sister, Margaret Junkin Preston. For instance, in *Mount Ida* Margart Preston depicts a bridge in the background, a boat in the foreground, and houses at the foot of the mountain. (Illustration 1) Similarly, *View on the Bushkill at Easton* depicts a couple by the side of a damn on the Delaware River, which links an image of domestic, middle class life with technology that was controlling nature. (Illustration 2) That most likely was drawn while Margaret's father was president of Lafayette College. Likewise, Preston's sketch of *Reverend Richard Finney's House in Maryland* depicts a well-kept two-story house with a two men in the front of landscaped yard. (Illustration 3)⁷³ Landscape art conveyed the sense of progress – and how that progress took place – through subduing nature, which was accomplished in part through the technology of law. Preston's sketch of *The Ohio River Above Stubenville* (illustration 4), for instance, depicts a steamboat traveling the river and a few other smaller boats along the shore, with dense forest on either side. The image is of human technology in the wilderness, and presumably bringing civilization with it. Though the process of civilization had a long way to go before it reached the state of Preston's other images. The landscape art illustrated the political philosophy of the era; some showed the Whig fear of decline. Other art showed the celebration of how humans improved upon nature. That art both celebrated the economic and moral progress of the era as well as demonstrating that through technology, like law, humans improved upon the state of nature.

George Junkin focused on the progress that was made possible because the 1850s were

⁷² *Id.* at 9. A few years later at VMI, Willoughby Newton explained the technological developments of Virginia:

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

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

⁷³ Margaret Junkin Preston, Sketch Book, collection 101b, Washington and Lee Special Collections.

the age of the “empire of the mind.”⁷⁴ The wide diffusion of knowledge led to a general skepticism, which advanced the cause of liberty:

Wherever a gleam of light has entered and reveals to him his chains, he has instantly endeavoured to break them. Hence the perpetual struggle for freedom. There is a law of political progress in the earth, the workings of which we notice with delight as we ponder the history of by-gone centuries. Most thrilling have been the scenes that the application fo this law had produced; and amid all the records of the past, no pages are more absorbing in their interest than those which tell of man’s struggles for liberty.⁷⁵

The pace of political change was increasing.

In this age, kingdoms that had their origins in the distant past – dynasties, white with the age of centuries–thrones, whose foundations seemed embedded in the very structure of the societies where they were reared–governments, that had interwoven their influence into the entire web of social existence–sovereignties, allied with system of aristocracies and with forms of religious superstition, so as by reciprocal influences to strengthen each other – all these have been shaken by the swelling tide of political progress–and all shall yet be swept to destruction.⁷⁶

All of this fit together for Junkin with a world of Christianity – for, as he said, “the progress of civilization and liberty, and the advancement of Christianity are nearly identical.”⁷⁷ This is the world of the bible as a part of liberty and order (including respect for property) as a support for liberty. That is the Whig vision. But there were dangers afoot. There was danger in all of this spirit of inquiry and in the rapid changes of the era, and in the questioning of the past. “The progress of the times, especially in our own land, seems inclined to abolish every thing that even wears the semblance of age. It would lay its sacrilegious hand upon religion itself, and forgetting that truth cannot be changed, that its applications only can be wrong, it assails the oldest and best established principles.”⁷⁸

There was insufficient attention to morality amidst all the concern with utility and the practical.

Enlighten the mind as you please – exalt reason – refine the man physically and

⁷⁴ JUNKIN, *supra* note 71, at 11.

⁷⁵ *Id.* at 14.

⁷⁶ *Id.* at 15.

⁷⁷ *Id.* at 21.

⁷⁸ *Id.* at 22.

intellectually—arm him with weapons that glitter with polish, whose keenness is perfection; but withhold from him *moral* culture, and you unbind a phrenzied giant—you produce a dangerous fiend—you start a mighty steam engine with no hand to guide its course or to arrest its desolating rush!⁷⁹

Such ideas led to an excess of reform. “Hence,” Junkin said, “the fanaticism of the day. Man would reject all the teachings of the past, all its principles, its laws, its religion, the social bonds, and even the sacred ties which hold society together, inflated with the idea that this is an age of miraculous progression, and confounding divine principle with the old errors which past generations have bound to it.”⁸⁰

Property law secured rights and made commerce and moral progress possible. New York politician Daniel Barnard developed his political philosophy perhaps most fully in an address, “Man and the State,” to the Yale Phi Beta Kappa Society in 1845. Barnard spoke of his anxiety – of his concern that the well-educated would use their talents for the “genial, gentle, suasive influence over the popular mind.” His mission was a search for eternal truth amidst the “age of reform.” His address was on the “relation of the state and of governments to the subject of the Moral condition and Progress of man.”⁸¹ The state was based on an unwritten social constitution that helped define the “political estate” – the group of political actors who in turn formed a written constitution. Barnard wanted civil society to overcome what he called “political materialism,” in which physical and material impulses led to a tyranny of the majority’s wishes.

This was a central – perhaps the central – issue for Whigs. How to mold and shape humans for progress? And while often addresses spoke of an individual’s duty, such progress occurred through society, through legal forms, through actions of the state, the family, and private organizations. For “men find themselves every where, not merely existing by the side of other men, but associated every where with other men, in various relations.” It was the social and the political state that could organize and develop human morality, for “Man does not exist alone.”⁸² This meant that political organization and order were central to human progress. It was possible to improve upon nature and improvement occurred often through the vehicle of law.

Barnard’s political theory justified, indeed depended upon, political morality. There was a “higher constitution” than mere numbers. It was a sense of patriotism, Christian duty, and morality.⁸³ Law was central to Barnard’s vision, which were intimately connected to “personal

⁷⁹ *Id.* at 22.

⁸⁰ *Id.* at 23.

⁸¹ DANIEL D. BARNARD, *MAN AND THE STATE: SOCIAL AND POLITICAL: AN ADDRESS DELIVERED BEFORE THE CONNECTICUT ALPHA OF THE PHI BETA KAPPA AT YALE COLLEGE, NEW HAVEN, AUGUST 19, 1846* 6, 8 (New Haven, B.L. Hamlen 1846).

⁸² *Id.* at 11.

⁸³ *Id.* at 36-38.

Morality.” Together the laws and such personal morality formed “a Code of National Morality.”⁸⁴ Given the centrality of law to the country’s definition and maintenance of morality, Barnard identified the terms where there might be progress—it had to “be done in the state and under the state.”⁸⁵ Barnard looked forward to the day when the state, aided by Christianity, would head off for “moral renovation, reform, and progress.”⁸⁶

The theme of progress – and particularly of economic considerations – appears in many places in the common law decisions of judges – torts, corporations, canals, railroads.⁸⁷ All of these things went together, as Georgia Supreme Court Chief Justice Joseph Lumpkin suggested in his South Carolina Agricultural Address in 1850. Lumpkin summarized the ways to bring progress to the region. His advice stretched from popular education to development of manufacturing. He suggested, for instance, that South Carolina “look to her own laws, in order that labor, capital and population may be invited within her borders.” He praised corporations in particular for their work at internal improvement. “[A]ssociated wealth is, in no small degree, the cause of modern civilization.”⁸⁸

The year after his South Carolina agriculture society address, Lumpkin decided *Shorter v. Smith*, a case involving a corporation charter. *Shorter* illustrated Lumpkin’s attitudes towards respectful but careful treatment of corporations by narrowly construing the rights given by a charter.⁸⁹ In *Shorter* a ferry operator requested an injunction to stop the building of a nearby bridge. The ferry operator had a charter from the state. The question then became, how to

⁸⁴ *Id.* at 39-40.

⁸⁵ *Id.* at 43.

⁸⁶ *Id.* at 45.

⁸⁷ Among the many examples where judges wrote of the expediency (or in expediency) of a legal rule – which illustrates how they incorporate their understanding of economics into decisions – one might turn to Justice Eugenius Nisbet’s opinion in *Macon & Western R.R. v. Davis*, 13 Ga. 68 (1853), which rejected strict liability for a railroad that injured cattle. *See also* *Heathcock v. Pennington*, 33 N.C. (11 Ired.) 640 (1850) (limiting liability of hirer of slave for the slave’s death when he fell down a mine shaft on self-consciously economic grounds); *Napier v. Bulwinkle*, 41 S.C.L. (5 Rich.) 311 (1852) (limiting doctrine of ancient lights for effect it had on building); *Jerome v. Ross*, 7 Johns Ch. 315 (N.Y. Ch. 1823) (allowing canal builders to continue to trespass and take gravel from neighbors’ property upon payment of compensation); *Lexington & Ohio R.R. v. Applegate*, 38 Ky. (8 Dana) 289 (1839) (limiting neighbors injured by a railroad to money damages rather than an injunction).

⁸⁸ JOSEPH HENRY LUMPKIN, AN ADDRESS DELIVERED BEFORE THE SOUTH-CAROLINA INSTITUTE, AT ITS SECOND ANNUAL FAIR, ON THE 19TH NOVEMBER, 1850 33-34 (Charleston, Walker & James 1851).

⁸⁹ 9 Ga. 517 (1851), 1851 WL 1466 (1851).

interpret that charter. Did it grant an exclusive license? And if so, did that license prohibit competing bridges or only other ferries? Lumpkin distinguished English precedent, which suggested that ferry franchises were construed as excluding competition, by reference to American values of the free market. “In England, and other countries, which are governed by force, the performance of public duties by inn-keepers, owners of bridges and ferries, &c., can be coerced by the enforcement of legal penalties. Not so here; we have, and in the very nature of things can have, no other protection, but that which results from free and unrestricted competition.”⁹⁰ Without an explicit grant of a monopoly, Lumpkin found it inappropriate to read one into the grant.

The conflict over narrow construction of grants appeared in 1857 in the Rockbridge County Court when VMI and the town of Lexington disputed the meaning of a contract they had regarding the supply of water from a nearby spring. VMI claimed that it had a right to on-going water under a contract with the town stretching back to 1840. Judge Lucas P. Thompson, a Whig, construed the contract narrowly to protect the town’s right to revoke the contract. This was a modest attempt to resolve a dispute without resorting to the Democratic principle that certain rights held by the government were irrevocable. Instead, it sought to construe a contract narrowly and thus preserve the town’s rights.⁹¹

One particularly poignant example of the way that legal technology assisted in economic progress comes from trusts, which were growing dramatically in popularity and sophistication in the antebellum era.⁹² In fact John Robinson, the key nineteenth century benefactor of Washington College, used a trust in his 1825 will to manage his property and provide for a very specific purpose, the support of Washington College. He was explicit about the public good he hoped to accomplish with the devise:

⁹⁰ *Id.* at 527, 1851 WL 1466, at *8.

⁹¹ REPORT OF THE BOARD OF VISITORS AND SUPERINTENDENT OF THE VIRGINIA MILITARY INSTITUTE 67-69 (n.p. n.p., July 1857). This case responded to Lexington’s undated ordinance limiting the amount of water that VMI and Washington College could take from the public spring. *See* Trustees Miscellaneous Papers, Box 1, folder 5, Washington and Lee Special Collections.

⁹² *See, e.g.,* Stephen D. Davis & Alfred L. Brophy, “*The Most Solemn Act of My Life*”: *Family, Property, Will, and Trust in the Antebellum South*, 62 ALA. L. REV. 757 (2011) (discussing growth of trusts in antebellum Alabama in 1830s and 1840s and identifying economic and family reasons for the increasing employment of trusts). Preliminary results from research that I am conducting with Douglas Thei reveal increasing use in Rockbridge County from 1820 to 1860, though not as dramatic as Greene County, Alabama. Davis and I hypothesized that areas with less affluence than Alabama’s cotton-producing counties might have less need and opportunity to employ trusts. Jason Kirklin’s findings for Indiana in this period also fit with this hypothesis. *See* Jason C. Kirklin, *Measuring the Testator: An Empirical Study of Probate in Jacksonian America*, 72 OHIO S. L. J. 479 (2011).

By adding to the means of Public instruction, I hope that some facilities have been given to the march of improvement and some contribution made to the peace and welfare of society in having its members inspired, at an early age with the salutary and conservative lessons of knowledge and virtue I rejoice in the trust that I have done something to protect the sons of others from ignorance and vice and something to confirm the political institutions of the country by enlightening the public will upon which they rest.⁹³

III. Anti-Slavery and Proslavery Thought at Washington College

A. The Social History of Slavery at Washington College

Overlaid with these ideas about moral progress and economic progress was a vigorous debate about slavery. Ruffner had— as with many other people in the Valley — mixed sentiments about slavery. He was opposed to it generally, even as he and his family’s salt business benefitted from enslaved labor.⁹⁴ He also opposed abolitionists.⁹⁵ In fact, the College benefitted in important ways from enslaved labor. John Robinson’s 1825 will left his entire estate to the College — including his 73 slaves — but with instructions that they not be sold for fifty years.⁹⁶

⁹³ John Robinson Will, April 26, 1825 (probated 1826) paragraph 10, Rockbridge County Will Book 6, at 78-82, Virginia State Library. The inventory of Robinson’s slaves appears in *id.* at 404. The will also appears in Trustee Papers, Folder 79, Washington and Lee Special Collections and two inventories appear in the Reid Papers, “A List of Negroes Belonging to the Estate of John Robinson at death,” [circa 1826] 027A-3, folder 52, and “A List of Slaves Belonging to Washington College, July 30, 1834,” Reid Papers, 027A-3, folder 56. An earlier version of the will appears in Trustee Papers, folder 77.

⁹⁴ See JOHN E. STEALEY, *THE ANTEBELLUM KANAWHA SALT BUSINESS AND WESTERN MARKETS* (1993).

⁹⁵ McDowell, *supra* note 7.

⁹⁶ Robinson Will, *supra* note 93:

^{9th} It is also my will and desire that all the negroes of which I may die possessed together with their increase shall be retained for the purposes of labor upon the above lands for the space of fifty years after my decease, always saving the rights of hiring out, within that time, such and as many of them as the aforesaid shall consider so far necessary on the [terms?] and of selling such others as may render themselves by their crimes or by mutinous habits, unsafe or injurious in their connections with their fellows. This right is to be exercised upon a sound discretion and in such manner as to give the negroes who are allotted for hire the alternative of being sold to masters of their own choice. In any disposition which may be made of these slaves and also in their treatment it is my earnest desire that the strictest regard be paid to their comfort and happiness as well as the interest of the Estate. At the expiration of these fifty years, the Trustees aforesaid are

Such restraints on sale of humans devised to beneficiaries were somewhat common in Rockbridge County⁹⁷ and elsewhere around the south,⁹⁸ though those restraints were typically on the sale of one or a few people, rather than the entire population of a major plantation. The college advertised the Robinson slaves as an important asset when it offered the presidency to Phillip Lindsay in 1829. (Illustration 5)⁹⁹

Robinson also imposed a permanent restraint on alienation of his estate at Harts Bottom. He imposed the restraint on alienation because he believed that the plantation would produce a superior return than any other investment they might make:

This prohibition against selling is founded upon an opinion, experimentally true with me, that this large and fertile property will yield a greater revenue than would be derived from any investment which could be made of its price if sold.¹⁰⁰

The college hired an overseer to manage Harts Bottom,¹⁰¹ and it also rented out a number of its

released from all restraint as to the disposal of the negroes and may sell or retain them as the results of their labor shall demonstrate to be best.

⁹⁷ See NEELY YOUNG, *RIPE FOR EMANCIPATION: ROCKBRIDGE AND SOUTHERN ANTISLAVERY FROM REVOLUTION TO CIVIL WAR 176* (2011) (listing several wills from the 1850s where testators imposed restraint on sale of human beings).

⁹⁸ See, e.g., Mary Cashaden's Will, Greene County, Alabama Wills Book B (1835), at 295, 297 (providing that one enslaved person, Besty, "shall not be sold at any time but that she shall be kept in the family of my daughter....").

⁹⁹ Samuel McD. Reid to Phillip Lindsey, June 18, 1829, Reid Family Papers, 027A-1, Washington and Lee Special Collections.

¹⁰⁰ Robinson Will, *supra* note 93.

⁸ It is my will and desire that Harts Bottom together with all my other Lands in its neighborhood shall not be subject to alienation or transfer, but shall be held by the trustees of Washington College for its use and benefit as an inalienable estate. ... The cultivation and management of the estate is to be under the discretion of the trustees.... Another apparently earlier, though undated (and perhaps incomplete) version appears in the James McDowell Papers, Southern Historical Collection, UNC, in folder 111 (on Washington College). The earlier version has somewhat different and shorter instructions regarding the treatment of the enslaved humans. Robinson's 1820 will instructed the college to keep the slaves together but did not impose a restraint on alienation. John Robinson Will, folder 71, Washington and Lee Special Collections.

¹⁰¹ Memorandum of Agreement, Trustees of Washington College and John Wallace, August 22, 1826, Reid Papers, 027A-3, Folder 52, Washington and Lee Special Collections.

enslaved humans. A broadside distributed in 1826 advertised that the college would rent about twenty people at the end of the year.¹⁰² They had pre-printed forms for the rental of their human property. (Illustration 6)¹⁰³

An 1829 opinion from Harrisonburg lawyer Chapman Johnson told the trustees that they might sell Harts Bottom, despite the clear instructions that the property was not to be sold. Johnson's opinion stated starkly that the common law repudiated restraints on alienation.

Nothing is more clearly laid down, in the common law ... than that such a restraint upon the alienation of property conveyed or devised in fee is merely void, and the ownership of the property [vests] ... in the grantee or devisee. These restraints are regarded as inconsistent with a fee simple estate, and void for that reason. They are also at war with that sound policy of the law, which abhors perpetuities, and which discountenances all attempts of the dead, to manage the property of the living.¹⁰⁴

Though Johnson's opinion related exclusively to Robinson's Harts Bottom estate, its reasoning applied as well to the restraint on alienation on humans. In January 1836 the college sold many of the slaves they received from Robinson. The large majority were sold to Hugh Garland of Lynchburg, for use on his plantation in Hinds County, Mississippi. A few other

¹⁰² "Negroes for Hire," December 19, 1826, Reid Papers, Washington and Lee Special Collections, 027-11, folder 153. Emma Burris suggests that the college rented substantially fewer people (such as nine in 1835), based it appears on a list of rentals for which payments were in arrears. *See* Emma Lynn Burris, *The Tale of 'Jockey' John Robinson, His Slaves, and Washington College 33* (Honors Thesis, Washington and Lee History Department, 2007). The "List of Negro Hires Due to Washington College," Trustee Miscellaneous Papers, Box 1, Folder 4, however, seems to be a list of unsettled accounts, not a complete list of hires. It appears that the college rented out substantially more people than Burris estimated. In the year of his death, Robinson's estate had rented nearly thirty of his slaves. *See* "A List of Negroes Belonging to the Estate of John Robinson," undated, circa 1826, Reid Papers, 027A-3, Washington and Lee Special Collections, folder 52 (listing approximately 28 "negroes" as "hired").

