

**LAND, SLAVES, AND BONDS:
TRUST AND PROBATE IN THE PRE-CIVIL WAR
SHENANDOAH VALLEY**

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ABSTRACT

Land, Slaves, and Bonds samples wills probated in Rockbridge County in Virginia’s Shenandoah Valley from 1820 to 1861, to detail the changes in testamentary devises and the technology of wills and trusts during that era of market revolution. We report the gender, familial status, distributions, and incidence of trusts for the 128 testators sampled. This study also traces changes in the sophistication of wills and accompanying trusts over time. Thus, it provides a window into how Rockbridge County residents used the legal process to transmit wealth between generations and to preserve it from creditors. It also details the response of lawyers and testators to the changing market.

The 40 years leading into the Civil War saw extraordinary expansion in the United States’ economy. The legal technology studied here reflects that growth in wealth and sophistication. At the same time, as the vigorous market economy was expanding—as testators’ wealth was increasingly reflected in personal property such as stocks and bonds, rather than real property—there were problems with identifying reliable agents (executors and trustees). Thus, testators continued to place a premium on family members to manage their wealth; and they also took extraordinary means, such as use of sophisticated trust documents and marriage settlements, to maintain property within their families. This study shows that testators turned frequently to legal technology to manage property and keep it within their families. They used the vehicles to keep property out of

the hands of creditors, especially the creditors of their sons-in-law. Legal technology helped respond to the impersonal market revolution.

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

INTRODUCTION

Recent writings on trusts and estates have asked a series of questions about who uses the probate process to transfer wealth and what do they do with their wealth.¹ Investigations have ranged from the gender and family status of testators to the objects of their devises, to how the probate system functions.² Scholars have also begun to investigate the legal technology in wills, such as the incidence of trusts and the sophistication in them,³ the language testators use,⁴ and the self-conceptions of testators about their role in trust administration,⁵ as well as legal doctrine.⁶ Scholars are looking anew at the history of trusts and estates, too. They are interested in gauging the gravitational pull of the economy

¹ See, e.g., David Horton, *In Partial Defense of Probate: Evidence from Alameda County, California*, 103 GEO. L.J. 605 (2015); David Horton, *Wills Law on the Ground*, 62 UCLA L. REV. 1094 (2015).

² Stephen Clowney, *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking*, 43 REAL PROP. TR. & EST. L.J. 27 (2008); Bridget J. Crawford & Anthony C. Infanti, *A Critical Research Agenda for Wills, Trusts and Estates*, 49 REAL PROP. TR. & EST. L.J. 317 (2014).

³ See, e.g., Jason Kirklin, Note, *Measuring the Testator: An Empirical Study of Probate in Jacksonian America*, 72 OHIO ST. L.J. 479 (2011).

⁴ See, e.g., Deborah S. Gordon, *Letters Non-Testamentary*, 62 U. KAN. L. REV. 585 (2014); Karen J. Sneddon, *Not Your Mother’s Will: Gender, Language, and Wills*, 98 MARQ. L. REV. 1535 (2015); Karen J. Sneddon, *In the Name of God, Amen: Language in Last Wills and Testaments*, 29 QUINNIPIAC L. REV. 665 (2011).

⁵ See Deborah S. Gordon, *Mor[t]ality and Identity: Wills, Narratives, and Cherished Possessions*, YALE J.L. & HUMAN. (forthcoming 2017); Deborah S. Gordon, *Trusting Trust*, 63 U. KAN. L. REV. 497 (2015).

⁶ See, e.g., Adam J. Hirsch, *Freedom of Testation/Freedom of Contract*, 95 MINN. L. REV. 2180 (2011).

on legal technology⁷ and the role of slavery on the evolution of legal doctrine.⁸ This Article turns to one county in the heart of the Shenandoah Valley in the 40 years leading into the Civil War to gauge who the testators were and what they did with their property, as well as how legal technology changed over this time. This Article contributes to the revitalization of trusts and estates scholarship by tracing the growing sophistication and incidence of trust as the market revolution swept through the Valley. As testators grew in wealth, they needed better ways of managing their wealth and keeping it within their families and away from creditors.

Part I locates key issues about the problems with maintaining property within the family and protecting it from unscrupulous managers in the years before the Civil War in the fictional literature set in and near Virginia's Shenandoah Valley. It also introduces the importance of slavery—as well as anti-slavery—to the Shenandoah Valley and to questions of preservation of wealth within families. Part II then links those concerns to Virginia's inheritance law and the legal treatises that advised how to best use trusts to protect property from creditors. Part III turns to Rockbridge County, the focal point of this study, and reports basic data on the 128 testators from 1820 to 1861 under study here. It reports descriptive statistics on who the testators were and what they did with their property. Part IV turns to the testamentary trusts that appeared in the Rockbridge County wills under study here and the increase in the incidence and sophistication of trusts, especially the increased use of trusts to protect against creditors. Finally, Part V turns to the presence of enslaved people in the Rockbridge County wills and how the wills reflect the desire to deal with enslaved people as property as well as, on rare occasions, free them. This study reflects the growing sophistication of legal technology of wills and trusts and the increasing need for sophistication in the market economy of the pre-Civil War years.

I. INHERITANCE AND SLAVERY IN LITERATURE OF THE SHENANDOAH VALLEY

Sometime around the early 1840s, the Irvine family of the Shenandoah Valley lost much of their inheritance.⁹ The agent who managed the inheritance, Thomas Bryson, had invested it in a bank, which failed.¹⁰ Lawrence Irvine, the

⁷ Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189 (1985).

⁸ See, e.g., Alfred L. Brophy, *The Market, Utility, and Slavery in Southern Legal Thought*, in SLAVERY'S CAPITALISM: A NEW HISTORY OF ECONOMIC DEVELOPMENT 262–76 (Sven Beckert & Seth Rockman eds., 2016) (discussing legal doctrine wrought to support slavery).

⁹ MARGARET JUNKIN PRESTON, SILVERWOOD: BOOK OF MEMORIES 19–24 (New York, Derby & Jackson 1856).

¹⁰ *Id.*

only male child in the family of a widowed mother and four sisters,¹¹ had inquired of the agent a few months before about the financial soundness of the bank, and the agent reassured the family that their money was safe.¹² Yet, that assurance proved ill-founded. A few months after the failure, the family lost their home to a fire; little was left, not even the painting illustrating a scene from Dante's *Inferno*.¹³ The painting showed the imprisonment of Count Ugolino, who sat in jail with his family for financial crimes and later occupied the second ring in the lowest circle of inferno, the area reserved for those who betray family and friends.¹⁴ Then the agent, Thomas Bryson, stole the family's remaining funds,¹⁵ declared bankruptcy,¹⁶ and finally fled with his family to Europe.¹⁷

The bank failure and the journey towards poverty began through the negligence of the trustee and the bank's managers. It was made worse through outright fraud. The Irvine family suffered through no fault of their own. When there were rumors that the bank might fail, Lawrence Irvine wrote to Bryson and received assurances that the bank was fine.¹⁸ Lawrence recalled his thinking that "as a great merchant," Bryson "ought to know what stocks were unsafe."¹⁹ Even after Bryson's poor investment choice in the bank was revealed, they again entrusted him with their finances.²⁰ The Irvines made the mistake of trusting an agent, a common problem and an increasing one as the traditional personal connections were breaking down.²¹ Apparently Bryson "put it into his own pocket, possibly intending, when he had used it as a little help to himself in his embarrassments . . . to invest it, and then patch up some story to cover the failure of the interest."²² But things were even worse than that; for when news came that Bryson had misappropriated the family's remaining money, they also learned that the Bryson family's assets were settled in his wife's hands, so that his

¹¹ STACEY JEAN KLEIN, MARGARET JUNKIN PRESTON, *POET OF THE CONFEDERACY: A LITERARY LIFE* 36 (2007).

¹² PRESTON, *supra* note 9, at 21.

¹³ *Id.* at 11–12, 30–31.

¹⁴ *Id.* at 30–31 (describing destruction of family estate, including picture); *id.* at 9–10 (describing picture with scene of Count Ugolino from the *Inferno*; perhaps Preston had Joshua Reynolds's 1773 *Count Ugolino and His Children* in mind).

¹⁵ *Id.* at 151–60.

¹⁶ *Id.* at 153–54.

¹⁷ *Id.* at 259–60.

¹⁸ *Id.* at 21.

¹⁹ *Id.* at 21.

²⁰ *Id.* at 180–81.

²¹ CHARLES SELLERS, *THE MARKET REVOLUTION: JACKSONIAN AMERICA, 1815–1846* (1992).

²² PRESTON, *supra* note 9, at 180–81.

creditors could not reach them.²³ Edith Irvine went to plead with Bryson for help, even though she knew that she had no legal claim. When he refused, she turned to his wife, hoping that the wife would give up some of her assets to help the Irvine family.²⁴ All to no avail. When Edith went to visit with Mrs. Bryson to ask for satisfaction, she appealed to her as a woman and mother. “Legally, I know,” Edith said, “we can compel nothing from *you*; but you are a woman—you have a mother’s heart—you will not see my widowed mother, with none to stand between her and the unpitiful world, driven out in the afternoon of her life[.]”²⁵ Edith did not have a claim beyond that of the other creditors; that is, there would be little satisfaction for the losses they sustained when Mr. Bryson used his power of attorney to drain the assets entrusted to him into his wife’s hands. It was fraud, but there was little recourse; Mrs. Bryson refused satisfaction and stated, “A man can’t be expected to be kinder to other people, than to his own family.”²⁶

Or so this scene of fraud, loss of inheritance, and decline in honor was imagined by Margaret Junkin Preston of Lexington, Virginia,²⁷ in her 1856 novel *Silverwood*.

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

Though the story of the Irvine family was fictional, it tapped into several important themes of the era, such as the dependence of families on the honor and trustworthiness of strangers and the inability of trust beneficiaries to protect themselves through the legal system. The moral claims that might have prevailed in an earlier generation were not effective in the impersonal market-oriented 1840s and 1850s.²⁸ The characters in the novel—the victims of Bryson’s misappropriation—understood the settlement in his wife as grossly unfair. “You see, sir, what roguery that unjust law leads to,” pointed out Dr. DuBois, who was in love with one of the Irvine daughters.²⁹

²³ 1 HENRY ST. GEORGE TUCKER, COMMENTARIES ON VIRGINIA LAW 116 (Winchester, Office of the Republican 1836) (discussing creation of trusts that keep property free from claims of husband) [hereinafter COMMENTARIES ON VIRGINIA LAW].

²⁴ PRESTON, *supra* note 9, at 219–20.

²⁵ *Id.* at 219.

²⁶ *Id.* at 218.

²⁷ KLEIN, *supra* note 11, at 36–38.

²⁸ *See, e.g.*, LAWRENCE FREDERICK KOHL, THE POLITICS OF INDIVIDUALISM: PARTIES AND THE AMERICAN CHARACTER IN THE JACKSONIAN ERA (1989) (emphasizing the impersonal market of the 1840s and 1850s).

²⁹ PRESTON, *supra* note 9, at 260. Dr. DuBois’s statement was not quite correct under Virginia law. A husband had to receive adequate compensation for property conveyed to the wife in trust. *See, e.g.*, *Bullock v. Gordon*, 18 Va. (4 Munf.) 450 (1815).

That [law] allows the property a man may choose to make over to his wife, to be free from all the liabilities of the husband; thus holding out a bribe to commit fraud. Now this woman, in the eye of common justice, is a swindler; yet she transgresses no law of the commonwealth.³⁰

What saved the Irvine family was marriage of one of the daughters into another wealthy and pious family and also an inheritance from the widow's uncle in Scotland.³¹ But even then, other family members threatened a lawsuit to challenge the will, and the Irvines sent a trusted cousin to Scotland to represent their interests.³²

The growing commercial nature of the nineteenth century, in which a family's wealth was increasingly held in corporate stock and notes rather than land, left many families injured by bad luck and the misdeeds of strangers. The nation was tied together with a national economy and a population in motion from their lives on farms and in rural areas to cities.³³ When a bank, manufacturing company, or turnpike company, for instance, failed, the loss of capital could affect many families—sometimes those even in distant states. This was a story on the minds of people who feared for the security of their family's inheritance and about their own place in the market economy of the rapidly changing nineteenth century.³⁴ Testators increasingly turned to law to impose additional duties on trustees and to secure their family's fortune, to the extent that they could.³⁵

Trust was necessary, but it often failed because in the impersonal world people did not abide their obligations and there was little morally or legally that could be done to compel people to meet their obligations.³⁶ As trusts were increasing in popularity—and as the law of trusts was developing—a parallel change took place in ideology about trusts. In the wake of the American

³⁰ PRESTON, *supra* note 9, at 260.

³¹ PRESTON, *supra* note 9, at 379–96.

³² *Id.* at 389.

³³ DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848*, at 211–22 (2007) (discussing increasing migration and the transportation revolution).

³⁴ Oliver Baldwin, *Address Delivered at the Dedication of the Hollywood Cemetery: On Monday, the 25th June*, in 15 *THE SOUTHERN LITERARY MESSENGER, DEVOTED TO EVERY DEPARTMENT OF LITERATURE AND THE FINE ARTS* 817–18 (Richmond, Macfarlane & Fergusson 1849).

³⁵ *See, e.g.*, *Harvard Coll. v. Amory*, 26 Mass. (9 Pick.) 446 (1830).

³⁶ GREGORY S. ALEXANDER, *COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970*, at 127–57 (1997) (discussing commercialization in antebellum era); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 211–52 (Stanley N. Kant ed., 1977) (discussing rise of commercial law in nineteenth century).

Revolution, the idea was that the rules of inheritance should be largely equal.³⁷ That was a key legislative reform in Virginia in the 1780s. Then affluent families tried to protect their children from creditors by use of trusts that limited beneficiaries' rights to property or kept property out of the hands of sons-in-law (and thus out of the hands of their creditors).³⁸ Where we had been suspicious of inherited wealth at the time of the Revolution, we increasingly embraced it. It was also likely a reaction to the realities of the market, just as was the growth of proslavery sentiments despite the legacy of statements of equality during the Revolution.

Trusts were part of the response to the market; they helped protect families from creditors.³⁹ One response to impersonal credit relations was to put property in trust to keep it within the family and outside of the hands of creditors.⁴⁰ Yet, even when the property was kept within the family, as *Silverwood* showed, the family had to rely on the services of a professional trustee to manage the property. Thus, in addition to the growth of trusts as a form of property, the common law developed extensive rules policing trustee behavior.⁴¹ The legal constraints on trustees emerged as Americans increasingly emphasized duties to oneself and to others.⁴² This was a particularly strong theme

³⁷ THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 140 (Boston, Lilly & Wait 1832) (discussing reform of inheritance law to give absolute right in slaves and property that had been entailed); 3 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 336–62 (Pennsylvania, William Young Birch & Abraham Small 1803).

³⁸ CHRISTOPHER MICHAEL CURTIS, JEFFERSON'S FREEHOLDERS AND THE POLITICS OF OWNERSHIP IN THE OLD DOMINION 130–34 (2012) (tracing changing ideas of Republicanism to those of promotion of slavery in Virginia from the Revolution to the Civil War).

³⁹ ALEXANDER, *supra* note 36, at 154–57.

