



# The World Made by Laws and the Laws Made by the World of the Old South

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FOR A GENERATION NOW, a group of scholars has reinvigorated the study of thought in the Old South. That is a tough task for at least two reasons. First, as the title of Drew Faust's *A Sacred Circle* implies, self-identified intellectuals were relatively few. Second, and this is more a product of our limitation than of their world, we have difficulty understanding how smart and well-educated people could support an institution that is so clearly, well, inhuman. Thus, we have difficulty seeing antebellum southerners as intellectuals or as serious thinkers.

Moreover, the actors did themselves a disservice in the way they engaged ideas. A Charleston, South Carolina, mob responded to antislavery literature sent through the U.S. mail in 1835 with a bonfire.<sup>1</sup> Other responses to the abolitionist literature crisis came through the legal and political system. For example, John C. Calhoun wrote a short but suggestive report for a congressional investigation of the power of the states and of the federal government to regulate the mail.<sup>2</sup> A Tuscaloosa County grand jury indicted Robert G. Williams, the New York-based editor of the *Emancipator*, in September 1835 for the abolitionist literature that arrived there the previous summer, even though he was obviously beyond the reach of the court. Tuscaloosa, Alabama's capital and a university town, had been a center of activity for the American Colonization Society.<sup>3</sup> A few years before Williams's indictment, the Tuscaloosa County Court had freed a young man who had been kidnapped in Philadelphia and sold into slavery in Alabama.<sup>4</sup> There was a world of possibilities in the Old South, of paths not pursued—such as gradual abolition of slavery. Still, the far more common response was the proslavery pamphlet or treatise—and sometimes a bonfire.

The violence went beyond burning of pamphlets. A mob murdered abo-

litionist newspaper editor Elijah Lovejoy in Missouri in 1836, and a student murdered the president of Mississippi's Oakland College in 1851, presumably for his pro-Union stance.<sup>5</sup> Professors who appeared insufficiently pro-slavery were encouraged to move on, as happened with President Howard Malcolm of Georgetown College in Kentucky, who resigned in 1849 amid charges that he was antislavery,<sup>6</sup> and Henry Ruffner of Washington College, who resigned shortly after publishing a lengthy attack on slavery.<sup>7</sup> Francis Lieber's bid to become president of South Carolina College in 1856 was opposed because of his supposed antislavery beliefs.<sup>8</sup> Others, such as Benjamin S. Hedrick at the University of North Carolina in 1856, were outright fired or had to go to extraordinary lengths to show that they were not soft on slavery, as chancellor F. A. P. Barnard did at the University of Mississippi in 1860.<sup>9</sup>

Even antebellum southerners realized (and in some ways celebrated) that they were less concerned with ideas than were their counterparts in the North. Abel Upshur's essay on "Domestic Slavery," which appeared in the *Southern Literary Messenger* in 1839, explored why slavery was "not favorable to the general diffusion of knowledge." There were, Upshur thought, some structural reasons (in an agricultural society, where many would receive no education, it was difficult to sustain common schools) as well as some cultural ones. "The habits and pursuits of the slave owner" might "make him less patient of the labor of study and less anxious for the acquisition of knowledge."

Such knowledge was not necessary for the slave owners' existence. Yet for the few who would be leaders of southern society, slavery made it possible to spend time in study. Slavery "removes from the student the necessity of personal labor, and gives him time for study; it relieves him from the sordid and distracting cares which, under different systems, are so apt to chill his hopes and discourage his exertions. Hence the mind is less trammelled by forms, and is more independent and free to exert its powers." Then in an unlikely parallel to Ralph Waldo Emerson's "American Scholar," Upshur said, "The school room is not the only means, nor even the *best* means of education." Where "our northern youth pass their leisure hours, for the most part, either in schools or in listening to itinerant speakers," southern youth "are freely thinking for themselves and forming ideas of their own."<sup>10</sup>

Slavery, then, was justified in part because of the leisure time it gave to slave owners. Southerners reiterated this argument until the war. James Henry Hammond's 1858 Mudsill Speech advanced the idea that there must

be a class of people who did the work to make it possible for others to do the thinking.

In all social systems there must be a class to do the menial duties, to perform the drudgery of life. That is, a class requiring but a low order of intellect and but little skill. Its requisites are vigor, docility, fidelity. Such a class you must have, or you would not have that other class which leads progress, civilization, and refinement. It constitutes the very mud-sill of society and of political government; and you might as well attempt to build a house in the air, as to build either the one or the other, except on this mud-sill. Fortunately for the South, she found a race adapted to that purpose to her hand. A race inferior to her own, but eminently qualified in temper, in vigor, in docility, in capacity to stand the climate, to answer all her purposes. We use them for our purpose, and call them slaves.<sup>11</sup>

Slavery was also justified for how it helped preserve republicanism. In addition to the leisure it gave to masters, it united white people—owners and nonowners alike—to give them a sense of rough equality, as many people, including William and Mary professor Beverley Tucker, argued.<sup>12</sup>

Sometimes legal historians have recognized the central role of judges and lawyers as intellectuals in the Old South. For example, Timothy Huebner's *The Southern Judicial Tradition* presented intellectual-biographical sketches of a number of nineteenth-century jurists.<sup>13</sup> Similarly, William Wiethoff has examined the judges' proslavery worldview in *A Peculiar Humanism* and *The Insolent Slave*.<sup>14</sup> Nearly three decades ago, Michael O'Brien published a meticulous reconstruction of the ideas of lawyer and attorney general Hugh S. Legaré.<sup>15</sup> Such studies offer important insight into the central role of economic thought and support for the market in the Old South and point out ways southern law created—and was created by—the economic and demographic reality of the slaveholding south. Yet historians of the Old South have often focused on those who cut against the grain of southern ideas. O'Brien's magisterial *Conjectures of Order* provides one gauge of how intellectual historians have approached the transmission of ideas in the Old South and the role of those ideas. O'Brien's volumes move from ideas grounded in social experience (a sort of social history of intellectual history) outward. O'Brien moves from the southerners as people of the world (travelers in Europe and Africa and elsewhere) to natural and social science to southerners' interactions with one another through conversations and books. Then the second volume turns to more traditional intellectual history—ideas about history,

economy, philosophy (including proslavery thought), and religion. The book is concerned with southerners' place in the world—as a postcolonial society—as well as with ideas of nationalism and empire. And it emphasizes the romantic ideas of the center part of his study, which themselves emphasized experience and the particular rather than the general. O'Brien's subjects travel in many circles. They move from the remnants of Enlightenment thought in the early nineteenth century to the romanticism of the 1830s–50s to the emergence of pieces of realism in the 1850s. It is a book about idiosyncratic thinkers as well as previously neglected figures.<sup>16</sup>