The accounts seems to have been in something of a state of disarray. In 1858 Samuel McDowell Reid wrote to Henry Ruffner to ask for payment of \$120 plus interest for the rental of Henry, one of the Robinson slaves in 1837. Samuel McD. Reid to Henry Ruffner, February 19, 1858, Reid Papers, 027-5, Washington and Lee Special Collections. Ruffner responded with a stern letter denying responsibility and concluding "I consider your claim invalid both morally and legally." Henry Ruffner to Samuel McD. Reid, March 5, 1858, Reid Papers, 027-5, Washington and Lee Special Collections.

¹⁰³ Rental Form, January 18th, 1835, Trustee Papers, Folder 93, Washington and Lee Library Special Collections.

¹⁰⁴ Chapman Johnson, September 12, 1829, Trustee Papers, Folder 85, Washington and Lee Special Collections.

people were sold locally.¹⁰⁵ Nevertheless, the college continued to own some people who were acquired from Robinson's estate, for in the early 1840s, the college paid \$300 a year to provide care for six elderly slaves whom they owned, at least four of whom came from the Robinson bequest.¹⁰⁶

According to Emma Burris, the leading historian of slavery at Washington College, there was concern in the wake of Nat Turner's rebellion in August 1831 that slaves in Lexington – and maybe some of Robinson's former slaves – were plotting rebellion.¹⁰⁷ There was a rumor around October 1831, or “at least much excitement,” as the only known correspondent described it. The rumor was that

a number were to assemble at Harts Bottom[;] that they were to be reinforced by others who were [to] come from Amherst County. A great many armed white men went down and brought to Lexington about 7 or 8 blacks; but they had no evidence on which they could rely.¹⁰⁸

The next month another Lexington resident reported that “The Southampton insurrection excited the people all over the state where there are slaves.” And in Lexington “a very rigid patrol has

¹⁰⁵ See Statement of Sale of Negroes, Trustee Papers, Folder 112 (reporting that Garland paid \$20,671.94) and Trustee Papers (1844), Folder 115, Washington and Lee Special Collections (listing accounts of sales of slaves and property from Robinson's estate). There was also an offer from William Abraham of Morganton to purchase the slaves for \$23,500. See William Abraham, September 25, 1835 and August 22, 1835, Reid Family Papers, 027-3, Folder 32, Washington and Lee Special Collections.

¹⁰⁶ Jacob Ruff to William Read, January 4, 1842, Trustee Papers, Misc. Papers, Box 1, Folder 6, Washington and Lee Library Special Collections (contract for \$300 for Washington College to Read to maintain six “elderly and infirm” slaves, “Susan, Sally, Creesy, Landon, Nero, and Dick”). According to the 1826 list of the slaves owned by Robinson's estate, Creesy was 68 years old in 1826 and worth nothing; Landon was forty-one, nearly blind, and worth twenty dollars; Nero was fifty, with a club foot, and worth nothing; and Dick was 55, lame, and worth \$125. Susan and Sally do not appear in the list of Robinson's slaves. The college's ownership of people had declined to sixty-seven people by July 1834. See “A List of Slaves Belonging To Washington College, July 30, 1834.” Reid Family Papers, Washington and Lee Special Collections, 027A-3, folder 56. At that point, nine of their enslaved human people were listed as a “charge,” rather than as an asset. See also Trustee Papers, Folder 109.

¹⁰⁷ Burris, *supra* note 102, at 26 (citing Aylett Alexander to William Alexander, October 19, 1831 and Andrew Anderson to William Alexander, November 25, 1831, Anderson Family Papers, Box 6, Folder 53, Washington and Lee Special Collections).

¹⁰⁸ Aylett Alexander to William Alexander, October 19, 1831, Anderson Family Papers, Box 6, Folder 53, Washington and Lee Special Collections.

been established and many have provided arms.”¹⁰⁹

Burris also suggests that nearly two decades later, in 1850, the son of some of Robinson’s slaves was plotting rebellion in Lexington.¹¹⁰ These are difficult stories to reconstruct in detail, but Burris’ suggestive links hint at a story of long-term persistence of ideas of freedom through revolution that stretch back to Gabriel’s Rebellion around Richmond in 1800, to the Haitian Revolution of 1793, and to the American Revolution before that. The ideas of Revolution that Robinson celebrated in his will¹¹¹ – and perhaps supported, or at least permitted, among his enslaved human property – may have lasted for generations. Or perhaps the belief among Lexington’s white citizens that their slaves were plotting rebellion says more about the fears of the white community there than the actions and ideas of the enslaved community. Such may have been the case when President George Junkin’s family accused some of their slaves of attempting to poison them in April 1859.¹¹² The stories will never be told in detail, but the possibilities invite speculation.¹¹³

B. Anti-Slavery Thought and Action of Washington College’s Faculty

Ruffner held apparently fairly consistent attitudes against slavery, but also against abolitionists as well. An 1837 letter from a friend, Presbyterian minister John S. McCutchan, lamented the hardening of attitudes towards slavery and increasing opposition to emancipation in a way that suggests that McCutchan and Ruffner shared views.¹¹⁴ Some other evidence comes from the novel *Judith Bensaddi*, which Ruffner had published in the *Southern Literary Messenger* in 1839. It was about a young lawyer from Rockingham County who was educated at William and Mary and made a trip down to Charleston. The lawyer met a young Jewish woman and her brother. He fell in love with her, though for various reasons, largely religious, the couple never married. There are some small keys to Ruffner’s attitudes towards slavery. Judith argued

¹⁰⁹ Andrew Anderson to William Alexander, November 25, 1831, Anderson Family Papers, Box 6, Folder 53, Washington and Lee Special Collections.

¹¹⁰ Burris, *supra* note 102, at 48 (reporting that Washington College trustees sold Henry Allen, January 6, 1851).

¹¹¹ Robinson Will, *supra* note 93, preamble (noting that he had “migrated to America just in time to participate in its Revolutionary struggle”).

¹¹² STACEY JEAN KLEIN, MARGARET JUNKIN PRESTON, POET OF THE CONFEDERACY: A LITERARY LIFE 41 (2007).

¹¹³ See, e.g., YOUNG, *supra* note 97; Fitzhugh Brundage, *Slavery in Antebellum Rockbridge County, Virginia*, 10 PROCEEDINGS ROCKBRIDGE COUNTY HIST. SOCIETY 333-344 (1989); Burris, *supra* note 102.

¹¹⁴ J.S. McCutchan, *supra* note 16.

with her brother, an abolitionist, about how well the slaves are treated. She believed the slaves were less bothered than would be white people at the loss of freedom. Such ideas, if they reflected Ruffner's attitude, would put him within the mainstream of Virginia faculty. This seems quite similar to William and Mary professor Thomas R. Dew's statement that the enslaved were happy with their lot.¹¹⁵ Yet, one difference that appears in the story is that Ruffner continued to think that slavery should be gradually abolished.

Another piece of evidence comes from an undated story that Ruffner wrote, apparently sometime near the end of his tenure at Washington College, about a slave, Jack Neal, whom he met years before while Neal was in jail for killing a man who was stealing him. Neal had been promised freedom in Maryland by his owner's will, but before the will was probated and Neal freed, he was kidnapped and put on a boat down the Ohio River, towards Louisiana. Somewhere near Kanawha County, Virginia, Neal killed one of the men and then was sentenced to death. Many people in Richmond, where Neal's appeal was heard, thought his case warranted further investigation, and so he received a new trial. However, at that trial Neal was again sentenced to death. And just a day before the scheduled execution, he escaped. Neal was recaptured but granted another reprieve and, eventually, freed.¹¹⁶ Ruffner recalled meeting Neal while he was in jail and while the story contains a characteristic attack on the abolitionists and some disparaging remarks about slaves in general (Neal was "free from the vices common to slave"), it suggests that Ruffner thought that Neal, though not justified in killing his kidnapper, should not be punished with death.¹¹⁷

Ruffner was also fairly consistently in favor of transportation of slaves outside of the state after emancipation. Thus, he was a leading figure in the Rockbridge Colonization Society, the local branch of the American Colonization Society.¹¹⁸ These seem to have been stable ideas in Lexington, because Washington College classics professor George Dabney was also a member. In fact, Dabney freed several of his slaves, the family of Samuel Harris. Some years later they

¹¹⁵ JUDITH BENSADDI: A TALE; AND, SECLUSAVAL, OR, THE SEQUEL TO THE TALE OF JUDITH BENSADDI (1839) (1984 ed.); see also Anagram Ferrun [Henry Ruffner], *The Yankee and the Duellist*, 6 S.LIT. MESSENGER 733-36 (1840); "Modern Magic," 6 *S.Lit. Messenger* 628-40 (September 1840); "The Rescued Novice," 6 *S. Lit. Messenger* 804-11 (December 1840).

¹¹⁶ Henry Ruffner, *Jack Neal*, 4 W.VA. HIST. MAG. 308-21 (1904). The story is also discussed, with a few more details, in Carrie Eldridge, *Cabell County's Empire for Freedom: The Manumission of Sampson Sanders' Slaves* 14-16, 34 (1999).

¹¹⁷ *Jack Neal*, *supra* note 116, at 309.

¹¹⁸ Ellen Eslinger, *The Brief Career of Rufus W. Bailey, American Colonization Society Agent in Virginia*, 61 J. SOUTHERN HIST. 39, 46 (2005) (discussing Ruffner's work on behalf of Rockbridge Colonization Society).

went to Liberia.¹¹⁹ There are some other hints of antislavery attitudes at Washington College. Several pages of notes, perhaps prepared for a speech against slavery, are preserved in the trustee papers.¹²⁰

Elsewhere in Lexington, others showed support for at least limited antislavery ideas. In 1834 William Caruthers, recently transplanted to New York from Lexington, published his mildly antislavery novel, *The Kentuckian in New York*.¹²¹ In fact, in the 1830s faculty at many southern schools questioned slavery. This was in keeping with Enlightenment ideas in circulation in southern schools at that point – such as the 1838 address of Kentucky’s Centre College president, John Clark Young, at Miami University of Ohio on abolition.¹²² At UNC William Gaston expressed the hope that slavery would be ended, as had a speaker in 1829.¹²³ At the University of Alabama in the early 1830s, members of the University community were active in the American Colonization Society.¹²⁴

Although Ruffner attacked abolitionists, he also spoke against slavery. In June 1843 he delivered a major speech to the Rockbridge Colonization Society¹²⁵ and in 1847 he delivered a

¹¹⁹ See MARIE TYLER-MCGRAW, *AN AFRICAN REPUBLIC: BLACK & WHITE VIRGINIANS IN THE MAKING OF LIBERIA* 90 (2007) (discussing Dabney’s emancipation of the Harris family); *id.* at 84-85 (discussing the Rockbridge Colonization Society); YOUNG, *supra* note 97, at 174.

¹²⁰ See Trustee Miscellaneous Papers, Box 1, Folder 5, undated, unsigned. The paper includes notes on an as yet unlocated book about slavery in the south.

¹²¹ WILLIAM A. CARUTHERS, *THE KENTUCKIAN IN NEW YORK* (New York, Harper and Brothers 1834). See also Cumings and Barclay v. Caruthers and Wife, 1838-013, Rockbridge County Chancery Court (suit by creditors of the Caruthers seeking to attach Mrs. Caruthers’ equitable interest in slaves given at the time of their marriage for payment of a debt).

¹²² See JOHN CLARKE YOUNG, *AN ADDRESS DELIVERED BEFORE THE UNION LITERARY SOCIETY OF MIAMI UNIVERSITY ... AUGUST 8TH, 1838* (Oxford, W.W. Bishop 1838).

¹²³ See WILLIAM GASTON, *ADDRESS DELIVERED BEFORE THE PHILANTHROPIC AND DIALECTIC SOCIETIES AT CHAPEL HILL, N.C., JUNE 20TH, 1832* 19 (Richmond, Thomas W. White, 2nd ed. 1832); WILLIAM HOOPER, *AN ORATION DELIVERED AT CHAPEL HILL ON WEDNESDAY, JUNE 24, 1829 ... 14-15* (Hillsborough, Dennis Heartt 1829).

¹²⁴ JOHN W. QUIST, *RESTLESS VISIONARIES: THE SOCIAL ROOTS OF ANTEBELLUM REFORM IN ALABAMA AND MICHIGAN* (1998) (discussing Tuscaloosa members of the American Colonization Society, including University of Alabama trustee James Birney and professor Henry Tutwiler); see also Alfred L. Brophy, “*The Law of the Descent of Thought*”: *Law, History, and Civilization in Antebellum Literary Addresses*, 20 L. & LIT. 343-402 (2008) (discussing the University of Alabama as a place of proslavery and occasionally anti-slavery thought).

¹²⁵ *Lexington Gazette*, June 7-8, 1843 (reprinting Ruffner address); see also 19 AFRICAN REPOSITORY 220-21 (1843) (mentioning address).

lengthy economic attack on slavery.¹²⁶ Here Ruffner employed a utilitarian argument against slavery that opposed Dew's utilitarian argument.¹²⁷ In August 1847 Ruffner took the bold step of debating slavery in the Franklin Society in Lexington. Ruffner argued for further action against slavery – he was definitely swimming against the tide at this point. Ruffner represented the time when the focus was on the role of education in uplift – in Enlightenment ideas of education and anti-slavery – in the possibilities of freedom and reform.

Ruffner argued – following such other leading figures as James Bruce, one of the wealthiest people in Virginia at the time and an important slave-owner – that slavery was inefficient. Bruce had stated in a now-lost July 4th oration the year before to the agricultural societies of Mecklenburg, Virginia, and neighboring Granville, North Carolina, that “the slave adds nothing to the moral and physical strength of the country, and if his labor be profitless, of course he is a nuisance, and the sooner we rid ourselves of him the better.”¹²⁸ Ruffner, like Bruce, and Jesse Harriston in the wake of the 1832 legislative debate, focused on the economic rather than the moral argument regarding slavery. In fact, Ruffner went further than Harrison; he suggested that slave labor was unproductive and thus injured agriculture; that because so much money was invested in slaves that Virginians neglected manufacturing and also transportation; and that because the white population was widely dispersed, public education was difficult. All of this led Ruffner to the conclusion that “slavery is pernicious to the welfare of states.”¹²⁹ He resurrected the idea of emancipation of children of slaves born sometime after the passage of an emancipation act.¹³⁰ Back in 1832, the proposed date was July 4, 1845. That date was well past by the time Ruffner was writing, but the idea was the same. Such an act would allow the slaveholders to amortize their investment. Ruffner's emancipation proposal, thus, tapped into a discussion that was several decades old. Like Jesse Harrison's response to Thomas Dew,¹³¹

¹²⁶ A SLAVEHOLDER OF WEST VIRGINIA[HENRY RUFFNER], ADDRESS TO THE PEOPLE OF WEST VIRGINIA: SHEWING THAT SLAVERY IS INJURIOUS TO THE PUBLIC WELFARE, AND THAT IT MAY BE GRADUALLY ABOLISHED WITHOUT DETRIMENT TO THE RIGHTS AND INTERESTS OF SLAVEHOLDERS (Lexington, R.C. Noel 1847). An abbreviated version appeared in the *Lexington Gazette*, October 28, 1847, at 1-2. See also *Valley Whig*, LEXINGTON GAZETTE, November 18, 1847, at 2 (responding to *Valley Whig* editorial criticizing Ruffner proposal and saying that “now is the time” to take up issue of gradual emancipation).

¹²⁷ DEW, *supra* note 14, at 401, 424.

¹²⁸ RUFFNER, *supra* note 126, at 23 (quoting Bruce). Bruce was at best a mild critic of slavery, though he was a long-time supporter of the Virginia Colonization Society. See Brophy, *supra* note 27, at 1938 n. 287.

¹²⁹ RUFFNER, *supra* note 126, at 30.

¹³⁰ *Id.* at 38.

¹³¹ See Harrison, *supra* note 15.

Ruffner argued only slavery's adverse economic effects, not the immorality of slavery. Given the difficulties of colonization, Ruffner seemed oddly unconcerned with its practicalities.

Ruffner was involved in a dispute about the economics of slavery: was slavery productive and how it compared to free labor? Ruffner had an economic account that also focused on the effects of slavery for white people. The discussion of the efficiency of slave versus free labor correlates with twentieth century historians' arguments about the profitability of slavery and the material lives of slaves. Because historians believed the arguments of anti-slavery southerners that slavery was unprofitable – arguments designed to show that slavery should end and thus were advocacy-oriented – they have, perhaps, been more accepting of arguments that slavery was unprofitable than they otherwise might have been.¹³²

Ruffner was opposed in the debate at the Franklin Society by John White Brockenbrough, a federal judge based in Lexington who also taught at the Lexington Law School – which was loosely affiliated with Washington College and after the war became the Washington and Lee Law School.¹³³ We have no record of Brockenbrough's arguments, so it is necessary to draw inferences from common proslavery arguments made by lawyers in the 1840s. It is likely he employed many of the stock arguments in circulation regarding utility: emancipation is impractical; the historical and demographic data suggest that emancipation would be a disaster for Virginia and for the enslaved as well, as William and Mary Professor Thomas R. Dew's argued.¹³⁴

¹³² See ROBERT FOGEL & STANLEY ENGERMAN, *TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY* 59-67 (1972) (summarizing historians' interpretation of the unprofitability of slavery from the early twentieth century); James Oakes, *The Politics of Economic Development in the Antebellum South*, 15 J. INTERDISCIPLINARY HIST. 305-16 (1984). Though there may have been a modernization crisis in Virginia in these years, the central tendency of debate seems to have more to do with the celebration of modernization. In the addresses, there is dispute about just how much "the utilitarian spirit of our age," as Presbyterian minister Benjamin Mosely Smith phrased it in 1847, would crowd out all competing values. See B.L. SMITH, *AN ADDRESS ON THE IMPORTANCE AND ADVANTAGE OF CLASSICAL STUDY ... WASHINGTON COLLEGE, JUNE 1849* 18 (Lexington, Patton & Burgess n.d.).