⁴⁰ 1 REVISED STATUTES OF THE STATE OF NEW YORK 724 (Albany, Packard & Van Benthuyzen 1828) (1828 New York statutory provision for what we now call a spendthrift trust). The statute provided:

No person beneficially interested in a trust for the receipt of the rents and profits of lands, can assign or in any manner dispose of such interest; but the rights and interest of every person whose benefit a trust for the payment of a sum in gross is created, are assignable.

Id.

⁴¹ 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 295–308 (New York, O. Halstead 1830) (discussing trust law); *id.* at 310, 315–17 (discussing powers of appointment and revocation for trusts). Regarding the martial settlement trust, Kent wrote that “it is not unusual to convey or bequeath property to a trustee in trust to pay the interest or income thereof to the wife for her separate use, free from the debts, control, or interference of her husband.” *Id.* at 161.

⁴² *See, e.g.*, WILLIAM GASTON, ADDRESS DELIVERED BEFORE THE PHILANTHROPIC AND DIALECTIC SOCIETIES AT CHAPEL HILL: JUNE 20, 1832 (Raleigh, Jos. Gales & Sons 1832) (discussing importance of duties to oneself and to nation). The talk of duties was central to the well-functioning market economy, for such much had to rest on trust that others would abide their

in Lexington, where students at both Washington College and the Virginia Military Institute heard a lot about duty.⁴³ Americans needed to emphasize duties, for trust was essential to a well-functioning economy.⁴⁴ Trust was an important value when one needed to rely on strangers. The theme of trust, consequently, appeared frequently in the fictional literature of the era.

Two other novels published in this era and set in the Shenandoah Valley also testified to the centrality of family, economic development, and slavery to the people of the Valley. William Caruthers's *The Kentuckian in New York*, published in 1834, explored the ways to resolve sectional tensions as it provided a character study of friends who had studied at Washington College and their acquaintances who moved from New York to Pennsylvania, Virginia, and South Carolina.⁴⁵ Caruthers was a native of Rockbridge County, though he had married a young woman from South Carolina, and wrote the novel while living in New York.⁴⁶ The novel was about the gradually increasing tensions between the North and South. It was mildly anti-slavery, for many characters looked forward to a time when slavery was as rare in tidewater Virginia as it was in western Virginia.⁴⁷ Though parts of the book were proslavery, one character spoke about the economic and social reasons slavery cannot be ended⁴⁸ as another spoke of the harsh nature of slavery in the deep South, where hundreds of slaves labored on plantations and did not know their owners.⁴⁹ The threat of slave insurrection loomed over the narrative,⁵⁰ which makes sense given that the book came out three years after the Nat Turner rebellion.⁵¹ Family and marriage, and especially inherited plantations, were central to the story.⁵² So was the sense that the world

obligations. See HEIDI J. LEWIS, *Jurisprudence at Davidson College Before the Civil War* 13–15 (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2463346 (discussing the meaning and utility of references to duties).

⁴³ See Christopher R. Lawton, *The Pilgrim's Progress: Thomas J. Jackson's Journey Towards Civility and Citizenship*, 116 VA. MAG. HIST. & BIOGRAPHY 2–41 (2008).

⁴⁴ Alfred L. Brophy, *The Road to the Gettysburg Address: Constitutionalism and the Antebellum Cemetery*, 43 FLA. ST. U.L. REV. (forthcoming 2016).

⁴⁵ WILLIAM CARUTHERS, *KENTUCKIAN IN NEW YORK* (New York, Harper Brothers 1834).

⁴⁶ WILLIAM R. TAYLOR, *CAVALIER AND YANKEE: THE OLD SOUTH AND AMERICAN NATIONAL CHARACTER* 205–09 (1993) (discussing Caruthers's background, education, marriage, and indebtedness); Elizabeth Preston Allen, *Notes on William Alexander Caruthers*, 9 WM. & MARY Q., 294–97 (1929). John Caruthers, William Alexander's father, is included in our sample. See Last Will and Testament of John Caruthers, Rockbridge County Wills Book 8, at 419 (1840).

⁴⁷ CARUTHERS, *supra* note 45, at 76–77 (abolitionist sentiments); *id.* at 115–16.

⁴⁸ *Id.* at 71–73.

⁴⁹ *Id.*; KEITH CARTWRIGHT, *READING AFRICA INTO AMERICAN LITERATURE: ETHICS, FABLES, AND GOTHIC TALES* (2002).

⁵⁰ CARUTHERS, *supra* note 45, at 69–71.

⁵¹ Alfred L. Brophy, *The Nat Turner Trials*, 91 N.C.L. REV. 1817 (2013).

⁵² JOHN L. HARE, *WILL THE CIRCLE BE UNBROKEN?: FAMILY AND SECTIONALISM IN THE VIRGINIA NOVELS OF KENNEDY, CARUTHERS, AND TUCKER, 1830–1845* (2002).

of New York was an impersonal one of credit relations, which was quite different from Washington College in Lexington, Virginia.⁵³ The “progress of the age”—a phrase that recalls the constellation of economic, technological, and moral changes of the 1820s and 1830s⁵⁴—was working, as one character acknowledged near the end of the volume, “a gradual revolution, which, in its onward career, will sweep away the melancholy vestiges of a former and more chivalrous and generous age.”⁵⁵ This was a recognition of the shift to an impersonal market economy from the world of personal connections.

There is more background to this story, though; for as Caruthers was writing about a marriage between a Washington College graduate and a woman from South Carolina in *Kentuckian in New York*,⁵⁶ he was a Washington College graduate married to a woman from South Carolina. His wife’s family had, moreover, placed her slaves in trust for her, in an attempt to place them beyond the reach of Caruthers’s creditors. That led to a lengthy and unsuccessful lawsuit in 1838 by Rockbridge County merchants who wanted to attach some of those slaves for Caruthers’s extensive debts.⁵⁷

Another novel, published nearly a decade before *The Kentuckian in New York*, had similarly focused on the declining fortunes of an affluent family in the Valley and the shifting attitudes towards slavery. George Tucker’s *The Valley of the Shenandoah*, published in three volumes, deals with the declining fortunes of the Grayson family set around the end of the eighteenth century in Virginia.⁵⁸ The novel, published towards the end of the period when Virginians still clung to anti-slavery beliefs, offered a subtle critique of slavery. The transition to a market economy was well underway in the novel—one of the particularly greedy minor characters was always on the “lookout for good bargains in land, negroes, or bonds.”⁵⁹ But there were other values on display there, too. Early in the novel, the Grayson family’s scion, Edward, presented a mild defense of slavery as less

⁵³ See, e.g., CARUTHERS, *supra* note 45, at 151–52; *id.* at 192–200 (discussing characteristics of businessmen in New York); *id.* at 54–55 (discussing moral philosophy).

⁵⁴ 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, 1916–19 (2011) (discussing references to the “spirit of the age”).

⁵⁵ CARUTHERS, *supra* note 45, at 194.

⁵⁶ *Id.* at 71–72.

⁵⁷ Caruthers Trust v. Jones, Rockbridge County Chancery Records, 1838-023 (1838), http://www.lva.virginia.gov/chancery/case_detail.asp?CFN=163-1838-023; Cumings v. Caruthers, Rockbridge County Chancery Court, 1838-013 (1838), http://www.lva.virginia.gov/chancery/case_detail.asp?CFN=163-1838-013 (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).

⁵⁸ See 1 GEORGE TUCKER, THE VALLEY OF THE SHENANDOAH; OR, MEMOIRS OF THE GRAYSONS (New York, C. Wiley 1825) [hereinafter 1 TUCKER].

⁵⁹ *Id.* at 21.

bad than the alternatives.⁶⁰ Edward, in keeping with the prevailing sentiments of the 1820s, thought slavery worse for white people than for the enslaved because it led them to avoid work.⁶¹ Soon, the family realized it was in too much debt because their deceased father had been too generous in acting as a surety. The estate's debts required them to sell their plantation and their enslaved human property in the piedmont and move to their remaining plantation in the Shenandoah Valley.⁶² The sale of slaves provided an anti-slavery bent to the novel, as a heart-rending episode of slavery.⁶³ The family's tragedy continued and Edward was killed in a duel in New York with one a man who had pursued his father's estate.⁶⁴

Tucker, who was a lawyer, had been born in 1775. He joined the University of Virginia as a faculty member in 1824, the year *Valley of the Shenandoah* appeared.⁶⁵ A number of vignettes in the novel reveal the role of the legal system—from probate through criminal trials—in the lives of Virginians. For it reveals the ways that the estate's creditors pursued the Graysons, the difficulties of lawyers representing clients, and the acquittal of one of Edward Grayson's friends who fought with a social inferior who had offended Grayson's sister.⁶⁶ The semi-autobiographical novel critiqued the increasingly materialistic aspects of Virginia society. The novel suggested that though families might lose their inheritance—in part through their efforts to assist their neighbors and friends in need and in part because they cared for enslaved humans—they might maintain their genteel status. But in the end, the story was one of declining fortunes.⁶⁷ It set the stage for later novels to explore in more detail the ways that the market upended Virginia society and left many without assets, even as some others might gain them.

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

Other fictional literature that dealt with areas of the South outside of the Shenandoah Valley expanded on the insecurity that heirs faced, particularly their

⁶⁰ *Id.* at 61–63.

⁶¹ *Id.* at 69–70.

⁶² 3 GEORGE TUCKER, *THE VALLEY OF THE SHENANDOAH; OR, MEMOIRS OF THE GRAYSONS* 127, 179 (New York, C. Wiley 1825) [hereinafter 3 TUCKER]; 1 TUCKER, *supra* note 58, at 115 (discussing estate's debts and limited options to pay them).

⁶³ 1 TUCKER, *supra* note 58, at 179.

⁶⁴ 3 TUCKER, *supra* note 62, at 246–47.

⁶⁵ *THE LIFE AND PHILOSOPHY OF GEORGE TUCKER* vii–viii (James Fieser ed., Thoemmes Continuum, 2004), http://www.rbltd.co.uk/bibliographies/Tucker_short_life.pdf/.

⁶⁶ 1 TUCKER, *supra* note 58, at 230–34 (portraying criminal trial and acquittal). The incident that led to the fight was a dispute between a wagon driver and a carriage driver regarding passage on a narrow road. *Id.* at 128–30.

⁶⁷ 3 TUCKER, *supra* note 62, at 251.

dependence on the honor of lawyers, executors, and trustees after a beneficiary died. Two years before the publication of *Silverwood*, Thomas B. Thorp's novel *The Master's House* told of a young college graduate, Graham Mildmay, who lost his inheritance.⁶⁸ Though he had grown up in affluent surroundings, the family's money was gone by the time that Mildmay graduated from college.⁶⁹ He then had to go out to Mississippi to make his fortune and redeem the family's estate in North Carolina.⁷⁰ Much of *The Master's House* critiques the system of slavery in Louisiana. For instance, the main character in the novel delivers a literary address while still in college on the importance of sectional compromise, while his counterpart delivers an address on the utility of slavery and the need for Southern rights.⁷¹ A second piece of evidence suggests that *The Master's House* was anti-slavery. Mildmay, who was forced by financial necessity to sell a slave, criticized a lengthy contract for sale.⁷² When he complained about the contract, Mildmay was told that it was copied from a precedent drafted by one of the best lawyers around.⁷³ This reveals one way that legal knowledge was transmitted—by the copying of forms from sophisticated lawyers. Nevertheless, there was a lawsuit over the slave in which the buyer lost.⁷⁴ Thus, *The Master's House* portrays the limited rights of a buyer of a “defective” slave.⁷⁵ All of this was set in motion by Mildmay's move to Louisiana, which was necessary because of the family's loss of their fortune. But that move to Louisiana is also what caused him to attempt to make slavery more humane. Perhaps in that novel is the lesson that the impersonal market that caused the loss of Mildmay's fortune also caused slavery to be inhumane. That is, as slavery became more commercial, it became more inhumane. That theme certainly fits with a lot of the anti-slavery fictional literature. Tucker's *Valley of the Shenandoah* portrayed the breakup of a plantation because of debt and alluded to the harshness and the uncertainties that awaited the enslaved people who were sold.⁷⁶ And the tragic odyssey of Uncle Tom in Harriet Beecher Stowe's *Uncle Tom's Cabin* was started when he

⁶⁸ THOMAS B. THORP, *THE MASTER'S HOUSE: A TALE OF SOUTHERN LIFE* (New York, T.L. McElrath 1854).

⁶⁹ *Id.* at 13–38.

⁷⁰ *Id.* at 38–48.

⁷¹ *Id.* at 25.

⁷² *Id.* at 181.

⁷³ *Id.* (lawsuit regarding breach of warranty for slaves and for the sale of a slave, which was a precedent copied from a leading lawyer).

⁷⁴ *Id.* at 170–84.

⁷⁵ See ARIELA J. GROSS, *DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM* 122–52 (2000) (describing the issue of buying a “defective” slave).

⁷⁶ 3 TUCKER, *supra* note 62, at 127, 179.

was sold south down the Mississippi river because of the debt owed by Master Shelby.⁷⁷ Debt and law cast a long shadow over the events of the novel.⁷⁸

Another somewhat less clearly anti-slavery novel, *The Guardian Slave*, was also published in Boston in 1853.⁷⁹ Even the title reflected the influence of trusts and estates laws—the guardian slave of the title was Hatchie, a loyal slave who protected the central character, an heiress named Emily Dumont.⁸⁰ The novel was set in motion when Emily's loving and protective father, Dumont, died. An unscrupulous lawyer and one of Emily's uncles conspired to steal her father's will then replace it with a forged will.⁸¹ The new will, instead of leaving Emily her father's vast estate, claimed that she was a slave and it ordered that she be taken from her home in Louisiana to Ohio, freed there, and given a modest annuity.⁸² In the process of replacing the real will with a fake one, Hatchie, Dumont's loyal and trusted slave, was apparently killed.⁸³

The uncle who had replaced the real will with the forgery and presumably killed Hatchie testified that Emily was, indeed, the daughter of a slave on Dumont's plantation, whom Dumont raised as his own daughter after his wife and infant daughter died in childbirth.⁸⁴ Some immediately suspected that the unscrupulous uncle, Jasper, had a hand in forging the will.⁸⁵ But given its legal language, they also understood that Jasper had help.⁸⁶

Though Emily was white and there was no other evidence that she was the daughter of a slave, that was insufficient evidence to vindicate her.⁸⁷ For as Emily recalled, there were many pale skinned slaves in New Orleans.⁸⁸ Emily then went north on a riverboat, headed for Cincinnati with the intent to fulfill the instructions of her father's will and then to seek vindication.⁸⁹ But along the way Hatchie reappeared—he was hidden in a coffin on the riverboat—and compelled

⁷⁷ HARRIET BEECHER STOWE, *UNCLE TOM'S CABIN; OR, LIFE AMONG THE LOWLY* (Boston, John P. Jewett 1852), reprinted in HARRIET BEECHER STOWE, *THREE NOVELS* 12–13, 19 (Library of Am. 1982).

⁷⁸ *Id.*

⁷⁹ WARREN T. ASHTON, *HATCHIE, THE GUARDIAN SLAVE; OR, THE HEIRESS OF BELLEVUE* (Boston, B.B. Mussey and Co. 1853).