Much of *Conjectures of Order* is about the cosmopolitan, engaged southerner, which leads to a question about how much the project of intellectual history involves showing creativity, originality, complexity, and connections to the larger intellectual world. Is an intellectual Madagascar of interest? Or do we want to hear more of citizens of the world? Do we care whether southerners responded to Emerson, Thoreau, Whitman, Channing, Parker, and Stowe or to people with whom they might have had more in common—for example, Aristotle, Burke, Bastiat, Guizot, and Carlyle? The engaged, worldly southerners are important creatures to study, but they may lead us to mistake the central character of southern society. Moreover, that Francis Lieber lived here, that Frederick Grimké was born here, that lawyer Jesse Burton Harrison of Lynchburg, or Charles Shaw, who served as an adjunct professor at the University of Virginia, and Henry Ruffner of Washington College—that they all opposed slavery was important, but it is also potentially misleading.<sup>17</sup>

Southern thinkers frequently emphasized experience, order, and utility. John Reuben Thompson, editor of the *Southern Literary Messenger*, told graduates of Washington College in Lexington, Virginia, in 1850 that what was needed was a southern literature “of our own, informed with the conservative spirit, the love of order and justice, that constitutes the most striking characteristic of the Southern mind.”<sup>18</sup> Henry St. George Tucker explained with even more precision the role of the southern lawyer in the search for stability. “Lawyers,” Tucker told the entering class at the University of Virginia law school in 1841, “are bred to a love of order.” His writings testified to that love.<sup>19</sup>

Lawyers, judges, and politicians, moreover, embraced the dominant spirit of utility.<sup>20</sup> In rejecting a slave owner's request that a railroad be held strictly liable for the death of a slave hit by a train car, Georgia Supreme Court justice Eugenius Nesbit said such a rule would be inexpedient. He opposed the

rule because it was inconsistent with the principle of fault and because it would discourage railroads.<sup>21</sup>

The Old South, then, had some very smart people who spent a lot of their time talking about conservative ideas and justifying their society. We see this in their moral philosophy texts, which taught that considerations of morality should turn in many instances on utility. That idea, in turn, became a key prop to proslavery action, for southerners could not see an end to slavery in a way that led anywhere other than the complete destruction of their society. That position was further bolstered by their histories.<sup>22</sup>

And historians sometimes recognize the importance of lawyers to southern intellectual history. O'Brien, for example, writes early in the first volume of *Conjectures of Order* that lawyers were a key group of southern intellectuals. "The lawyer with his Blackstone, the minister with volumes of sermons and the Bible, the merchant with ledgers and news from Liverpool, the physician with medical textbooks, the journalist, the bookbinder, the bookseller, all these made a child understand that print and ideas mattered."<sup>23</sup> Yet after that acknowledgment of the centrality of law, O'Brien largely abandons those with legal training as objects of study. Of the one hundred or so people who are his focus, few have legal training, fewer still are practicing lawyers, and none are judges.

Yet there are important questions regarding how those with legal training saw their world, how they fit together ideas of history (from ancient Greece and Rome to feudalism, the French Revolution, Haiti, and the United States) with their modes of interpretation. What did the Anglo-American history of protection of property rights teach about the need for security for property? How did southerners' thinking about property change from Jefferson's writings on the abolition of fee tail to the defense of property in humans in the 1830s made by Chancellor James Harper and in the 1850s by Chief Justice Joseph Henry Lumpkin of Georgia?<sup>24</sup>

In addition to Harper, Thomas Ruffin, and Lumpkin, who should be added to the intellectual history of the Old South? Lots of judges. From the U.S. Supreme Court, we should include southerners John Marshall, John Archibald Campbell, John Catron, Peter V. Daniel, William Johnson, James Wayne, and Roger B. Taney.<sup>25</sup> Many state jurists deserve attention as well; the most prominent include William Gaston of North Carolina; Eugenius Nesbit, Henry L. Benning, and Ebenezer Starnes (author of a little-noticed empirical study of slavery that responded to abolitionists' attacks on slavery by attempting to show that enslaved people fared better under slavery than

recently freed slaves) of Georgia;<sup>26</sup> William Brockenbrough, William Robertson, Spencer Roane, and Henry St. George Tucker of Virginia; John Belton O'Neill of South Carolina; and Abner Smith Lipscomb and Oran Milo Roberts of Texas.<sup>27</sup> From Mississippi, there are William Harris, author of the zealously proslavery decision *Mitchell v. Wells*; William L. Sharkey, author of *Hinds v. Brazealle* (which deprived a child of an inheritance left by his father and put the child back into slavery with the father's relatives); Alexander M. Clayton, author of an opinion that upheld a devise to the American Colonization Society; and Alexander Handy, who upheld a devise to slaves and who also dissented from *Mitchell v. Wells*.<sup>28</sup> Also among the nation's leading legal thinkers were southerners Hugh S. Legaré and William Wirt.

The list of lawyers and legislators worthy of study is long. It includes Benjamin Watkins Leigh, who argued forcefully in favor of slavery in the early 1830s, and John Marshall's son, Thomas, who mildly attacked slavery in the Virginia legislature's debate in the wake of Nat Turner's rebellion.<sup>29</sup> Many politicians imported their legal ideas into college literary societies, including Jefferson Davis, James Pettigru, and R. M. T. Hunter.<sup>30</sup> Literary figures with legal training include William Gilmore Simms; John Pendleton Kennedy, whose *Swallow Barn* included a discussion of property law; James Glover Baldwin, whose *Flush Times in Alabama and Mississippi* discusses legal culture in those frontier states in the 1830s; and Augustus Longstreet.<sup>31</sup> Even among southerners without formal legal training, law was a common theme. The book-length responses by southern men and women to Harriet Beecher Stowe's critique of slave law in *Uncle Tom's Cabin* included Caroline Hentz's *Planter's Northern Bride*, St. John's College professor Edward Stearns's *Notes on Uncle Tom's Cabin*, Mary Eastman's *Aunt Phillis' Cabin*, and M. J. McIntosh's *Lofty and the Lowly*.<sup>32</sup>

A focus on college faculty and those who spoke at colleges helps bridge theory and the active life of politics and law, for those people provide keys to understanding how the motives expressed in the works of intellectuals connect to action. When we ask how our nation's ideals—and the beliefs that circulate throughout the land—impel us from dream, feeling, and idea to political action and then even to violence, we can benefit from looking at those who express those sentiments and then act on them.<sup>33</sup> One of the great problems of intellectual history is to connect ideas to action. This may be one of the gifts that an intellectual history of law can offer us.