¹³³ William Gleason Bean, *The Ruffner Pamphlet of 1847: An Antislavery Aspect of Virginia Sectionalism*, 61 VA. HIST. MAG. 260, 270 (1953) (mentioning Franklin Society Secretary's notes of March 6, 1847, indicating that Brockenbrough's proslavery speech "was as able as could be made on that side").

¹³⁴ Dew's *Review*, *supra* note 14. Dew's *Essay on Slavery*, as his *Review* was often known, was taught at VMI in the 1850s by F.H. Smith. See VMI REPORT, *supra* note 91, at 20 (stating that F.H. Smith taught Dew's *Essay on Slavery* to some of his mathematics students). A year earlier, VMI had reported to the state legislature that it included proslavery thought as a part of its curriculum

Believing that every citizen of Virginia should be instructed at least to some extent in the science of government, and made acquainted with the theory and nature of the constitutional union of the United States ... and especially believing it essential that he

Perhaps he took on Ruffner's argument about the economic costs of slavery. Some sense of the views of VMI professor Francis Henney Smith, another of the participants in the Franklin Society debate, appear in his 1857 report to the Virginia legislature. Smith justified his Institution in part based on the support it gave to slavery:

The military discipline of the institution gives protection and efficiency to the peculiar institutions of the state and of the south. Slavery is a material element of southern power and southern polity; and to rightly defend and direct it, constitutes an important duty on the part of those who form the mind and habits of our southern youth. There is no labor so profitable, none so free from pernicious influences to society, as slave labor. Military institutions, by the order and system and responsibility which their discipline encourages, discharge a most important function in these respects. And in the enumeration of these benefits, none are more decided or more worthy of consideration than those which result from the discipline of these schools in promoting the material comfort and well being of the slave himself.¹³⁵

Almost certainly Brockenbrough also pointed out how free workers' lives were no better. This was a fulcrum moment in proslavery thought, which was moving from arguments about how slavery made republicanism possible because it made white people equal to arguments that slavery benefitted the enslaved. That particular argument was popular into the late 1830s and also in some parts of the south again in the 1850s – like James Henry Hammond's mud sill speech.¹³⁶ But it does not seem to have found favor among the places on the border regions, like western Virginia and Kentucky.

While Ruffner and George Dabney were taking action to end slavery, others on the Washington College faculty supported it. George Armstrong, who taught at Washington College from 1838 to 1851 and then served as a Presbyterian minister in Norfolk, published in 1857 the proslavery pamphlet, *The Christian Doctrine of Slavery*. It defended slavery as consistent with

should understand and believe the foundation of that divine institution of slavery which is the basis of the happiness, prosperity and independence of our southern people, and thoroughly fortified to advocate and defend it, the board has been enabled, by extending the term of the course, to introduce into the curriculum of instruction these most important subjects. They have also, for a like reason, had an opportunity to add to the course the subject of general history, as taught in the able manual of President Dew

REPORT OF THE BOARD OF VISITORS AND SUPERINTENDENT OF THE VIRGINIA MILITARY INSTITUTE, JULY 1856 4 (1856).

¹³⁵ VMI REPORT, *supra* note 91, at 24.

¹³⁶ James Henry Hammond, *Speech to the U.S. Senate, March 4, 1858*, CONG. GLOBE, 35th Cong., 1st Sess., Appendix 68, 70–71.

the Bible and also urged obedience to the law, even if individuals found it distasteful.¹³⁷ Armstrong was surprisingly silent about owners' duties to treat their slaves in a Christian manner, which was a common part of southern works on Christianity and slavery in the 1840s and 1850s.¹³⁸

The wake of the Franklin Society debate exacerbated already existing conflicts Ruffner had with the trustees and the community and that led ultimately to his resigning in June 1848.¹³⁹ Though Ruffner's letter of resignation stated that family health reasons were his motivation¹⁴⁰ and the trustees emphasized in their letter the excellent service that Ruffner had performed for the College,¹⁴¹ there seem to have been other factors at play. Rumors circulated that some of the board of trustees wished all the faculty to resign, so that the board could reconstitute the faculty.¹⁴² While the board did not act on the remaining faculty's concern, the board did clarify that the faculty served at their pleasure.¹⁴³

Ruffner left Lexington shortly after his resignation, but that was not the end of his anti-slavery advocacy. He is credited with publishing a response to Ellwood Fisher's *Lecture on the North and the South*.¹⁴⁴ Someone – probably Ruffner, though also perhaps Centre College

¹³⁷ See GEORGE ARMSTRONG, *THE CHRISTIAN DOCTRINE OF SLAVERY* 127-29 (New York, Charles Scribner 1857).

¹³⁸ *DUTIES OF MASTERS TO SERVANTS: THREE PREMIUM ESSAYS* (Charleston, Southern Baptist Publication Society 1851).

¹³⁹ Bean, *supra* note 133, at 277 n.39 (attributing Ruffner's resignation to a combination of factors, including local church politics, conflict within Washington College, and the pamphlet); WILLIAM HENRY RUFFNER, *WASHINGTON AND LEE HISTORICAL PAPERS*, no. 6, at 77-79 (1904) (discussing factors leading to Ruffner's resignation).

¹⁴⁰ Henry Ruffner to Board of Trustees, June 1848, folder 125.

¹⁴¹ Board of Trustees, draft letter, June 1848, folder 125.

¹⁴² See Letter from P. Calhoun, George E. Dabney, George D. Armstrong, and Benjamin S. Ewall to Board of Trustees, June 22, 1848, in Board of Trustees Papers, folder 125, Washington and Lee Library, Special Collections (citing editorial in *Valley Star*); undated and unsigned letter, James McDowell Papers, University of North Carolina, Folder 111, Washington College File (alluding to complaints about president and faculty, which included lack of discipline and also lack of respect for the president).

¹⁴³ Board of Trustees, Draft of College Regulations, June 1848, Trustee Papers, folder 125, Washington and Lee Special Collections.

¹⁴⁴ ELLWOOD FISHER, *LECTURE ON THE NORTH AND THE SOUTH, ... BEFORE THE YOUNG MEN'S MERCANTILE LIBRARY ASSOCIATION ... JANUARY 16, 1849* (Cincinnati, 1849).

President John Clark Young,¹⁴⁵ writing under the pseudonym “Justice” – took on Fisher’s argument that slavery was actually economically beneficial to the South, as had several other pamphlets.¹⁴⁶ Ruffner wrote proudly to his former colleague George Dabney with details about his response to Fisher:

It is rather longer than my Address to West Virginia, and dissects Friend Fisher’s Calhoun Nullifying, Proslavery Statistical Fallacies and Absurdities, completely, and I trust effectually too. ... Fisher’s production is said to be the strongest publication[;] yet it[’]s weak on the proslavery side. Miserably weak is the cause that cannot be better defended.¹⁴⁷

C. Washington College and the Support of Slavery: Union and Economy

About the same time that Ruffner was speaking about the evils of slavery, Miami University President George Junkin was in Ohio arguing against abolitionists. In an 1843 lecture on “the Union versus abolitionists,” Junkin took on anti-slavery religious and moral arguments.¹⁴⁸ Junkin’s extended essay was mostly an examination of the biblical support for slavery. It was, in fact, so narrow and numbing in its focus that in another debate on slavery in Cincinnati, an anti-slavery speaker claimed that Junkin had “in the first Presbyterian church in this city ... *Junkinized*

¹⁴⁵ Duke University’s copy of the pamphlet has a hand-written attribution to Young on the title page. Young had written about gradual emancipation, though the “Justice” essay seems a more robust defense of emancipation than he was engaging in by the late 1840s. See JOHN CLARKE YOUNG, AN ADDRESS TO THE PRESBYTERIANS OF KENTUCKY PROPOSING A PLAN FOR THE INSTRUCTION AND EMANCIPATION OF THEIR SLAVES (Newburryport, Charles Whipple, 1836); JOHN CLARKE YOUNG, SCRIPTURAL DUTIES OF MASTERS: A SERMON PREACHED DANVILLE, KENTUCKY ... (Danville, Presbyterian Church American Tract Society 1846).

¹⁴⁶ JUSTICE, REVIEW OF ELLWOOD FISHER’S LECTURE ON THE NORTH AND THE SOUTH (Louisville, 1849). Oliver Crenshaw, *General Lee’s College* at 59 (1969) and Neely Young attribute the pamphlet to Ruffner. See YOUNG, *supra* note 97, at 142. Young also attributes another essay, “The Bible and Slavery,” which appeared in the *Louisville Examiner* on September 28, 1849, to Ruffner. This essay took a moral position against slavery. YOUNG, *supra* note 97, at 142-43. Ruffner also employed a characteristic argument regarding utility. After stating that slavery is a social, moral, and political evil, Ruffner said, “the only question is, ‘How can we get rid of it without creating a greater evil than that which we propose to remove.’” *Id.* at 143.

¹⁴⁷ Henry Ruffner to George Dabney, May 29, 1849, in William Henry Ruffner Papers, Box 1, Folder 8, Columbia Theological Seminary, Decatur, GA.

¹⁴⁸ GEORGE JUNKIN, THE INTEREST OF OUR NATIONAL UNION VERSUS ABOLITIONISM (Cincinnati, R. Donogh 1843); 23 JOHN C. CALHOUN PAPERS 450 (Sept. 17, 1846).

the minds of the people for two whole days; and when he had done, I do not believe that the heads of his auditors contained two substantial ideas on the topics which he handled.”¹⁴⁹

However, in two places – in the introduction and at the end of the nearly eighty page pamphlet that emerged from his lecture -- Junkin turned to the implications of the Bible’s recognition of slavery for American religion and politics. He thought it improper to criticize masters or deny them communion in the church for owning people.¹⁵⁰ In fact, Junkin thought the people who criticized slave-owners or tried to deny them communion were despotic people who had substituted their judgement for that of God.¹⁵¹ The abolitionists’ argument, Junkin posited, was that “slavery as it exists and is practiced in the United States involves many great and crying moral evils” and it should, therefore, be abolished. Yet Junkin limited the critique of slavery by arguing that though sometimes slavery was inhumane, the inhumanity was not inherent in slavery. In fact, many institutions allowed inhumane things to happen, but they did not need to be abolished. Marriage, for instance, allowed inhumane things, yet no one suggested it should be abolished.¹⁵²

Yet even if abolitionists could show that slavery necessarily involved evil, Junkin still thought that would not make a case for immediate abolition. He put the abolitionists to a high burden, based on a utilitarian calculation of costs and benefits of abolition. Abolition was only justified when “abolition would remove the remaining evils and not introduce greater.”¹⁵³ And Junkin thought that immediate abolition would be of no benefit to the enslaved people and thus would be a violation of the Golden Rule.¹⁵⁴ From that he went on to conclude that if abolitionists refused communion to southerners “and denounce them as guilty of damning sin, as kidnappers and menstealers, as worthy of the penitentiary” there would be “a dissolution of the Union – a civil, and perhaps a servile war.”¹⁵⁵ The Union would end in a war of “uncompromising extermination, that will lay waste this vast territory, and leave the despotic powers of Europe exalting over the fall of the Republic.”¹⁵⁶ This expanded on his introduction in which he labeled abolition “a treasonable movement against the Constitution” and hypothesized that abolitionists

¹⁴⁹ JONATHAN BLANCHARD & NATHAN LEWIS RICE, A DEBATE ON SLAVERY ... UPON THE QUESTION: IS SLAVE-HOLDING IN ITSELF SINFUL, AND THE RELATION BETWEEN MASTER AND SLAVE, A SINFUL RELATION? 228 (Cincinnati, Wm H. Moore 1845).

¹⁵⁰ JUNKIN, *supra* note 148, at 71.

¹⁵¹ *Id.* at 72.

¹⁵² *Id.* at 75.

¹⁵³ *Id.* at 77.

¹⁵⁴ *Id.* at 77-78.

¹⁵⁵ *Id.* at 79.

¹⁵⁶ *Id.*

were working the British government “in an extended scheme to divide and destroy the republic, whenever a war with England occurs, by means of black troops from the West Indies and Canada, co-operating with a slave insurrection.”¹⁵⁷

Junkin’s primary argument was that slave-holding was not immoral and therefore slaveholders should not be censured. He translated that into a constitutional argument: that anti-slavery advocates threatened the Union by their censure of slavery. This joined the argument that slavery was constitutional with an argument about expediency. Junkin then employed a macro-level utilitarian argument that abolitionists threatened Union. This was a religious version of the argument heard frequently in politics – and also in judicial decisions – that Union was more important than the values of anti-slavery.

Junkin’s argument was a popular one in the 1840s in some circles, for it was similar to that of Daniel Webster’s March 7, 1850, speech in favor of the fugitive slave act. Webster argued for a tolerance of slaveholders in order to preserve the Union.¹⁵⁸ Where Junkin had been concerned pretty much exclusively with a religious defense of slavery, Webster advanced a legal argument that Southerners were entitled to respect for their property. Both Junkin and Webster were joined in the constitutional argument that Union required forbearance against criticism of slaveholders.¹⁵⁹

Junkin presented a religious analog to arguments circulating in the judiciary, in which even anti-slavery judges urged support for the constitutional rights of slaveholders because the preservation of the Union was at stake.¹⁶⁰ Some who made that argument may have been antislavery in private and yet they believed that the Constitution’s injunction to tolerate southern states’ institutions – or the value of Union – commanded a proslavery result. However, Junkin was not anti-slavery in private. He, in fact, believed that the Bible supported slavery and he spoke repeatedly in favor of slavery. Junkin spoke of the harm that abolitionists caused to the Constitution, as well as the Biblical support for slavery. The value of Union trumped other considerations. It was part of the way that Whigs in particular appealed to national unity. At one

¹⁵⁷ *Id.* at 4.

¹⁵⁸ *Speech of Mr. Webster*, CONG. GLOBE, 31st Cong., 1st Sess. 269 (March 7, 1850).

¹⁵⁹ A brief summary of Junkin’s constitutional thought, which follows the conservative Whig approach to constitutionalism, appears in D.X. Junkin’s *The Reverend George Junkin ...* 510-11 (Philadelphia, Lippincott 1871).

¹⁶⁰ See ROBERT COVER, *JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS* (1975). Junkin’s argument makes clear that the value of Union was often the basis for arguments about tolerating slavery and even refusing to take action against it. This was an instance in which the religious and constitutional arguments multiplied together to form a strong bulwark against abolitionists. Even if, as Jeffrey Schmitt has recently suggested, the Fugitive Slave Act *was* unconstitutional, judges and professors supported the act and slavery as a way to preserve Union. This suggests yet another way that the interests of enslaved people – and the conscience of abolitionists – were subordinated to considerations of Union, independent of the Constitution. See Jeffrey M. Schmitt, *The Antislavery Judge Reconsidered*, 29 L. & HIST. REV. 797 (2011).

point they were arguing about the enduring value of the Union – about how it was impossible to calculate its value. Junkin was in a middle position in proslavery advocacy, for an important part of the generation of southern nationalism went even further. Ministers frequently moved from the Bible’s support of slavery to the position that Southerners were entitled to secede.¹⁶¹ For later southerners began to calculate the value and found it wanting.

1. Junkin Presidency at Washington College

George Junkin’s argument was popular with some, but not at Miami University of Ohio. The pamphlet seems to have cost him his job at Miami and he returned to LaFayette College in Easton in 1844. But things did not go smoothly there either. In 1848 when Washington College was looking for a new president the trustees turned to Junkin.¹⁶² He arrived in Lexington around November 21, 1848¹⁶³ and delivered his inaugural address on the anniversary of Washington’s Birthday, February 22, 1849.¹⁶⁴ The address, “Christianity the Patron of Literary and Science,” took up a topic that might at first seem both narrow and tangential to Junkin’s presidency: whether education was a duty of the church or the state. What made that topic salient to Washington College was that it was in competition with a state institution, Virginia Military Institute, founded in 1839, and just a decade old. It was also relevant for another reason, because Whigs emphasized the importance of private corporate and charitable action rather than government action in bringing about moral and economic progress.

Junkin turned to ancient history to show how churches had taken on much of the role of education; and warned that when the government and the church were joined – as happened in the Dark Ages – that learning decreased. He invoked leading historians and lawyers – Henry Hallam, Chancellor James Kent, and Chief Justice John Marshall – to suggest that education was a function of churches rather than the state. Marshall’s opinion in *Dartmouth College* occupied a central place in Junkin’s address, to show that though schools received charters from the state, they were freed from state control.¹⁶⁵ This dispute bubbled over at other times as well, for

¹⁶¹ JOHN MCCARDELL, *THE IDEA OF A SOUTHERN NATION: SOUTHERN NATIONALISTS AND SOUTHERN NATIONALISM, 1830-1860* (1981); MITCHELL SNAY, *GOSPEL OF DISUNION: RELIGION AND SEPARATISM IN THE ANTEBELLUM SOUTH* (1994).

¹⁶² CRENSHAW, *supra* note 146, at 111.

¹⁶³ LEXINGTON GAZETTE, November 21, 1848, at 2.

¹⁶⁴ GEORGE JUNKIN, *CHRISTIANITY THE PATRON OF LITERATURE AND SCIENCE, AN ADDRESS DELIVERED FEBRUARY 22, 1849 ON THE OCCASION OF THE AUTHOR’S INAUGURATION AS PRESIDENT OF WASHINGTON COLLEGE* (Philadelphia, 1849). *See also Celebration of the 22nd*, LEXINGTON GAZETTE, February 27, 1849, at 2 (discussing celebration of Washington’s birthday, including orations by students at Washington College and VMI).

