Slavery's Legalism: Lawyers and the Commercial Routine of Slavery

JUSTIN SIMARD

Eugenius Aristides Nisbet played a critical role in Georgia's secession from the United States. Elected as a delegate to Georgia's 1861 secession convention, Nisbet introduced a resolution in favor of severing ties with the Union, and he led the committee that drafted his state's secession ordinance. Nisbet was a trained lawyer who had served on the Georgia Supreme Court, and his legal training shaped the way that he viewed secession. He believed that the Constitution did not give states the right to dissolve the Union; instead, this power rested solely in the people, and he framed the resolution and ordinance accordingly. Thanks in part to Nisbet, it was the "people of the State of Georgia" who "repealed, rescinded and abrogated" their ratification of the Constitution in 1788.[1]

1. After the resolution passed 166–130, Nisbet and seventeen other delegates drafted the Ordinance. *Journal of the Public and Secret Proceedings of the Convention of the People of*

Justin Simard is a Jack Miller Center Postdoctoral Fellow at the Northwestern Center for Legal Studies and a Visiting Scholar at the American Bar Foundation <justin.simard@gmail.com>. He thanks the University of Pennsylvania, the Cromwell Foundation, the Baldy Center for Law and Social Policy, and the Jack Miller Center for research support. Many thanks also to Greg Ablavsky, Ryan Calder, Roseanne Currarino, Anne Fleming, Cassandra Good, Sarah Barringer Gordon, Michael Halberstam, Dani Holtz, David Hausman, Amanda Kleintop, Matthew Kruer, Sophia Lee, Walter Licht, Scott Nelson, Alexis Broderick Neumann, Gail Radford, Matt Steilen, Karen Tani, Emma Teitelman, Tamara Plakins Thornton, Barbara Young Welke, Sarah Winsberg, Adam Wolkoff, and Mike Zuckerman for comments and criticism. He also thanks Elizabeth Dale, Gautham Rao, and his reviewers for their time and attention.

Law and History Review May 2019, Vol. 37, No. 2

doi:10.1017/S0738248019000300

By helping to give legal imprimatur to Georgia's secession, Nisbet provided a capstone to decades of legally manifested sectional tensions. In the nineteenth century, Northern courts helped diffuse and support free-labor ideology and Southern courts helped secure the slave system.[2] Northern abolitionists furthered their cause through suits in state court, not only by freeing slaves but also by taking advantage of the courtroom as a publicity tool.[3] Southern slaveholders asked their state courts to enforce and extend the law of slavery, and Southern judges obliged by slowing emancipation, securing slaveholders' interests against attacks from the North, and using their opinions to address Northern audiences.[4] Whereas Morton Horwitz and others have found that Northern judges favored "active and powerful" commercial actors, Southern appellate courts appear to have resisted legal and economic change, in favor of supporting the "the hierarchical order of slavery."[5] Judges interpreted and enforced fugitive

---

Georgia (Milledgeville, GA: Boughton, Nisbet & Barnes, 1861), 15, 35–39. See also Ralph A. Wooster, *The Secession Conventions of the South* (Princeton, NJ: Princeton University Press, 1962), 91. For more on the politics surrounding the Georgia secession convention see William W. Freehling, *Secessionists Triumphant: 1854–1861* (New York: Oxford University Press, 1990), 450–51.

2. See, for example, Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party before the Civil War* (Oxford: Oxford University Press, 1995); Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (Chapel Hill: University of North Carolina Press, 1981); John Philip Reid, "Lessons of Lumpkin: A Review of Recent Literature on Law, Comity, and the Impending Crisis," *William and Mary Law Review* 23 (1982): 580–81; Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1978); Paul Finkelman, ed., *Articles on American Slavery: Vol. 6, Fugitive Slaves* (New York: Garland Publishing, 1989); Steven Lubet, *Fugitive Justice: Runaways, Rescuers, and Slavery on Trial* (Cambridge, MA: Belknap Press, 2010); Christopher Tomlins, *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580–1865* (Cambridge: Cambridge University Press, 2010), 509–69; William W. Fisher III, "Ideology and Imagery in the Law of Slavery," *Chicago Kent Law Review* 68 (1992): 1051–83; Thomas D. Morris, *Southern Slavery and the Law, 1619–1860* (Chapel Hill: University of North Carolina Press, 1996); and Mark V. Tushnet, *The American Law of Slavery, 1810–1860* (Princeton, NJ: Princeton University Press, 1981).