Professor (and later president) Thomas Dew of William and Mary is central to antebellum southern thought. Dew's *Reviews of the Debates in the Leg-*

*islature* in the wake of Nat Turner's Rebellion is a key summation of southern proslavery thought. Dew's colleague, Beverley Tucker, who taught law at William and Mary, included a complex civil suit and criminal prosecutions in his novel *George Balcombe*; Tucker critiqued the statement in Blackstone's *Commentaries* that slavery is inconsistent with natural law, and he frequently lectured on the ways that slavery was necessary for republicanism. Thomas Cobb's five-hundred-page treatise, *An Inquiry into the Law of Negro Slavery*, combines history with law and gives us a comprehensive view of conservative thought, as does Louisiana lawyer George Sawyer's *Southern Institutes*, a legal history of slavery. Albert Taylor Bledsoe, who was trained in law and practiced before teaching at the University of Mississippi and University of Virginia, wrote *Liberty and Slavery*, which defended the idea that freedom is greatest in a society where order is maintained by law. Bledsoe was joined by three University of Virginia colleagues who wrote about natural law—Henry St. George Tucker, George F. Holmes, and James P. Holcombe. Yet standard intellectual histories of the Old South rarely mention the hundreds of volumes of case reports and treatises that represent the well-considered thoughts of some very smart and articulate people.<sup>34</sup>

How, then, does a focus on southern legal thought—in the pages of state and federal reporters, in the treatises and pamphlet literature, and in their fictional literature—affect how we think about southern intellectual history? There are four ways in which legal literature might contribute to the southern intellectual history project and to an understanding of the ways that legal thought is closely connected to economic and social reality.

First, the legal literature can help us clarify some themes in political thought, like the growth of liberalism and the market in the South. Where some historians focus on southerners' antimarket writings, the judicial opinions disclose a distinctly promarket orientation, a theme of growing importance to historians.<sup>35</sup> Here, the opinions confirm the latter picture. Three examples illustrate this point. First, judges limited the liability of tortfeasors, placing blame for loss of life on the slaves rather than the employer.<sup>36</sup> Similarly, judges limited the liability of white people who abused slaves while limiting liability for torts by slaves.<sup>37</sup> Moreover, judges generally protected vested rights against encroachment, although Democrats and Whigs had some significant differences in their approaches. Yet disputes arose as to how such protections might be achieved, and visions about property rights and community interests that mapped Whig and Democratic ideologies clashed. These conflicts were particularly apparent in cases involving the interpre-

tation of charters, where Democratic judges were concerned that charters might be interpreted to grant monopolies (and thus increase consumers' prices), where Whigs were concerned with limiting the state's power to take away property.<sup>38</sup> In other cases, courts limited injunctions to prohibit property owners from interfering with railroads or other businesses. In their place, property owners received modest compensation in the form of payments for the decreased value of their property.<sup>39</sup>

Georgia's Lumpkin illustrates these themes of competition and rationality. In *Shorter v. Smith*, one of his most famous opinions, Justice Lumpkin revealed a promarket disposition that refused an injunction sought by ferry owners against the construction of nearby bridges. Lumpkin easily dismissed the claim in an opinion rich with Whig rhetoric about the importance of competition. Lumpkin would not grant any exclusive rights based on the ferry franchises. He observed that "the continued existence of the government would be of no great value, if by implication and presumptions, it was disarmed of its creation, and the functions it was designed to perform, transferred to the hands of privileged corporations." Lumpkin concluded with discussion of the importance of competition: "We have and in the very nature can have, no other protection but that which results from free and unrestricted competition."<sup>40</sup>

The legal theory fits with larger themes in southern intellectual history: to decide cases, judges looked to the context rather than to universal truths and focused on practices that correlated with the ideas of contemporary European thinkers such as Hegel and with the southern reaction to the Enlightenment.<sup>41</sup> Southern intellectuals' writings demonstrate a deep appreciation for the law's dependence on the surrounding moral and economic circumstances and an even deeper respect for property, which is seen as supporting both economic growth and freedom. The idea is that property is a stabilizer.<sup>42</sup> Moreover, law gradually progressed. Southerners wrote about this progress as a gradual adaptation rather than dramatic changes from the common law.<sup>43</sup>

The legal literature also reflects complex ideas. For example, Thomas Cobb's *An Inquiry into the Law of Negro Slavery* creatively read precedent to suggest that international law compelled recognition of slavery everywhere. Cobb believed that comity provided a positive law to support slavery even in jurisdictions where there was no other law supporting it.<sup>44</sup> South Carolina theologian and professor James Thornwell elaborated on this position in his January 1861 pamphlet, *The State of the Country*, which urged seces-

sion. Thornwell drew on the common belief that slavery was nearly ubiquitous in human history and maintained that slavery predated the existence of law.<sup>45</sup> From this he concluded that slavery was not bounded by municipal law but exists as if by nature. Thornwell turned this into an argument that slavery is a national—indeed, international—phenomenon that does not need municipal law to support it. Where ever slave owners went, the law went as well, to protect them. “Slavery is rooted in a common law, wider and more pervading than the common law of England—THE UNIVERSAL CUSTOM OF MANKIND.”<sup>46</sup> This idea was evidence of slavery’s centrality to southern law. Slavery was the bedrock on which the society rested; the law had to support slavery. These ideas were connected and supported each other. It would be folly to try to break free of these accepted truths. As Thornwell well understood, the conflict over the constitutional protection of slavery was the center of the secession crisis. Southerners were, he grimly concluded, “struggling for our very being.”<sup>47</sup>

Southerners also drew on romantic-era ideas when they emphasized the way that law had to fit with its social context, that legal rules needed to be calibrated to the character of the people governed by them. Enlightenment principles of freedom did not fit everyone. Instead, a constitution had to be adjusted to the people it was designed to govern. Virginia lawyer John Randolph Tucker, grandson of St. George Tucker, told the literary societies at William and Mary in 1852,

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.<sup>48</sup>

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 that “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.<sup>49</sup>

When Lumpkin simplified the rules regarding conveyancing in 1848, he

thought that he needed to give reasons for the rule he had been using or abandon it in favor of a rule that made more sense. “The nations of the earth are clamoring for bread, they will be put off no longer with a stone. They ask for reasons, they will not be satisfied by mere precedents, however hoary with antiquity. It is quite too late in the age of the world, to substitute words for things, sound for sense, the shadow for the substance.”<sup>50</sup> Such language bears a striking resemblance to Emerson’s “American Scholar” as well as to southern literary addresses.<sup>51</sup>

However, North Carolina Supreme Court justice Thomas Ruffin warned against too frequent or too dramatic a modification in the common law in *State v. Ephrain* (1836):

It is true, that the exigencies of society have, from time to time, obtained, in some instances, judicial modifications of ancient rules of law, but this has been effected by slow and almost imperceptible degrees, and without a recurrence, at those times, to first principles, until a succession of inadvertent departures from the old rule, have so strongly established exceptions to it, that a court subsequently reviewing the whole ground, finds it more difficult and dangerous to attempt to re-establish the principle of its integrity, by retracing the steps of those who had lost sight of it, than to receive and enforce the rule, with its exceptions, all as they came down to us. . . . Courts cannot thus change their position, and frame anew original rules of law, or introduce exceptions not before found, either in terms or in principles.<sup>52</sup>

Second, the legal writers show us how ideas relate to action. Legal thinkers frequently used the technology of law as a support for rather than a weapon against their culture. And while much of the focus should be on how law works in conjunction with culture—judicial and political ideology are, obviously, closely allied—legal doctrine also exercises an independent authority.<sup>53</sup> Politics and considerations of utility are important, but legal ideas have an independent, autonomous power. We often hear in legal scholarship about the ways that law bends the humanitarian sentiments of judges who feel differently about a case from what the law commands. Robert Cover’s *Justice Accused* called this the moral-formal dilemma, which placed the moral result in opposition to the formal result required by law.<sup>54</sup> Herman Melville’s novella *Billy Budd* and Stowe’s *Dred: A Tale of the Great Dismal Swamp* are prominent examples from literature that deal with such subordination of justice to law.<sup>55</sup> And occasionally, when judges acted on their internal moral sentiments instead of the proslavery law, they were criticized.