¹⁶⁵ JUNKIN, *supra* note 164, at 18.

instance, when Presbyterian Minister Benjamin Moseby Smith delivered an address in Lexington around 1844 as the Presbyterian church was celebrating a new building and said that the Presbyterians did not turn state institutions to the service of their religion. This was taken as a thinly veiled criticism of VMI.¹⁶⁶

Junkin, then, brought a series of conservative Whig ideas with him to Lexington – a support for the Constitution and with it a proslavery religious vision, a sense of the importance of religiously based instruction, and a belief in the power of private charitable corporations and churches to work to accomplish their mission of spiritual education. In his 1851 graduation address, for instance, where Junkin defended college education: it was colleges that had provided the training in mental science, logic, and rhetoric that made the Compromise of 1850 possible. Without that training, “how soon would sophistical reasoning, demagogue logic, spurious eloquence, and ignorance of the laws of the mind, its emotions, passions, and susceptibilities, have plunged us into the vortex of civil discord and all the indescribable horrors of civil and servile war?”¹⁶⁷

Other graduation speakers also defended slavery and sometimes Union. The editor of Richmond’s periodical the *Southern Literary Messenger*, John Reuben Thompson, delivered an address at the 1850 graduation, which was Junkin’s second at Washington College. Thompson was a leading figure in the literary movement of the south and a leading proponent of southern literary nationalism and of proslavery thought. He took over the editorship of the *Southern Literary Messenger* in 1847 when he was only twenty-four and he continued with it until 1860. He published, for instance, such works as “The Duty of Southern Authors” in 1856.¹⁶⁸

Thompson’s address, on the “present condition of education and literature in Virginia”¹⁶⁹ was an explanation of the role that literature played in Virginia society. Thompson provided a call for broad general education, which he supported with the argument that people were only entitled to self-government if they were fit for it. This was one of the common argument employed against emancipation; the idea was that enslaved people were not fit for self-government.¹⁷⁰ In this way, hierarchy was used to advocate for education. Moreover, in contrast to many Democrats who emphasized the positive nature of widely distributed literature, Thompson saw much

¹⁶⁶ FRANCIS HENNEY SMITH, *THE VIRGINIA MILITARY INSTITUTE: ITS BUILDING AND RE-BUILDING 90-92* (1912) (discussing controversy with Reverend B. Smith).

¹⁶⁷ GEORGE JUNKIN, *AN APOLOGY FOR COLLEGIATE EDUCATION: BEING THE BACCALAUREATE ADDRESS ... JUNE 18TH, 1851* 21 (Lexington, 1851).

¹⁶⁸ W.R.A., *Duty of Southern Authors*, 23 S. LIT. MESSENGER 241 (1856).

¹⁶⁹ JOHN REUBEN THOMPSON, *EDUCATION AND LITERATURE IN VIRGINIA: AN ADDRESS DELIVERED BEFORE THE LITERARY SOCIETIES OF WASHINGTON COLLEGE, LEXINGTON, VIRGINIA, 18 JUNE, 1850* 11 (Richmond, H.K. Ellyson 1850).

¹⁷⁰ THOMPSON, *supra* note 169, at 16.

contemporary literature as subversive – either because it lacked in morals or because it was antislavery.¹⁷¹ “Fanaticism in ... that fell shape of modern abolition, which, with impious tread, has dared to confront the presence of the Divine Majesty itself and mock at its revelation, stalks abroad through the land.”¹⁷² Thompson had a particular cure for this, which may be seen as somewhat self-serving given his occupation as editor of a literary journal.. “There is but one way to counteract this influence,” Thompson said, “and this is by a 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. In such an enterprise, worthy of the best efforts that we can make, Virginia is impelled to take the lead, as well by every consideration of pride and self-interest, as by the thronging recollections of the past.”¹⁷³

Another proslavery faculty member was D.H. Hill – later a famous Confederate general – who taught mathematics at Washington College from 1849 to 1854 before moving on to Davidson College in North Carolina. While at Davidson, Hill published a mathematics text that used some word problems to depict Yankees and abolitionists in unflattering light. For instance, one difficult problem dealt with emancipation and the generosity of North and South:

A gentleman in Richmond expressed a willingness to liberate his slave, valued at \$1000, upon the receipt of that sum from charitable persons. He received contributions from 24 persons; and of these there were 14/19ths fewer from the North than from the South, and the average donation of the former was 4/5ths smaller than that of the latter. What was the entire amount given by the latter?¹⁷⁴

Given the testimonials to the book, which came from Professors T.J. Jackson and William Gilham of VMI and J.L. Campbell of Washington College, it seems that Hill had likely done much of the work on the textbook while at Washington College. He also spoke extensively about the honor

¹⁷¹ *Id.* at 32, 35.

¹⁷² *Id.* at 32. Elsewhere in Lexington, proslavery ideas were likewise afoot. For instance, President Junkin’s daughter Margaret Junkin Preston carried on the proslavery case in a series of essays published in 1852. Margaret Irvine [Margaret Junkin Preston], Letters from a Virginia Cousin (Sept. 9, 1852), in Margaret Junkin Preston Scrapbook, Special Collections, Washington and Lee Library, Collection 101b.

¹⁷³ There were some other speeches published from this period, but few of them illuminate ideas of jurisprudence. THOMAS J. KIRKPATRICK, ON SELF DEVELOPMENT THE OBJECT OF LIFE: AN ADDRESS DELIVERED BEFORE THE GRAHAM PHILANTHROPIC SOCIETY WASHINGTON COLLEGE ... JULY 2, 1852.

¹⁷⁴ D.H. HILL, ELEMENTS OF ALGEBRA 124, 150, 153 (Philadelphia, Lippincott 1857). Another problem paints the slave system in a somewhat less favorable light: “A planter, who knows that his negro-man can do a piece of work in 5 days, when the days are 12 hours long, asks how long it will take him when the days are 15 hours long.” *Id.* at 106.

system at Washington College as a manifestation of Protestant thought in his inaugural address at Davidson. The idea was that students internalized standards of discipline, rather than having those standards imposed from without.¹⁷⁵

The literary societies frequently debated questions of the morality of slavery. They debated such questions as “Ought the Congress of the United States to provide a means for the exportation of the Blacks to Africa?” (decided in the affirmative, 16 to 8);¹⁷⁶ “Is the Roman Catholic religion or slavery the greatest evil to our country?”¹⁷⁷ “Is slavery in itself an evil?” (decided in the negative)¹⁷⁸ “Is slavery in accordance with the dictates of Humanity?”¹⁷⁹ “Is the law of the United States prohibiting citizens from teaching their slaves to read a proper one?” (yes by a vote of 16 to 11)¹⁸⁰ “Is slavery a moral and political evil?” (rejected by a vote of eight yes and eleven no)¹⁸¹ and “Should the African Slave trade be reopened?”¹⁸² They also debated other issues of racial justice, such as “were the Europeans justifiable in taking possession of America against the will of the Aborigenes?” The latter they answered yes by a vote of 13 to two.¹⁸³ While such questions do not by themselves suggest anti-slavery thought, they illustrate that slavery was a question of much interest to the students and the votes on some of the debates suggest that there was at least unease about slavery.

¹⁷⁵ D. H. HILL, COLLEGE DISCIPLINE: AN INAUGURAL ADDRESS DELIVERED AT DAVIDSON COLLEGE, N.C. ON THE 28TH FEBRUARY, 1855 (Charlotte, The Watchman Office 1855).

¹⁷⁶ Graham Society Minute Books, 1848-51, at 95. *See also* Susan M. Coblenz, *The Graham Philanthropic Society and the Washington Literary Society at Washington College: A Study of Their Libraries Through 1864* (M.A. Thesis, University of North Carolina – Chapel Hill).

¹⁷⁷ Graham Society Minute Books, January 10, 1852, vote of 8 to 7.

¹⁷⁸ Graham Society Minute Books, June 23, 1855, 3 votes yes, 6 votes no. This was also debated on June 24, 1846 by the Graham Society.

¹⁷⁹ Graham Society Minute Books, September 15, 1855 (14 yes; 5 no).

¹⁸⁰ Washington Society Minute Books, February 7, 1857 (set for debate on February 25, and affirmed 16 to 11).

¹⁸¹ Washington Society Minute Books, September 10, 1859 (set for debate on September 24, 1859).

¹⁸² Washington Society Minute Books, October 27, 1859, affirmed by a vote of 9 to 4 yes. [7]

¹⁸³ Washington Society Minute Books, May 28, 1859. This was also debated on April 19, 1845.

2. Empire, Slavery, Christianity: Junkin Outside of Washington College

It is odd, perhaps, that Junkin's major public statements regarding slavery were made to Northern audiences – his 1843 address in Cincinnati and an 1856 address to the literary societies at Rutgers. Thus, he spoke on issues of concern to Northerners and pled the case of the South to them. These audiences may have caused him to emphasize particular issues that would be of interest to them – like Union and the ways to maintain Union. Though he also firmly supported slavery.

Junkin's July 1, 1856 address to the Rutgers literary societies offered his most extensive discussion of political theory.¹⁸⁴ It presents a complete vision of a Christian Union, a commercial republic based on Protestant ideas that focuses on the individual and links agriculture, manufacturing, and commerce. Junkin began with an attack on Materialism (the idea that we are determined more by our surroundings than religious beliefs) and Transcendentalism.¹⁸⁵ He posited, in explicit contrast to French historian François Guizot, that the Bible was a central factor in the development of western civilization.¹⁸⁶ Building from that basis in the ways that Protestant thought contributed to American development – Junkin says of the early settlers of America that the Bible “became their chart across the Atlantic, and faith stood at the helm and guided every vessel to these wilderness shores. ... Here they find their simple democratic religion ... the very element of their political freedom.”¹⁸⁷ In fact, he found in America the working out of God's plan; “government, too, is an ordinance of God, not a device of human ingenuity. ... the great principles of law, and the necessity of their application, and the power of government –all are of

¹⁸⁴ Junkin's longest work of political and constitutional thought was a polemical attack on secession, published in 1863. GEORGE JUNKIN, *POLITICAL FALLACIES: AN EXAMINATION OF THE FALSE ASSUMPTIONS, AND REFUTATION OF THE SOPHISTICAL REASONINGS, WHICH HAVE BROUGHT ON THIS CIVIL WAR* (New York, Charles Scribner 1863). Even in 1863, Junkin was quoting from his Rutgers speech about how to deal with slavery – and his conclusion to the crisis was restoration of the Union. He invoked the phrase “the Constitution as it is, and the Union as it was.” *Id.* at 309. By 1863, it was clear to many if not all, that such a resolution was far, far in the distant past. The world had changed dramatically and left Junkin's vision well behind, just as it had when he was pleading for Union in the secession spring of 1861. *Political Fallacies* discusses Junkin's arguments with secessionists in Lexington. *See, e.g., id.* at 8-18, 262. And it looked back to his Miami University address two decades before as accurately predicting the course of events. *See id.* at 277-78.

¹⁸⁵ GEORGE JUNKIN, *AN ADDRESS DELIVERED BEFORE THE LITERARY SOCIETIES OF RUTGERS COLLEGE* (New York, Pruden and Martin 1856).

¹⁸⁶ *Id.* at 5-6, 8 (discussing materialism and Guizot's *History of European Civilization* (3rd Am. Ed., New York, D. Appleton 1843)).

¹⁸⁷ *Id.* at 13.

God.”¹⁸⁸

Junkin spoke in grand, almost melodramatic terms, about the ways that Providence had worked out a system of American liberty:

the divine Architect alone saw the whole magnificent structure, and the relations of the whole. He directed by His unerring eye, and aided by his invisible hand, each workman ... — the hewer of timber, the hewer of stone, the founder in brass and iron, the sculptor in wood, the goldbeater and the carpenter; and when each had accomplished and completed his part, he guided every movement ... and the glorious temple of liberty arose in all the gracefulness of her symmetry, the elegance of her proportions, the massive grandeur of her strength, the unity of her design, the majestic sublimity of her original conception — E PLURIBUS UNUM.¹⁸⁹

Junkin then drew upon Romantic imagery of the United States to support the idea of Union. He asked whether “the stars and stripes which bear your commerce and your thunder in triumph over the waves of all the oceans, and float in sublime majesty over yon magnificent temple, be trampled in the mire, and torn into ribbons, and worn in derision beside the stars and garters of a titled despotism, in all the enslaved nations!” “No!” was Junkin’s answer. “The union, it must be preserved!”¹⁹⁰ That last phrase linked to Andrew Jackson’s toast at the Jefferson Day dinner in 1830, where, in response to John C. Calhoun’s toast that “The Union, next to our liberties most dear,” President Jackson said, “The Union, it must be preserved.” That became a rallying cry in opposition to South Carolina’s nullification movement and then later against secession.¹⁹¹

Junkin’s appeal to romantic imagery and to self-interest, like the benefits that empire, commerce, and Christianity brought to the United States, supported the Union.¹⁹² He also saw the government as a helping to bring about freedom; in keeping with many Whig thinkers, Junkin spoke of how government ensured freedom by restraining passions and establishing order.¹⁹³

¹⁸⁸ *Id.* at 21.

¹⁸⁹ *Id.* at 22-23.

¹⁹⁰ *Id.* at 23.

¹⁹¹ See NILES WEEKLY REGISTER 216 (May 15, 1839) (discussing Jackson’s toast); George Bancroft, *Eulogy Delivered at Washington City, June 27, 1845*, in MONUMENT TO THE MEMORY OF ANDREW JACKSON 33, 46 (B.M. Dusenbery ed., Philadelphia, Walker & Giles 1845) (discussing Jackson’s phrase, “The Union, It Must be Preserved.”). See also WHITE, *supra* note 45, at 487-88 (discussing Jackson’s toast and that of John C. Calhoun, “The Union, next to our liberties most dear”).

¹⁹² JUNKIN, *supra* note 185, at 21-23.

¹⁹³ *Id.* at 21.

At the conclusion of his address, Junkin turned to the threat to Union, what he called that “grand providential problem in the nineteenth century” – slavery.¹⁹⁴ Here his belief that the hand of God lay behind America posed something of a problem. How to explain slavery? For Junkin it was another part of God’s design to Christianize the enslaved. Junkin was blunt: “He has civilized as well as christianized in two hundred and thirty-six years, a larger portion of human beings, than have been civilized and christianized by the agencies of all churches in all the world for the last thousand years.”¹⁹⁵ This extraordinary way of phrasing the issue and benefit of slavery in the United States paralleled some of the most zealously proslavery writings of the antebellum period.¹⁹⁶

Junkin thought that God’s plan was to return enslaved people to Africa. “He will take them back to the place of their fathers’ sepulchers in sufficient numbers to use them for the civilization and christianization of a mighty continent.” This, despite the fact that for two decades few people had thought that colonization had much future.¹⁹⁷ Junkin’s admonition was “let the human master exercise all his legal rights, but whenever God shall put it into his heart to send his servant home to his fatherland, let us furnish the means.”¹⁹⁸ He did not, however, offer much in a way of a plan or even hope. His suggested a Constitutional amendment that would permit Congress to appropriate up to five million dollars a year for colonization.¹⁹⁹

Some sense of Junkin – and of his similarities as well as differences with Ruffner – appear in an address that Ruffner gave on July 4, 1856, just three days after Junkin’s Rutgers speech, at Kanawha Salines – near Morganton, Virginia (now West Virginia), where his family had a

¹⁹⁴ *Id.* at 30.

¹⁹⁵ *Id.* at 31.

¹⁹⁶ For instance, Georgia Supreme Court Justice Joseph H. Lumpkin spoke in similar terms to Junkin in 1850 to the South Carolina Institute’s annual fair about the virtues slavery brought to enslaved people. “The universal view of the South now is, that the spectacle of three hundred thousand barbarians, emerging, under the mild and humane treatment of their owners, into near four millions of civilized Christians, is not only without parallel in the history of the African race, but of the whole world.” LUMPKIN, *supra* note 88, at 15.

¹⁹⁷ See Dew, *supra* note 14, at 405-18 (suggesting impracticability of paying for emancipation and transportation of Virginia’s enslaved population outside of the United States); TYLER-MCGRAW, *supra* note 119 (discussing persistent attempts at promoting colonization, especially in Virginia).

¹⁹⁸ JUNKIN, *supra* note 185, at 32.

¹⁹⁹ *Id.* at 34.

lucrative salt business.²⁰⁰ It was Ruffner's last public address. Ruffner's July Fourth oration took, also, the theme of Union. And he appealed to sentiments of Union, but mostly to the economic benefits of the Union – the ways that it facilitated the growth of cities, manufacturing, and agriculture. The speech looked to the commercial benefits of Union and speculated that seventy years hence the United States would be a vast republic. That address emphasized the value of Union through a characteristic, for Ruffner, economic analysis. Like Junkin, Ruffner appealed to romantic images of prosperity in the landscape:

Now over what a vast expanse do we see fields teeming with the fruits of agriculture! Southern industry produces bales of cotton by the million, and hogsheads of sugar by the hundred thousand. Further north, a million of barns are yearly filled with plenty. Manufactories are not less flourishing. Ten thousand water falls and ten thousand steam engines are driving machinery; towns and cities rise and flourish, as much on the operations of handicraft, as on the exchanges of commerce. No where is more ingenuity displayed in useful inventions and improvements; no where is more skill displayed in all the operations of industry.²⁰¹

Commerce had grown and steam and electricity made it possible to cover huge distances in little time. "Mountains have ceased to be an obstruction to trade and travel. Currents are a very slight impediment to navigation. Distance is of little importance, when men and things can be whirled over five or six hundred miles in a day and a night, and the telegraph can shoot a dispatch over one thousand miles in a minute."²⁰² Ruffner credited religion and Union rather than race for much of the progress. Ruffner did not suggest as Junkin had, that slavery might be a benefit to the enslaved, though he did add that Africans "must remain ever distinct" and thus, one presumes, were not capable of sharing in the United States' bounties.²⁰³

Ruffner, as had Junkin, suggested the dire consequences of disunion – war, economic ruin, and the end of liberty. He placed blame on both abolitionists and extreme pro-slavery advocates separation and warned that separation "if it come at all, must come with blood and slaughter." He thought there might be other places that the abolitionists and pro-slavery forces might wage their

²⁰⁰ HENRY RUFFNER, UNION SPEECH; DELIVERED AT KANAWHA SALINES, VA., ON THE FOURTH OF JULY, 1856 (Cincinnati, Applegate & Co. 1856). In January 1861, Ruffner reported to his son that West Virginia would not secede from the United States. Henry Ruffner to William Henry Ruffner, January 9, 1861, Ruffner Papers, Columbia Theological Seminary, Decatur, GA.

²⁰¹ RUFFNER, *supra* note 200, at 7.

²⁰² *Id.* at 9.

²⁰³ *Id.* at 11. Ruffner's son also spoke in favor of colonization. WILLIAM HENRY RUFFNER, AFRICA'S REDEMPTION: A DISCOURSE ON AFRICAN COLONIZATION ... JULY 4, 1852 (Philadelphia, William S. Martien 1852).

conflict: “If the restless spirits of the country are so eager for war, let them go abroad and fillibuster; let the fiery abolitionists and their disunionist adversaries in the South, go to Cuba, and try the experiment of a slavery and anti-slavery war in that island of slaves, before they destroy the peace and prosperity of their own great and happy country. The result may teach them a useful lesson, and so cool their blood, as to make the survivors willing to let the Union abide in peace.”²⁰⁴ But the prescription for how to deal with the threat of disunion was different; where Junkin proposed a fanciful plan of colonization and a Constitutional amendment to fund it, Ruffner wanted something more moderate, the election of “only sober-minded conservative men, who will behave themselves like Christian gentlemen.”²⁰⁵

The appeal to moderation on both sides was losing ground, and particularly, perhaps on the southern side as Southerners expanded their Constitutional theory of the equal dignity of states to have their property and institutions recognized in the territories and in their ideas that the Constitution required the Northerners take lengthy measures to protect slavery. By the time of secession, they had constructed an argument that the election of Lincoln was itself a violation of the Constitution because he would not sufficiently protect property in humans. And to understand how different the ideas in circulation at Washington College were from those elsewhere in the south, it is necessary to turn to the context in Lexington, elsewhere in Virginia, and in South Carolina.