3. See Lubet, *Fugitive Justice*; and Paul Finkelman, *Slavery in the Courtroom: An Annotated Bibliography of American Cases* (Washington, DC: Library of Congress, 1985), 12–13.

4. Reid, "Lessons of Lumpkin," 580–81; Tushnet, *American Law of Slavery*, 18–20; and Alfred L. Brophy, *University, Court, and Slave: Pro–Slavery Thought in Southern Colleges and Courts and the Coming of the Civil War* (New York: Oxford University Press, 2016), 212–74.

5. Howard H. Schweber, *The Creation of American Common Law, 1850–1860* (Cambridge: Cambridge University Press 2004), 6. Those judges who did favor development "gained little headway." Timothy S. Huebner, *The Southern Judicial Tradition: State Judges and Sectional Distinctiveness, 1790–1890* (Athens, GA: University of Georgia Press, 1999), 5.

slave laws and the fugitive slave clause of the Constitution, freed slaves traveling in the North, refused to recognize slave emancipations in other states, and prohibited slave owners from freeing their slaves.[6] Federal courts also weighed in, developing a jurisprudence friendly to slaveholders, which ultimately resulted in the Supreme Court's 1857 decision in *Dred Scott v. Sandford*.[7] These legal confrontations, historians maintain, led to tremendous divergence of law in the North and South and an increasing reliance on arguments grounded in "higher law" rather than on statutes or the Constitution.[8] Nisbet's secession ordinance, based in powers held by the "people of the state of Georgia" rather than in constitutional provisions provides a case in point. In this story, the law derived its greatest significance from the role it played in splitting North and South.[9] In a choice between slavery and legal nationalism, slavery appears to have won out until after the Civil War.[10]

This article challenges that familiar story or at least it argues that the story obscures a vital aspect of American legal history. Alongside the law and politics of sectionalism, another force quietly sustained intersectional cooperation. It too could be found in the career of a lawyer like Nisbet. Despite seemingly intractable differences with Northern lawyers, he and other elite Southern lawyers professed and demonstrated commitment to a vision of legal practice and decision making that they shared with their Northern colleagues. This vision was rooted, not in commitments to slavery, free labor, or economic development but rather first, in legalism, and second, in commercial legal practice. Lawyers demonstrated their commitment to legalism by adhering to their profession's technical rules and customs, which they learned from cases and treatises and from their professional community. Lawyers agreed on the form and mode of legal argumentation—it needed to be precise, accurate, and backed up by learned citation—even when they disagreed substantively. For them, these forms and practices had inherent value. Although a legalistic perspective encouraged lawyers to invest significance in the most abstruse legal issues, much of the work of an elite nineteenth-century lawyer revolved

6. Finkelman, *Imperfect Union*, 126–235; and Reid, "Lessons of Lumpkin," 580–81.

7. Fehrenbacher, *Dred Scott*; and Finkelman, *Imperfect Union*, 236–84.

8. Lubet, *Fugitive Justice,* 267–73, 294, 314, 325–26; and Finkelman, *Imperfect Union*, 183.

9. See Tushnet, *American Law of Slavery,* 229–32; Mark E. Brandon, *Free in the World: American Slavery and Constitutional Failure* (Princeton, NJ: Princeton University Press, 1998), 167–99; and Brophy, *University*, xix, 275–95.

10. From this perspective, it was not until after the Civil War that Southern jurists caught up with the legal reformers in the North in developing an American common law. See Schweber, *Creation of American Common Law*, 1–13.

around more routine commercial and financial matters. This focus on commercial routine also linked the national legal community. Lawyers capitalized on the flexibility and portability of their legal forms to support clients engaged in commercial activity from finance to slave agriculture.

A legalistic culture and the commercial work to which it was frequently applied linked lawyers across sectional boundaries. It appeared in out-of-court debt collection, before trial judges, and in appellate court decisions, even those that explicitly affirmed slavery. Partially insulated from many of the political and economic conflicts of the Antebellum era, it allowed Southern lawyers to serve as intermediaries between North and South. Northern merchants and manufacturers sold their goods on credit to Southern merchants, giving plantation owners the opportunity to live a luxurious life on the backs of their slaves, and Southern lawyers collected when Southerners failed to pay their bills. More generally, lawyers supported a commercial environment structured by law, setting ground rules and smoothing out complications. A legal and financial infrastructure staffed by lawyers thus facilitated Northern investment in the South before the Civil War. Whereas prominent but rare proslavery jurisprudence acted as a divisive force in Antebellum Southern legal practice, mundane but common commercial legal actions strengthened legal and financial ties with the North. Working across jurisdictions, lawyers cemented and effectuated the work of treatise writers and legislators. They supported slavery in subtle but important ways.