⁸⁰ *Id.* at 20.

⁸¹ *Id.* at 31–32.

⁸² *Id.* at 49–52.

⁸³ *Id.* at 46–47.

⁸⁴ *Id.* at 51–53.

⁸⁵ *Id.* at 57, 59.

⁸⁶ *Id.* at 59.

⁸⁷ *Id.* at 151.

⁸⁸ *Id.* at 151–52.

⁸⁹ *Id.* at 59.

a confession from the attorney.⁹⁰ Thus, the loyal slave outwitted the lawyer and uncle and helped restore Emily to her rightful place as heir of the plantation, after a few more improbable plot twists. Though the author denied any antislavery intent,⁹¹ the antislavery implications of the novel were clear. It suggested that white people might be mistakenly enslaved on slight evidence, so it put readers into the position to realize that they, too, might be subject to slavery. It also portrayed an enslaved person as an intelligent and honorable person and thus humanized him, which again worked to undermine support for slavery.⁹²

C. Controversy Over Slavery in the Shenandoah Valley

As Southern novels increasingly spoke about the benefits of slavery to the enslaved in sentimental terms in the response to *Uncle Tom's Cabin*, their legal literature increasingly spoke about the economic importance of slavery to Southern society, as did the speeches of politicians. The Virginia legislature debated the future of slavery in the commonwealth in the spring of 1832, in the wake of the Nat Turner rebellion and calls by some Virginians to gradually end slavery. Those calls did not go far, but many in the legislature and the public reaffirmed their commitment to enslaved humans as property.⁹³ The debates made clear that property in humans served important functions for the state and for individual owners. Yet, some in the Shenandoah Valley saw the calculations differently from those in the heavily enslaved portions of eastern Virginia.

James McDowell of Lexington, who studied at Washington College and later at Yale and Princeton and served for a time as trustee of Washington College,⁹⁴ 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 hold their property is gone; society ceases to give its

⁹⁰ *Id.* at 109–10.

⁹¹ *Id.* at 5 (“The tale was written before . . . negro literature had become a mania in the community. It was not designed to illustrate the evils or the blessings of slavery. It is, as its title-page imports, *a tale*; and the author has not stepped out of his path to moralize upon Southern institutions.”).

⁹² See generally SARAH N. ROTH, GENDER AND RACE IN ANTEBELLUM POPULAR CULTURE (2014) (arguing that abolitionist literature that humanized enslaved people and portrayed them as citizens helped move public attitudes away from slavery and towards emancipation).

⁹³ See, e.g., ALFRED L. BROPHY, UNIVERSITY, COURT, AND SLAVE: PROSLAVERY THOUGHT IN SOUTHERN COLLEGES AND COURTS AND THE COMING OF CIVIL WAR 25–34 (2016) (discussing Virginia legislature’s debate in the wake of Nat Turner rebellion).

⁹⁴ See McDowell, James, (1795–1851), BIOGRAPHICAL DIRECTORY UNITED STATES CONGRESS 1774–PRESENT, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=M000419> (last visited Oct. 6, 2016); *Emeritus Trustees*, WASH. & LEE, <http://www.wlu.edu/board-of-trustees/emeritus-trustees> (last visited Oct. 6, 2016).

consent.⁹⁵ 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.⁹⁶ 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.⁹⁷

The headway was short-lived, and by the late 1830s, even those from the Shenandoah Valley were expressing reservations about further anti-slavery action. James McDowell delivered an address at Princeton in 1838, and he was wary of abolitionists at that point.⁹⁸ His address was an eloquent appeal to the 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.”⁹⁹ He urged the Princeton audience to cast aside “every prejudiced conception of the popular capacity.”¹⁰⁰ 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

⁹⁵ JAMES MCDOWELL, SPEECH OF JAMES MCDOWELL, JR., *in* THE HOUSE OF DELEGATES OF VIRGINIA, ON THE SLAVE QUESTION: JANUARY 21, 1832, at 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* Letter from Robert H. Rose to McDowell (Apr. 10, 1832), *in* MCDOWELL PAPERS, UNC Library, Series 1.3, April 1832.

⁹⁶ ALEXANDER, *supra* note 36, at 26–42 (discussing conflicting roles of property in Jefferson's thought); WILLIAM J. 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).

⁹⁷ Letter from Aylett Alexander to William Alexander, *in* ANDERSON FAMILY PAPERS, Box 6, Folder 53, Washington and Lee Special Collections.

⁹⁸ JAMES MCDOWELL, ADDRESS DELIVERED BEFORE THE ALUMNI ASSOCIATION OF THE COLLEGE OF NEW JERSEY, SEPTEMBER 26, 1838, at 34–36 (Princeton, R.E. Hornor 1839).

⁹⁹ *Id.* at 22.

¹⁰⁰ *Id.* at 26.

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.¹⁰¹

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.”¹⁰² And only in the United States had principles and that hope reached their “full development.”¹⁰³ 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 li[ke] 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.¹⁰⁴

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.¹⁰⁵ McDowell was pleading the case of the Union—and appealing to the virtues of self-government and democracy—in the face of what he saw as fanaticism.¹⁰⁶ In September 1850, during debate over the Wilmot Proviso, which would have 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.¹⁰⁷ 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

¹⁰¹ *Id.* at 27.

¹⁰² *Id.* at 30.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 31–32.

¹⁰⁵ See JAMES MCDOWELL, SPEECH OF JAMES MCDOWELL, OF VIRGINIA, ON THE WILMOT PROVISIO, DELIVERED IN THE HOUSE OF REPRESENTATIVES, TUESDAY, SEPTEMBER 3, 1850 (1850).

¹⁰⁶ See *id.*

¹⁰⁷ See *id.*

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.¹⁰⁸

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.”¹⁰⁹ The abolitionists, in short, threatened the “happy and united country” with disunion and war.¹¹⁰

The issues regarding slavery and freedom debated by people like McDowell, as well as the issues of family wealth, fraud, and creditors raised by the fictional literature, derived from the vibrant debate about slavery and economic development in Virginia in the years leading into the Civil War. They all built on Virginia’s statutory and common law of inheritance, which we will take up in the next section.

II. VIRGINIA INHERITANCE LAW IN THE ERA OF MARKET REVOLUTION

Virginia law established in 1785 that property descended in equal shares to a decedent’s children.¹¹¹ That was the rule regardless of the gender of the decedent, although married women in Virginia during the period studied here had limited rights to dispose of property at death.¹¹² This limitation on the rights

¹⁰⁸ See *id.* at 15. 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 he 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 3.

¹⁰⁹ MCDOWELL, *supra* note 95, at 5.

¹¹⁰ *Id.* at 36–37.

¹¹¹ COMMENTARIES ON VIRGINIA LAW, *supra* note 23, at 189, 194 (discussing “titles by descent”). When decedents did not have issue, their property ascended to their fathers, mothers, then siblings and issue of siblings. *Id.* at 193.

¹¹² ALEXANDER, *supra* note 36, at 158–64 (discussing passage of married women’s property acts); Richard H. Chused, *Married Women’s Property Law, 1800–1850*, 71 GEO. L.J. 1359, 1359–62 (1983); Peggy A. Rabkin, *The Origins of Law Reform: The Social Significance of the Nineteenth-Century Codification and Its Contribution to the Passage of the Early Married Women’s Property Acts*, 24 BUFF. L. REV. 683 (1974). The married women’s property acts were in essence making available in statutory form what was already available to those who could afford a marriage settlement. Just as with the general incorporation statutes of the era, the married

of married women helps explain why property was left to daughters in a legal life estate or in an equitable life estate. Thus, when the daughters passed away they had no property interest, and the property went immediately to their issue.¹¹³ Sometimes particularly affluent and sophisticated parents left property in trust to a daughter with the power of appointment.¹¹⁴ Affluent parents might also create a trust prior to a woman's marriage in which the husband would have only limited rights.¹¹⁵ Thus, trusts were used to manage a wife's separate property.¹¹⁶ While Virginia intestacy law made no provision for a surviving spouse, another part of the Virginia code provided that surviving widows were entitled to dower, which was a one-third interest in the real property decedent owned at any time during the marriage, unless she had released her dower right in that property.¹¹⁷

The legal treatise literature on trusts and estates grew in size and sophistication from the 1820s to the Civil War. Though the literature was often published in New York and Philadelphia, there was also a robust and sophisticated literature focused on Virginia trust and estates law.¹¹⁸ This literature followed the growth in sophistication of Virginia trust and estates law. For instance, one case in the Virginia Court of Appeals arose from an intestate who passed away in Rockbridge County in 1851.¹¹⁹ In that case, the decedent's widow claimed a one-third share of property put into trust for the widow's benefit (rather than a one-third share of his estate after the satisfaction of creditors).¹²⁰ The court upheld the widow's claim and thus extended the protection of the widow's dower rights to property put into trust during life.¹²¹ Had the court ruled otherwise, it would have allowed creditors to reach property that they could not have reached had the property remained in the hands of the decedent at the time

women's property acts made a legal relationship available to the entire community without the need for a special legal form. *See* MARYLYNN SALMON, *WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA* (1986).

¹¹³ *See, e.g.*, Last Will and Testament of Sally Moore, Rockbridge County Probate Book 15, at 404–05 (1860) (establishing trusts for life for both son Andrew and daughters Sally, Mary, and Magdalene that lasted for life and then went to their children).

¹¹⁴ *See, e.g.*, 2 KENT, *supra* note 41, at 143–44 (“[T]hough a married woman cannot be said strictly to make a will, yet she may devise, by way of execution of a paper, which is rather an appointment than a will.”).

¹¹⁵ COMMENTARIES ON VIRGINIA LAW, *supra* note 23, at 111 (discussing marriage settlement).

¹¹⁶ *Id.* at 116 (discussing trusts for wife's separate property to be protected from the husband).

¹¹⁷ 1 THE REVISED CODE OF THE LAWS OF VIRGINIA 403 (Richmond, Thomas Ritchie 1819).

¹¹⁸ *See, e.g.*, 2 JOHN TAYLOR LOMAX, *LAW OF ADMINISTRATORS AND EXECUTORS* (Richmond, Adolphus Morris 1857); COMMENTARIES ON VIRGINIA LAW, *supra* note 23.

¹¹⁹ *Poindexter v. Jeffries*, 56 Va. (15 Gratt.) 363, 363 (1859).

¹²⁰ *Id.* at 363–68.

¹²¹ *Id.* at 380.

of his death.¹²² Similarly, in 1855, in *Ruffners v. Putner*,¹²³ the Virginia Court of Appeals interpreted and validated a trust that limited the use of trust property to pay the Ruffners' debts.¹²⁴ The Ruffners were the beneficiaries of what we now call a spendthrift trust. John Tayloe Lomax's *Law of Administrators and Executors*, which was published in Richmond and focused on Virginia law, covered the rights of beneficiaries of marriage settlements and other trusts.¹²⁵

Similarly, Virginia cases upheld some devises to slaves. For instance, *Elder v. Elder's Executor*,¹²⁶ upheld a provision that allowed a slave to have several acres for the remainder of his life, but a more generous provision in the will moved towards a status between slavery and freedom and was declared invalid.¹²⁷ The trust form was used to both manage slaves and to provide for freedom, depending on the wishes of the settlor, but it was used substantially more frequently for managing slaves than for freeing them. Lomax's treatise also discussed the emancipation of slaves via will and how to handle those cases.¹²⁸ Thus, the cases and legal literature addressed the growing sophistication of testators.

III. PROBATE IN ROCKBRIDGE COUNTY

The fictional literature of the Shenandoah Valley reflected the struggles of Virginians regarding inheritance, preservation of wealth within families in the era of rapid technological change, expansion in transportation, and increases in population. As populations grew and people's businesses and fortunes depended on those they did not know well, they began to evolve legal technologies to protect family members and preserve their wealth for their family members. This section examines the specific setting of Rockbridge County in Virginia's Shenandoah Valley and then turns to the methodology of this study of wills probated in Rockbridge County from 1820 to 1861. Finally, it explores key

¹²² See *id.* at 363.

¹²³ 53 Va. (12 Gratt.) 541 (1855).

¹²⁴ See *id.*

¹²⁵ See, e.g., 2 LOMAX, *supra* note 118, at 421, 448–51, 506–07 (discussing marriage settlements and trusts).

¹²⁶ 31 Va. (4 Leigh) 252, 256–58, 263–65 (1833) (interpreting trust to free a slave and send her to Liberia).

¹²⁷ While Virginia courts limited the rights of slaves to be given freedom, see, e.g., *Wynn v. Carrell*, 43 Va. (12 Gratt.) 227 (1845), other states allowed slaves some control over their lives, see, e.g., *Beaupied v. Jennings*, 28 Mo. 254 (1859) (upholding a will provision that allowed a slave to choose her owner). The Virginia courts allowed enslaved people to sue for their freedom. See *Brewer v. Harries*, 46 Va. (5 Gratt.) 285 (1848) (allowing a free woman of color to file habeas corpus petition to get three children from her husband's owner).

¹²⁸ 2 LOMAX, *supra* note 118, at 320–43; see also Stuart Gold, *The "Gift" of Liberty: Testamentary Manumission in New Jersey 1791–1805*, 15 RUTGERS RACE & L. REV. 1 (2014).

descriptive statistics of who the testators were and what they did with their property.

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

Rockbridge County, in the center of Virginia's Shenandoah Valley, was first settled by Europeans in the 1730s, and it grew substantially following the American Revolution.¹²⁹ The county is named for the famous "Natural Bridge," a natural formation in the county's south, which had attracted visitors as early as the middle of the eighteenth century.¹³⁰ Thomas Jefferson described the Natural Bridge in his *Notes on the State of Virginia*:

The Natural Bridge, the most sublime of Nature's works, . . . must not be pretermitted. It is on the ascent of a hill, which seems to have been cloven through its length by some great convulsion. . . . Though the sides of this bridge are provided in some parts with a parapet of fixed rocks, yet few men have resolution to walk to them and look over into the abyss. . . . It is impossible for the emotions arising from the sublime, to be felt beyond what they are here: so beautiful an arch, so elevated, so light, and springing as it were up to heaven, the rapture of the spectator is really indescribable!¹³¹

But in the late 1840s, because of a lawsuit, the property was up for auction.¹³² This led one romantic Virginian, John Rueben Thompson, editor of the *Southern Literary Messenger*, to wonder how the property could be sold. He wrote of the sublime beauty of the bridge:

[W]e confess we ouwere greatly surprised to learn that the Natural Bridge was to be sold. Such a thing had never occurred to us. Somehow—we know not how—we had taken up the idea that it belonged to nobody, that it was a sort of *nullius status*, that it was indeed incapable of transfer from one person to another. . . . If we had looked upon it as property at all, we should have rather considered it an "incorporeal hereditament" as *affecting the imagination*, and we should as soon have thought of buying a rainbow or a sunset, evanesce[n]t as they

¹²⁹ CHARLES A. BODIE, REMARKABLE ROCKBRIDGE: THE STORY OF ROCKBRIDGE COUNTY, VIRGINIA 34–35 (2011); *see also* OREN FREDERIC MORTON, A HISTORY OF ROCKBRIDGE COUNTY, VIRGINIA (1920).