IV. The Lexington Context: Constitutionalism at The Virginia Military Institute

Elsewhere in Lexington, more extreme ideas were appearing. At the Lexington Law School – housed in Franklin Hall – there was talk of the ways that law brought order. Professor John White Brockenbrough was the instructor in the Lexington Law School and while his inaugural lecture focuses on the course of study and the need for attention by students, rather than principles of jurisprudence, one might turn to the writings of Brockenbrough’s teacher Henry Tucker at the Winchester Law School to get a sense of Brockenbrough’s jurisprudence. For instance, Tucker delivered a broad address to entering students at the University of Virginia in 1841.²⁰⁶ Tucker’s address summarized a lot of jurisprudence in a short compass, beginning with the grand (perhaps even grandiose) sense that “*Law* is the great bond or cement of society, that without it, the social fabric would tumble in ruins about our heads, and man would return once more to the condition of savage.”²⁰⁷ This was part of a sense that law was part of bringing order,

²⁰⁴ RUFFNER, *supra* note 200, at 14-15.

²⁰⁵ *Id.* at 16.

²⁰⁶ HENRY ST. GEORGE TUCKER, INTRODUCTORY LECTURE DELIVERED BY THE PROFESSOR OF LAW IN THE UNIVERSITY OF VIRGINIA ... SEPTEMBER, 1841 (Charlottesville, Magruder & Noel 1841).

²⁰⁷ *Id.* at 4. *See also id.* at 5 (Law was the means by which “our rights are protected, our persons defended, our property guarded, and our duties pointed out by its watchful care.”).

rather than a restriction on the natural freedom of humans, and was a common element of much thinking in the nineteenth century. This was also related to the idea that the rights that people have are related to their station in society. Some were suited to freedom and others, according to the book *Liberty and Slavery* by Tucker's colleague at the University of Virginia Albert Taylor Bledsoe, were not.²⁰⁸ This was a common argument among proslavery advocates²⁰⁹ – and a key distinction from the world of Enlightenment, universal truths like all people are created equal.²¹⁰

Lawyers played a special role in establishing that order. They opposed “perpetual revolutions, civil commotion, high handed and lawless usurpation of the power to punish, mobocracy in all its forms, agrarianism with its attendant mischievous principles.” These sounded like thinly veiled attacks on the Democrats and their failure to protect against mobs and on their perceived attempts to redistribute property. “Calm, reflecting, judicious” lawyers are “bred to a love of order, a devotion to settled forms, and to the supremacy of the law.”²¹¹

This is part of a shift from a vision of universal human rights – recall the words that Holcombe used in 1857 in his Cincinnati address – to a belief that rights are contingent on individual capacity and on surrounding circumstances. This shift from natural law that strove for immutable principles was towards romantic-era notions of calibration of law to individual circumstances, situating rights in their context. While we see some of this in Junkin's 1843 address, elsewhere in the south this theme was explored in greater amplitude. For instance, Professor William Porcher Miles of the College of Charleston (and a former member of the US House of Representatives) delivered an address in 1852 with the title that “Republican government not everywhere and always the best; and Liberty not the birthright of Mankind.” The title was also Miles' thesis.²¹²

The move was from some sense of natural law to calibration of rights to people's context (and thus asked questions like, were the enslaved fit for freedom), and then to an empiricism that asked the costs and benefits of freedom. What followed the shift from Enlightenment to Romanticism was a growth in empiricism (this fit with the utilitarian ideas as well), which looked with ever finer detail at the context. Proslavery writers sought to show the economic need for slavery and that enslaved people were better suited to be slaves than free. Antislavery writers pursued several tracks simultaneously. First, some maintained the original natural rights arguments. Second, some wrote about the ways that enslaved people were suited to freedom and thus took on the very specific argument about the proslavery writers. Finally, others turned

²⁰⁸ ALBERT TAYLOR BLEDSOE, *LIBERTY AND SLAVERY* (Philadelphia, Lippincott 1856).

²⁰⁹ JUNKIN, *supra* note 148, at 77-78 (arguing that slaves not yet fit for freedom).

²¹⁰ *See, e.g.*, BLEDSOE, *supra* note 208, at 103-04 (criticizing the Declaration of Independence's philosophy as a dangerous principle of political philosophy).

²¹¹ TUCKER, *supra* note 206, at 7.

²¹² WILLIAM PORCHER MILES, *REPUBLICAN GOVERNMENT NOT EVERYWHERE THE BEST ... AN ADDRESS DELIVERED BEFORE THE ALUMNI SOCIETY OF THE COLLEGE OF CHARLESTON ... MARCH 30, 1852* (Charleston, Walker & James 1852).

towards empiricism to demonstrate the horrors of slavery. For example, lawyer William Goodell published *The American Slave Code in Theory and Practice*, which compiled extensive data on the slave system as it functioned, as well as discussing the slave code.²¹³

Virginia Military Institute was located adjacent to Washington College, but it was a very different place ideologically. In contrast to Washington College's focus on classical education and on Whig ideas, it was a place of Democratic ideas, where engineering and mathematics were the focus. VMI Superintendent Francis Henney Smith's book, *College Reform*, pushed a practical curriculum.²¹⁴ This represented a shift in higher education, from a classical curriculum to a practical one. It correlated with practical ideas about economy and utility in law as well.²¹⁵

A. Sectionalism in the Early 1850s

On July 4, 1850 John White Brockenbrough delivered an address to commemorate the laying of a cornerstone of VMI's new barracks. It dealt with VMI's role in Virginia government and the values of the Union VMI could promote. "The Union is dear to the hearts of our people, not only because of the historic glories that cluster around it," Brockenbrough said, "but because it is identified in their convictions and judgment with their freedom and happiness." These were cultural values that worked in conjunction with the economic prosperity made possible by Union and in this regard it is similar to the Washington College addresses on the value of Union. But a subtle shift was taking place on that campus. For Brockenbrough thought that the people only loved the Union "which the Constitution gave us." This was an idea that became central to the secession debates: that the South should be loyal to the Constitution as they interpreted it.²¹⁶ It was a contingent affinity for Union. And when the North interpreted the Constitution differently – or violated it, depending on one's perspective – then the South was not bound by that interpretation. This a subtle, but noticeable, contrast with Ruffner and Junkin.

Brockenbrough thought that a "fanatical majority in Congress may effectively subvert the Constitution while its forms may be studiously preserved. Its potency for good will then be destroyed, its efficacy for evil only will survive."²¹⁷ In this address we see how the cultural values

²¹³ WILLIAM GOODELL, *THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE* (New York, American and Foreign Anti-Slavery Society, 1853).

²¹⁴ FRANCIS H. SMITH, *COLLEGE REFORM* (Philadelphia, Thomas, Cowperthwait & Co. 1851).

²¹⁵ Bradford Alexander Wineman, Francis H. Smith: Architect of Antebellum Southern Military Schools and Educational Reform 199-200 (Ph.D. dissertation, Texas A&M, 2006).

²¹⁶ Cf. "JUSTICE", *supra* note 146, at 1 (commenting that Ellwood Fisher's ideas fit better with South Carolina than Ohio).

²¹⁷ JOHN WHITE BROCKENBROUGH, *ADDRESS DELIVERED ON LAYING THE CORNER STONE OF THE NEW BARRACKS OF THE VIRGINIA MILITARY INSTITUTE. JULY 4, 1850* (New York, John Wiley 1850).

supporting Union were shifting; and how a southern interpretation of the Constitution -- that its form might be followed while still violating its spirit -- was emerging as well. This is a transition point from Union to secession. "Suppose ... that the madmen who make war upon the essential principles of the Constitution shall accomplish their fell purpose, can any doubt that the clustering stars and stripes of the Union will go down in blood?"²¹⁸ Though he hoped it would not come to this, Brockenbrough said that if war came, VMI alumni would be central to the defense of Virginia.²¹⁹

B.J. Barbour of Orange County delivered a wide-ranging address on July 4, 1854 that covered such topics as the wasteful state spending for internal improvements, the virtues of individualism and limited government, and the Bible as literature and as a source of insight. Barbour also made passing reference to the problems of antislavery advocacy, what he called that "morbid philanthropy and calculating humanity, which takes a fugitive slave for its hero, drapes a city in mourning when the constitution is obeyed, appeals to a higher law for revenge, ... and comes, with blood on its hands and scripture on its lips, to lift the assassin's knife and light the incendiary's torch, in the name of a meek and lowly Savior."²²⁰ These were references to Harriet Beecher Stowe's *Uncle Tom's Cabin* and to the rendition of Anthony Burns from Boston to slavery in Virginia pursuant to an order by Judge Edward Loring. That led to a sermon by Thomas Wentworth Higginson.²²¹ Yet, Barbour was somewhat more optimistic about the future than Brockenbrough had been three years earlier. For he at least seemed to have some hope that there would remain "a Union of free and equal states." For that to happen, Virginians had to protect "the right of each community to manage its own affairs." However, as with Brockenbrough, Barbour envisioned a world where secession would be necessary.

B. The Monument and the Constitution

Even as the VMI lecturers were contemplating disunion, there were trends pulling back towards Union. Governor Henry Wise delivered an address in July 1856 that was in essence a dedication speech for VMI's statue of Washington.²²² The VMI statue was cast from Jean Antoine

²¹⁸ BROCKENBROUGH, *supra* note 217, at 18.

²¹⁹ *Id.* ("In that dark hour, if come it must, she will turn with assured hope to the hundreds of alumni of this school, and can any doubt that they will be the first to rush to the rescue of their beloved Virginia, and repulse the invaders from her soil?").

²²⁰ B.J. BARBOUR, AN ADDRESS TO THE LITERARY SOCIETIES OF VIRGINIA MILITARY INSTITUTE ON THE 4TH OF JULY, 1854 (Richmond, Macfarlane & Ferguson 1854). The address also appeared in the *Southern Literary Messenger's* September 1854 issue at 513-28.

²²¹ THOMAS WENTWORTH HIGGINSON, MASSACHUSETTS IN MOURNING. A SERMON ... JUNE 4, 1854 (Boston, James Munoe and Company 1854).

²²² HENRY M. WISE, GOV WISE'S INAUGURAL ADDRESS AT LEXINGTON VA. MILITARY INSTITUTE, JULY 1856 (n.d., n.p.). The speech was also reprinted, along with brief remarks by a

Houdon's marble statue of Washington in the Virginia capitol building, which Houdon had created using measurements and a mask he took of Washington. It was supposed to be the most realistic statue ever made of Washington.

Governor Wise discussed the usual function of a monument, that it is for "memories which may be lost, for the fame that which be forgotten." Yet, no monument was necessary for Washington. His "fame is higher than any pinnacle which can ever be built of granite or marble. ... He liveth in the hearts, not only in his fellow-citizens, but in all of mankind."²²³ The statue to Washington served as a way of preserving his memory and also of promoting constitutional values that Washington represented. The values that mattered included rising above political faction and containing sectional divisions. Of course, other orators recognized that monuments served other purposes. Graduating senior J.W. Holcombe acknowledged that in Europe, monuments might strike terror and maintain feudalism:

The gradual elevation of the middle orders to power and importance had been attended with an increasing desire for civil and religious liberty, and a fierce and implacable hatred of those, who, for so many centuries, had trampled with ruthless violence on the inalienable rights of humanity. ... The throne was no longer near to dazzle and terrify by its splendid power; around them were no monuments to give to the institutions of tyranny the dread and solemn sanctions of antiquity; no pyramid, built up in remote centuries, unpeirced by a single gleam of traditionary light, towered before them, bearing upon its gloomy front the bloody records of former crime and oppression; no stately castle, within whose embattled walls had lived and move the beauty, the chivalry, the aristocracy of long-buried generations, reflected down upon the solemn shadow of the mighty Past; no hoary cemetery, within whose hallowed precincts were contained the emblazoned tombs of princes and nobles remembered only for their vices, of sovereigns at whose death no tears were shed, of orators who were ever the ready apologists of tyranny, of scholars who were the pensioned flatterers of power, of poets who profaned the high gift of genius to pamper the vices of a profligate and dissolute court²²⁴

Wise also used to his address to question appeals to the "higher law." He recalled that during the Revolution Massachusetts supplied arms for the cause, not "to rebel against the laws of Kansas," a reference to the recent efforts of Massachusetts to support the abolitionists in Kansas with weapons.²²⁵ Several months later, on September 2, 1856, Superintendent Francis Henney Smith delivered an address on the start of the new school year that similarly focused on the ways that Massachusetts had violated the duty of upholding the Constitution and celebrated the ways

cadet, in *VMI Report*, *supra* note 134, at 63-80, 85.

²²³ WISE, *supra* note 222, at 11.

²²⁴ HOLCOMBE, *supra* note 59, at 8.

²²⁵ WISE, *supra* note 222, at 17.

that VMI helped prepare students for defense of slavery.²²⁶

Wise referred to the planned Equestrian statue on the Richmond capitol grounds, which was still two years away from placement and dedication, but which contemplated Washington on a horse on a pedestal above several important but lesser figures – Meriweather Lewis, Patrick Henry, George Mason, Thomas Jefferson, and George Wythe or John Marshall.²²⁷ The year after Wise discussed the Washington Equestrian Statue, United States Senator RMT Hunter, gave an address VMI and the year after that, on February 22, 1858 (Washington’s birthday), he gave the dedication address of the Equine Statue.²²⁸ There Hunter spoke of the role of monuments and also of Washington’s contributions. Washington joined the nature of the new world with some vestiges of learning of the old – he built a responsible state with a new doctrine of society.²²⁹ And while Hunter viewed the monument as a great teacher – and sought other monuments so that there would be a “monumental history,”²³⁰ he also recognized that Washington’s imprint on culture would long outlast the monument. “[W]hen all its particles, fugitive on the winds, shall have disappeared from human view, there will still survive the monument which Washington's own genius has erected for itself.”²³¹ That genius made a stable nation on American principles of equality and democracy, which is what one would expect a Democrat to say. Hunter deserves attention, though, for his words in Lexington as well as in Richmond.

On the morning of July 3, 1857, Robert M.T. Hunter presented a moderate, indeed optimistic, speech at VMI that surveyed the growth of civilization over centuries. It was characteristic of Democratic speeches, in that he focused on the popular mind. For instance, he said that "public opinion ... is destined to be the great moral and motivating power of civilized society."²³² And though Hunter was a leading pro-slavery politician in the 1850s, his moderate

²²⁶ FRANCIS HENNEY SMITH, INTRODUCTORY ADDRESS TO THE CORPS OF CADETS OF THE VIRGINIA MILITARY INSTITUTE, ON THE RESUMPTION OF ACADEMIC DUTIES, SEPTEMBER 2ND, 1856 21 (Richmond, Macfarlane & Fergusson 1856).

²²⁷ WISE, *supra* note 222, at 11.

²²⁸ ROBERT E. BONNER, MASTERING AMERICA: SOUTHERN SLAVEHOLDERS AND THE CRISIS OF AMERICAN NATION 165-70 (2009) (discussing speeches at dedication of Washington Equine statue).

²²⁹ MR HUNTER’S ORATION: OPENING ODE AND ORATION DELIVERED AT INAUGURATION OF CRANFORD’S WASHINGTON EQUESTRIAN STATUTE (Richmond, McFarlane & Fergusson 1858).

²³⁰ HUNTER, *supra* note 229, at 23.

²³¹ *Id.* at 22.

²³² ROBERT M. T. HUNTER, ADDRESS DELIVERED BEFORE THE TWO LITERARY SOCIETIES OF THE VIRGINIA MILITARY INSTITUTE, JULY 3, 1857 (Richmond, MacFarlane & Fergusson 1857).

speech at VMI and at the dedication of Washington Equine Statue in Richmond points to how he shaped his message depending on venue.²³³ There were, nevertheless, elements of Hunter's address that spoke to slavery and alluded to the dangers of abolitionism. Hunter spoke of the stages of civilization and causes of progress. The "immense disparity"²³⁴ between the savage and civilized state of human progress Hunter attributed to a variety of factors, including government, the "Republic of Letters," reason, Christianity, commerce, the wide diffusion of knowledge through books, all of which made empire possible.²³⁵ While rather abstract, Hunter's analysis of the causes of civilization had implications for how the audience viewed themselves and their place in the course of human progress, and also, presumably, for how they viewed slavery.

Hunter spoke of the power of John Locke's ideas, but warned that Locke's and Rousseau's Enlightenment ideas "were the seed of the wind from which sprang the whirlwind of the French Revolution."²³⁶ Hunter was also skeptical of new ideas that were either insufficiently tried or insufficiently constrained. "He who sends forth a great general idea for the government of his race, with the limitations and restrictions necessary to fit it for the practical uses of man, although that idea may be founded in truth, is like him who turns a locomotive loose upon the track, without a conductor to guide it..."²³⁷ It took little abstraction on the part of his audience to see this as a reference to abolitionists. For this was another attack on the reform spirit of the age, as had been presented by people like William Kent at Union College in 1846, Timothy Walker at Harvard in 1850, and George Junkin at Rutgers in 1856, among many others. And it was, Hunter said at the end of his speech, to the churches and the schools that Virginia would look to protect public opinion, that great "world wide power."²³⁸ But scholars might also play a part in this

²³³ See, e.g., *Speech of Hon. Robert M. T. Hunter, of Virginia, on the Resolutions of the Massachusetts Legislature Concerning the Assault on Mr. Sumner*, CONG. GLOBE, 34th Cong., 1st Sess. 656-60 (June 24, 1856); *Speech of Hon. R.M.T. Hunter, of Virginia, on the Admission of the State of Kansas: Delivered in the Senate of the United States, March 12, 1858*, CONG GLOBE, (Washington, 1858). For another moderate speech, see R.M.T. Hunter, *A Discourse Delivered Before the Virginia Historical Society, at Their Eighth Annual Meeting, December 14, 1854* (Richmond, Clemmitt & Fore 1855). See also William S. Hitchcock, *Southern Moderates and Secession: Senator Robert M. T. Hunter's Call for Union*, 59 J. AM. HIST. 871-84 (1973) (placing Hunter in context of secession and concluding that he was for Union to the extent that the South had a dominant place in it).