The career of E.A. Nisbet illustrates the profession's role as commercial facilitator as well as the heated legal politics that eventually (if temporarily) destroyed commercial ties and lawyerly interchange. The simultaneous pull of each pole existed in many forms, even in the life and work of a single lawyer. Nisbet was born in Georgia in 1803, studied at the Litchfield Law School in northwestern Connecticut, and then returned home, where he worked as a lawyer and judge until he retired in 1870. Throughout his life, Nisbet strongly supported slavery. He grew up in a slave-owning family, married the daughter of a plantation owner, and owned slaves himself. After the Civil War, he remembered slavery fondly and argued that all Southerners—including slaves—were better off before the "rapacity and injustice of the Radical Party" had turned his society on its head. Yet despite his role in secession and his allegiance to the Lost Cause, during his legal education, service as a judge on the Georgia Supreme Court, and work as a private lawyer, Nisbet ascribed to a legal culture that he shared with Northern lawyers. This article follows Nisbet's legal career from its beginning at the Litchfield Law School where his teachers instilled the value of legalism, to his time on the Georgia Supreme Court where he demonstrated his commitment to professional legal argumentation, and to

its end when, as a private lawyer, Nisbet and his partners applied their legal tools to commercial debt cases. Nisbet's career reveals the powers and limitations of the legal culture to which he ascribed.[11]

Education

In the early nineteenth century, when Nisbet went to law school, nearly every lawyer in the English common law world learned by apprenticing. The tradition, which dated back to the twelfth century, required would-be lawyers to prepare for practice by working alongside experienced attorneys, reading treatises, and observing court proceedings.[12] Although loathed by most clerks, the apprenticeship form of legal education faced little competition. By the time Nisbet decided to pursue law in 1823, America's brief experiments with school-based legal education had mostly failed.[13] Most lawyers continued to learn from the same treatises, but they

11. For background on Nisbet's connections to slavery, see E.A. Nisbet, Diary, October 31, 1869, David M. Rubenstein, Rare Book & Manuscript Library, Durham, North Carolina (hereafter DRML); 1840 United States Census; E.A. Nisbet, Diary, January 11, 1855, DRML; 1860 United States Census, Slave Schedule Bibb County; and E.A. Nisbet, Diary, November 28, 1869, DRML. Nisbet's original diary is not in his paper collection at the DRML. The following excerpts are from a handwritten copy.

12. Students may have supplemented these practical exercises with instruction from judges and attendance at lectures. Paul Brand, "Legal Education Before the Inns of Court," in *Teaching and Transmission of Law in England 1150–1900,* ed. Jonathan A. Bush and Alain Wijffels (New York: Hambledon Press, 1999), 51–84, 62–68.

13. Clerks complained that lawyers rarely offered direct instruction and that when they did, their lessons were often lackluster. Consumed by their monotonous work of copying documents, apprentices often had little time to read, and they were expected to learn from a limited number of notoriously difficult treatises. Charles R. McKirdy, "The Lawyer as Apprentice: Legal Education in Eighteenth Century Massachusetts," *Journal of Legal Education* 28 (1976): 127–28; Paul M. Hamlin, *Legal Education in Colonial New York* (New York: New York University Law Quarterly Review, 1939), 42, 130–33; George Dargo, *Law in the New Republic: Private Law and the Public Estate* (New York: Knopf, 1983), 51; John Langbein, "Blackstone, Litchfield, and Yale: The Founding of the Yale Law School in History of the Yale Law School," in *History of the Yale Law School: The Tercentennial Lectures*, ed. Anthony T. Kronman (New Haven, CT: Yale University Press, 2004), 24. Despite these limitations, apprenticeship was the dominant form of legal education until the twentieth century. See Laura Kalman, "Professing Law: Elite Law School Professors in the Twentieth Century" in *Looking Back at Law's Century*, ed. Austin Sarat, Bryant Garth, and Robert A. Kagan (Ithaca, NY: Cornell University Press, 2002), 340–42. Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (Chapel Hill: University of North Carolina Press, 1983), 95–96. For the failure of school-based education, see Craig Evan Klafter, "The Influence of Vocational Law Schools on the Origins of American Legal Thought, 1779–1829," *American Journal of Legal History* 37 (1993): 322. William Ewald III, "James Wilson and the Drafting of the

did so while working alongside practicing lawyers. Nisbet, however, elected to attend the Litchfield Law School, which educated roughly 1,000 American lawyers in northwestern Connecticut from 1784 to 1833.[14] There, he and other Southern lawyers learned to become members of the legalistic culture that would link them to their Northern colleagues.