¹³⁰ BODIE, *supra* note 129, at 55.

¹³¹ THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 21–22 (London, John Stockdale 1787).

¹³² John R. Thompson, *Advertisement Extraordinary*, 15 SOUTHERN LITERARY MESSENGER 664, 664 (Nov. 1849).

are, as becoming the owner of the Natural Bridge. The magnificent phenomena of nature everywhere—Alps, torrents, cataracts, illimitable prairies—seem to us in their eternal grandeur to mock the efforts of man to reduce them into possession.¹³³

The population of Rockbridge County in 1820, the first year of this study, was 11,945, of whom 2,612 (21.9%) were enslaved.¹³⁴ By 1860, the population was 17,248, of whom 3,985 (23.1%) were enslaved.¹³⁵ Rockbridge thus provides an important counter-example to the more heavily enslaved counties of eastern Virginia.¹³⁶ Rockbridge was home to some moderate anti-slavery advocates,¹³⁷ which may help explain some of the behavior towards enslaved people displayed by testators. As Neely Young's recent study reveals, somewhere around 5% of Rockbridge's enslaved population were freed via will in the pre-Civil War era.¹³⁸

Though agriculture was the primary occupation of most of the county's residents, the county seat of Lexington was an important urban center in the Shenandoah Valley.¹³⁹ Among the indicators of growth in the late eighteenth century was the founding of a school, Liberty Hall, in Lexington. The school was later renamed Washington College in honor of a bequest of canal stock made by George Washington.¹⁴⁰ In 1839, the Virginia Military Institute was chartered by the state and located in Lexington.¹⁴¹ The town of Lexington developed as an important intellectual center of the Valley, because of the schools and churches there, and because of the county government.¹⁴² It supported several newspapers

¹³³ *Id.* at 664–65.

¹³⁴ POPULATION OF VIRGINIA—1820, <http://www.viriniaplaces.org/population/pop1820numbers.html> (last visited Oct. 6, 2016).

¹³⁵ POPULATION OF VIRGINIA—1860, <http://www.viriniaplaces.org/population/pop1860numbers.html> (last visited Oct. 6, 2016).

¹³⁶ See POPULATION OF VIRGINIA—1820, *supra* note 134 (showing higher slave populations in eastern Virginia counties during 1820); see also POPULATION OF VIRGINIA—1860, *supra* note 135 (showing higher slave populations in eastern Virginia counties during 1860).

¹³⁷ NEELY YOUNG, *RIPE FOR EMANCIPATION: ROCKBRIDGE AND SOUTHERN ANTISLAVERY FROM REVOLUTION TO CIVIL WAR* xiii–xiv, 1–9 (2011).

¹³⁸ *Id.* at 175–88.

¹³⁹ BODIE, *supra* note 129, at 61–88.

¹⁴⁰ George Washington's Last Will and Testament (July 7, 1799), in 4 THE PAPERS OF GEORGE WASHINGTON, RETIREMENT SERIES, APRIL–DECEMBER 1799, at 477 (W.W. Abbot, ed., 1999) (confirming that the “hundred shares which I held in the James River Company, I have given, and now confirm in perpetuity to, and for the use & benefit of Liberty-Hall Academy, in the County of Rockbridge”).

¹⁴¹ *VMI History Timeline*, VA. MIL. INST., <http://www.vmi.edu/archives/vmi-archives-faqs/vmi-history-timeline/> (last visited Oct. 6, 2016).

¹⁴² BODIE, *supra* note 129, at 66–87.

and a literary society, where radical ideas like the gradual abolition of slavery were discussed into the 1840s.¹⁴³

Lexington and Rockbridge were the center of some antislavery advocacy. Washington College's President Henry Ruffner spoke against slavery in June 1843 in a major speech to the Rockbridge Colonization Society¹⁴⁴ and again in 1847 in a lengthy attack on the economic implications of slavery.¹⁴⁵

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.¹⁴⁶ Ruffner focused on the economic rather than the moral argument regarding slavery.¹⁴⁷ He suggested that slave labor was unproductive and thus injured agriculture;¹⁴⁸ that because so much money was invested in slaves that Virginians neglected manufacturing and also transportation;¹⁴⁹ and that because the white population was widely dispersed, public education was difficult.¹⁵⁰ All of this led Ruffner to the conclusion that “slavery is pernicious to the welfare of States.”¹⁵¹

Ruffner was involved in a dispute about the economics of slavery: was slavery productive and how did it compare to free labor? Ruffner had an economic account that also focused on the effects of slavery for white people. The discussion of the efficiency of slave versus free labor correlates with twentieth century historians' arguments about the profitability of slavery and the material lives of slaves. Because historians believed the arguments of anti-slavery southerners that slavery was unprofitable—arguments designed to show that slavery should end and thus were advocacy-oriented—they have, perhaps, been more accepting of arguments that slavery was unprofitable than they otherwise might have been.¹⁵²

¹⁴³ *Id.* at 88–115.

¹⁴⁴ LEXINGTON GAZETTE, June 7–8, 1843 (reprinting Ruffner address); *see also* 19 AFRICAN REPOSITORY 220–21 (1843) (mentioning address).

¹⁴⁵ *See* 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); *see also* *Valley Whig*, LEXINGTON GAZETTE, Nov. 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).

¹⁴⁶ RUFFNER, *supra* note 145, at 23.

¹⁴⁷ *Id.* at 27–29.

¹⁴⁸ *Id.* at 22–23.

¹⁴⁹ *Id.* at 22–29.

¹⁵⁰ *Id.* at 29–33.

¹⁵¹ *Id.* at 30.

¹⁵² *See* ROBERT WILLIAM FOGEL & STANLEY L. ENGERMAN, TIME ON THE CROSS: EVIDENCE AND METHODS 59–67 (1974) (summarizing historians' interpretation of the unprofitability of slavery from the early twentieth century); James Oakes, *The Politics of Economic Development in the*

In 1848, in part because of his anti-slavery advocacy, Ruffner resigned the presidency.¹⁵³ He left Lexington shortly afterward, but that was not the end of his anti-slavery advocacy. He is credited with publishing a response to Ellwood Fisher's *Lecture on the North and the South*.¹⁵⁴

Ruffner's arguments against slavery demonstrate the centrality of ideas about economy in the Shenandoah Valley. Economic progress appeared in some other ways in the writings of those in the Valley as well. In 1851, George Junkin, Jr., the son of the college president, delivered an address on *The Progress of the Age*, at Washington College.¹⁵⁵ Junkin identified an upward trajectory of human progress.¹⁵⁶

Thus has the progressive spirit of the age tunneled mountains, filled up valleys, converted deserts into gardens, spanned the ocean as with a bridge, and enabled man to walk its depths as on dry land, supplied the most widely separate climes with their interchanged productions, increased mechanic power tenfold, raised Agriculture to the dignity of a Science, reduced war to a matter of calculation, and marvelously lifted from man the weight of that curse which was pronounced upon him when driven from Eden's bliss.¹⁵⁷

Antebellum South, 15 J. INTERDISC. HIST. 305, 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 DELIVERED BEFORE THE GRAHAM PHILANTHROPIC AND WASHINGTON LITERARY SOCIETIES OF WASHINGTON COLLEGE, JUNE 1849, at 18 (Lexington, Patton & Burgess n.d.); *Utilitarianism*, 4 VA. U. MAG. 260 (1860).

¹⁵³ William Gleason Bean, *The Ruffner Pamphlet of 1847: An Antislavery Aspect of Virginia Sectionalism*, 61 VA. MAG. HIST. & BIOGRAPHY 260, 277 (1953) (attributing Ruffner's resignation to a combination of factors, including local church politics, conflict within Washington College, and the pamphlet).

¹⁵⁴ ELLWOOD FISHER, LECTURE ON THE NORTH AND THE SOUTH DELIVERED BEFORE THE YOUNG MEN'S MERCANTILE LIBRARY ASSOCIATION OF CINCINNATI, OHIO, JANUARY 16, 1849 (Cincinnati, 1849); see OLLINGER CRENSHAW, GENERAL LEE'S COLLEGE; THE RISE AND GROWTH OF WASHINGTON AND LEE UNIVERSITY 59 (1969) (attributing the pamphlet to Ruffner); YOUNG, *supra* note 137, at 142. For a copy of the lecture, see OSGOOD MUSSEY, REVIEW OF ELLWOOD FISHER'S LECTURE ON THE NORTH AND THE SOUTH (Cincinnati, 1849).

¹⁵⁵ See GEORGE JUNKIN, JR., THE PROGRESS OF THE AGE: AN ADDRESS DELIVERED BEFORE THE LITERARY SOCIETIES OF WASHINGTON COLLEGE, AT LEXINGTON, VIRGINIA, JUNE 17, 1851 (Philadelphia, 1851).

¹⁵⁶ *Id.* at 5–9.

¹⁵⁷ *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

Junkin went on to describe the telegraph and photography, too.¹⁵⁸ The Virginia landscape artist Edward Beyer 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.¹⁵⁹

Such themes of progress through order also appear in the landscape sketches of Junkin’s sister, Margaret Junkin Preston, whose book *Silverwood* provided the opening vignette of this Article. For instance, in *Mount Ida*, Margart Preston depicts a bridge in the background, a boat in the foreground, and houses at the foot of the mountain.¹⁶⁰ The landscape art celebrated the economic and moral progress of the era, as well as demonstrated that through technology, like law, humans improved upon the state of nature.¹⁶¹

George Junkin focused on the progress that was made possible because the 1850s were the age of the “empire of [the] mind.”¹⁶² The wide diffusion of knowledge led to a general skepticism, which advanced the cause of liberty:

[W]herever a gleam of light has entered and revealed to him his chains, he has instantly endeavoured [sic] 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 of this law has 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.¹⁶³

The pace of political change was increasing.

breaking cargo, from Lexington to Norfolk. Her railways span the Commonwealth. She has shaken hands with her sisters of North Carolina and Tennessee; she has tunnelled the Blue Ridge, scaled the Alleghanies, and with unshaken constancy, in the face of every obstacle, is pressing her way to the Ohio. In any age but this, such achievements would be deemed miraculous.

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

¹⁵⁸ JUNKIN, *supra* note 155, at 9.

¹⁵⁹ See EDWARD BEYER, *ALBUM OF VIRGINIA; OR, ILLUSTRATION OF THE OLD DOMINION* (1858).

¹⁶⁰ MARGARET PRESTON JUNKIN, *SKETCH BOOK*, Washington and Lee Special Collections.

¹⁶¹ See generally Alfred L. Brophy, *Property and Progress: Antebellum Landscape Art and Property Law*, 40 MCGEORGE L. REV. 603 (2009) (discussing antebellum Americans’ love of property and how that love appears in landscape art).

¹⁶² JUNKIN, *supra* note 155, at 11.

¹⁶³ *Id.* at 14.

[I]n 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.¹⁶⁴

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.”¹⁶⁵ 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 [sic] 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.¹⁶⁶

While people at Washington College were arguing against slavery and also celebrating the wealth created by the technological progress of the age, Rockbridge County residents were not nearly as wealthy as other residents of others parts of Virginia and other parts of the South. Thus, Rockbridge provides a contrast with other parts of the state and the South. In particular, Rockbridge provides a comparison with the wealthy parts of the south that revealed a heavy reliance upon legal technology, such as in Greene County, Alabama.¹⁶⁷ The wealth in Rockbridge was largely created through agriculture, but there was also some technology, such as iron forges.¹⁶⁸ The James River and Kanawha canal, which runs through Rockbridge, helped lower transportation costs down the

¹⁶⁴ *Id.* at 15.

¹⁶⁵ *Id.* at 21.

¹⁶⁶ *Id.* at 22.

¹⁶⁷ Stephen Duane Davis II & Alfred L. Brophy, “*The Most Solemn Act of My Life*”: *Family, Property, Will, and Trust in the Antebellum South*, 62 ALA. L. REV. 757, 772–75 (2011).

¹⁶⁸ BODIE, *supra* note 129, at 92–96 (reporting that agriculture reigned supreme but noting the importance of canals and iron forges to the Valley’s economy); *see also* CHARLES B. DEW, *BOND OF IRON: MASTER AND SLAVE AT BUFFALO FORGE* (1995) (discussing the iron forges of Rockbridge County).

James River to Richmond, the point of departure for ocean-going vessels.¹⁶⁹ Thus, Rockbridge residents were familiar with and invested in bonds, as well as some industrial and agricultural enterprises.¹⁷⁰ Hence, this study is about the forms of wealth in Rockbridge in that era of market revolution—largely land, slaves, and bonds—and what testators did with their property.¹⁷¹

B. *The Methodology*

This study draws upon the methodology of several similar studies of both pre-Civil War and twentieth century probate.¹⁷² We analyze 128 wills from Rockbridge County, Virginia, using the microfilm of the Rockbridge County probate records that are available at the Library of Virginia.¹⁷³ We included every complete and readable will probated in Rockbridge County at five year intervals from 1820 to 1860. We also included 1851 and 1861 to expand the samples at several key times of particular interest to us. Thus, we included wills probated in 1820, 1825, 1830, 1835, 1840, 1845, 1850, 1851, 1855, 1860, and 1861. The will books are organized according to when the wills were probated rather than when they were written. Thus, a will that was executed in 1810 and probated in 1820 was included in the study,¹⁷⁴ while a will written in 1820 and probated in 1822 would not be. For many of the wills, there are additional records, such as inventories of estate. However, because our primary focus was the testator's expressions in the will and the legal technology, we made no systematic use of these additional records. After we identified the 128 usable wills probated, we coded each will for testator's and beneficiaries' gender and relationship; preference between heirs; incidence, sophistication, and purpose of trusts; incidence of bequests of and emancipation of slaves; and other peculiar provisions.

¹⁶⁹ BODIE, *supra* note 129, at 103–05.

¹⁷⁰ *Id.*; see also *Am. Colonization Soc'y v. Gartrell*, 23 Ga. 448 (1857) (discussing estate of testator who left his slaves to the American Colonization Society, which consisted of “lands, slaves, bank and railroad stocks, bonds, notes, and other evidences of debt”).

¹⁷¹ See, e.g., *Reid v. Blackstone*, 55 Va. (14 Gratt.) 363 (1858) (testator disposing of bonds and slaves, with the slaves to be freed in Pennsylvania).

¹⁷² See Davis & Brophy, *supra* note 167, at 774–75; Lawrence Friedman, Christopher Walker, & Ben Hernandez-Stern, *The Inheritance Process in San Bernardino County, California, 1964: A Research Note*, 43 HOUS. L. REV. 1445, 1445–60 (2007); Kirklin, *supra* note 3, at 479–85 (2011); see also YVONNE PITTS, *FAMILY, LAW, AND INHERITANCE IN AMERICA: A SOCIAL AND LEGAL HISTORY OF NINETEENTH-CENTURY KENTUCKY* 1–30 (2013).

¹⁷³ We used the microfilm copies of the Rockbridge County probate records at The Library of Virginia: http://www.lva.virginia.gov/public/local/results_all.asp?CountyID=VA249#WIL. We have modernized spelling of quotations from the wills throughout this Article.

¹⁷⁴ See, e.g., *Last Will and Testament of Mary Wilson*, Rockbridge County Wills Book 5, at 59–60 (written in 1810 and probated in 1820).