²³⁴ HUNTER, *supra* note 232, at 9.

²³⁵ *Id.* at 17-18 (government and republic of letters), 19-20 (commerce and Christianity), 30 (commerce), 24-25 (books).

²³⁶ *Id.* at 44.

²³⁷ *Id.* at 44.

²³⁸ *Id.* at 58. Hunter's references to public opinion, *id.* at 58, 35, are in stark contrast with Whig references to the need for checks on demagogues and on public opinion. This is a key fault

defense and proper expansion of the “empire of the mind.” As Hunter said:

The poor scholar from out the dim recesses of his garret, may utter the war cry which shall raise a world in arms against oppression or an abuse, which he has been the first to discover, and to point out the true mode of attacking. Or he may conceive and send forth the idea which is to be a welcome guest in every human habitation, from the palace to the hovel, and to dwell as a secret companion and a familiar charm in the breast alike of the peasant and the prince.²³⁹

C. The Turn Away from Union

On the morning of July 3, 1857 – the same day that Senator Hunter delivered his moderate address – James W. Massie, an 1849 graduate of VMI and a graduate of Brockenbrough’s Lexington Law School, who was then a professor of mathematics at VMI, delivered a very different address to the alumni of VMI. The alumni address, like the address to the two literary societies that Hunter gave that afternoon, were all part of the graduation exercises.

Massie stoked division between North and South through a historical account of the differences between North and South. He premised his lecture on the idea that North and South had separate civilizations -- a theme that was popular in the south in the 1850s. This stands in stark contrast with the Washington College addresses that referenced the Puritans and the unified culture of North and South. His major premise was that Massachusetts and Virginia had substantially different cultures. Massie used those states as stand-ins for the North and South generally.²⁴⁰ While Massie said little directly about law, he laid out the cultural differences that supported a different interpretation of the Constitution.

He returned to the founding of Massachusetts and Virginia and explained Massachusetts as a radical colony, founded by religious fanatics. Such an interpretation actually had strong purchase in historical circles through the middle of the twentieth century and it is interesting to contemplate how the ideas borne of sectional division may have influenced historical interpretation for decades afterwards until Perry Miller appeared and revived the Puritan intellectuals as a subject of serious inquiry. By contrast, Massie found the Virginia founders to be pragmatists, interested in transplanting British law and thought to the Americas. This explained the differing policies on slavery, more than climate. Among the charges Massie brought against the Puritans was they were not interested in rational liberty. Their opposition to slavery was another sign of this; they supported abolition even when it was inappropriate and the slaves were

line between Whigs who sought control of public opinion and Hunter who celebrated it. *See* Brophy, *supra* note 27, at 1926-37 (discussing conflicts of Whig and Democrat ideology).

²³⁹ HUNTER, *supra* note 232, at 47.

²⁴⁰ JAMES W. MASSIE, AN ADDRESS DELIVERED BEFORE THE SOCIETY OF ALUMNI OF THE VIRGINIA MILITARY INSTITUTE, JULY 3D, 1857 (Richmond, McFarlane & Fergusson 1857).

not capable of handling freedom.²⁴¹ What was a little ambiguous was how the American Revolution emerged in Virginia; Massie explained it – as did other leading southerners – as a conservative revolt against monarchy.

Meanwhile, the Massachusetts philanthropists become fanatics. Massie warned against the reform spirit of the age, which seemed so popular in the North:

It is a mistake to suppose that progress, necessarily involves cardinal change. Change is the child of error, like Death of Sin; progress is development, enlargement, growth. When society is progressing most rapidly, it is either limiting the operation of well-established principles, or extending those principles to new and before untried emergencies.²⁴²

However, in the south slavery helped protect against irrational and inappropriate change. “The Southern mind is fully alive to [slavery’s] incalculable benefits, and even the North are beginning to feel its want as a conservative element.”²⁴³ Massie spoke as well of individualism, as did others like Senator Hunter, of conservative principles like opposition to political change, and of white equality. It was a stark address; there should be no surprise that Massie would later support secession.

For VMI orators, the arguments were about the constitutional rights of the south and biblical and utilitarian arguments about slavery. They were less about the preservation of the Union and more about preservation of southern rights. By the next year, 1858, it was to the point where there was no longer a perceived need to even talk about the virtues of slavery. At that time Willoughby Newton, a former member of the United States House of Representatives from the Virginia Piedmont, was able to say that slavery was unquestionably proven to be good. “The day” for an argument about slavery “is past. Such a flood of light has been shed upon it during the last few years, in all its aspects, moral, social, religious, and politico-economical, that nothing more remains to be said.”²⁴⁴

Newton acknowledged that there may have been differences of opinion on this in the South as recently as a twenty-five years before, but he believed that “all thoughtful and practical men are now agreed as to its necessity.” He continued with extreme praise of the origins of slavery

The landing in Virginia from a Dutch ship in the month of August, 1620, of twenty African slaves, has been in its results, one of the most remarkable events in the history of

²⁴¹ *Id.* at 37.

²⁴² *Id.* at 34.

²⁴³ *Id.* at 39.

²⁴⁴ NEWTON, *supra* note 72, at 9. The *Southern Literary Messenger*’s article, “Duty of Southern Authors,” *supra* note 168, acknowledges that something had to be done to prove to Northerners that slavery was positive, or even acceptable.

mankind. Inconsiderable in itself, revolting as it may be to natural feeling, no calm observer of the progress of human affairs can fail to perceive in it the beginning of a mighty agency for the advancement of the wealth, happiness, civilization, and refinement of the world.²⁴⁵

While Newton made the concession – more perhaps characteristic of the 1820s than the 1850s – that natural feeling revolted at the idea that slavery was so beneficial, his extraordinary praise of the institution continued. “No event in the history of modern times, save the discovery of America itself, is of equal importance.” It was of such grand importance because it

cleared the forests, and opened the rich lands of Virginia to cultivation; it produced in such abundance corn and tobacco, as soon to diffuse through the Colony, a feeling of security and content. It raised up a class of independent and intelligent landed proprietors, who became the law-givers of the Colony, and the guardians of the liberties of the people. It inspired the white race with an intenser love of freedom, and a more watchful jealousy of encroachments upon their rights. And had no little influence in forming that race of great men, who, in the Colonial Assembly, laid broad and deep the foundations of public liberty ... and carried through with success, in the council and the field, the great work of the Revolution.²⁴⁶

What was particularly important about Newton’s address is that after he established the economic and political predicate for slavery, he then turned to the ways that the North was undermining slavery. Newton put this into a Constitutional framework, not just saying that the North was undermining the foundational piece of southern economy and political culture, but that the North was violating the South’s constitutional rights. “The power of the Government has passed to the North, and all the checks of the Constitution are broken down. In the House of Representatives, in the Senate, and in the Electoral Colleges, the South finds no safety and is subject to the will of an unchecked majority, whose power will soon be as overwhelming as it is despotic.”²⁴⁷ While John C. Calhoun had proposed giving the south a veto power, Newton thought that not even that

²⁴⁵ NEWTON, *supra* note 72, at 10.

²⁴⁶ *Id.* at 11. Newton continued with the economic benefits that slavery brought, including the production of cotton, which in turn “in the North has given wings to enterprise, built up cities – created, as if by magic, beautiful villages, and covered the whole face of the country with evidences of busy and prosperous industry.” *Id.* at 12. *See also Address of Hon. Willoughby Newton, Before the Virginia State Agricultural Society, ... Feb. 19th, 1852, 7 AMERICAN FARMER 413 (June 1852); Address of the Hon. Willoughby Newton, Delivered Before the Maryland State Agricultural Society, at its Third Annual Exhibition, in the City of Baltimore, October 25th, 1850, 6 AMERICAN FARMER 189 (December 1850).*

²⁴⁷ NEWTON, *supra* note 72, at 26.

right would be enough to save the south.²⁴⁸ The grim truth was that, “Disguise it as we may, the time is fast approaching when there will be no alternative but separation from the North, or tame submission to uncontrolled despotism.”²⁴⁹ Newton even envisioned a separate Southern nation and even began to hypothesize how it might be funded and what it might accomplish in terms of internal improvements.²⁵⁰ The stage was being set by people like Newton to condition the public mind for secession; a theory of how the North violated the constitutional rights of the south was well developed; a distinctly southern history and a southern interpretation of slavery, economy, and religion supported disunion. The pieces were being put in place for a southern nation, indeed, perhaps even a southern empire, that might in the words of Newton “give new development of the capacity and progressive power of the Anglo-Saxon race, and to bring within the range of free government and regulated liberty, the semi-barbarous hordes that now encumber the Southern portion of this continent.”²⁵¹

The speeches at Washington College and VMI both operated at a high level of generality, as they linked constitutional culture to the conflicts of party ideology – democracy and republicanism – to the issues of moral and economic progress, and slavery. These addresses, along with other public discussions of slavery and jurisprudence, operated at a general (or maybe abstract is a better word) level. As we try to understand the role of constitutional ideas and ideas related to constitutionalism, like concepts of patriotism and Union, in shaping (and explaining) coming of Civil War, it is good to remember that the Constitution operated as a set of words and also as a set of ideas. College literary addresses, as well as speeches in Congress and on the hustings, worked at accessible and general levels in their discussion of the Constitution and Union as a set of concrete legal rules and as a set of grand ideas. It is to some of the other ideas, given in addresses further from Lexington, that we now turn, to see the range of ideas in circulation and also to link those ideas to action.

V. Utility, Order, and Slavery – The Constitutional Origins of Secession

We need to put the ideas in circulation in Lexington into context by looking at what was happening along the Atlantic seaboard north of the Mason-Dixon line, and across the Blue Ridge in Charlottesville and further down towards the coast in Williamsburg at William and Mary, and further south, in Charleston and Columbia, South Carolina.

A. Obedience to Law In Northern Literary Addresses

²⁴⁸ *Id.* at 27 (“[T]he safety and interests of the South may require positive legislation, as in the admission of new States or the acquisition of territory, as well as a negative on the power of the majority.”).

²⁴⁹ *Id.* at 22.

²⁵⁰ *Id.* at 29-30.

²⁵¹ *Id.* at 29.

Many of the ideas about lawyers – and law more generally – as a governor of passions and as a response to abolitionist fanaticism was something we heard about in schools North and South. In fact, this was a central theme at many colleges in the wake of the Fugitive Slave Act of 1850, which was part of a Compromise of 1850 to help hold the Union together amidst agitation in the South for secession then. Sometimes in the north there were strongly proslavery addresses. In addition to Lexington resident James McDowell’s 1838 address at Princeton that was supportive of slavery, though it was more so as a way of maintaining Union than for the benefits that many Southerners associated with slavery, David Kaufman delivered a vigorously proslavery address at Princeton in 1850. Kaufman, an 1833 graduate of Princeton, was serving in the United States House of Representatives from Texas in 1850 when he addressed Princeton’s Whig and Cliosophic literary societies. “Who does not see in the transplanting of the Africans to America, the means of restoring to the degraded descendants of Ham the benefits of civilization and Christianity,” Kaufman asked. “In no country on earth is the African as happy, as useful to himself or to the country he inhabits, as the southern slave. Our inestimable slavery does not fail even when it is subjected to the scrutinizing gaze of the inquirer. It confers unnumbered blessings upon the black man as well as the white.”²⁵²

At other elite Northern schools the story was similar in terms of the desire for protection of constitutional rights and of Union, but the vigorously proslavery arguments made at VMI and Princeton were rare. More frequently Northern schools appealed to the rule of law, whatever that happened to be, rather than supporting slavery robustly. William Greene spoke at Brown with a theoretical discussion of the need for upholding the law. Greene was concerned about the political upheaval wrought by reformers, whom he labeled a cabalistic party.

In its practical uses in the history of governments, it means quite as often to upheave and overturn as to improve and make better. The first movers in reforms, however innocently, often mistake change for improvement. They think that something must be better than the present, because, as every body knows, the present is not perfect; and that something, they think they have discovered. They over look the fact, however, that the principle of imperfection which never ceases, must equally attach to this new something which they would reach; and that thus, the principle of reform, as they apply it, resolves itself into an infinite series of experiments; the effect of which must be, to keep up perpetual agitation with perpetual disappointment in the objects of it.²⁵³

One group of reformers attracted his attention in particular. It was abolitionists (although he

²⁵² DAVID S. KAUFMAN, ADDRESS ... BEFORE THE AMERICAN WHIG AND CLIOSOPHIC SOCIETIES OF THE COLLEGE OF NEW JERSEY, JUNE 25TH, 1850 17-18 (Princeton, J.T. Robinson, 1850).

²⁵³ WILLIAM GREENE, SOME OF THE DIFFICULTIES IN THE ADMINISTRATION OF A FREE GOVERNMENT: A DISCOURSE PRONOUNCED BEFORE THE RHODE ISLAND ALPHA OF THE PHI BETA KAPPA SOCIETY, JULY 8, 1851 19 (Providence, John F. Moore 1851).

referred to them obliquely) who sought to undue law by making it bow to immediate public sentiment. And yet public sentiment measured any way other than at the ballot was improper. More evils flowed from law bowing to sentiment than were corrected by it, for when law was overridden by sentiment, there was a lack of control:

Public sentiment, however overwhelming, cannot enact law. It can, at the most, only express the tone with which the powers of government should be administered; in the opinion of those by whom that sentiment is entertained. Whether or not it be entitled to authoritative influence in the administration of the government, the ministers of power for the time being, must, upon their proper responsibility, be the sole judges. If, perchance, the law making power enact a law in opposition to the public sentiment, there are two ways of meeting the difficulty: first, by direct resistance to the law; and, second, by patiently awaiting its repeal, by the election to power of a new and more faithful set of men. The first is rebellion; which in resisting one law, violates all; and thus breaks up the government. The second, in due time, breaks up the law and maintains the government. The first, in correcting one evil, perpetrates a thousand others. The second, by correcting an evil, does a good and nothing more. The first, is anarchy, with a liability to all the desolating mischiefs that pertain to it. The individual second, is the every day experience of the best systems of government, and nobody is disturbed. The government itself, remains sacred as it was.²⁵⁴

Greene urged, in keeping with the majority of jurists at the time a reliance upon the political process to change the Fugitive Slave Law. He also criticized abolitionists for their impatience with the world and the pace of reform. Instead of accepting the world, idealists (of whom abolitionists were the prime focused disproportionately on the evils. “[T]heir error . . . consists, generally, not in designing too little, but too much, for human good:—in attempting to do, not what *should* not, but what *cannot*, be done; and thus in *wasting* power, with indiscriminating judgment, rather than *abusing* it, with an unworthy purpose.”²⁵⁵ The reformers lived in a parallel universe; their world was one of fiction, not fact. And, on balance, they did more harm than good, for “they make ends of what should perhaps be only means; and are apt to lose sight of a general purpose, however important, in their exclusive devotion to what should be regarded only as a particular step in the attainment of it.”²⁵⁶ Greene’s argument rested on considerations of utility. What behavior, his political calculus asked, would result in the most good, on balance. “Carried out,” the proposition that individuals should disobey a law was “full of uncalculated and uncalculable mischief. It would destroy government, by the very means it proposes to sustain it. It suggests anarchy as a cure for bad legislation—a wisdom of the sort of that which would kill off

²⁵⁴ *Id.* at 16.

²⁵⁵ *Id.* at 18.

²⁵⁶ *Id.* at 18 (“Such minds rarely do much good for the whole of a thing.”).

the whole human race to get rid of sin.”²⁵⁷

B. University of Virginia

Where Washington College nurtured an sense of Union and an adherence to the Constitution, the University of Virginia’s faculty and orators developed a southern interpretation of the Constitution, which told of the ways that Northerners had violated the rights of southerners. They translated such political theory and economic beliefs into constitutional doctrine that held the remedy was, perhaps, secession. In June 1850, about the same time that John Brockenbrough was beginning to calculate the value of Union and question how much longer southerners could abide it, Muscoe R.H. Garnett delivered an extended address about the problems with centralization in governments. Garnett was a young man; had been born in 1821 in Essex County, Virginia, then studied at his father’s school and later graduated from the University of Virginia and its law school in 1842. He represented the radical ideas that gained such ground in Virginia in the 1850s.²⁵⁸

Garnett’s address was ostensibly about the ways that men of literature affected – one might even say controlled – the world. He found that literature with was closely related to the form of government; that in governments that provided for humans’ wants, there was insufficient incentive for people to struggle. Those governments, which Garnett labeled socialist, did not produce great literature.²⁵⁹ In places where individuals had to depend on themselves, however, literature developed. But the address was more than about literature; it was about how socialist governments caused people to depend too much on a central government. He thought that federal governments, which dispersed power between sovereigns would slow down the evils of centralization, but even in those cases, laborers were left vulnerable to employers. And thus appeared the argument, advanced in greater amplitude in the 1850s, that slavery protected laborers as much as any system could. For slavery, Garnett said, gave owners an incentive to make sure that labor was treated well.²⁶⁰ This was an argument that others, like George Fitzhugh, developed more fully later in the decade, to suggest that slavery was an antidote to the excesses of capitalism. While the market certainly left many free workers in dire straits, it was hard to make the case that slavery protected the slaves more than the market protected free workers – and one that few people found convincing.

Much of Garnett’s address was about the relationship between types of government and freedom. This was the philosophical framing for the argument that slavery was necessary for the

²⁵⁷ *Id.* at 18.

²⁵⁸ CARMICHAEL, *supra* note 42, at 89-120.

²⁵⁹ MUSCOE R.H. GARNETT, AN ADDRESS DELIVERED BEFORE THE SOCIETY OF ALUMNI OF THE UNIVERSITY OF VIRGINIA, AT ITS ANNUAL MEETING ... 29TH OF JUNE, 1850 6 (Charlottesville, O.S. Allen & Co. 1850).