Cobb believed that Lord Mansfield's antislavery decision in *Somerset's Case*, for example, was based on passion rather than logic. Cobb tersely concluded that the decision "is by no means calculated to advance his fame."<sup>56</sup>

Yet law sometimes provided a counterbalance to judges' proslavery ideas. Tennessee Supreme Court justice John Catron, who went on to serve on the U.S. Supreme Court, provides one example. His opinion in *Fisher's Negroes v. Dabbs* (1834) freed slaves who had been left by their owner in a trust to be freed but were not. Catron adopted as part of his opinion the trial court's opinion that confessed that he preferred to keep the slaves in slavery. Catron's opinion is convincing on this point. He emphasized the virtues of slavery for both the society and the slave. "Generally and almost universally," Catron wrote, "society suffers and the negro suffers by manumission." However, Catron upheld the will and thus emancipated Fisher's slaves.<sup>57</sup>

Judges allow us to see the impact of moral philosophy, which is a branch of applied ethics. They separate sentiment from reason and apply reason as well as precedent. In 1837, the Mississippi Supreme Court invalidated a slave owner's will that left his estate to his son and the mother of his son, whom he had taken to Ohio and freed some years before. The family returned to Mississippi, where they lived at the time of the man's death. Then, following his death, his other heirs challenged the will; the court looked to Mississippi's statutes limiting emancipation. It grimly concluded that the "laws of this state cannot be thus defrauded of their operation by one of our own citizens."<sup>58</sup> Other opinions in Mississippi and elsewhere are more expansive in their discussion of the evils of emancipation.

Proslavery opinions rarely mention slave owners' love for their slaves. Instead, the opinions speak of the places where masters must have uncontrolled authority over the body of the slave, as in *State v. Mann*; they speak of the need for power, not love; they silence slaves, often refusing to take testimony from them. *Dred Scott*, for example, refused to even let a slave into federal court by denying him the benefits of citizenship. The restrictions on teaching slaves to read likewise reveal an acknowledgment of literacy's power to introduce destabilizing ideas.<sup>59</sup>

Judicial opinions link history and moral philosophy. Catron's opinion in *State v. Foreman* mixed the judge's thought on history, economy, and constitutional law.<sup>60</sup> The opinion, which ran to dozens of pages in the *Tennessee Reports*, asserted Tennessee's right to criminal jurisdiction over a crime on Cherokee territory. Catron surveyed the history of Western Europe's colonization of the Americas to make the case for the right to govern native so-

cieties. He recognized that morality might suggest a different result but asserted that Tennessee had the power—and therefore the right—to punish crimes on Indian land:

Our claim is based on the right to coerce obedience. The claim may be denounced by the moralist. We answer, it is the law of the land. Without its assertion and vigorous execution this continent never could have been inhabited by our ancestors. To abandon the principle now is to assert that they were unjust usurpers, and that we, succeeding to their usurped authority and void claims to possess and govern the country, should in honesty abandon it, return to Europe, and let the subdued parts again become a wilderness and hunting ground.<sup>61</sup>

Catron's applied ethics taught him the value of rights to soil and to sovereignty; his exploration of history with natives led him to the conclusion that states should continue to exercise power over the Native Americans.

Alabama confronted a similar issue when the state sought to punish a white man for the murder of a Creek Indian. All of the seriatim opinions in *Caldwell v. State* (1832) turned on whether the state had jurisdiction to punish crimes occurring on tribal land located within the state of Alabama.<sup>62</sup> Chief Justice Abner S. Lipscomb upheld Alabama's power to pass legislation punishing murder and thus upheld the death sentence against the white man. Lipscomb used the need to punish the murder to secure the state's jurisdiction over land inhabited by natives. He thus limited native rights of sovereignty. Lipscomb believed that natives had limited rights to the land they inhabited because they did not possess the attributes of sovereignty.<sup>63</sup> Lipscomb employed his understanding of native society to deprive the natives of the rights of sovereignty, finding the native societies nomadic and without an "established system of government."<sup>64</sup> In his words, "the pretension of those who live by the chase, must yield to the cultivator of the soil."<sup>65</sup>

Justice John M. Taylor's opinion surveyed much colonial and national history to assess natives' rights to the land. He recalled that until recent years, the natives had been the "undisputed lords of this immense continent." Some observers might conclude from that history that the natives should maintain sovereignty over the lands they occupy, and "such reflections excite a warm interest in behalf of the Indian, and we listen to his complaints fully prepared to believe that he has been injured. Similar feelings have been general throughout the union, and, doubtless, they have often controlled the intellect, and commanded the judgment, when forming an opinion upon the rights of the states over these rude nations."<sup>66</sup> But those feelings of the heart

did not hold sway in Alabama's courts, for the court justified the continued occupancy of the land.

Taylor found progress in the growth of cities and political institutions, in commerce, and in the development of agriculture. That progress led Taylor to believe that the natives had no claim to sovereignty or land in Alabama. The court found the hand of Providence in the changes: "Are we not compelled to admit that the superintending providence of that Being who first formed the earth, is to be seen in this mighty change?"<sup>67</sup>

Emancipation cases give further illustration of how judges brought their understanding of history and society together with their precedent. Sometimes, as in *Hinds v. Brazeale*, the people the owner tried to free were members of his own family. In other instances, slave owners tried to free dozens or hundreds of people through use of sophisticated trust instruments. Those attempts met with varying levels of success, in part determined by the intricacies of the owners' instructions—such as whether the slaves would be taken out of the state or out of the country or given a choice of whether to stay or go.<sup>68</sup> In other instances, the differences seem to turn on the personal beliefs of the judges; judges from Alabama, for example, were less willing to contemplate emancipation than those in Tennessee.<sup>69</sup>

In *American Colonization Society v. Gartrell* (1857), Justice Lumpkin narrowly construed the American Colonization Society's charter to limit its power to accept a gift of slaves. Lumpkin found that the charter only gave the society power to transport slaves—with the slaves' consent—to Liberia. When Gartrell left slaves in trust to the society to be transported to Liberia, the gift exceeded the society's charter. That almost laughably fine parsing of the document's language in part reflected Lumpkin's opposition to emancipation. He concluded his opinion with a broad condemnation of emancipation and broad praise for the civilizing influence of slavery:

Under the superior race and no where else, do [slaves] attain to the highest degree of civilization; and any experiment, whether made in the British West India Islands, the coast of Africa, or elsewhere, will demonstrate that it is a vain thing for fanaticism, a false philanthropy, or anything else, to fight against the Almighty. . . . Let our women and old men, and persons of weak and infirm minds, be disabused of the false and unfounded notion that slavery is sinful, and that they will peril their souls if they do not disinherit their offspring by emancipating their slaves!<sup>70</sup>

The legal reasons for the narrow construction of the society's charter were bolstered by Lumpkin's understanding of history and contemporary

society. A few years earlier, however, Lumpkin had permitted—over a dissent from Justice Henry Benning—a testator to provide for a slave to be taken outside of the state and freed directly.<sup>71</sup>

Third, legal texts contribute to the history of the book project, for we can trace the influence of ideas with some specificity. We can answer such questions as how did judges use books, and which books did they use? We have hundreds of volumes in which judges explain what they are doing and where their ideas originated. An 1856 Mississippi decision, *Vicksburg and Jackson Railroad Company v. Patton*, distinguished New England cases to show that railroads have a duty to those who pasture their cattle on unenclosed land.<sup>72</sup> In five Confederate-era cases, men who had purchased substitutes for service in the military claimed that their reconscription violated their vested rights; five separate state supreme courts ruled against the men, with rather divergent rationales.<sup>73</sup> Such studies can tell us how ideas migrate from one judge to another; the opinions disclose a multidecade dialogue between judges.<sup>74</sup> Here the sophisticated quantitative techniques that have yielded such insight into the networks of discussion and measures of influence for contemporary judges might be applied. We can begin to measure which judges were most cited and on what issues, as well as how far those citations stretched in time and how many other jurisdictions followed (or distinguished) those judges. That will help set a lower limit on the judges' intellectual circles.

Fourth, the opinions complement pieces of intellectual historians' broad picture. Judges were empirical and concerned with past and future and with the concrete. Judges, like southerners generally, shifted from an Enlightenment to a proslavery romantic world. Law may very well have been more integrated with national thought (perhaps more colonized by the North than in other areas of the intellect). For law was surely conservative—dramatically so—in both North and South. In fact, northerners praised law precisely for its ability to constrain change.<sup>75</sup>

Perhaps southern legal thinkers do not fit so neatly into boxes of Enlightenment and romanticism. Still, some judges invoked key concepts of the romantic era such as light. One Kentucky judge wondered, "Why wander and lose ourselves in the intricate mazes of technicality, when high above our path there gleams the light to guide us in our construction and dispel the darkness with which ingenious counsel have shadowed this subject?"<sup>76</sup> And a Georgia jurist invoked romantic imagery in commenting on the history of slavery and feudalism: "It is a region of mists and fogs and darkness. The

servitude of those times may shed light upon slavery—may illustrate the character of slavery in its first formations—may serve to confirm that idea of title.”<sup>77</sup> But more frequently, when antebellum southern jurists invoked romanticism, they did so to criticize rather than uphold the idea.<sup>78</sup>

In an area as important as legal thought that engaged the lives and fortunes of so many people so directly, we ought to pay attention to how closely it was allied to northern thought as well as to how the values of property and slavery were protected by it.

\* \* \*

Just as we accept that southerners sincerely and deeply believed in evangelical Protestantism and in internal improvements, we should accept that they wrote in favor of slavery because that was an issue of exceptional importance to them. In that way, we can see how their legal system worked in conjunction with economic and demographic reality as well as their understanding of history. The laws and the justifications for them were dictated by southerners’ understandings of economic and social life.

Instead of thinking, as Anthony Grafton has so brilliantly helped us do, about “worlds made by words,” we should be thinking about the world of economy and society that demanded a proslavery law and how proslavery legal thought in turn provided support to the world of the Old South.<sup>79</sup> In recovering the mind of the Old South, we must pay due attention to the place of law in their world. It was a place where abstract intelligence, precedent, and stories about the past and present interacted with cold reality. The codes, Constitution, common law, and treatises provided a framework for understanding and then channeling actions as our country fell apart over fundamental issues of property and slavery. And therein lies a story about our nation’s journey toward Civil War based on economic and social realities and the law that was created to sustain and foster those realities.

#### NOTES

1. See William W. Freehling, *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816–1836* (New York: Harper and Row, 1965), 340–41 (discussing the abolitionist literature crisis).

2. Clyde N. Wilson, ed., *Papers of John C. Calhoun* (Columbia: University of South Carolina Press, 1980), 16:301.

3. *Documents of the Senate of the State of New York, Fifty-Ninth Session* (Albany: Mack, 1836), 1:2 (reprinting grand jury’s indictment and Alabama governor John Gayle’s request for Williams’s extradition). Gayle had been the vice president of the Auxiliary Col-

onization Society of Alabama. See "State Colonization Society of Alabama," *African Repository* 5 (1830): 379. See also Jeannine DeLombard, *Slavery on Trial: Law, Abolitionism, and Print Culture* (Chapel Hill: University of North Carolina Press, 2006), 51; James Benson Sellers, *Slavery in Alabama* (Tuscaloosa: University of Alabama Press, 1950), 366–67.

4. See Judson Crump, "The Petition for Freedom" (seminar paper, University of Alabama School of Law, Fall 2007).

5. Richard Aubrey McLemore, *A History of Mississippi* (Hattiesburg: University and College Press of Mississippi, 1973), 1:363.

6. Victor B. Howard, *The Evangelical War against Slavery and Caste: The Life and Times of John G. Fee* (Selinsgrove, Pa.: Susquehanna University Press, 1996), 47. Centre College president John C. Young was also antislavery. See *Letters of James Gillespie Birney*, ed. Dwight L. Dumond (New York: Appleton-Century, 1938), 1:277–80; Howard Tallent, *Evil Necessity: Slavery and Political Culture in Antebellum Kentucky* (Lexington: University Press of Kentucky, 2003), 38 (identifying Young as an antislavery conservative).

7. William Gleason Bean, "The Ruffner Pamphlet of 1847: An Antislavery Aspect of Virginia Sectionalism," *Virginia Magazine of History and Biography* 61, no. 3 (1953): 260, 277 n. 39.

8. See Daniel Walker Hollis, *University of South Carolina*, vol. 1, *South Carolina College* (Columbia: University of South Carolina Press, 1951), 177–93.

9. *Record of the Testimony and Proceedings in the Matter of the Investigation of the Trustees of the University of Mississippi . . . of the Charges Made by H. R. Branham, against the Chancellor of the University* (Jackson: Mississippian Office, 1860), 16.