There were several points that required judgment calls on our part. One was the equality of distribution to issue. In many instances it was difficult to determine equality. For instance, when a testator devised different parcels of land to issue, it was unclear if they were of equal or roughly equal value. Given the Virginia Code's equality in intestacy,¹⁷⁵ we presumed that devises were equal unless there was contrary evidence, which there often was, of preferential treatment.¹⁷⁶ There were also some instances of unequal treatment between male and female issue in when they received their devises. Thus, male issue sometimes received their portions outright, while female children received that property in trust. Those were issues of equality of terms of descent as opposed to amount of property and we coded those separately.

The second area that required substantial judgment calls were the cases where property required on-going management by the executors. In cases where this appeared to invoke on-going management duties—even where the will did not use the word “trust”—we coded that as a trust.¹⁷⁷ This decision posed some problems because there are a few cases in which it is unclear where the funds for continuing support come from. For instance, we coded as an implicit trust David Potter's instructions that left his plantation to his two sons and reserved half the crops in the ground “for the support of the family” and then required that “my daughters Nancy and Betsey [are] to be supported by the boys as long as they live single.”¹⁷⁸ Our perhaps charitable interpretation here was that the support was to come out of the plantation left to “the boys.” But whether and how such a “trust” would be enforced against them remains unclear. Some wills left what might have been classified as a legal life estate, though we often viewed it as creating an implicit trust. For instance, Jacob Dice's 1860 will left his farm to his two sons with instructions that they farm it while his wife is alive and give her one-third of the proceeds.¹⁷⁹ This appeared to us to be at least slightly more than a life estate in one-third of the property, for it seemed to impose duties on the

¹⁷⁵ 1 THE REVISED CODE OF THE LAWS OF VIRGINIA, *supra* note 117, at 355.

¹⁷⁶ This is also in keeping with the Virginia Supreme Court's interpretation of a will that was probated in Rockbridge County. The will provided “I will and bequeath to the children of Arthur McMaster and David McMaster and to Robert B. McKee McMaster all the funds remaining after every just claim against my estate has been satisfied, to be equally divided between them.” The Court interpreted that as giving shares of equal size to each of the children of Arthur McMaster, the children of David McMaster, and to Robert McMaster. *McMaster v. McMaster*, 51 Va. (10 Gratt.) 275 (1853).

¹⁷⁷ JOEL TIFFANY & EDWARD BULLARD, *THE LAW OF TRUSTS AND TRUSTEES, AS ADMINISTERED IN ENGLAND AND AMERICA, EMBRACING THE COMMON LAW, TOGETHER WITH THE STATUTE LAWS OF THE SEVERAL STATES OF THE UNION, AND THE DECISIONS OF THE COURTS THEREON* 42–44 (Albany, W.C. Little 1862) [hereinafter *TIFFANY ON TRUSTS*] (discussing forms of implied trust created via will).

¹⁷⁸ Last Will and Testament of David Potter, Rockbridge County Wills Book 13, at 222 (1854).

¹⁷⁹ Last Will and Testament of Jacob Dice, Rockbridge County Wills Book 15, at 443 (1860).

sons with respect to the management of the property.¹⁸⁰ A similar and stronger case of imposing a duty with regard to management of property came in Thomas Greene's 1861 will, which provided that his executor was to rent out land to pay his debts, then use the remainder "for the entire benefit of" his granddaughter Nancy Jane Greene.¹⁸¹ We also included in this study cases where a beneficiary received an annuity that would be paid out of the estate.¹⁸² In reporting this, we break out the cases of implicit trust from explicit trust.

Finally, we have not looked outside the wills for data on testators here, as some previous studies have done.¹⁸³ While it may have been possible to locate many of our testators in the United States' decennial censuses or in Rockbridge County tax assessments, our focus is on the employment of legal devices, such as trusts and life estates, rather than the social history of the probate process.¹⁸⁴ Hence, this Article focuses on the terms of the wills and testamentary trusts.

C. *Who Were the Testators?*

In the pre-Civil War era, wills in Rockbridge County were primarily the domain of men. Of the 128 testators we studied from 1820 to 1861, 71.1% (N=91) were men.¹⁸⁵ The predominance of male testators appeared throughout the period. Of the 67 wills we studied before 1850, 71.6% were written by men

¹⁸⁰ *Id.* A similar—and rather confusing—will of Archibald McCluer left property to his wife and two daughters "during the lifetime of" his wife. Last Will and Testament of Archibald McClung, Rockbridge County Wills Book 16, at 224 (1861). As with Dice's will, this might be read as a legal life estate, though again the language of "support" suggests a trust relationship and duties on the part of the widow to manage the property for the two daughters. Similarly, Henry Firebaugh's 1861 will devised "the use of my farm" to his wife for her life for "her raising and educating my children." Firebaugh also left the profits and his stock, stills, and tubs in the distillery at David Firebaugh's property for "the benefit of my wife and children." Last Will and Testament of Henry A. Firebaugh, Rockbridge County Wills Book 16, at 228 (1861).

¹⁸¹ Last Will and Testament of Thomas Greene, Rockbridge County Wills Book 16, at 144 (1856); *see also* Last Will and Testament of James G.W. Yonel, Rockbridge County Wills Book 16, at 231 (1861) ("I will and bequeth to my son Robert D. Yonel a good support off of my property, and it is my request for him to live with his mother.").

¹⁸² *See, e.g.*, Last Will and Testament of William Thompson, Rockbridge County Wills Book 13, at 367–69 (1854) (providing for implicit support trust for three elderly slaves).

¹⁸³ *See, e.g.*, Davis & Brophy, *supra* note 167, at 775; David Horton, *Wills Law on the Ground*, 62 UCLA L. REV. 1094, 1096–1104 (2015); David Horton, *In Partial Defense of Probate: Evidence from Alameda County, California*, 103 GEO. L.J. 605, 611–14 (2015); Reid Kress Weisbord, *Trust Term Extension*, 67 FLA. L. REV. 73, 74–79 (2015); Thomas E. Simmons, *Wills Above Ground*, 23 ELDER L.J. 343, 344–46 (2016).

¹⁸⁴ *See, e.g.*, PHILIP GREVEN, *FOUR GENERATIONS: POPULATION, LAND, AND FAMILY IN COLONIAL ANDOVER, MASSACHUSETTS 1–19* (1970); JEAN R. SODERLUND, *QUAKERS & SLAVERY: A DIVIDED SPIRIT* 54–86 (1985) (surveying probate inventories to determine the wealth of testators and to link that to ownership of humans in colonial Pennsylvania and New Jersey).

¹⁸⁵ *See infra* Table 1.

and of the 61 wills we studied that were probated from 1850 to 1861, 70.9% were written by men. The majority of male testators were married (N=56, 61.5%).¹⁸⁶ The opposite was true for female testators. Only one female testator out of 37 (2.7%) was identified in her will as married.¹⁸⁷ This is unsurprising, because married women had extremely limited rights to dispose of property. One married female testator had a joint will executed by her and her husband and, in fact, she was widowed by the time her will was probated.¹⁸⁸

The gender imbalance in the number of testators and the number of married testators did not translate into a disproportionate number of male family members mentioned in each will.¹⁸⁹ In fact, slightly more female family members than male family members were mentioned in the Rockbridge County wills. On average, six family members were mentioned in the wills we sampled from 1820 to 1861. Of those six mentioned family members, on average 3.1 were female and 2.9 were male.

D. What Did Testators Do With Their Wealth?

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

1. General Testamentary Practices

We took a broad approach to determining whether a testator's distribution to their issue was equal or favored, and we only labeled a distribution as favored if it obviously favored one or more issue over other issue. If we did

¹⁸⁶ See *infra* Table 2.

¹⁸⁷ See *infra* Table 2.

¹⁸⁸ Last Will and Testament of Adam Leach and Margaret Leach, Rockbridge County Wills Book 13, at 384 (1853). A wife could not generally make a will while married, even though she could exercise a power of appointment over property left in trust for her. See 2 KENT, *supra* note 41, at 170–71.

¹⁸⁹ We ascertained the gender of a testator's family members based upon whether the testator explicitly mentioned his relation to the family member (e.g., "son" or "daughter," "grandson" or "granddaughter," etc.) or by the gender generally associated with the family member's name. Similarly, we ascertained whether one was a family member based upon whether the testator explicitly mentioned his relation to the person or by whether the person shared the last name of the testator or the testator's family members.

not determine a distribution to be favored, we labeled the distribution as equal. Of the 128 testators from Rockbridge County, 66.4% (N=85) devised property to their issue. More than half (N=47, 55.3%) of those who devised property to their issue devised property equally to them,¹⁹⁰ while 44.7% (N=38) of those who devised property to their issue made a favored distribution to their issue.¹⁹¹ When testators made a favored distribution of property to their issue, male issue were highly favored over female issue.¹⁹² Of the testators who made a favored distribution and favored male issue over female issue or vice versa,¹⁹³ 85.3% (N=29) favored their male issue. Only 14.7% (N=5) favored their female issue.¹⁹⁴ Not included in these percentages are the four testators who made distributions that favored both male and female issue over other issue. Many of the devises to issue were outright, in a few cases devises to daughters were limited so that if they died without surviving issue the interest would shift to a sibling or the sibling's issue.¹⁹⁵

At other times testators made outright gifts, such as David Greenlee's bequest to his son Robert of "as much money as may be necessary in the prudent use of it for outfit and attendance of medical lectures in Philadelphia for two

¹⁹⁰ Given Virginia intestacy law's demand for equal inheritance (*see supra* note 175), in cases when it was unclear whether there was equal or unequal distribution we presumed equal distribution. Moreover, when sons and daughters received equal shares, but daughters received property in life with a remainder to their issue or in trust for life, remainder to their issue we classified this as equal. Our rationale was that the property distributed to the daughter's stock was equal to that of the son's stock, even though there were procedural differences. This classification is somewhat controversial because it remains in dispute how to interpret devises to daughters in trust. Norma Basch's study of women and property in New York state in this time period, for instance, noted the predominance of property left in trust to daughters as a sign of the restricted property rights of daughters and their relatively limited power. *See* NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK* 100–11 (1982). Yet, we focus on the central purpose of the trust as maintaining property within the daughter's family and freed from the creditors of her husband. Thus, our focus is on the ways this technology preserved income for the daughter rather than how it limited her rights to control the property. In fact, some trusts both attempted to protect the daughter's share from her husband's creditors and give her control over its disposition. *See* 2 KENT, *supra* note 41, at 161, 170–71 (discussing trusts for married women that gave the beneficiaries control over the corpus even during life).

¹⁹¹ *See infra* Table 6.

¹⁹² *See infra* Table 7.

¹⁹³ We ascertained the gender of a testator's issue based upon whether the testator explicitly mentioned his relation to the issue (e.g., "son," "daughter," "grandson," or "granddaughter") or by the gender generally associated with the issue's name. In the four cases where testators favored both female and male issues over other issues, we have removed them from this analysis.

¹⁹⁴ *See infra* Table 7.

¹⁹⁵ *See, e.g.*, Last Will and Testament of Nancy Cunningham, Rockbridge County Wills Book 7, at 298 (1835).

sessions.”¹⁹⁶ Another ordered a specific monument (headstone)¹⁹⁷ and another set aside the family cemetery from sale with the rest of the estate.¹⁹⁸ He also directed “that no badges of mourning be worn by any relations on my account.”¹⁹⁹

Almost all devises were to family members. Rockbridge County testators rarely devised their property to non-family members or charitable organizations.²⁰⁰ Of the 128 testators, only 18 (14.1%) devised property to people outside of the family.²⁰¹ Fewer than 5% of the testators (3.9%, N=5) made a charitable devise.²⁰² For instance, one will left money to the “Theological Seminary in Prince Edward, Virginia,” the Union Theological Seminary that was then part of Hampden-Sydney College.²⁰³ Another left \$100 to the Presbyterian Church,²⁰⁴ and another left a residuary to the Virginia Bible Society.²⁰⁵ And one left \$300 in trust for the Ebenezer Church.²⁰⁶ Six testators freed enslaved people and so in some sense one might say left “property” to non-family members. In the instances where they left property to non-family members, it was often in return for care those others had provided. For instance, David Ford’s 1825 will left the residuary of his estate to his friend John McFadden “for the friendly care he has taken care of me in my sickness.”²⁰⁷ There were, it seems, a good many agreements regarding care in Rockbridge County.²⁰⁸

¹⁹⁶ Last Will and Testament of David Greenlee, Rockbridge County Wills Book 11, at 293 (1850).

¹⁹⁷ Last Will and Testament of Arthur McCluer, Rockbridge County Wills Book 13, at 301–02 (1855).

¹⁹⁸ Last Will and Testament of William Miller, Rockbridge County Wills Book 8, at 431–32 (1840).

¹⁹⁹ Last Will and Testament of John Davidson, Rockbridge County Wills Book 7, at 366–67 (1835).

²⁰⁰ See *infra* Table 6.

²⁰¹ See *infra* Table 6.

²⁰² See *infra* Table 6.

²⁰³ Last Will and Testament of Cynthia Cloyd, Rockbridge County Wills Book 6, at 449–50 (1830).

²⁰⁴ Last Will and Testament of Benjamin Darst, Rockbridge County Wills Book 7, at 370–71 (1835).

²⁰⁵ Last Will and Testament of William T. Hamilton, Rockbridge County Wills Book 8, at 405 (1840).

²⁰⁶ Last Will and Testament of William Harper, Rockbridge County Wills Book 12, at 44–45 (1851).

²⁰⁷ Last Will and Testament of David Ford, Rockbridge County Wills Book 5, at 508 (1825).

²⁰⁸ Last Will and Testament of Boston Temple, Rockbridge County Wills Book 6, at 492–93 (1829) (apparent *inter vivos* trust regarding second wife’s care during her life); Last Will and Testament of John Berryhill, Rockbridge County Wills Book 6, at 21 (1825) (leaving 40 acres and a house to Amy Beverly, “a woman of colour who has kept house for me a number of years”); Last Will and Testament of William Patton, Rockbridge County Wills Book 6, 487–88 (1830) (leaving

2. Married Testators

The distributions that testators in Rockbridge County made to their surviving spouses are also indicative of the prevailing attitudes about gender and maintenance of family wealth during the antebellum period. The 57 married testators made 56 distributions of property to their surviving spouses.²⁰⁹ No married testators made an outright devise of their entire estate to a surviving spouse. Only four of the married testators (7.1%) made an outright devise to their surviving spouses of property at all.²¹⁰ Substantially more popular among married testators was to leave the surviving widow a life estate, an estate for widowhood, or a support trust. Forty (71.4%) of the 57 married testators devised their surviving spouses a life estate or an estate for widowhood and 21.4% (N=12) of married testators devised to their surviving spouses a support trust.²¹¹ Thus, given that 56 of the 57 married testators were male,²¹² married men overwhelmingly left their surviving spouses a life estate or an estate for widowhood, as opposed to an outright devise of property.²¹³ Those life estates were usually in a subset of the property. Often it appears that the testators who left property in life estates for their daughters did so to keep the property within the family. For instance, Thomas Beggs's will, probated in 1840, had a codicil that altered an outright devise to his daughter to give her instead a life estate with a remainder to her heirs.²¹⁴

Such were the types of testators and what they did with their wealth. A select group of testators, often those who had particular wealth or particular needs to provide for vulnerable members of their family, left property in trust. The next section turns to examine the testamentary trusts in the wills under study

farm to two sons who had "laboured for the support of myself and wife and the younger children until they left me to get trades or married and removed"); Last Will and Testament of Arthur McCluer, Rockbridge County Wills Book 13, at 301-02 (1854) (mentioning 1841 agreement regarding the conveyance of a tract of land in exchange for the care of Arthur McCluer and his wife); *see also* HENDRICK HARTOG, SOMEDAY ALL THIS WILL BE YOURS: A HISTORY OF INHERITANCE AND OLD AGE (2012).