Litchfield seems an unlikely place for a Southerner to study the law. Connecticut was far from the South, especially in the early nineteenth century. Yet Nisbet and students like South Carolinian William Dickinson Martin braved difficult trips to make it to the school. In 1809, Martin's journey took 26 days. Before he arrived, he had crossed a broken bridge on a horseback trip to Richmond, Virginia; sold his horse at a cut-rate price; taken a stage coach from Richmond to Paulus Hook, New Jersey; traveled by boat to New York; traveled by another boat to New Haven; and finally ridden a stage coach 36 miles to Litchfield. Martin, however, was not the first South Carolinian to make the trip. More than a dozen others had attended Litchfield before him, including John C. Calhoun, who wrote Martin a letter of introduction to the school's founder, Tapping Reeve.[15]

Connecticut was not only separated from the South by hundreds of miles but also by a drastically different way of life. Martin, Nisbet, and other Southerners left behind their plantation homes and an economy built on slavery for Connecticut, a state in which gradual emancipation had begun in 1784, and where men worked as small farmers or artisan manufacturers. Martin noted in his journal that he encountered white servants for the first time on his trip to Litchfield. There had been little need for white servants in South Carolina. When Martin left for Connecticut, his state had just been forced by Congress to end its 4 year experiment in reopening the

---

Constitution," *Pennsylvania Journal of Constitutional Law* 10 (2008): 914; Craig Evan Klafter, *Reason over Precedents: Origins of American Legal Thought* (Westport, CT: Greenwood Press, 1993), 10.

14. The school's graduates made up nearly 5% of the lawyers in the United States. Rough estimates suggest that there were between 22,000 and 24,000 lawyers in the United States in 1850. Lawrence Friedman, *A History of American Law*, 3rd ed. (New York: Simon and Schuster, 2005), 483; Stevens, *Law School,* 22. Between 1794 and 1833, approximately 1,000 lawyers attended Litchfield. Even though some of these Litchfield alumni had died or left legal practice by the 1850s, they still made up a significant portion of the bar. My calculations (comparing contemporary law schools over a similar period of time) suggest that Litchfield accounted for the same proportion of the legal profession as the combined graduates of Yale, Harvard, Stanford, the University of Chicago, and the University of Pennsylvania do today.

15. Anna D. Elmore, "Introduction," in William Dickinson Martin, *Journal: A Journey from South Carolina in the Year 1809,* ed. Anna D. Elmore (Charlotte, NC: Heritage House, 1959), ii, vii, 10, 41, 42.

overseas slave trade, during which 40,000 more Africans had been enslaved and brought to its shores to fill the demands of cotton planters.[16] In 1810, enslaved people made up nearly half of the state's population. Nisbet's Georgia home was little different. When Nisbet traveled to Litchfield, more than 40% of his state's population was enslaved. Nisbet himself had grown up surrounded by African Americans owned by his family, and he held an idyllic vision of Southern slave society. His father's slaves, he recalled, "were part and parcel of the family." Nisbet claimed that he had "loved them all" and believed that "they were happy and faithful and attached." Nisbet, like Martin before him, had not come to Litchfield to challenge an economic institution to which he was personally, financially, and ideologically devoted but rather to learn to practice law in a Southern slave society to which he would return.[17]

Once in Connecticut, Martin, Nisbet, and other Southern students steeped in slavery learned from two teachers, Tapping Reeve and James Gould, who opposed it.[18] Like the English jurist William Blackstone, Reeve found slavery "repugnant to reason . . . and the principles of natural law."[19] Because slavery did not exist in the common law, Reeve argued it

16. William W. Freehling, *The Road to Disunion: Secessionists at Bay, 1776–1854* (New York: Oxford University Press, 1990), 136. The reopening of the overseas slave trade was enabled by the constitutional provision that prevented Congress from barring the slave trade until 1807. South Carolina reopened the trade between 1803 and 1807; ibid., 136.