10. Abel Upshur, "Domestic Slavery," *Southern Literary Messenger* 10, no. 10 (1839): 677, 680–81.

11. James Henry Hammond, "Speech to the U.S. Senate, March 4, 1858," *Congressional Globe*, 35th Cong., 1st sess., Appendix 68, 70–71 (1858). I am indebted to Jeannine DeLombard for reminding me of the importance of this speech.

12. Nathaniel Beverley Tucker, "A Note to Blackstone's Commentaries," *Southern Literary Messenger* 1, no. 5 (1835): 227–31.

13. Timothy Huebner, *The Southern Judicial Tradition: State Judges and Sectional Distinctiveness, 1790–1890* (Athens: University of Georgia Press, 1999).

14. William Wiethoff, *A Peculiar Humanism: The Judicial Advocacy of Slavery in the High Courts of the Old South, 1820–1850* (Athens: University of Georgia Press, 1996); William Wiethoff, *The Insolent Slave* (Columbia: University of South Carolina Press, 2002).

15. Michael S. O'Brien, *A Character of Hugh S. Legaré* (Knoxville: University of Tennessee Press, 1985).

16. Michael S. O'Brien, *Conjectures of Order: Intellectual Life and the American South, 1810–1860* (Chapel Hill: University of North Carolina Press, 2004), 1:16.

17. See A Citizen of the South [Charles Shaw], *Is Slavery a Blessing? A Reply to Prof. Bledsoe's Essay on Liberty and Slavery: With Remarks on Slavery as It Is* (Boston: Jewett, 1857); [Jesse Burton Harrison], "The Speech of Thomas Marshall in the House of Delegates . . ." *American Quarterly Review* 12, no. 24 (1832): 379–426; A Slaveholder of West Virginia [Henry Ruffner], *Address to the People of West Virginia Showing Slavery Is Injurious to the Public Welfare* (Lexington, Va.: Noel, 1847).

18. John R. Thompson, *Education and Literature in Virginia: An Address Delivered before the Literary Societies of Washington College, Lexington, Virginia, 18 June, 1850* (Richmond: Ellyson, 1850).

19. Henry St. George Tucker, *An Introductory Lecture Given to the Law Class at the University of Virginia* (Charlottesville: Magruder and Noel, 1841), 7.

20. Among the many examples from judicial opinions that focus on the economic and social utility are *Scroggins v. Scroggins*, 14 N.C. (3 Dev.) 535 (1832) (denying divorce by court order—rather than legislative act—on the grounds that it might make subsequent divorces more common); *Heathcock v. Pennington*, 33 N.C. (11 Ired.) 640 (1850). Debate over the Fugitive Slave Act of 1850 brought out a lot of statements about the need to judge slavery in its context and abolition according to its likely consequences, which many southern (and northern) senators believed would be worse than its continuance. See, e.g., *Congressional Globe*, 31st Cong., 1st sess., 1106 (1850) (Senator John Bell of Tennessee).

21. *Macon & Western R. Co. v. Davis*, 13 Ga. 68 (1853) (rejecting strict liability for death of a slave killed by a railroad): “It would be strange indeed, if the General Assembly had made, or should ever make a citizen or a corporation, in the pursuit of a calling authorized by law, liable for injuries done to the property of another, without fault on the part of the citizen or the corporation, and by the negligence or willful wrong of the owner. Such legislation would be a reproach to the civilization of the age. No such rule of liability is found on the Statute book of any State of this Union, or of Great Britain, and I dare say, never will be found in the legislation of any free State. Besides its oppressive injustice, it would be grossly inexpedient, inasmuch as it would deny to the public the incalculable benefits of Railroads, for no company would long exercise franchises thus encumbered.”

22. See, e.g., Thomas R. R. Cobb, *An Inquiry into the Law of Negro Slavery in the United States, to Which Is Prefixed an Historical Sketch of Slavery* (Philadelphia: Johnson, 1858), cxxiv–ccv (discussing recent history of slavery, especially emancipation in Haiti and the United States); Thomas R. Dew, “Professor Dew on Slavery,” in *The Pro-Slavery Argument* (Charleston: Walker, Richards, 1852), 287.

23. O’Brien, *Conjectures of Order*, 1:18.

24. William Harper, “Harper on Slavery,” in *Pro-Slavery Argument*, 1; *Cleland v. Waters*, 16 Ga. 496 (1854).

25. In addition to his judicial opinions, Campbell wrote and spoke extensively. See John A. Campbell, *Address Delivered before Alumni Society of the University of Georgia* (Athens, Ga.: Peterson, 1853); John Archibald Campbell, *The Institutions, Duties, and Relations of Alabama: An Oration before the Erosophic and Philomathic Societies of the University of Alabama, July 12th, 1859* (Tuscaloosa: Warren, 1859). Campbell’s five articles on slavery in the *Southern Quarterly Review* helped establish the key proslavery arguments regarding the ubiquity of slavery and the dangers of emancipation in the decade leading into Civil War. See “Slavery in the U.S.,” *Southern Quarterly Review* 12, no. 23 (1847): 91–134; “Slavery among the Romans,” *Southern Quarterly Review* 14, no. 28 (1848): 391–432; “British West India Islands,” *Southern Quarterly Review* 16, no. 32 (1850): 342–77; “The Rights of the Slave States,” *Southern Quarterly Review*, n.s., 3, no. 5 (1851): 101–45; “Slavery throughout the World,” *Southern Quarterly Review*, n.s., 3, no. 6 (1851): 305–39.

26. See *Padelford, Fay & Co. v. Savannah*, 36 14 Ga. 438 (1854) (Benning, J.) (concluding, after extensive survey of history of the ratification of the Constitution, that states are coequal with the federal government); *Cleland v. Walters*, 19 Ga. 43 (1855) (Lumpkin, J., with Starnes concurring and Benning dissenting) (upholding will that ordered a slave transported outside of Georgia and emancipated); Henry L. Benning, *Speech on Federal Relations . . . Delivered in the Hall of the House of Representatives, November 6th*

1860 (n.p., [1860]), reprinted in *Secession Debated: Georgia's Showdown in 1860*, ed. William W. Freehling and Craig W. Simpson (New York: Oxford University Press, 1999), 115–44; Ebenezer Starnes, *The Slaveholder Abroad; or, Billy Buck's Visit, with His Master, to England* (Philadelphia: Lippincott, 1860). An appendix reprints Starnes's empirical investigation of the criminal justice system in Georgia and its comparison with the United Kingdom. Starnes sought to portray the United Kingdom as having more crime than Georgia as part of his demonstration that slavery aided the social organization of the United States.