²⁶⁰ GARNETT, *supra* note 259, at 10.

maintenance of democracy of white people. For slavery best allowed the preservation of decentralized, republican government and, relatedly, for the avoidance of conflicts between labor and capital. Southern schools occupied a particularly important place in this defense of slavery, for they permitted such truths to be told in the face of anti-slavery domination of the Northern schools. Garnett recalled that “the few who received education at Northern colleges brought back second hand history and shallow philosophy.” That led southerners to think that slavery might, indeed, be evil.²⁶¹

Because of southern institutions, like the University of Virginia, southerners learned a different story. “We read history, and we see that slavery is coeval with society, and almost co-existent with the human race; that it was *commanded* in God’s chosen theocracy, and *sanctioned* by his Apostles in the Christian Church; that where ever it has been abolished, its substitute has been found in an aristocratic distinction of castes, or in poor laws, and a war, ever increasing in bitterness, between the owners of food and property, and the poor....”²⁶² Southern institutions taught the correctness of slavery – in fact, that slavery was indispensable to democratic government. Garnett was speaking several years before James Henry Hammond’s 1858 speech in the United States Senate popularized the “mud sill” theory, that slaves provided the mud sill on which white democracy was built. Yet, Garnett was talking about those same ideas and emphasized, indeed justified, the university for its role in defending slavery. Lessons learned at southern schools led, in Garnett’s mind, to a further embrace of slavery. “The more we reflect upon our situation, the better we shall be contented, the more will we determine to devote ourselves to developing its rich resources, instead of sentimental whinings over what we neither can, nor ought to change.”²⁶³

In the same year as Garnett’s University of Virginia alumni address he also published, anonymously, a pamphlet, *The Union, Past and Future* also designed to support southern constitutional rights.²⁶⁴ That pamphlet addresses in economic and political terms what Garnett’s alumni address dealt with in literary and philosophic terms: the need for defense of slavery and also a decentralized government based on principles of slavery. *The Union* returned to the history of the constitution to show the importance of slavery and of the south’s early domination of the nation’s economy, then moved forward to a narrative of how northern anti-slavery activists were systematically working to take away enslaved property and to restrict the south’s economic development. It was a call for southern economic development through manufacturing, as well as

²⁶¹ *Id.* at 27 (“at last we began to believe what was so often dinned in our ears, that slavery was the moral, social and political evil they pretended.”).

²⁶² *Id.* at 29.

²⁶³ *Id.* at 30.

²⁶⁴ A CITIZEN OF VIRGINIA [MUSCOE R.H. GARNETT], *THE UNION, PAST AND FUTURE: HOW IT WORKS, AND HOW TO SAVE IT* (4th ed. Charleston, Walker & James 1850). *See also Is Southern Civilization Worth Preserving?*, 19 S.Q. REV. 190 (Jan. 1851) (reviewing [Garnett], *Union*, *supra*).

a call for a robust defense of the south's constitutional rights. For instance, Garnett emphasized the growing theory about the equality of the states, which held that the federal government could do nothing that would injure the rights of slave-holding states. Under that theory, the federal government could not tax disproportionately the products of slave labor, nor could it exclude slavery in the territories or take similar action against slavery, such as abolishing slavery in the District of Columbia.

The year after Garnett's address, in 1851, John Randolph Tucker, the son of law professor Henry St. George Tucker and the grandson of St. George Tucker, addressed the University of Virginia alumni. Tucker was less than thirty years old (he was born in 1823), but he showed already a mastery of southern constitutional ideas. Tucker's extensive address surveyed constitutional history, particularly during the founding period, to argue that states could judge for themselves violations of the Constitution and choose to secede if they wished. This argument was aimed at opposing "consolidation." While he argued for the right of secession, he claimed at the end of his speech that if southern states asserted their rights to set their own policy against the consolidation of the federal government that this would preserve the Union, presumably because there would be no need to secede.²⁶⁵

The leader of the University of Virginia's movement of southern rights was a law professor, James P. Holcombe. "The power of the pen now exceeds that of the purse, the sword, and the tongue," thirty-three year old Holcombe told his school's alumni in 1853. "The empire of Aristotle survived that of Alexander. Napoleon did not alter the face of Europe, more than Bacon." The best example of the power of literature was also a recent one, of the French Revolution. "When society was first convulsed by the upheaving of that awful revolution, with which the heart of Europe still palpitates, when a generous but mistaken sympathy with new-born freedom, disguised from the wisest and noblest spirits, the full extent of the crisis, England was saved from the torrent of wild and disorganizing opinion which swept towards her shores, by that moral break-water which the genius of Burke interposed."²⁶⁶ Holcombe used those examples of learning to justify the University. For southern universities offered the hope of a new, southern literature supporting slavery. Up to this point, Northerners has taken the lead in presenting the evils of slavery. Their anti-slavery argument was winning converts. "We can no longer cover the salient points of our institutions through the halls of Congress. The voice of the statesman the orator can not reach the masses, with whom lie the issues life and death," Holcombe worried. "Literature alone can dispossess the demon of fanaticism by its 'sweet compulsion.'"²⁶⁷

Only southerners could properly interpret slavery for the rest of the world. Until "a class of native authors, Southern born and Southern bred," arrived to explain slavery, "the rest of the

²⁶⁵ JOHN RANDOLPH TUCKER, AN ADDRESS DELIVERED BEFORE THE SOCIETY OF ALUMNI OF THE UNIVERSITY OF VIRGINIA ... 28TH JUNE 1851 62-64 (Richmond, H.K. Ellyson 1851).

²⁶⁶ JAMES P. HOLCOMBE, AN ADDRESS DELIVERED BEFORE THE SOCIETY OF ALUMNI, OF THE UNIVERSITY OF VIRGINIA, AT ITS ANNUAL MEETING, HELD IN THE PUBLIC HALL 40 (Richmond, Macfarlane and Ferguson 1853).

²⁶⁷ *Id.* at 41.

world” would never understand slavery.²⁶⁸ Harriet Beecher Stowe’s *Uncle Tom’s Cabin* had been out for only a short while when Holcombe addressed the alumni, but already it disclosed “the most formidable danger which crosses our line of future march.”²⁶⁹ Yet southern literature offered the best hope of repudiating the abolitionists. Holcombe spoke in apocalyptic terms. “We shall divide the public opinion of the world, break the force of its sympathy, and by pouring through the bosoms of our people the living tide of hope, strengthen their hearts for the day of trial, and cover our land and its institutions with a shield of fire.”²⁷⁰

Holcombe himself delivered an important proslavery oration to the Virginia State Agricultural Society in 1858, which was subsequently printed in Richmond’s *Southern Literary Messenger*. The meetings of state agricultural societies, like the Union Agricultural Society (as in Union of North Carolina and Virginia), which began an annual fair in 1854 to exhibit and discuss the latest ideas in agriculture, frequently reaffirmed the centrality of slavery. Thomas Gholson, who was a key supporter of slavery during the debate in the Virginia legislature after Nat Turner, spoke about the importance of slavery at the Union Agricultural Society’s first meeting in 1854, as did North Carolina politician A.W. Venable.²⁷¹

The lecture asked, “Is Slavery Consistent with Natural Law?”²⁷² Holcombe took the Virginia legislature’s debate in the wake of Nat Turner as a fulcrum point on the move from Jefferson’s definition of natural law, towards an embrace of the hierarchy inherent in nature. The South had moved from Jefferson’s declaration “that he knew no attribute of the Almighty which would take of the side of the master in a contest with his slave.” Instead, among the educated classes, “the justice, the humanity,” of slavery “has become the prevailing conviction.”²⁷³

The path to the pre-determined answer, “yes, slavery is consistent with natural law” owed much to Aristotle and little to Jefferson. Holcombe defined natural law as the “ethical rules ... which, upon the grounds of their own fitness and propriety, and irrespective of the sanction of Divine authority, commend themselves to the most cultivated human reason.” In other words, natural law was the law that humans might develop based on the surrounding circumstances, not some Jeffersonian notion of rights existing in a state of nature. This was an important shift that

²⁶⁸ *Id.* at 37.

²⁶⁹ *Id.* at 40.

²⁷⁰ *Id.* at 42.

²⁷¹ THOMAS S. GHOLSON, VALEDICTORY ADDRESS ... DELIVERED BEFORE THE UNION AGRICULTURAL SOCIETY OF VIRGINIA AND NORTH CAROLINA, OCTOBER 27, 1854 (Richmond, Geo. P. Evans 1854); A.W. VENABLE, ADDRESS ... DELIVERED BEFORE THE UNION AGRICULTURAL SOCIETY OF VIRGINIA AND NORTH CAROLINA, OCT. 25, 1854 (Petersburg, Southern Farmer 1854).

²⁷² James P. Holcombe, *Is Slavery Consistent With Natural Law?*, 27 S. LIT. MESSENGER 401 (Dec. 1858) (reprinting address to Union Agricultural Society).

²⁷³ *Id.* at 402.

allowed Holcombe to position slavery as consistent with the law as it had been constructed. He did not need to face arguments about rights in nature or grand Enlightenment pronouncements that all people were created equal. By defining natural law as the dictates of “cultivated human reason,” he plugged into a matrix of calculations about what rules were consistent with history and expediency and the stage of development of the enslaved people. That might not be what most people would think was the “natural law,” but it was consistent with the ways that southern thinkers were re-writing the definitions of freedom and natural right.

Partly, though, the “natural law” was determined by inductive reasoning from things as they were. By looking around, Holcombe posited that slavery was consistent with natural law because if the community were starting over, they would institute slavery. “It would be our right and duty to reduce the negro to subjection,” he boldly stated. Virginians would re-institute slavery because it was necessary to the well-being of their state.

In fact, the claim of the state was a bedrock principle in setting the law. Because humans seemed to live in society – rather than a state of individualism – humans had to give up some of their rights. Humans’ rights had to be balanced against others in society. That trimmed the rights of humans. Quite simply, the “horizon of unbounded liberty of nature” were limited “under those complex and refined forms which have been developed by Christian civilization.”²⁷⁴ Government, ordained by God, required limitations on each other’s rights. Some might think that the state was a restriction upon the freedom of people, yet that was inherent in the nature of a state. “Its function is to reconcile the conflicting rights, and opposing interests, and jarring passions of individuals, so as to secure the general peace and progress.”

Those limitations on rights were, in turn, based on the capacities of those who were governed.²⁷⁵ “Owing likewise to this variety of condition, and of moral and intellectual endowment, it is impossible to prescribe any stereotype forms admitting of universal application, under which the restraining discipline of law should be exercised.”²⁷⁶ In successive stages of government, the restrictions on the individual would change.. “The ends of social union remain the same through all ages, but the means of realizing those ends must be adapted to successive stages of advancement, and change with the varying intelligence and virtue of individuals, and classes, and races, and the local circumstances of different countries.”²⁷⁷

Holcombe abandoned talk of what slavery did for the equality of white men. Here we had

²⁷⁴ JAMES P. HOLCOMBE, SKETCHES OF THE POLITICAL ISSUES AND CONTROVERSIES OF THE REVOLUTION: A DISCOURSE DELIVERED BEFORE THE VIRGINIA HISTORICAL SOCIETY ... JANUARY 17, 1856 at 4 (Richmond, William H. Clemmitt 1856).

²⁷⁵ *Id.* (“The State was made for man, and not man for the State, but the cooperation of the State is yet so necessary to the perfection of his nature, that his interests require the renunciation of any claim inconsistent with its existence, or its value as an agency of civilization.”).

²⁷⁶ *Id.* at 4.

²⁷⁷ Holcombe, *supra* note 272, at 404.

an exploration of the benefits to slaves and to society. It was a utilitarian, non-religious defense. Slavery was, quite simply, the bedrock of southern society,

The main-wheel and spring of your material propriety, interwoven with the entire texture of your social life, underlying the very foundations of the public strength and renown, to lay upon it any rash hand would put in peril whatever you value; the security of your property, the well-being—if not the existence of that dependent race which Providence has committed to your guardianship—the stability of your government, the preservation in your midst of union, liberty, and civilization.²⁷⁸

In contrast to defenses of slavery from the 1830s and early 1840s, Holcombe said nothing about the way that slavery supported republicanism or brought political equality to white people.

Such principles were supported by “inductive reasoning” and by observation.²⁷⁹ Holcombe looked far, as well as near, for his observations. The British colonization of India provided an apt comparison. “It was a despotism no doubt, but it was a mild and paternal one; and no form of restraint less stringent could be substituted with equal advantage to those upon whom it was to operate.” The circumstances on the ground showed that colonization was appropriate, indeed, beneficial. “Any is right in the concrete, when necessary to the welfare of the community in which it exists, or beneficial to the subject upon whom it is imposed.”²⁸⁰

The people of the United States accepting without much reflection, those expositions of human rights embodied in the infidel philosophy of France, and glowing with that generous enthusiasm to communicate the blessings of liberty which is always inspired by its possession, have been disposed to look with common aversion upon all forms of unequal restraint. ... Forgetting the ages through whose long night their fathers wrestled for this blessing, they have regarded an equal liberty, as the universal birth-right of humanity. ... But alas! the crimes which have been committed in the name of liberty the social disorder and political convulsion which have attended its progress, if they have not broken the power of spells over the heart, have dispersed the illusions of our understanding.²⁸¹

The revolutions in France, Italy, Greece, Mexico, and Latin America provided evidence that not all people were suited for freedom. Some were “swallowed up in the gulfs of anarchy and despotism—the rest still float above the wave, but with rudder and anchor gone, stripped of every

²⁷⁸ *Id.* at 401.

²⁷⁹ *Id.* at 405.

²⁸⁰ *Id.* at 405-06.

²⁸¹ *Id.* at 406.

bellying sail and steadying spar, they only serve ‘Like ocean wrecks, to illuminate the storm.’”²⁸² The evidence he amassed to show the futility of emancipation and transportation out of the state and that slaves were – by and large – treated well, demonstrated that slavery needed to continue. “Arithmetic is the enemy of rhetoric” was his solemn conclusion.

The picture was of the utter destruction that would attend the end of slavery. While his 1856 speech to the Virginia Historical Society on Virginia’s contributions to the Revolutionary cause highlighted the role of slavery,²⁸³ much of Holcombe’s story was the supposed benefit to slaves.

African slavery is no relic of barbarism to which we cling from the ascendancy of semi-civilized tastes, habits, and principles; but an adjustment of the social and political relations of the races, consistent with the purest justice, commended by the highest expediency, and sanctioned by a comprehensive and enlightened humanity.

Its history when fairly written, will be its ample vindication. It has weaned a race of savages from superstition and idolatry, imparted to them a general knowledge of the precepts of the true religion, implanted in their bosoms sentiments of humanity and principles of virtue, developed a taste for the arts and enjoyments of civilized life, given an unknown dignity and elevation to their type of physical, moral and intellectual man, and for the two centuries during which this humanizing process has taken place, made for their subsistence and comfort, a more bountiful provision, than was ever before enjoyed in any age or country of the world by a labouring class. If tried by the test which we apply to other institutions, the whole sum of its results, there is no agency of civilization which has accomplished so much in the same time, for the happiness and advancement of our race.²⁸⁴

During the crisis over the coming of secession, Holcombe published a pamphlet whose title describes its thesis well: *The Election of a Black Republican President as an Overt Act of Aggression on the Right of Property in Slaves*.²⁸⁵ In that address in Albemarle County, Holcombe elaborated on the southern constitutional theory that they could not be bound by a constitutional majority – because there was no unity of interest between North and South. Holcombe understood, as others seem not to, that at least the “technicalities” of constitutional law prohibited

²⁸² *Id.* at 406 (a slight mis-quotation of Thomas Campbell’s *The Pleasures of Hope* 81 (London, Longman, Hurst, Rees, Orme, Brown, and Green 1825)).

²⁸³ HOLCOMBE, *supra* note 274, at 7 (“In America,” because of the combination of “descent, religion, laws, manners and institutions, especially that of slavery, the spirit of independence was at its height.”).

²⁸⁴ *Id.* at 420.

²⁸⁵ *The Election of a Black Republican President as an Overt Act of Aggression on the Right of Property in Slaves ...* (Richmond, C.H. Wynne 1860).

such an argument. Holcombe, like many other southerners, argued from the spirit of the Constitution, not its letter.²⁸⁶ While Holcombe acknowledged, indeed built much of his argument around the Supreme Court's declaration that slavery was constitutionally protected in the territories, he predicated that Lincoln's appointments could effectively end that right. At some later date there would likely be a constitutional amendment prohibiting slavery. Holcombe predicted that the interpretation of the Constitution might change, even if there was no constitutional amendment to prohibit slavery. From that he concluded, "We must prepare for either a disgraceful and unconditional surrender; or we must make up our minds to begin resistance ... to measures and proceedings which are perfectly constitutional in form."²⁸⁷ In fact, those arguments about the nature of constitutional violation were central to the movement for secession in many venues.

C. William and Mary

Where Henry Ruffner was moderately antislavery in the 1840s, already in the 1830s William and Mary professors in the 1830s were publishing important proslavery literature. Nathan Beverly Tucker wrote about the role of slavery in sustaining the republic, a proslavery political theory, which was also advanced in Abel Upshur's 1840 address at William and Mary. Thomas R. Dew wrote the 1832 Review of the Debates in the Virginia Legislature, an economically oriented defense of slavery and also an attack on the possibility of colonization. This was part of a shift toward a sense of the slave as the person brought by abolitionists causes a shift to the virtues of slavery.

In 1854 John Randolph Tucker, who had also spoken at the University of Virginia, spoke before the William and Mary literary societies about the political theory of republicanism. He offered a defense of republicanism for the checks it offered to democratic impulse.²⁸⁸ Tucker's abstract address first turned to the Republican idea in the United States, which combined democratic and representative principles and that balanced power of the people with liberty of individuals. In fact, liberty, which involved protection of individual rights, was central to Tucker's world. He thought that humans are entitled to the utmost civil liberty that can exist while still maintaining society. Tucker's world, like that of other southerners, was one of ordered liberty, in which democratic majorities were restrained from infringing the property and personal rights of individuals. Tucker drew the distinction between equality of rights and equality of condition. Everyone, he thought, had equal rights to civil liberty; however, the limiting principle here was that they had only rights to so much liberty as their condition permitted. Thus, the amount of rights that individuals were entitled to varied according to their station in society. This

²⁸⁶ *Id.* at 8.

²⁸⁷ *Id.* at 9.