17. Percy Wells Bidwell, "Rural Economy in New England at the Beginning of the Nineteenth Century," *Transactions of the Connecticut Academy of Arts and Sciences* 20 (1916): 270–71; and Martin, *Journal,* 27. *Historical Statistics of the United States: Millennial Edition Online*: Table Bb1–98; E.A. Nisbet, Diary, November 28, 1869, DRML. As Al Brophy has pointed out, Southern support for slavery was less uniform in the early nineteenth century than it would be later. Brophy, *University,* 50.

18. Gould, a former Litchfield student, began teaching alongside Reeve in 1798. In 1820, he took over management of the school, and he continued to teach after Reeve died. Andrew M. Siegel, "'To Learn and Make Respectable Hereafter': The Litchfield Law School in Cultural Context," *New York University Law Review* 73 (1998): 2003.

19. Sir William Blackstone, *Commentaries on the Laws of England: In Four Books with an Analysis of the Work*, vol. 1, ed. Thomas Lee (London: S. Sweet, 1829) (originally published without an editor in 1765 by Clarendon Press in Oxford), 423. Blackstone argued that slavery could be grounded in neither the law of war nor the law of contract: not in the law of war because there was no right to slaughter and, therefore, no right to enslave as an alternative; not in the law of contract, because a slave received no consideration for bargaining away his freedom. Reeve's views on slavery are discussed in Ellen Holmes Pearson, *Remaking Custom: Law and Identity in the Early American Republic* (Charlottesville: University of Virginia Press, 2011). Reeve's opposition to slavery was not just academic. Before he began teaching apprentices, he worked alongside fellow attorney Theodore Sedgwick to win the freedom of a man and woman in Massachusetts by arguing that slavery was illegal under the equal rights provision of the recently ratified 1780 Massachusetts

could only be established through positive law. A government, in other words, had to ratify the institution with legislation.[20] Applying this standard, Reeve believed that Connecticut had never officially established slavery. The state regulated it like other vices, but never gave it the approbation of the law. Gould, in his lectures, agreed that slavery contravened both common and natural law but, unlike Reeve, maintained that Connecticut's laws regulating slavery, even those that limited the rights of slaveholders, embodied tacit approval of slavery in Connecticut law.[21]

Despite Connecticut's distance and its teachers' opposition to slavery, Southerners including Nisbet and Martin embraced the Litchfield Law School. Of the 836 students for whom hometown data exist, 225 were from Southern slave states. That 30% of Litchfield's students came from the South reflects the prominence and success of its early Southern graduates and the cross-sectional legalistic culture that allowed lawyers educated in the North to build careers in the South.[22] Southern students lauded the school and its proprietors. Even John C. Calhoun, who spent many of his years in public life defending, justifying, and working to expand slavery, remembered his time at Litchfield fondly.[23] In 1810, he wrote to Reeve

---

Constitution. The case, *Bett v. Ashley,* took place in 1781. The jury concluded that the couple "[were] not and [had not been] at the time of the purchase of the original writ the legal Negro servants of their former master" and awarded them "thirty shillings lawful silver Money, Damages, and the Costs of this suit Paned at five pound fourteen shillings and four pence like Money." Jury Verdict, *Bett v. Ashley* (1781). The defendant appealed, but after the Massachusetts Supreme Judicial Court declined to hear another case attacking slavery on similar grounds, he confessed judgment. For more on the case, see Arthur Zilversmit, "Quok Walker, Mumbet, and the Abolition of Slavery in Massachusetts," *William and Mary Quarterly* 25 (1968): 614–24. Reeve's co-counsel, Theodore Sedgwick, would later represent Massachusetts in Congress and serve on the Massachusetts Supreme Judicial Court. Richard E. Welch, *Theodore Sedgwick, Federalist: A Political Portrait* (Middletown, CT: Wesleyan University Press, 1965).

20. Lord Mansfield reached the same conclusion in *Somerset v. Stewart,* 98 ER 499 (1772).

21. See Pearson, *Remaking Custom,* 119–21. James Gould also criticized slavery because it violated the right of contract.

22. The Litchfield Law School did not convey degrees, and there is no official list of students who attended its entire set of lectures. For the sake of simplicity, I will refer to students who attended Litchfield as "graduates." Most Southern graduates returned to the South after their educations; a small number of Northern students also established careers in the South. Lawrence B. Custer, "The Litchfield Law School: Educating Southern Lawyers in Connecticut," *Georgia Journal of Southern Legal History* 2 (1993): 202–3.