²⁰⁹ *See infra* Table 7.

²¹⁰ *See infra* Table 5.

²¹¹ *See infra* Table 5.

²¹² *See infra* Table 3.

²¹³ *See infra* Table 5.

²¹⁴ *See* Last Will and Testament of Thomas Beggs, Rockbridge County Wills Book 8, at 326 (1840) (providing a codicil that revoked "the foregoing bequest of a portion of my landed estate to my daughter Ann her heirs and assigns forever as above expressed: but give and bequeath the same to her during her natural life, and at her decease to her child or children should she have any and their heirs forever: but if she should die leaving no child or children; then I give and bequeath the said landed estate one half to my grandson William Beggs now living with me and the other half to the children of Jane McClung deceased to them and their heirs forever").

here and how they were increased in frequency and sophistication from 1820 to 1861.

IV. TRUST INCIDENCE AND PURPOSES: THE EXPANSION OF AMERICAN TRUST LAW

A. *Changes in Trust Incidence, 1820–1861*

One of the most dramatic changes in Rockbridge County wills from 1820 through 1861 is the growth in the use of both implicit and explicit testamentary trusts. Where there were six implied trusts and no explicit trusts in the 17 wills (35%) probated in the 1820s, by the 1850s there were 4 explicit trusts and 18 implied trusts in the 39 wills (56%) probated.²¹⁵ Both the incidence and sophistication of the trusts increased over the 40 years under study here.

1. Maintenance, Care, and Education of Family Members

The trusts served a number of purposes. Particularly early on, they were primarily concerned with the maintenance and care of vulnerable family members, particularly widows and daughters. An early example of a trust for support of family was John Sloane's 1830 will that left his real property and one slave in trust for support for his wife and children for her life.²¹⁶ Sloane ordered that his "mansion house . . . with the Garden attached . . . with the negro woman Hannah" would be kept for life for his wife.²¹⁷ His other real property was to be "rented or sold as may appear most advisable by my executors" and the remaining money was loaned to provide support.²¹⁸ This put a lot of control in the hands of executors, but also reveals Sloane's sophisticated sense of the market. He wanted his property put to use to provide either rental income or interest income for his family. Hugh Buchanan's will, also probated in 1830, had quite similar terms. It provided that when his sons reached the age of majority that they could farm the land to provide for the family; and if they could not do that, the executors were instructed "to have the land worked to their minds for the support of the family."²¹⁹

Five wills provided trusts for the care of disabled individuals, including one that made specific reference to a Virginia statute for care of disabled

²¹⁵ See *infra* Table 3.

²¹⁶ Last Will and Testament of John Sloane, Rockbridge County Wills Book 6, at 410 (1830).

²¹⁷ *Id.*

²¹⁸ *Id.* at 409–10.

²¹⁹ Last Will and Testament of Hugh Buchanan, Rockbridge County Wills Book 6, at 438–39 (1830).

individuals.²²⁰ Another left an explicit trust for a son “of unsound mind.”²²¹ Another provided for support for a mentally ill wife, using money from state bonds, which was returning 6% interest.²²² Andrew Bogan’s 1825 will provided that his executor pay the room and board for his sister, whom he described as “not of a sound mind.”²²³ John Allen’s will left the residue of his estate to one of his daughters with the expectation that she would maintain “my daughter Betsy who is insaned.”²²⁴

Obviously a lot of the testators were concerned with the maintenance of beloved family members for the remainder of their lives and made a number of arrangements to make sure that other family members—often children—would take care of them. The testators frequently gave them property to assist with the support.²²⁵

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

One representative example of a trust to care for surviving spouses and for children comes from Michael Kirkpatrick’s will probated in 1825. He provided that

the plantation in which my wife has the interest . . . be not divided until [their son] Joseph comes of age and that his interest therein herein after named be worked together with his mother’s and that the increase thereof be used by my wife and daughter

²²⁰ Last Will and Testament of Rachel McNutt, Rockbridge County Wills Book 8, at 334 (1840) (mentioning “[a]n act to reduce into one the several acts concerning guardians, orphans, curators, infants, masters, and apprentices,” in her will and asking her daughter, Catharine, be treated “as if she were an infant under the age of fourteen years”).

²²¹ Last Will and Testament of James Dunlap, Rockbridge County Wills Book 8, at 415–16 (1839).

²²² Last Will and Testament of John McClelland, Rockbridge County Wills Book 13, at 361 (1855).

²²³ Last Will and Testament of Andrew Bogan, Rockbridge County Wills Book 5, at 519 (1825).

²²⁴ Last Will and Testament of John Allen, Rockbridge County Wills Book 6, at 463 (1830).

²²⁵ See, e.g., Last Will and Testament of Matthew Willson, Rockbridge County Wills Book 6, at 484–85 (1830) (leaving farm to his son, reserving a one-third interest in the profit to his wife, and providing that daughter may live with his son’s family while she is single); Last Will and Testament of William Patton, *supra* note 208, at 487–88 (charging “my plantation with the comfortable support and maintenance of my beloved wife Nancy”).

Nancy and son Joseph as a family until Joseph . . . attains the age of twenty one years and also until Nancy . . . marries.²²⁶

An example of an implicit trust for education came in Robert McCluer's will, which left property in his wife's "hands in such manner . . . as may enable her to have my children educated."²²⁷ McCluer allowed his wife to invade the principal if the income was insufficient.²²⁸ James Johnston's 1835 will left property to his wife "to assist in supporting and educating my younger children" and the residuary was left to the wife.²²⁹

William Thompson's will left the residue of his plantation, including a mill, with instructions that his executors rent it out during his wife's life. He was careful to give instructions on the rental and the management of the property. The executors were to hold the tenant "to such prudent mode of cultivation as will not impoverish" the lands and also to bind the tenant "not to waste the timber unnecessarily."²³⁰ Though this was an implicit rather than explicit trust, Thompson's instructions regarding the management of the property is reminiscent of the increasing control that settlors placed on trustee investment decisions in explicit trusts.²³¹

²²⁶ Last Will and Testament of Michael Kirkpatrick, Rockbridge County Wills Book 5, at 514 (1825). Five years later John Sloane had a similar, but somewhat more detailed, instructions for his executors regarding maintaining some of his real property for his wife and minor children and also sale of the remaining property to provide income and then legacies for them as they reached age of majority. Sloane's will stipulated:

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

Last Will and Testament of John Sloane, *supra* note 216, at 409–10.

²²⁷ Last Will and Testament of Robert McCluer, Rockbridge County Wills Book 7, at 317 (1835).

²²⁸ *Id.*

²²⁹ Last Will and Testament of James Johnston, Rockbridge County Wills Book 7, at 333 (1835). Another will included a specific provision for one of his son's medical education. *See* Last Will and Testament of David Greenlee, Rockbridge County Wills Book 11, at 293 (1850).

²³⁰ Last Will and Testament of William Thompson, Rockbridge County Wills Book 13, 367–69 (1855).

²³¹ *See infra* VI.A.3 (discussing instructions to trustees regarding management of trust corpus).

2. Protection of Beneficiaries from Creditors

Beginning in the 1830s, the trusts also increasingly took on an additional role of not just providing for support and education, but also protecting beneficiaries against creditors. This was an expansion of the use of trusts to protect property left to daughters from their husbands and their husbands' creditors. For generations before the Rockbridge testators studied here, English and then American law permitted donors to establish trusts for women that would prohibit their husbands from having access to the trust property.²³² Trusts for daughters served an important purpose in keeping property within the family and providing an important source of income for the entire family and protecting the daughter's property from her husband's creditors. That technology was readily available through treatises and even form books. For instance, Benjamin Tate's *The American Form Book*, published in Richmond in 1845, had several pages devoted to a marriage settlement.²³³

Perhaps even more importantly, beyond the cases of marriage settlements, trust settlors were beginning to prohibit beneficiaries from alienating their interests in the trust income. State statutes explicitly recognized the rights of settlors to protect beneficiaries' interests from creditors, such as protecting beneficiaries from alienating their interest until they received it. New York's revision in 1828 did this.²³⁴ Similarly, a Kentucky statute prohibited married women who were beneficiaries of family trusts from alienating their interest without permission of an equity court.²³⁵

Beginning in the 1840s, several of the Rockbridge County wills we sampled included provisions to protect beneficiaries against creditors in their wills. This process of protecting beneficiaries' interests against creditors emerged rather gradually. The first sign of this came in William Miller's will probated in 1840. Miller stipulated that one of his son's share "shall remain in the hands of my executors and they are to pay it to him as they in their judgment think his necessities require it."²³⁶ This suggests that his son's trustee might distribute income to him in varying amounts, which could frustrate creditors'

²³² Allison Tait, *The Beginning of the End of Coverture: A Reappraisal of the Married Woman's Separate Estate*, 26 YALE J.L. & FEMINISM 165, 178 (2014).

²³³ BENJAMIN TATE, *THE AMERICAN FORM BOOK: CONTAINING LEGALLY APPROVED PRECEDENTS* 243–46 (Richmond, Drinker & Morris eds. 1845). Tate also provided extensive will forms, including one with an annuity to a wife and a will for an independent woman. *Id.* at 249–53, 255–58.

²³⁴ 1 REVISED STATUTES OF THE STATE OF NEW YORK 730, § 63 (Albany, Packard and Van Benthuyzen 1829).

²³⁵ TIFFANY ON TRUSTS, *supra* note 177, at 672 (citing Kentucky Revised Statute, chap. 47, sec. 17 at 395 (1856); *Daniel v. Robinson*, 57 Ky. 301 (1857); *Williamson v. Williamson*, 57 Ky. 329, 386 (1857)).

²³⁶ Last Will and Testament of William Miller, *supra* note 198.

claims. Five years later, John McFaddin's will took another, even more explicit, step towards a spend-thrift trust by explicitly prohibiting his sons from binding their property for any debt.²³⁷ The will, probated in 1845, explicitly restrained his sons from alienating their interests in trust until they reached age 21.²³⁸ A decade later, Arthur McCluer's will, probated in 1855, placed a house and surrounding property at Sulphur Spring in trust for John E. McCluer and then restricted the use of proceeds or income from the property to pay "the debts of the said John E. McCluer."²³⁹

Arthur McCluer's will had an implicit trust (really a life estate) of a house and the profits from the property for his son John McCluer. He also imposed a restraint against alienation so that the land and the rents and profit would not "be subject to the debts of the said John E. McCluer."²⁴⁰ And Frederick Read's will probated in 1855 contained yet further innovations in leaving property to his daughter, Polly, to prevent her husband, Edward Bolen, from accessing the property. Read left the property in trust, with explicit instructions that "Bolen should not in any way or manner participate in, have any benefit, use or enjoyment of the said devise made to . . . Polly his wife."²⁴¹ Read thus appointed his executors "as trustees to hold and dispense to . . . Polly all and every part of her share of my estate for her use and benefit at such times and in such sums as she may wish or demand, she being the judge of her necessities."²⁴² When Polly passed away, she had a power of appointment and in the failure of exercise, there was a reservation over to Read's other heirs.²⁴³ Testators were getting more sophisticated in protecting beloved family members from their husbands and their husbands creditors. They were also getting more sophisticated in giving instructions about their wishes.

3. The Growth of the Explicit Trust

One of the other changes in the testamentary trusts that we observed was the growth in explicit references to putting property in trust. While the majority of trusts were implicit, there were seven explicit trusts in the 128 we studied. The first explicit reference to a trust in a will studied here came in John Trimble

²³⁷ Last Will and Testament of John McFaddin, Rockbridge County Wills Book 10, at 154–65 (1845).

²³⁸ *Id.* ("[N]either of the three sons named above can in any way sell any of the lands and houses willed to them or bind said lands and houses or any part of them for any debt of their own contracting, or the debts of any person or persons whatsoever until they arrive at the age of twenty one.").

²³⁹ Last Will and Testament of Arthur McCluer, *supra* note 197.

²⁴⁰ *Id.*

²⁴¹ Last Will and Testament of Frederick Read, Rockbridge County Wills Book 13, at 226–27.

²⁴² *Id.*

²⁴³ *Id.*

McCluer's will, probated in 1835, which put his property in trust with his father for the benefit of John's sister, Eglantine.²⁴⁴ McCluer's will had relatively little on the trustee's duties, so it is quite similar to the implied trusts that appeared with great frequency in the wills we studied. But often the explicit reference to trust in a will was accompanied with detailed instructions to the trustee regarding the management of property and the distribution of income. James Dunlap's will, probated in 1840, left the residue of his estate in equal portions to his three children, but left one of his son's portion as follows:

in the hands of my wife Elizabeth and my son John E. Dunlap in Trust to be used for the support and maintenance of the said James Baxter until he shall attain the age of twenty one years and after that period the said Trustees shall make such disposition of said fund as to them shall seem right.²⁴⁵

He left his daughter's portion "in the hands of my wife Elizabeth and my son John E. Dunlap in trust for the use and maintenance of the said Lyleann."²⁴⁶ But he gave the trustees the power to "pay the whole sum to . . . Lyleann at any time they may think proper."²⁴⁷ Edward Graham's will, also probated in 1840, left property in North Carolina in trust for his son William and he gave the trustee, another son named Archibald, "discretion to give the rents and profits of said land to said son William or his heirs, in such sums as he may think proper."²⁴⁸

David Greenlee's will, probated in 1850, put property in trust with his wife and provided detailed instructions on the use of the property for the education of their children. He wrote,

I loan to my wife in Trust, until our youngest child marries or arrives at lawful age all my estate of every kind for the purpose following to wit: . . . The maintenance, schooling and clothing of our children, now minors, until they marry or arrive at lawful age, in the same style and to the same extent as give to our children now married or of lawful age.²⁴⁹

The distribution instructions were that when their minor children "marry or arrive at lawful age, they shall receive in money or in property (as deemed best for them

²⁴⁴ Last Will and Testament of John Trimble McCluer, Rockbridge County Wills Book 7, at 331–32.

²⁴⁵ Last Will and Testament of James Dunlap, *supra* note 221.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ Last Will and Testament of Edward Graham, Rockbridge County Wills Book 8, at 435–36 (1840).