²⁸⁸ JOHN RANDOLPH TUCKER, ADDRESS ... DELIVERED BEFORE THE PHOENIX AND PHILOMATHEAN SOCIETIES, OF WILLIAM AND MARY COLLEGE, ON THE 3D OF JULY, 1854 (Richmond, Chas. H. Wynn 1854).

was part of Tucker's attack on agrarianism, an English movement that sought the redistribution of wealth.²⁸⁹ "The true corollary is, that as each has separate gifts from his Creator, and comes into the social compact to preserve them, equality of right demands that each be left to work out his own destiny, freely and manfully—to accomplish all which by nature he is fitted to accomplish, without hindrance from his fellows, and without help or interference from this government."²⁹⁰ Tucker had a pithy phrase to encapsulate his theory: "The world the arena, men the athlete, government the mere police, God the arbiter, and the reward the laurel he can gather, and the crown he can win."²⁹¹

Tucker's theory calibrated rights to social position; it was a long way from the Enlightenment idea that all people are created equal – and have equal rights, for instance, to be free from slavery. Instead, the theory was that rights and Constitutions should be made to fit the condition of the people being governed.

The man who writes constitutions by the dozen, and keeps them on hand for use or distribution, without a careful investigation of the social capacities of the people for whom they are designed—he who *guesses* that our institutions would be admirably suited for China or Japan, or that our federative system of republics would work with facility and success under a President Roberts upon the coast of Africa, is a dangerous empiric—a mere pretender, whose reward should be fixed in perpetual banishment from the counsel of a wise people. And in the solitude of an asylum for political lunatics.²⁹²

Tucker spoke about the reality of life in the south, about the place of enslaved people and about history. He asked whether "any man" could deny "the most favorable condition for the African is slavery, and the only condition for the Saxon, consistent with his progress or even existence, is that of being director of the physical and moral energies" of the enslaved people.²⁹³ "Republicanism," Tucker tersely concluded, "demands the maintenance of" slavery.²⁹⁴ And, as others were also saying at this time, the mere promises of the Constitution were not enough to maintain southern rights. Tucker reached beyond the paper document; he understood the importance of a constitutional culture that supported slavery. This is further evidence of why ultimately secession was seen as so necessary – because political reality suggested that the North would at some point end slavery. The testimony of people who lived through the era, like Tucker, remind us of the salience of a cultural ideas to Union, whether those idea were like Henry

²⁸⁹ *Id.* at 9.

²⁹⁰ *Id.* at 10.

²⁹¹ *Id.*

²⁹² *Id.* at 11.

²⁹³ *Id.* at 15.

²⁹⁴ *Id.*

Ruffner's in favor of Union and against slavery, or in favor of Union and in favor of slavery like Junkin's, or against Union and in favor of slavery, like many other Southerners by the time of secession.

One might look elsewhere in the south for a diversity of ideas. Until very late in the 1850s, graduation orators at the University of North Carolina consistently supported Union. They resisted even the beginning of the discussion of the value of Union; instead, they had appeals to the romantic vision of a great commercial republic. It was not until 1857 that Henry W. Miller, a Democratic politician, seriously contemplated disunion in a graduation address. Further south, in South Carolina, the ideas of disunion were broached earlier and more vigorously.

D. South Carolina Colleges

For decades, South Carolina had been the leader of the movement for a separate southern nation. Its intellectuals developed constitutional theory first regarding South Carolina's right to nullify federal law, then developed arguments about the equality of the states that protected slavery in the territories and also throughout the south.²⁹⁵ Those arguments seeped into formal constitutional law in such decisions as the *Dred Scott* case and also served to bend Americans' sense of what was constitutionally mandated. These ideas appeared in literary addresses at South Carolina college as well. Thus, William Porcher Miles' provocatively titled *Republican Government Not Everywhere the Best*. Miles took a more extreme view from Tucker and suggested that there were places where republican government was inappropriate because the condition of the people were not ready yet for such freedom. This required little abstraction to understand that Miles applied such ideas to the enslaved Africans.²⁹⁶

Charleston lawyer Richard Yeadon, who wrote an extreme defense of slavery and attack on abolitionists in 1835 when abolition literature was widely distributed through the United States mail, *The Amenability of Northern Incendiaries as Well to Southern as to Northern Laws*.²⁹⁷ By 1857 when Yeadon addressed the Erskine literary societies, he never longer seemed to feel the need for a defense of slavery. Instead, he focused on the constitutional rights of the south and the steps necessary to protect those rights. In view of the still aggressive spirit and faithless conduct of the North, which yet cloud the political heavens with portents, and jar the land with volcanic throes, we should continue to exercise that jealous and eternal vigilance, which is the price of

²⁹⁵ WILLIAM W. FREEHLING, *PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY* (1966) (addressing the "Development of a Theory"); MANISHA SINHA, *THE COUNTERREVOLUTION OF SLAVERY: POLITICS AND IDEOLOGY IN ANTEBELLUM SOUTH CAROLINA* (1996).

²⁹⁶ MILES, *supra* note 212.

²⁹⁷ [Richard Yeadon], *THE AMENABILITY OF NORTHERN INCENDIARIES AS WELL TO SOUTHERN AS TO NORTHERN LAWS ...* (Charleston, T.A. Haden 1835).

liberty, and the only assurance of Southern rights and Southern safety.”²⁹⁸ Yeadon echoed the sentiments of the South Carolina Senator John C. Calhoun that “We of the Southern States holding the institution of domestic slavery, to be interwoven with the fabric of our social existence, and to be our destiny, must keep the vantage ground we have gained, and, standing on the Constitution, insist on and maintain ... our full measure of right...”²⁹⁹

In March 1860, Reverend John L. Girardeau spoke at the graduation of the College of Charleston.³⁰⁰ Girardeau addressed the concern over the dark cloud, “black and threatening” hanging over the Union. He feared that the “Constitution and law of the land have lost their force and commanding authority” and he proposed to explain why they had and hope this might be remedied.³⁰¹ Girardeau discussed the ways that government was calibrated to the needs of the people. At the end he confronted the Free Soil’s support of a higher law over the Constitution.³⁰² Southern thinkers – and many Northern ones as well, including George Junkin – opposed the idea that the Bible commanded or even authorized antislavery action in contradiction of the Constitution. Girardeau, thus, turned to the ways that the Constitution was related to the Divine authority. He found no contradiction, for “the institution which [the Constitution] upholds is sanctioned by that law.” Girardeau invoked eight southern writers (William Smith, Albert Taylor Bledsoe, Chancellor James Harper, James Henry Hammond, William Gilmore Simms, Thomas R. Dew, William J. Grayson, and James Henley Thornwell) to remind his audience that the southern position on the lawfulness of slavery was well-established and that it was consistent with the Bible. Girardeau’s conclusion was that if slavery “be not condemned by the Word of God, the fact that it is sanctioned by the Constitution can furnish no ground of conscientious resistance of the provisions of that instrument. Resistance may be offered, but it is not a righteous resistance....”³⁰³ It was Northerners, then, who violated the Constitution when they opposed the return of fugitive slaves or resisted the *Dred Scott* decision.³⁰⁴ It was Northerners who risked “rebellion against the authority of the Supreme Rule, faithlessness to the stipulations of solemn

²⁹⁸ RICHARD YEADON, AN ADDRESS ... BEFORE THE EUPHENIAN & PHILOMATHEAN LITERARY SOCIETIES OF ERSKINE COLLEGE ... AUGUST 12TH, 1857 48 (Due West, S.C., Due West Telescope 1857).

²⁹⁹ *Id.*

³⁰⁰ JOHN L. GIRARDEAU, CONSCIENCE AND CIVIL GOVERNMENT: AN ORATION DELIVERED BEFORE THE SOCIETY OF ALUMNI OF THE COLLEGE OF CHARLESTON ... MARCH 27TH, 1860 (Charleston, Evans & Cogswell 1860).

³⁰¹ GIRARDEAU, *supra* note 300, at 4.

³⁰² *Id.* at 16.

³⁰³ *Id.* at 17.

³⁰⁴ *Id.* at 18-19.

treaties, and treachery to the dearest interests of man.”³⁰⁵ With such rhetoric at a college graduation, one can understand how the movement for secession, based on the idea that the North had already violated the Constitution, unfolded over the next year.

One of the most important pamphlets urging secession in the spring of 1861 came from James Henley Thornwell,³⁰⁶ who had served as professor at South Carolina College and then as president from 1852 to 1855. In 1861, Thornwell was teaching at the Columbia, South Carolina, Presbyterian Theological Seminary.³⁰⁷ His pamphlet, *The State of Our Country*, was widely read – including, apparently, by George Junkin, who referred to how Thornwell focused on Lincoln’s election and the exclusion of slavery from the territories as the justification for secession.³⁰⁸

Thornwell demonstrates how central constitutionalism was to Southern thinking at the time of secession. For he wrote that the “real cause of the intense excitement of the South ... is the profound conviction that the Constitution, in its relations to slavery, has been virtually repealed.”³⁰⁹ Northerners had violated the spirit of the Constitution and revoked the promises of the Constitution to protect slavery. “The election of Lincoln,” Thornwell wrote, “when properly interpreted, is nothing more or less than a proposition to the South to consent to a Government, fundamentally different upon the question of slavery, from that which our fathers established.”³¹⁰ Thornwell believed that the Constitution’s attitude towards slavery was equality among the states, in which the slaveholding states were treated the same as the non-slaveholding states (he did not say “free states”). Here he drew on decades of Southern constitutional theorizing that demanded that slave-owners be able to take their human property into all the territories of the United States and also that Congress could act to limit or discriminate against slavery.³¹¹ Slavery was justified by the constitution and the world, which Thornwell asserted was the “universal custom of mankind.”³¹²

Secession was a constitutional crisis borne of the violation of the Constitution, Thornwell

³⁰⁵ *Id.* at 19.

³⁰⁶ JAMES HENLEY THORNWELL, *THE STATE OF THE COUNTRY* 20, 24-25 (Columbia, Southern Guardian 1861).

³⁰⁷ JAMES OSCAR FARMER, *THE METAPHYSICAL CONFEDERACY: JAMES HENLEY THORNWELL AND THE SYNTHESIS OF SOUTHERN VALUES* 58 (1999).

³⁰⁸ JUNKIN, *supra* note 184, at 265-66. Junkin was likely referring to Thornwell’s pamphlet, which refers to Lincoln’s election and to the future of slavery in the territories. *See* THORNWELL, *supra* note 306, at 20, 24-25.

³⁰⁹ THORNWELL, *supra* note 306, at 9.

³¹⁰ *Id.* at 9.

³¹¹ *See, e.g.*, DON FEHRENBACHER, *THE DRED SCOTT CASE IN LAW AND POLITICS* (1978).

³¹² THORNWELL, *supra* note 306, at 14.

believed. He interpreted the Constitution using its text, such as the fugitive slave clause, Supreme Court precedent of *Prigg v. Pennsylvania*, which struck down a Pennsylvania statute that added additional burdens to the return of fugitive slaves, and his sense of the ubiquity of slavery. He believed that the “Constitution covers the whole territory of the Union, and throughout that territory, has taken slavery, under the protection of the law.”³¹³

However, Lincoln’s election, was “the death-knell of slavery.”³¹⁴ For Thornwell believed that Northerners have evaded the spirit of the Constitution and that they would remake it further given the chance. The Constitution’s form had stayed the same, but the substance had changed. “The very moment [Lincoln] goes into office, the Constitution of the United States, as touching the great question between North and South, is dead. The oath which makes him President, makes a new Union.” The South, quite simply, was being “reduced to zero,” as Southerners struggled for “their very being.”³¹⁵ Thornwell, thus, showed himself an agile interpreter of the Constitution. He cultivated, as did many Southerners, a reading of the Constitution that was firmly proslavery and drew upon common Southern beliefs about slavery as natural, rather than unusual. Such ideas, so widely discussed on college campuses, help us understand the secession movement. Those ideas go off the page of the written Constitution, to address the sentiments of Union (or disunion) and the ways that social and economic imperatives related to those constitutional decisions. In short, Thornwell lets us see in the compass of one pamphlet how Southerners understood their constitutional rights and acted on them.

The addresses at Washington College and other institutions illustrate how jurisprudence and constitutional thought fit together with economic and social facts. The dominant constitutional culture, the interpretation of the Constitution in a proslavery and pro-secession fashion, was supported by the economic reality of slavery and the well-developed political theory of social hierarchy so carefully explained in so many places in the southern academy. Together these accepted facts – of the economic necessity for slavery, the need for the superior to govern the inferior, and God’s command of slavery – worked in conjunction with the southern interpretation of the Constitution. In seeing all of these pieces together we see how the war came. This considers the Civil War as a constitutional crisis, not in the sense that there was the breakdown of the Constitutional order. Instead, the addresses here invite the question how Southern interpretations of the Constitution were shaped by economics and social thought, as well as how the Constitution and ideas about Union helped to shape the Southern responses to the perceived threats to slavery. The addresses at Washington College and VMI the varieties of the intellectual world of the South and in that way understand something more about how their world operated and the matrix of possible responses to Lincoln’s election.³¹⁶

³¹³ *Id.* at 16.

³¹⁴ *Id.* at 24.

³¹⁵ *Id.* at 23, 25.

³¹⁶ See generally WILLIAM A. LINK, *ROOTS OF SECESSION : SLAVERY AND POLITICS IN ANTEBELLUM VIRGINIA* (2003). Where Link seeks to expand our sense of political history, by

VI. Epilogue: Washington College, Constitutionalism, and Union

Now let us return to the central characters in this story: the faculty of Washington College. Though he had moved back his family's property near what is now Charleston, West Virginia, Henry Ruffner grieved for the Union. In May 1861, Ruffner wrote his daughter about the crisis. He employed characteristically economic terms: "Should the Civil War proceed to actual invasion and bloodshed about the Potomac, our state, both government and people, will be insolvent within 12 months. Our masters of the convention have passed an act to stay the collection of debts ... that the state constitution prevents it. A reaction in this state, especially in West Virginia, doubtless [simmer], but too late and few to save the state."³¹⁷

In Lexington, in December 1860 George Junkin argued the case for Union with residents of Lexington and also in the pages of Philadelphia's *North American* newspaper. In an essay entitled, "A Voice of a Pennsylvanian in the Heart of Virginia," Junkin asked for compromise – he pointed out the need to abide the South's rights to reclaim fugitive slaves.³¹⁸ Junkin did not realize that Southern complaints about violations of the Constitution were much longer. It was the whole approach of the North toward slavery that bothered Southerners.³¹⁹ After that, Junkin published in the *Lexington Gazette* an appeal to Virginians – again, too little.³²⁰

Meanwhile, the students at Washington College advocated secession.³²¹ In April 1861,

looking at the effects of actions of people not allowed to vote – like the enslaved people of pre-war Virginia, this paper looks to the constitutional ideas of people outside of the judiciary and asks how those ideas related to economics and society – and also invites further work on how those ideas related to secession. *See also* THOMAS RITTENBURG, *COMPELLED TO FIGHT, THE SECESSION CRISIS IN ROCKBRIDGE COUNTY, VIRGINIA* (2009).

³¹⁷ Henry Ruffner to daughter Julia, May 7, 1861, William Henry Ruffner Papers, Library of Virginia.

³¹⁸ *See, e.g.*, Thomas Cobb, in *SECESSION DEBATED: GEORGIA'S SHOWDOWN IN 1860* 3,9 (William W. Freehling & Craig M. Simpson eds., 1992) (contrasting the spirit of the Constitution with its letter and observing that the North had violated the spirit of the Constitution through the election of Lincoln); THORNWELL, *supra* note 306, at 24-25 (discussing ways that the North had violated the Constitution).

³¹⁹ Letter to the *Philadelphia North American* December 18, 1860, quoted in Junkin's *Memoirs*, *supra* note 159, at 512-14.

³²⁰ CRENSHAW, *supra* note 146, at 118?

³²¹ In the last two years before war, the Washington Literary Society debated topics that suggested they had turned much more proslavery. For instance, on May 28, 1859, they concluded 13 to 2 that "the Europeans [were] justifiable in taking possession of America against the will of the Aborigines." That is a turn from the Graham Society's debate of May 3, 1845, "Were the Europeans justified in taking possession of America in opposition to the wills of the

Junkin confronted students who had placed a secession banner above the Washington Statue on the Washington College's main building.³²² Junkin resigned, then closed up shop in Lexington and headed for Pennsylvania.³²³ Junkin left behind his daughter, Margaret Junkin Preston, who was married to VMI professor and soon to be Confederate Major Thomas Preston, two sons who had important pastorates in Virginia. In the Lexington cemetery, moreover, were the bodies of his wife and daughter – who had been married to Professor Thomas L. Jackson, soon to be the famous Confederate General Stonewall Jackson. Thus, the Junkin family – like so many others – was torn by the impending war. Soon, Junkin heard that the student he argued about the banner with and several others died at the Battle of Bull Run in July 1861.³²⁴ The worst was yet to come.

Junkin's final act with regard to his Washington College students was enacted in July 1863, shortly after a battle in a small crossroads in Pennsylvania where he went to tend to the wounded. After a sermon to wounded Confederate soldiers, alumni gathered around him and he, so the story goes, called the roll of the former students. It is unclear just how happy a meeting this was, under such different circumstances from when the students set out on promising lives so many years before.³²⁵ This is just one more of a many scenes of the agony wrought in the wake of

aborigines," which was decided in the negative by a vote of 5 yes and 8 no.

On October 27, 1859 the Washington Literary Society concluded 9 to 4 that the "African slave trade [should] be reopened." On several occasions in late 1860 and early 1861, they debated secession explicitly. On November 11, 1860 they debated, "In case of disunion should Virginia adhere to the North or South?" On January 19, 1861 they debated, "Ought Virginia to call a convention?" In February 1861 they debated, "Should Texas declare itself independent and take Mexico?" *See also* CARMICHAEL, *supra* note 42, at 139 (discussing turn to secession at Washington College).

³²² JUNKIN, POLITICAL FALLACIES, *supra* note 93, at 10.

³²³ *Id.* at 14-18.

³²⁴ *Id.* at 14.

³²⁵ JUNKIN, *supra* note 159, at 550. The president of Gettysburg College recalled in 1868 that the meeting was like this:

One Sabbath afternoon, ... I found perhaps a dozen of his former pupils in Washington College, whom I persuaded to attend the services in the chapel. Dr. J. delivered a very pungent discourse; the services were of a very solemn character. After they were concluded, these college young men all remained to take their old preceptor by the hand. Among the number was a Confederate chaplain; and it was most touching to see the aged man of God throw his arms around the young man's neck and weep, exclaiming, "I never thought you would be engaged in this work!"

As they gathered around him, apparently most glad to meet him again, he took from his pocket the old classbook, and commenced to call the roll, and rehearsed the history of

that Constitutional drama – in which slavery, Constitutionalism, and law were so central.

each member, showing how all had suffered more or less in consequence of their resistance to the best government which God had ever given to men.