23. According to Calhoun, slavery was "a positive good," and its regulation outside of Congress's jurisdiction. See John C. Calhoun, "Speech on the Reception of Abolition Petitions," February 6, 1837 in *Speeches of John C. Calhoun: Delivered in the Congress of the United States from 1811 to the Present Time* (New York: Harper & Brothers, 1843), 222–26.

to recommend a student for admission to Litchfield and to "express his gratitude" for the "many advantages" he had received from Reeve's teaching. John Y. Mason, a proslavery Virginian who had attended Litchfield in 1817, referred to Reeve's lectures as "masterly productions," and noted the "decided advantage" that Litchfield held over any apprenticeship. In 1822, when Reeve turned 70 and reached the mandatory retirement age for Connecticut judges, a group of his students organized a collection to help support their former teacher, noting "the important services which he has rendered to us individually, as well as to his country, by the promotion of legal science." Six of the ten men on the organizing committee lived in the South.[24]

Appreciation for a Litchfield education extended beyond nostalgic alumni; Georgians valued the school's reputation so highly that the legislature passed a special act in 1823 to allow Nisbet to join the bar before he turned 21. Litchfield's graduates benefited from a comprehensive introduction to the treatises and cases that apprentices toiled through on their own. This curriculum especially appealed to students in places with fewer established lawyers. Litchfield provided the elite legal education that local lawyers could not. It offered access not only to a national legal network but also to an alumni network with members active in politics and the law.[25]

The ability of Litchfield to attract Southern students and to launch them into successful legal careers in the South illustrates the relatively low importance that both students and faculty placed on the law of slavery as a subject of study and the value that they saw in less controversial legal subjects.[26] Neither of Litchfield's teachers devoted much attention to

24. John C. Calhoun to Tapping Reeve, February 10, 1810, Tapping Reeve Collection, Helga J. Ingram Memorial Research Library, Litchfield Historical Society, Litchfield, CT (hereafter LHS); John Y. Mason to Edmunds Mason, January 28, 1818, reprinted in Francis Leigh Williams, "The Heritage and Preparation of a Statesman, John Young Mason, 1799–1859," *Virginia Magazine of History and Biography* 75 (1967): 322; and Nicholas Ware et al. to W. Sanford et al., May 4, 1822, LHS.

25. Custer, "Litchfield Law School," 195–96; see "Sketch of the Life of E.A. Nisbet," *Macon Weekly Telegraph*, April 4, 1871, 6; and Mark Boonshoft, "The Litchfield Network: Education, Social Capital, and the Rise and Fall of a Political Dynasty, 1784–1833," *Journal of the Early Republic* 34 (2014): 570.

26. Litchfield's students from outside the South held a range of views on the subject. Some, such as Roger Sherman Baldwin who attended Litchfield in 1812, worked against the institution. Baldwin, a future senator and governor of Connecticut, defended the African captives who had rebelled on the Spanish ship *La Amistad*, eventually winning his clients' freedom after arguing alongside former president John Quincy Adams at the United States Supreme Court in 1841. *United States v. Libellants and Claimants of the Schooner Amistad*, 40 U.S. 518 (1841). Others such as Marcus Morton who attended Litchfield in 1806 and would become the governor of Massachusetts, had a complicated relationship with the politics of slavery. He was characterized by political opponents both as an

slavery in his lectures. A typical student's notebook, composed of more than 1,000 pages of material, included less than 3 pages on the fundamental law of slavery. Instead, Reeve and Gould educated their students extensively on more mundane (and practical) legal subjects. Their lessons included lectures on the technical skills of a private lawyer, the rules of pleading, writs of error, bills of exceptions, evidence, chancery, apprentices, agents, sheriffs, and executors. Slavery merited an entry or two in the index to a student's notebook. Debt collection, in contrast, received significant coverage.[27] Like the treatises on which they based their lectures, Reeve and Gould's discussions of pleading and substantive law were narrow and technically focused.[28] Reeve and Gould's lack of attention to the law of slavery may have reflected their reluctance to broach a politically

abolitionist and a defender of the institution but fell somewhere in between. See Jonathan H. Earle, *Jacksonian Antislavery and the Politics of Free Soil, 1824–185* (Chapel Hill: University of North Carolina Press, 2004), 113–14; and Jonathan Earle, "Marcus Morton and the Dilemma of Jacksonian Antislavery in Massachusetts, 1817–1849," *Massachusetts Review* 4 (2002): 61–88.