²⁴⁹ Last Will and Testament of David Greenlee, *supra* note 196.

by my trustee) a sum as equal as possible to that heretofore given my married daughters.”²⁵⁰

John Nelson’s will, probated in 1851, for instance, ordered his property to be sold and the proceeds invested “in the best possible way for the benefit of my beloved wife and children so that at the same time they receive a sufficient and comfortable support.”²⁵¹ Nelson’s will suggests that he was thinking in economic terms. Similarly, Sarah Moore, who was a widow of a Revolutionary War soldier, included an explicit trust with instructions on investment to provide for her children for their lives in her will probated in 1860.²⁵² Moore included a remainder over to her children’s issue and, if they had none, then a shifting interest in favor of her other issue. This will provided an explicit standard for investment of trust corpus—“good securities”²⁵³—and it was also among the most detailed trusts in any of the Rockbridge County wills we surveyed. Moore’s will provided that

One other sixth of my Estate shall be vested by my Executors in good securities, and the annual products paid over to my daughter Sally for the support of herself and her child or children during her life, and at her death, the proceeds of said share to be applied to the support of her child or children, until it or they arrive at age or get married, and the principal of said share to be then paid over to said child or children. But if my said daughter Sally shall leave no child of hers to survive her, or if she shall leave a child or children to survive her, and such child or children shall die before attaining the age of twenty one and before marriage, then the said share of my Estate hereby given to my said daughter Sally is to be distributed amongst the residue of my children or their descendants.²⁵⁴

²⁵⁰ *Id.*

²⁵¹ Last Will and Testament of John Nelson, Rockbridge County Wills Book 12, at 50 (1851).

²⁵² Last Will and Testament of Sarah Moore, Rockbridge County Wills Book 15, at 404–05 (1860).

²⁵³ *See id.* Moore’s “good securities” language is popular language in trusts at the time. *See, e.g.,* McDonogh’s Ex’rs v. Murdoch, 56 U.S. 367 (1854) (charitable devise of up to \$3 million); Barney v. Saunders, 57 U.S. 535 (1854); Vidal v. Girard’s Ex’rs, 43 U.S. 127 (1844); Maury’s Adm’r v. Mason’s Adm’r, 8 Port. 211 (Ala. 1838) (Justice Goldthwaite’s opinion on trustee duties); Titus v. McLanahan, 2 Del. Ch. 200 (1859); Perin v. McMicken’s Heirs, 15 La. Ann. 154 (1860); Lewis v. Lusk, 35 Miss. 401 (1858); Niles v. Stevens, 4 Denio 399 (N.Y. Sup. Ct. 1847); King v. Rundle, 15 Barb. 139 (N.Y. App. Div. 1853); *see also* TIFFANY ON TRUSTS, *supra* note 177, at 630–31 (discussing investment instructions to trustees regarding bonds).

²⁵⁴ Last Will and Testament of Sarah Moore, *supra* note 252.

B. Increasing Sophistication of Trusts, 1820–1861

The increase in use of testamentary trusts in Rockbridge from 1820 to 1861 is reflected in the treatises and case law as well. One good gauge of sophistication of trust law is the discussion in Kent's *Commentaries*.²⁵⁵

Other treatises detailed in even greater detail the sophistication of trusts. There was close parsing of the language necessary for a trust to keep property out of the hands of a beneficiary's creditors. The 1862 edition of *Tiffany on Trusts*, for instance, noted that a trust must evince intent to vest the entire interest in the wife in order to keep it free from a husband's creditor. Thus, a trust that provided that the wife was "to have use and benefit of the said slaves and all the proceeds thereunder during life" was not enough to protect from husbands' creditors. For the wife had control over the property and thus it was reachable by creditors.²⁵⁶ Though, as Tiffany's treatment made clear, if the property was in trust "where there is a limitation to trustees to the separate use of a married woman, the courts will strive to adopt a construction which is not advantage." The creation of a trust that allowed the wife to have only rents and profits of real property for "sole use during life" would give the wife the sole power over them and also prohibit her from alienating them ahead of time.²⁵⁷ A more robust limitation, such as wife has benefit and creditors can't reach, was needed.

A decade earlier James Hill's *A Practical Treatise on the Law Relating to Trustees* provided instructions on the creation of trust for separate estate.²⁵⁸ Tiffany and Hill both make clear—as did the sophisticated English literature on trusts—that judges were parsing trust language very closely. And by the early 1850s, testamentary trusts had grown in sophistication. New Orleans businessman John McDonogh left a will that ran to nearly 30 printed pages that

²⁵⁵ The secondary literature also has identified the sophistication and prevalence of trusts in the pre-Civil War North. See, e.g., Alexander, *supra* note 7, 1198–1200 (identifying New York's support for spendthrift trust in the 1820s); Chused, *supra* note 112, at 1383 (finding trusts common even in 1820s in New York); Lawrence Friedman, *The Dynastic Trust*, 73 YALE L.J. 547, 576 (1964) (discussing spendthrift trusts in the pre-Civil War era).

²⁵⁶ TIFFANY ON TRUSTS, *supra* note 177, at 670 n.3 (citing *Hale v. Stone*, 14 Ala. 803, 804 (1848)).

²⁵⁷ *Id.* at 671–72; 2 REVISED STATUTES OF NEW YORK 15, § 63 (3d ed., Albany, Weare C. Little and Co. 1846) (providing that "no person beneficially interested in a trust for the receipt of the rents and profits of lands, can assign or in any manner dispose of such interest; but the rights and interest of every person for whose benefit a trust for the payment of a sum in gross is created, as assignable").

²⁵⁸ JAMES HILL, A PRACTICAL TREATISE ON THE LAW RELATING TO TRUSTEES: THEIR POWERS, DUTIES, PRIVILEGES, AND LIABILITIES: WITH NOTES AND REFERENCES TO AMERICAN DECISIONS BY FRANCIS J. TROUBAT 420 (Philadelphia, Lea & Blanchard 1846) (providing explanation that is very similar to TIFFANY ON TRUSTS, *supra* note 177, at 670). Hill's treatise gave instructions on the need for clear prohibition on anticipation of income and the adoption of spendthrift trust, as well as the duties of trustees for married women. *Id.* at 423, 422, 405.

provided for the emancipation of all of his slaves. Some were freed outright and immediately; others were ordered freed and sent to Liberia; and others were to be freed after they had worked for his heirs for 15 years.²⁵⁹ Later in his will, McDonogh left detailed instructions for the establishment of a school for New Orleans children.²⁶⁰

The technology of the trust was brought to the masses—or at least some affluent testators—by form books such as Benjamin Tate, *The American Form Book: Containing Legally Approved Precedents*, published in Richmond in 1845. Among its forms were several wills and even a deed of manumission.²⁶¹ Tate's *American Form Book* is an expanded version of *The Form Book: Containing Three Hundred of the Most Approved Precedents* published in Philadelphia in 1836.²⁶²

The Rockbridge County wills depict a part of the larger story of the growth of the sophistication of trusts. The documents in Rockbridge tell that story, and though the Shenandoah Valley seems to lag behind other more affluent areas, such as New York, the Rockbridge wills reflect the development of statutes, treatises, and documents elsewhere. This is a story of the growth of protections of family members amidst the impersonal market. What is less clear is how to account for this development. Gregory Alexander attributes the evolution of trust law to an intellectual development—the departure from a law/equity distinction and the growth of a contract-based way of seeing the world.²⁶³ In the age of the market revolution, contracts were increasingly respected. This gave individual decisions preference over collective decisions made by the common law or by legislators. Those earlier doctrines had hard rules, such as the rule of *Brandon v. Robinson*²⁶⁴ that a trust could not establish a universal rule of protecting beneficiaries from alienating their interest before

²⁵⁹ THE LAST WILL AND TESTAMENT OF JOHN MCDONOGH, LATE OF MACDONOGHVILLE, STATE OF LOUISIANA, ALSO HIS MEMORANDA OF INSTRUCTIONS TO HIS EXECUTORS, RELATIVE TO THE MANAGEMENT OF HIS ESTATE 6–7 (1851) (providing extensive instructions to executors regarding property left in trust to the American Colonization Society).

²⁶⁰ *Id.* at 23–26.

²⁶¹ TATE, *supra* note 233, at 161–69.

²⁶² THE FORM BOOK: CONTAINING THREE HUNDRED OF THE MOST APPROVED PRECEDENTS (Philadelphia, Barrington & Geo. D. Haswell 1836). *The Form Book* has forms for manumission. *Id.* at 251–52. The wills in those books were less sophisticated than many wills that were already appearing in litigation. *Id.* at 279–87. For instance, *Public Administrator of New York v. Watts*, 1 Paige Ch. 347, *rev'd*, 4 Wend. 168 (N.Y. Sup. Ct. 1829), included the entire text of a will from New York that had a provision for emancipation as well as several explicit trusts. The will was successfully excluded as un-executed. *See also* Den v. Vancleve, 5 N.J.L. 589 (1819) (elderly man's will challenged on lack of capacity); *Clarke v. Fisher*, 1 Paige Ch. 171 (N.Y. Ch. 1828) (lack of capacity).

²⁶³ Alexander, *supra* note 7, at 1199.

²⁶⁴ *Brandon v. Robinson*, 34 Eng. Rep. 379 (1811) (discussed in Alexander, *supra* note 7, at 1198–99).

they received a distribution—or what we call a spendthrift trust. But it could establish that a trust interest terminated when a beneficiary went into bankruptcy. Some American courts followed this for a while. Then the age of contract allowed greater flexibility and so legislatures beginning with the 1829 New York code allowed settlors to establish trusts that prohibited beneficiaries from alienating their interest in the trust until it was distributed to them (and thus largely protected beneficiaries from creditors).²⁶⁵

Where Alexander frames this as an issue in how property rights are conceptualized, we approach the recognition of what is now known as the spendthrift trust from a different level of generality, one focused on the reality of the marketplace. The impersonal marketplace placed families at grave disadvantages. They had to rely upon people not known well to them and who could not be constrained by tradition norms of community behavior. Settlor's strong desire to preserve their family fortunes amidst the market economy was reflected in their increasing resort to trusts, especially where family members served as trustees. Before the 1830s in Rockbridge County, wills gave instructions to family members. They provided guidance to how beneficiaries were to use property for the care of other vulnerable family members. Thus, the will was used to protect one family member against another. Beginning in the 1830s and going forward, wills and the trusts they contained offered protection against the world. They protected the vulnerable family members against creditors outside the family. The trust was increasingly employed as a device to preserve the family—particularly the affluent family—against the market.

This invites a hypothesis about the nature of legal change in this case. That is, what we have traced in small detail for Rockbridge was apparently happening nationwide. And there is the question of what is cause and effect and what is merely correlation. This taps into key questions about the relative weight of intellectual categories and economic considerations in legal reform.²⁶⁶ Marriage settlements were well-recognized and already existed as a device to protect wealth within families. Hence, the New York state validating spendthrift trusts may have been more a movement to make law accessible than a change in how trust property was conceptualized. That movement to make law accessible led to a number of reforms in the pre-Civil War era, such as the general incorporation statute.²⁶⁷

²⁶⁵ 1 REVISED STATUTES OF THE STATE OF NEW YORK 730, § 63 (Albany, Packard & Van Benthuysen 1829).

²⁶⁶ Compare Robert C. Berring, *Legal Research and the World of Thinkable Thoughts*, 2 J. APP. PRAC. & PROCESS 305 (2000) (emphasizing legal categories as channeling legal arguments and, thus, legal development) with MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780–1860* (1977) (emphasizing economic interests in legal change in early nineteenth century).

²⁶⁷ Susan P. Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations*, 49 AM. U. L. REV. 81 (1999).

While we have written about the ways that changes in incidence and sophistication of trusts was driven by the economy, there remains one other important part of the wealth of Rockbridge County to address: how the wills and testamentary trusts dealt with enslaved humans. While most of the story about slaves and wills relates to how the wills distributed enslaved people and how trusts were used to protect enslaved people against claims of creditors of beneficiaries, one piece of the story relates to how wills were sometimes used to free enslaved people.

V. ENSLAVED PEOPLE IN ROCKBRIDGE COUNTY WILLS

Given the importance and value of slaves in the antebellum South, the presence of enslaved people in Rockbridge County wills deserves close attention. While slavery was not as prevalent in Rockbridge as in many Virginia counties, still more than one in five people in the county were enslaved from 1820 to the 1860. Forty-four of the 128 wills (34.4%) made specific mention of slaves. While obviously important, this is substantially lower than many other southern counties at the time. For instance, nearly 80% of testators in Greene County, Alabama, in the 1830s and 1840s devised at least one person.²⁶⁸

Rockbridge County testators often devised their human property to their surviving spouse and children; they sometimes put their human property in trust, again often for their surviving spouse and children.²⁶⁹ Sometimes, however, they put their human property in trust as a step towards freedom and, in a few cases, they freed their slaves outright. Thus, Rockbridge testators used the technology of wills and trusts for everything from managing their enslaved humans to freeing them. They used trusts for slavery and for freedom.

A. *Distribution of Slaves Among Family Members*

Of the 44 wills that devised enslaved people, 17 left enslaved people to a surviving spouse. Sometimes these were outright gifts and at other times they were left only for life.²⁷⁰ For example, Edward Graham's will probated in 1840 left all his slaves and the rest of his personal property to his wife "for the support of her and her family including my daughters Nancy and Elizabeth during the life of my said wife," then the remainder went outright in equal portions to his children.²⁷¹ Twenty-three of the 44 wills that devised enslaved people left enslaved people to issue. For example, Samuel S. Campbell left one slave—named George Washington—to his wife and another slave—named John

²⁶⁸ Davis & Brophy, *supra* note 167, at Table 2 (reporting 78% of wills in Greene County, Alabama, over this period devising humans).

²⁶⁹ *See infra* Table 10.

²⁷⁰ *See infra* Table 10.

²⁷¹ Last Will and Testament of Edward Graham, *supra* note 248.

Adams—to his daughter Sally.²⁷² In other cases, slaves were given to family members. For instance, Hannah Moore gave three slaves her nephew's son.²⁷³

B. *Emancipating Slaves*

Perhaps because slaves were less prevalent in Rockbridge wills than in many other places in the South, the testators in Rockbridge were more likely to provide for their freedom than in many other parts of the South.²⁷⁴ Beginning just after the Revolution, Virginia law allowed owners to emancipate slaves via will,²⁷⁵ although before freeing the slaves all the testators' debts had to be paid, or the slaves would be used to satisfy them.²⁷⁶ Moreover, the Virginia code required testators who freed young slaves (those under 18) or older slaves (those over age 45) had to provide for their maintenance or their estate would be charged for it.²⁷⁷

Some Rockbridge testators took advantage of this law to free their enslaved human property. This reflects the attitudes of people in the Shenandoah Valley, where slavery was less economically important than in many other parts of the South and also where proslavery thought was less thoroughly entrenched than in other parts of the South. Testators provided for emancipation in 6 of the 44 wills (13.6%) that mentioned enslaved people.²⁷⁸ That represented just under 5% of the total wills surveyed here.

²⁷² Last Will and Testament of Samuel S. Campbell, Rockbridge County Wills Book 8, at 419–20 (1840).

²⁷³ Last Will and Testament of Hannah Moore, Rockbridge County Wills Book 8, at 320 (1840) (providing that “I give and bequeath to said James Barclay my black boy Eli my black girl Louisa and also my girl Magdalen”).

²⁷⁴ See Ellen Eslinger, *Free Black Residency in Two Antebellum Virginia Counties*, 79 J. SOUTH. HIST. 261–98 (2013) (discussing free people in Rockbridge and Albemarle Counties).