27. See, e.g., *Duncan v. Magette*, 25 Tex. 245 (1860) (analogizing justice to raw gold and law to minted gold coin).

28. *Mitchell v. Wells*, 37 Miss. 235 (1859); William L. Sharkey, *Commencement Address Delivered before the Law Students of the University of Mississippi on the 5th Day of July, 1859* (Oxford, 1859); *Planters' Bank v. Snodgrass*, 5 Miss. (4 How.) 573 (1840) (Sharkey, dissenting); *Mahorner v. Hooe*, 17 Miss. (9 Smedes & M.) 247 (1848); *Hinds v. Brazealle*, 3 Miss. (2 How) 837 (1838). *Hinds* was followed in a number of southern cases, including *Willis v. Jolliffe*, 11 Rich. Eq. 447 (S.C. Eq. 1860). See also *Vance v. Crawford*, 4 Ga. 445 (1848); *Wade v. American Colonization Soc.*, 15 Miss. (7 Smedes & M.) 663 (1846); *Shaw v. Brown*, 35 Miss. 246 (1858) (upholding will devising property to former slaves); *Mitchell v. Wells*, 282 (Hardy, dissenting).

29. *The Speech of Thomas Marshall . . . on the Policy of the State in Relation to Her Colored Population . . .* (Richmond: White, 1832).

30. Jefferson Davis, *Address . . . before the Phi Sigma & Hermean Societies, of the University of Mississippi Oxford, July 15, 1852* (Memphis: Appeal Book and Job Office, 1852); James L. Pettigru, *An Oration Delivered before the Phi Kappa and Demosthenian Societies of the University of Georgia, August 6, 1846* (Athens: Southern Whig Office, 1846); R. M. T. Hunter, *An Address Delivered before the Society of Alumni of the University of Virginia: At Its Second Annual Meeting, Held in the Rotunda, on the 4th of July, 1839* (Charlottesville: Tompkins and Noel, 1839).

31. John Pendleton Kennedy, *Swallow Barn, Or a Sojourn in the Old Dominion* (Philadelphia: Carey & Lea, 1832); Joseph Glover Baldwin, *The Flush Times of Alabama and Mississippi* (New York: D. Appleton and Company, 1853).

32. Caroline Hentz, *The Planter's Northern Bride* (Philadelphia: Peterson, 1854); Edward Josiah Stearns, *Notes on Uncle Tom's Cabin: Being a Logical Answer to Its Allegations and Inferences against Slavery as an Institution* (Philadelphia: Lippincott, Grambo, 1853); Mary H. Eastman, *Aunt Phillis' Cabin; or, Southern Life as It Is* (Philadelphia: Lippincott, Grambo, 1852); Maria J. McIntosh, *The Lofty and the Lowly; or, Good in All, and None All-Good* (New York: Appleton, 1853).

33. See Alfred L. Brophy, "The Republics of Liberty and Letters: Progress, Union, and Constitutionalism in Graduation Addresses at the Antebellum University of North Carolina," *North Carolina Law Review* 89, no. 6 (2011): 1879–1964.

34. Thomas R. Dew, *Review of the Debate in the Virginia Legislature in 1831 and 1832* (Richmond: White, 1832); Nathaniel Beverley Tucker, *George Balcombe* (New York: Harper, 1836); Nathaniel Beverley Tucker, "A Note to Blackstone's Commentaries," *Southern Literary Messenger* 1, no. 5 (1835): 227–31; Thomas R. Cobb, *An Inquiry into the Law of Negro Slavery in the United States* (Philadelphia: Johnson, 1858); George Sawyer, *Southern Institutes* (Philadelphia: Lippincott, 1858); Albert Taylor Bledsoe, *An Essay on Liberty and Slavery* (Philadelphia: Lippincott, 1856); Henry St. George Tucker, *A Few Lectures on Natural Law* (Charlottesville, Va.: Alexander, 1844); George Frederick

Holmes, "Observations on a Passage in the Politics of Aristotle on Slavery," *Southern Literary Messenger* 16, no. 4 (1850): 193–205; James P. Holcombe, "Is Slavery Consistent with Natural Law?" *Southern Literary Messenger* 27, no. 6 (1858): 401–21.

35. Cf. Eugene Genovese and Elizabeth Fox-Genovese, *The Mind of the Master Class: History and Faith in the Southern Slaveholders' Worldview* (Cambridge: Cambridge University Press, 2005), 3, with John Majewski, *Modernizing a Slave Economy: The Economic Vision of the Confederate Nation* (Chapel Hill: University of North Carolina Press, 2009).

36. *Heathcock v. Pennington*.

37. *State v. Mann*, 13 N.C. 263 (1830).

38. See, e.g., *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 375 (1856) (Campbell, J.); *Dyer v. Tuscaloosa Bridge Company*, 2 Porter 296 (Ala., 1835) (narrowly construing a legislative grant to operate a bridge and thus permitting competing bridges).

39. *Lexington & Ohio Railroad v. Applegate*, 38 Ky. (8 Dana) 289 \*15 (1839) ("The onward spirit of the age must, to a reasonable extent, have its way. The law is made for the times and will be made or modified by them. The expanded and still expanding genius of the common law should adapt it here, as elsewhere, to the improved and improving condition of our country and our countrymen. And therefore, rail roads and locomotive steam cars—the offspring, as they will also be the parents, of progressive improvement—should not, in themselves, be considered as nuisances, although, in ages that are gone, they might have been so held, because they would have been comparatively useless, and therefore more mischievous.") Justice Robertson's reasoning and language then spread northward. See, e.g., *Chapman v. Albany & S.R. Co.*, 10 Barb. 360 (N.Y. Supp. 1851) (quoting *Applegate*); *Hatch v. Vermont Cent. R. Co.*, 25 Vt. 49 (1852) (citing *Applegate* and limiting a railroad's liability for consequential damages to land not taken). Justice Levi Woodbury, a Democrat from New Hampshire, cited Robertson to support the proposition that private charters might be altered in *West River Bridge v. Dix*, 47 U.S. 507, 547 (1848). Otherwise, Woodbury concluded, "The means of social and commercial intercourse might be petrified, and remain for ages, like the fossil remains in sandstone, unaltered, and the government, the organ of a progressive community, be paralyzed in every important public improvement."

40. *Shorter v. Smith*, 9 Ga. 517, 525, 527 (1851).

41. See Michael J. O'Brien, "Conservative Thought in the Old South: A Review Article," *Comparative Studies in Society and History* 34, no. 3 (1992): 566, 569–70 (discussing importance of context).

42. See, e.g., Thomas Roderick Dew, *A Digest of the Laws, Customs, Manners, and Institutions of the Ancient and Modern Nations* (New York: Appleton, 1853).

43. See, e.g., Hugh S. Legaré, "Kent's Commentaries," *Southern Review* 2 (1829): 72, 78. In *Hull v. Hull*, 3 Rich. Eq. 65 (1850), for example, South Carolina's chancery court wrote of the changes in treatment of personal property (like trusts), from the era when personal property was of less importance than real property to a period when it was of greater importance: "The feudal system yielded to the irresistible influence of advancing civilization; but it yielded slowly, and its stern features are still, and for a long period to come will remain, deeply impressed upon the civil polity of the British Isles. And even here in this new and distant land, and under our republican institutions, differing so widely from those of mediaeval ages, it not unfrequently imposes its rude shackles upon the administration of justice."