27. Samuel Cheever's two volumes of notes from 1812, for example, contain less than two and a half pages of notes related to the fundamental law of slavery. Samuel Cheever, Notes on Lectures of Reeve and Gould (1812), http://nrs.harvard.edu/urn-3:HLS.Libr:8253506 and http://nrs.harvard.edu/urn-3:HLS.Libr:8254042 (accessed April 30, 2019). In contrast, Reeve and Gould lectured extensively on bills of exchange, promissory notes, usury, notice and demand (for overdue payment), and action of account (used to recover money). They also taught students how to navigate the rules of exchange related to personal property and real estate. Students recorded these lessons under headings such as mortgages, real property, alienation by deed, ejectment (used to evict a tenant), disseisin (used to recover land), and real actions (used for suits related to property). See Asa Bacon, Student Notebooks, 1794, LHS; Ebenezer Baldwin, Student Notebooks, 1810, LHS; William S. Andrews, Lectures Upon the Various Branches of Law by Reeves and Gould at the Law School in Litchfield, Conn, 1812–1813, vol. 2, Harvard Law School Library, Cambridge, MA (hereafter HLS); Notes of Reeve's Lectures on Various Legal Subjects in the Litchfield Law School, 1808, vol. 2, HLS; Nash Lonson; Lectures on Various Legal Subjects Delivered in the Litchfield Law School, 1803, vol. 1, HLS; Henry Holton Fuller, Lectures of Tapping Reeve, Litchfield Law School, 1812–13, vol. 1, HLS; and Caleb Stark, Lectures of James Gould, Litchfield Law School, 1824–25. vol. 3, HLS.

28. Andrew Siegel and Angela Fernandez have both argued that Reeve's school was strongly influenced by Federalist political ideals and point out some areas in which Reeve's lessons reflected his political aims rather than well-established precedent. Fernandez provides a particularly compelling example of this in her analysis of Reeve's treatment of the rights of married women. See Siegal, "'To Learn and Make Respectable Hereafter,'" 1978–2028; Angela Fernandez, "Spreading the Word: From the Litchfield Law School to the Harvard Case Method" (JSD diss., Yale Law School, 2007); and Angela Fernandez, "Tapping Reeve, Coverture and America's First Legal Treatise," in *Law Books in Action: Essays on the Anglo-American Legal Treatise*, ed. Angela Fernandez and Markus D. Dubber (Portland, OR: Hart Publishing, 2012). Both Siegal and Fernandez also acknowledge, however, the technical legal content of much of the

charged subject, but it also indicates that they did not understand opposition to slavery as essential to the profession. Even Reeve, who had argued in his own legal practice that slavery violated the Connecticut Constitution, believed that positive law could legalize a practice he resented.

In place of a moral core, Litchfield offered a technical one. This legalistic perspective classified slavery's problems as political, rather than legal. As long as a simple act of the legislature could authorize slaveholding, slavery did not present interesting or important legal issues. From the perspective of a working lawyer, the law on this question was settled. A difficult question of law, even one involving a seemingly mundane subject such as the law of debt, demanded more explication. This lawyerly view of the legal system, characterized the Litchfield curriculum. Reeve and Gould focused on the private legal rules that would prepare their students to practice in a legal world in which most lawyers earned a living handling commercial issues.[29]

This choice of focus distinguished Reeve and Gould from other early law professors. At William and Mary, the College of Philadelphia, and Columbia, legal luminaries George Wythe, James Wilson, and James Kent conceptualized legal education broadly, offering curricula laced with political theory and philosophy that were intended to position their students to play crucial roles in a young republic.[30] But such curricula

---

Litchfield curriculum. The technical focus of the lectures at Litchfield is particularly evident when they are contrasted with other law school lectures at the time.

29. Despite strikingly different approaches, Morton Horwitz, William Nelson, Bruce Mann, Dan Hulsebosch, and Laura Edwards have all written of the dynamic relationship between lawyers and commerce. See Morton J. Horwitz, *The Transformation of American Law, 1780–1860*; William E. Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760–1830* (Cambridge, MA: Harvard University Press, 1975); Bruce Mann, *Neighbors and Strangers: Law and Community in Early Connecticut* (Chapel Hill: University of North Carolina, 1987), especially 6 for his discussion of the frequency of debt-related litigation; Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830* (Chapel Hill: University of North Carolina Press, 2005); and Laura Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill: University of North Carolina Press, 2009).