²⁷⁵ 1 THE REVISED CODE OF THE LAWS OF VIRGINIA, *supra* note 117, ¶ 53 at 433–44. The first version of this Act was passed in 1782. See *id.* at 434 n.r.

²⁷⁶ *Id.* ¶ 54 at 434. Moreover, surviving widows could elect a one-third interest in the slaves a husband tried to emancipate via will. *Id.* § 60 at 435.

²⁷⁷ *Id.* ¶ 55 at 434. The legislature subsequently imposed some restrictions on emancipation via will. After 1808, emancipated people were required to leave the state within 12 months. *Id.* ¶ 61 at 436. It remains unclear how frequently local courts enforced that requirement. See generally KIRT VON DAACKE, *FREEDOM HAS A FACE: RACE, IDENTITY, AND COMMUNITY IN JEFFERSON'S VIRGINIA* (2012).

²⁷⁸ See, e.g., Last Will and Testament of John McEune, Rockbridge County Wills Book 5, at 57 (1820) (freeing slave, Cate); Last Will and Testament of John Davidson, Rockbridge County Wills Book 7, at 366–67 (1835) (freeing slave and her daughter at wife's death); Last Will and Testament of John McClelland, Rockbridge County Wills Book 13, at 361 (1855) (freeing two male slaves and one female slave and any children she had and providing them with some money and personal property); Last Will and Testament of Isaac Davis, Rockbridge County Wills Book 16, at 223 (1861) (freeing slaves on wife's death and providing for their transportation to Liberia); Last Will and Testament of Polly Bailey, Rockbridge County Wills Book 16, at 238 (1861) (freeing

John McEune's will probated in 1820 illustrates such provisions for freedom. McEune provided that "my negroe girl Cate . . . be set free." He also provided that one of his bonds with \$600 be used to provide for her support if that was necessary.²⁷⁹ McEune, thus, provided not just for freedom but for support for the newly freed Cate. The most extensive instructions regarding emancipation of slaves came in William Miller's will, which put the humans he owned in trust with instructions regarding the pay they were to receive until they were freed.²⁸⁰ This is what was known as a trust for quasi-freedom or "qualified state of bondage,"²⁸¹ which was generally regarded with suspicion if not outright prohibited.²⁸² Isaac Davis's will, probated in 1861, left his slaves to his wife for her life and then ordered them freed and sent to Liberia on her death. "After the death of Mary M. Davis the three black girls and boy named Mary and Mariah and Sarah and the boy Scout to be free and at liberty to go to Liberia." He repeated the instruction that "at the death of my wife Mary M. Davis the negroes are not to go back to any other owner . . . but be free and to have fifty dollars

slave, Caroline); Last Will and Testament of William Miller, *supra* note 198 (paying slave Becky until her children are of age and then freeing them).

²⁷⁹ Last Will and Testament of John McEune, *supra* note 278.

²⁸⁰ Last Will and Testament of William Miller, *supra* note 198.

²⁸¹ See, e.g., *Campbell v. Smith*, 54 N.C. (1 Jones Eq.) 156, *1 (1854) (rejecting claim that there was a secret trust to hold slaves in a "qualified state of bondage"); *Lemmond v. Peoples*, 41 N.C. (6 Ired. Eq.) 137, *2 (1849) (referring to "qualified state of bondage"). In South Carolina such "nominal servitude" was prohibited by statute as well as case law. See 11 South Carolina Statutes 155; *Belcher v. McKelvey*, 32 S.C. Eq. (11 Rich. Eq.) 9, *5 (1859) (charging that the slave George earned money used to buy his freedom while being held in "nominal servitude").

²⁸² See, e.g., *Hurdle v. Outlaw*, 55 N.C. (2 Jones Eq.) 75 (1854) (noting that there was no claim that the slaves were given to beneficiary to be held "nominally as slaves"); *Green v. Lane*, 43 N.C. (8 Ired. Eq.) 70, 74–76, 78 (1851) (interpreting will providing for quasi-freedom); *Lemmond v. Peoples*, 41 N.C. (6 Ired. Eq.) 137, *2–*3 (1849) (refusing to enforce outright conveyance of slaves because it was a secret trust to continue to hold slaves in a "qualified state of bondage"); *Thompson v. Newlin*, 38 N.C. (3 Ired. Eq.) 338, 341 (1844) (discussing trust for quasi-freedom); *Sorrey v. Bright*, 21 N.C. (1 Dev. & Bat. Eq.) 113, 115 (1835) (invalidating a trust for quasi-freedom or quasi-slavery). This is a somewhat separate issue from a secret trust in which slaves were conveyed outright to a donee with the understanding that the donee would free the slaves. See, e.g., *Miller v. Gaskins*, 11 Fla. 73, *4 (1864); *Campbell v. Smith*, 54 N.C. (1 Jones Eq.) 156, *2 (1854) (finding rebuttal of allegations of a secret trust to hold slaves in "qualified state of bondage"); *Thomas v. Palmer*, 54 N.C. (1 Jones Eq.) 249, 252 (1854) (finding "it is against public policy to . . . allow negroes to remain among us in a qualified state of slavery"); *Thompson v. Newlin*, 43 N.C. (8 Ired. Eq.) 32, *8–*9 (1851) (finding that secret trust to take slaves out of state and emancipate them is lawful); *Thompson v. Newlin*, 41 N.C. (6 Ired. Eq.) 380 (1849) (finding that secret trust to take slaves out of state and emancipate them is lawful); *Thompson v. Newlin*, 38 N.C. (3 Ired. Eq.) 338 (1844) (requiring donee of slaves to answer whether there was a secret trust regarding slaves or whether there was an outright gift of them with no agreement regarding slaves); *Huckaby v. Jones*, 9 N.C. (2 Hawks) 120, 121 (1822) (finding devise invalid because it was premised on secret promise that slaves be held in "qualified state of bondage"); see also Alfred L. Brophy, *Thomas Ruffin: Of Monuments and Moral Philosophy*, 87 N.C.L. REV. 799, 819–24 (2009).

each . . . out of the estate[.]” He further provided that the personal property, money, and bonds were to be used to send the slaves to Liberia.²⁸³

A few of the wills that did not free enslaved people had some other provision to provide for enslaved people in some way. John McFaddin’s will, probated in 1845, instructed that the slaves were to be distributed in “Christian manner.”²⁸⁴ That opens up an issue of what Christian manner meant regarding the treatment of slaves. Henry Hardy’s will dictated that several slaves were to be paid wages until they reached what one might call retirement age—or became disabled—and then they were to be provided basic care.²⁸⁵ Hardy’s will also prohibited the sale of the slaves.²⁸⁶ William Thompson’s will, probated in 1840, instructed his executors to “make such arrangements with my wife and children for the support of my three old slaves, Mary, Venus, and Patsy, as they may be able without charge to the Estate.” It went on to provide that if those slaves ever “become a charge to the estate it is my will and direction that each of my children be required to constitute an equal proportion towards the expense of supporting them.” Thus, Thompson, like Hardy, bound his estate to take care of the elderly slaves. It would be a grave mistake to make too much out of these provisions for enslaved people who had contributed decades of labor to their owners. But perhaps such will provisions testify to the differences in the nature of slavery in the Shenandoah Valley from the more impersonal plantations in Virginia’s tidewater and Piedmont regions.

Though it does not feature in our sample because of the date it was probated, one of the most sophisticated wills and largest estates probated in Rockbridge County was that of bachelor John Robinson, who died in 1826. Though his will is not in our sample, because it was not one of the years in our study, it provides an important example of the sophistication of legal technology in Rockbridge in the 1820s and also how an affluent testator left his property to a charity, Washington College. Robinson left nearly 80 people in trust to the college. He placed a restraint on alienation of both his plantation, Hart’s Bottom, and his enslaved human property.²⁸⁷ And though Washington College

²⁸³ Last Will and Testament of Isaac Davis, *supra* note 278.

²⁸⁴ Last Will and Testament of John McFaddin, *supra* note 237.

²⁸⁵ Last Will and Testament of Henry Hardy, Rockbridge County Wills Book 11, at 254–55 (1850).

²⁸⁶ *Id.* (restraining sale of one slave and ordering that other slaves be paid and taken care of by beneficiaries); *see also* YOUNG, *supra* note 137, at 176 (listing several wills from the 1850s where testators imposed restraint on sale of human beings).

²⁸⁷ *See* Last Will and Testament of John Robinson, Rockbridge County Wills Book 6, ¶ 10 at 78–82. The restrictions on alienation appeared in two paragraphs of the will, that relating to the plantation, Hart’s Bottom, and that related to the slaves:

8th 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

subsequently sold the property and the people, John Robinson's will reflects the importance of slavery to the wealth of many Rockbridge residents, as well as their ambivalence about slavery.

VI. CONCLUSION

Recent trusts and estates scholarship has explained how economic considerations are central to statutes²⁸⁸ and judicial decisions.²⁸⁹ Other scholarship explores how slavery's centrality to the Southern society and economy drove legislators and judges to limit testators' rights to free their slaves.²⁹⁰ Later, similar considerations affected the treatment of inheritance via intestacy from freed people.²⁹¹ Other scholarship studies the significance of

inalienable estate. . . . The cultivation and management of the estate is to be under the discretion of the trustees. . . .

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 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.

Id. ¶¶ 8–9. An inventory of Robinson's slaves appears in Rockbridge County Wills Book 6, 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 False at death," [circa 1826] 027A-3, Folder 52, and "A List of Slaves Belonging to Washington College, July 30, 1834," 027A-3, Folder 56. An earlier version of the will appears in Trustee Papers, Folder 77, Washington and Lee Special Collections. 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.

²⁸⁸ Daniel B. Kelly, *Toward Economic Analysis of the Uniform Probate Code*, 45 U. MICH. J.L. REFORM 855 (2012).

²⁸⁹ Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621 (2004).

²⁹⁰ See, e.g., BERNIE JONES, *FATHERS OF CONSCIENCE: MIXED-RACE INHERITANCE IN THE ANTEBELLUM SOUTH* (2009).

²⁹¹ See Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221 (1999).

language of testators²⁹² as well as what testators actually did with their property.²⁹³ The studies of doctrine in history reveal the centrality of gender, marriage, and considerations of family wealth protection were central to the evolution of wills law.²⁹⁴ Law—as statutes, as court procedure and doctrine, and as will and trust documents—were dictated by economic and social reality.

The Rockbridge wills surveyed here show how testators turned to wills and trusts to distribute property and protect their families. Residents of the Shenandoah Valley were not as wealthy as other parts of the South, yet in the 40 years leading into the Civil War, their wills and trusts increased in sophistication. The wills and trusts had increasing detail in instructions to executors and trustees about the management and distribution of property. These invite further, more finely grained studies of the wealth of testators who use trusts and how different levels of wealth relate to distribution patterns to family members. For instance, how affluent are testators who use explicit trusts and how does that compare to those who do not use explicit trusts; how settlors' investment and management instructions relate to their wealth; and how distribution patterns differ according to testators' wealth. The data here invite further work that links wealth, age, and familial status, and the particular types of technology and to particular distributions.

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

I William J. Thompson of the County of Rockbridge and State of Virginia being now upon the eve of leaving my native country as a volunteer to assist in the defence of the rights of the Southern Confederacy, desire to dispose of all my estate, which I bequeath and will to my two sisters, viz. Nancy J. Moore wife of N.G. Moore and Sallie Thompson, to be equally divided

²⁹² See, e.g., Karen J. Sneddon, *Speaking for the Dead: Voice in Last Wills and Testaments*, 85 ST. JOHN'S L. REV. 683 (2011); Deborah S. Gordon, *Reflecting on the Language of Death*, 34 SEATTLE U.L. REV. 379 (2011).

²⁹³ See, e.g., BARRY LEVY, *QUAKERS AND THE AMERICAN FAMILY: BRITISH SETTLEMENT IN THE DELAWARE VALLEY* (1988) (detailing patterns of devise among Quakers in the Delaware Valley in the eighteenth century); LORENA S. WALSH, *MOTIVES OF HONOR, PLEASURE, AND PROFIT: PLANTATION MANAGEMENT IN THE COLONIAL CHESAPEAKE, 1607–1763*, at 15–19 (2010) (describing use of probate inventories to reconstruct the plantations in colonial Chesapeake and the transition from servant to slave labor in the latter part of the seventeenth century).

²⁹⁴ BASCH, *supra* note 190.

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between them or their legal representatives. Given under my hand and seal this 27th day of May 1861.²⁹⁵

Thompson's will was probated on January 6, 1862; Thompson, like so many other people of his generation both North and South, had perished in the War.

²⁹⁵ Last Will and Testament of William J. Thompson, Rockbridge County Wills Book 16, at 277 (1862).

VII. APPENDIX: TABLES

Table 1: Testators by Gender by Decade

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

Table 2: Married Testators by Gender by Decade

	1820s	1830s	1840s	1850s	1860s	Total
Female	0	0	0	1	0	1
Male	4	15	13	12	8	52
% Male Tesators	25%	83.3%	72.2%	40%	61.5%	43.7%

Table 3: Testamentary Trusts by Gender of Testator by Decade

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

Table 4: Sophistication of Testamentary Trusts by Decade

	1820s	1830s	1840s	1850s	1860s	Total	(% Total Wills)
Implicit	2	12	10	18	10	52	(43.8%)
Explicit	0	1	2	2	0	5	(3.9%)
Explicit/ Detailed	0	0	0	2	0	2	(1.6)
						63	(49.2%)

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

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

Table 6: Distributions by Testators by Decade*

	1820s	1830s	1840s	1850s	1860s	Total
<i>Equal Distribution to Issue</i>	6	7	8	16	7	44
<i>Favored Distribution</i>	5	7	8	10	6	36
<i>Devise to Non- Family Member</i>	3	4	3	4	4	18
<i>Charitable Devise (Emancipation?)</i>	0	2	1	1	1	5

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

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

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

Table 8: Wills Devising Enslaved People by Decade

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

Table 9: Trust Beneficiaries

	<i>1820s</i>	<i>1830s</i>	<i>1840s</i>	<i>1850s</i>	<i>1860s</i>	<i>Total</i>	<i>(% wills with trusts)</i>
<i>Surviving Spouse</i>	2	6	3	8	5	24	(59%)
<i>Female Family/Issue</i>	4	8	6	5	3	26	(59%)
<i>Male Family/Issue</i>	1	8	6	4	2	21	(47.7%)
<i>Slaves</i>	1	0	0	3	1	5	(11.3%)
<i>Charity</i>	0	0	0	1	0	1	(2.3%)
<i>Unknown Relationship</i>	0	1	2	4	3	10	(22.7%)

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

	<i>1820s</i>	<i>1830s</i>	<i>1840s</i>	<i>1850s</i>	<i>1860s</i>	<i>Total</i>	<i>(% wills devising slaves)</i>
<i>Surviving Spouse</i>	2	6	3	8	5	24	(38.6%)
<i>Children</i>	2	5	5	11	0	23	(52.3%)
<i>Other Relatives</i>	0	0	0	1	1	2	(4.5%)
<i>Emanci- pation</i>	1	1	1	1	2	6	(13.6%)

** Some wills left slaves to more than one category.