44. Cobb, *Inquiry*, 179–85.

45. James Henley Thornwell, *The State of the Country* (Columbia, S.C.: Southern Guardian, 1861), 14.
46. *Ibid.*
47. *Ibid.*, 25.
48. John Randolph Tucker, *Address . . . Delivered before the Phoenix and Philomathean Societies, of William and Mary College, on the 3d of July, 1854* (Richmond: Wynn, 1854), 11.
49. *Ibid.*, 15.
50. *Leary v. Durham*, 4 Ga. 593, 602 (1848).
51. In speaking of the scholar (though one might think of him as speaking of the jurist as well), Emerson said that “whatsoever new verdict Reason from her inviolable seat pronounces on the passing men and events of to-day,—this he shall hear and promulgate.” See Ralph Waldo Emerson, “American Scholar,” in *Emerson’s Essays*, ed. Joel Porte (New York: Library of America, 1983), 51, 64.
52. *State v. Ephrain*, 19 N.C. 160, 167 (1836).
53. Perhaps the best-known example of the alliance between legal doctrine and political ideology in the antebellum South involves the changes in Kentucky courts’ composition in the 1820s and the resulting changes in bankruptcy and Contracts Clause doctrine. See Theodore W. Ruger, “A Question Which Convulses a Nation’: The Early Republic’s Greatest Debate About the Judicial Review Power,” *Harvard Law Review* 117, no. 3 (2004): 827–97.
54. Robert Cover, *Justice Accused: Anti-Slavery and the Judicial Process* (New Haven: Yale University Press, 1975).
55. Herman Melville, *Billy Budd, Sailor: An Inside Narrative* (1924; Indianapolis: Bobbs-Merrill, 1975); Harriet Beecher Stowe, *Dred: A Tale of the Great Dismal Swamp* (Boston: Phillips, Sampson, 1856).
56. Cobb, *Inquiry*, 174.
57. *Fisher’s Negroes v. Dabbs*, 14 Tenn. 119 \*6 (1834).
58. *Hinds v. Brazealle*.
59. See William Goodell, *The American Slave Code in Theory and Practice* (New York: American and Foreign Anti-Slavery Society, 1853) (discussing state restrictions on literacy). Gates thinks somewhat differently; he sees restrictions on literacy as an effort to force slaves to conform to prevailing beliefs in biological inferiority. See Henry Louis Gates, “Race, Writing, and Difference,” *Mississippi College Law Review* 3, no. 2 (1984): 287–97.
60. *State v. Foreman*, 16 Tenn. 256 (1835).
61. *Ibid.*, \*12 (July Term). Catron separated law from morality, a common response of judges confronting property claims in the antebellum era.
62. *Caldwell v. State*, 1 Stew. & P. 327 (Ala. 1832) (construing jurisdiction to try white man for murder of Creek Indian).
63. *Ibid.*, 332–33 (citing *Johnson v. McIntosh*, 23 U.S. 543 [1823]; *Goodall v. Jackson*, 29 Johns. R. 693 [N.Y. 1823]).
64. *Ibid.*, 333.
65. *Ibid.*, 339.
66. *Ibid.*, 444.
67. *Ibid.*, 445.
68. See Alfred L. Brophy, “Thomas Ruffin: Of Monuments and Moral Philosophy,” *North Carolina Law Review* 87, no. 3 (2009): 799, 818–28.

69. Cf. *Atwood's Heirs v. Beck*, 21 Ala. 590 (1852) and *Trotter v. Blocker*, 6 Porter 269 (1838) with *Blackmore and Hadley v. Phil*, 15 Tenn. (7 Yerger) 452 (1836).

70. *American Colonization Society v. Gartrell*, 23 Ga. 448, \*11 (1857).

71. *Cleland v. Walters*.

72. *Vicksburg and Jackson Railroad Company v. Patton*, 31 Miss. 156 \*3 (1856). Arguments of counsel for the railroad also show evidence of romantic rhetoric. Counsel spoke of the value of railroads and telegraph to society: "The requirements of the age, the spirit of public improvement, the law of progress, so strikingly exhibited by all the civilized nations of the earth, imperiously demand a medium for the more rapid transportation of person, property and intelligence. Science was taxed—was in *travail* to discover it. The present century originated it. The law throws its protecting arms around the *iron horse* and the winged messenger of lightning, to prevent obstructions in their rapid flight."

73. See *Burroughs v. Peyton*, 57 Va. 470 (1864); *Daly v. Fitzgerald*, 34 Ga. Supp. 85 (1864); *Ex Parte Tate*, 39 Ala. 254 (1864); *Gatlin v. Walton*, 60 N.C. 222 (1864); *Ex Parte Mayer*, 27 Tex. 715 (1864); Alfred L. Brophy, "'Necessity Knows No Law': Vested Rights and the Styles of Reasoning in the Confederate Conscriptioin Cases," *Mississippi Law Journal* 69, no. 3 (2000): 1123–80.

74. One classic example of this is the reaction to Thomas Ruffin's 1830 opinion in *State v. Mann*, to which subsequent courts as well as abolitionists responded down into the 1850s. See, e.g., *State v. Negro Will*, 18 N.C. (1 Dev. & Bat.) 121, 126 (December Term 1834); *State v. Caesar*, 31 N.C. (9 Ired.) 391 (June Term 1849); *State v. Hoover*, 20 N.C. (3 & 4 Dev. & Bat.) 500 (December Term 1839); *Neal v. Farmer*, 9 Ga. 555 (May Term 1851); Cobb, *Inquiry*, 84 (citing *State v. Mann*); Harriet Beecher Stowe, *A Key to Uncle Tom's Cabin* (Boston: Jewett, 1853): 70–72, 77–79, 81–86, 108, 121, 233 (discussing Ruffin and *State v. Mann*).

75. See, e.g., Daniel Lord, *On the Extra-Professional Influence of Lawyers and Ministers* (New York: Chatterton, 1851), 3; Timothy Walker, *The Reform Spirit of the Day: An Oration before the Phi Beta Kappa Society of Harvard University, July 15, 1850* (Boston: Munroe, 1850), 15.

76. *Williamson v. Williamson*, 57 Ky. (18 B. Mon.) 329 (1858).

77. *Neal v. Farmer*. One Georgia justice evaluated a testator's mental state at various stages of his life through imagery of light. See *Terry v. Buffington*, 11 Ga. 337 (1852) ("These and like objects, although seen by the testator as through a glass dimly, by reason of the infirmity of age, or other causes, are still contemplated, not by the flashy, fitful and evanescent glare of the aurora borealis; but the steady, though subdued light and illumination of the 'glorious king of day,' although disrobed of his gorgeous and dazzling beams.")

78. In *Newsom v. Jackson*, 26 Ga. 241 (1858).

79. Anthony Grafton, *Worlds Made by Words: Scholarship and Community in the Modern West* (Cambridge: Harvard University Press, 2009).