30. Wilson offered a statement of this position in the introduction to his law lectures. Law, he explained, was "something higher than a mere instrument of private gain," and a complete legal education demanded that students master both "metaphysical" and "historical knowledge," "pry into the secret recesses of the human heart, and become well acquainted with the whole moral world, that they discover the abstract reason of all laws." James Wilson, "Lectures on Law" in *Collected Works of James Wilson*, vol. 1, ed. Kermit L. Hall and Mark David Hall (Indianapolis, IN: Liberty Fund, 2007), 457–58. Kent, similarly spoke of the "singular" obligation" Americans had "to place the Study of the law at least on a level with the pursuits of Classical Learning" as a means of "preserv[ing] [the] Fruits of

did not tap into the practice-oriented legal culture that attracted students to Litchfield, and they educated far fewer students. Like Nisbet, most would-be lawyers sought a legal education to prepare them for legal practice, one of the few career paths available in the Early Republic that offered the potential of improving one's station in life. As one Southern student put it, he traveled to Litchfield because he knew its education could earn him "an honorable standing in the profession." Northerners too were drawn to a legal education that focused on the technical rules of law. Such an education seemed the best way to make a "living by it."[31]

Although Litchfield provides a particularly powerful and (influential) example of the transmission of the norms that bound together the American legal profession, its legalistic focus does not appear to have been unique. The "practice-centered" education of apprentices focused on the technical workings of the judicial system. When apprentices had time to read, they relied on many of the source cited in Litchfield's lectures. References to English texts such as William Blackstone's *Commentaries*, the writings of Lord Coke, and William Hawkins' *Pleas of the Crown* found in Litchfield student notebooks also appeared on the reading lists

... Independence." James Kent, "An Introductory Lecture to a Course of Law Lectures" (1794) in *American Political Writings During the Founding Era*, vol. 1, ed. Charles S. Hyneman and Donald S. Lutz (Indianapolis, IN: Liberty Fund, 1983), 937–38, 949. Wythe also wrote of the importance of legal education in "form[ing] such characters as may be fit to succeed those which have been ornamental and useful in the national councils of America." George Wythe to John Adams, December 5, 1783, quoted in Alonzo Thomas Dill, *George Wythe: Teacher of Liberty* (Williamsburg, VA: Virginia Independence Bicentennial Commission, 1979), 2.

31. Wythe, Wilson, and Kent's schools had brief, regionalized runs of success, but none lasted as long or trained nearly as many students as Reeve and Gould. George Wythe and his successor, St. George Tucker, educated fewer than 100 students in 23 years. Klafter, "Influence of Vocational Law Schools," 322. Wilson and Kent trained even fewer students. Kent's enrollment decreased from forty-three in his first year to merely two in his second. He resigned his chair in the spring of 1797, 4 years after he had begun. Klafter, *Reason over Precedents*, 10. Wilson discontinued his lectures after finishing only half of his initial course. Ewald, "James Wilson," 914. On the power of a legal career to create wealth, see Friedman, *History of American Law*, 227–28; Anton Chroust, "Dilemma of the American Lawyer in the Post-Revolutionary Era," *Notre Dame Law Review* 35 (1959): 48–50; Jackson Turner Main, *The Social Structure of Revolutionary America* (Princeton, NJ: Princeton University Press), 190–92; Martin, *Journal*, 4; and John Lloyd Stephens to Benjamin Stephens, quoted in Victor W. von Hagen, "Introduction," in John Lloyd Stephens, *Incidents of Travel in Egypt, Arabia Petraea, and the Holy Land*, ed. Victor W. von Hagen (Norman: Oklahoma University Press, 1970), xiv.

of apprentices. In the early nineteenth century, such English legal texts made up the bulk of early American legal literature.[32]

These English texts devoted passing, if any, attention to the fundamental law of slavery; instead, like the lectures Reeve and Gould derived from them, they concentrated on private legal issues. During the nineteenth century, a growing body of United States legal texts, including those written by Reeve and Gould, exhibited the same tendency.[33] Justice Story's *Commentaries on the Law of Bailments* (1832), which covers law governing the transfer of certain types of property, was typical. In that work Story analyzed cases across jurisdictions, and he treated the law of slavery only incidentally, discussing bailments cases involving enslaved people alongside those involving things such as boats.[34] For a lawyer schooled in legalism, the category of bailment was more important than that of slavery. The focus by legal writers on widely applicable formal legal rules was encouraged by the relatively small American bar. An author hoping to sell more than a few copies of his work needed to aim for a national audience.[35] As the preface to Reeve's treatise put it, his goal was "to render the book … equally valuable to all parts of the country."[36] Treating slave law like any other form of law made financial sense.[37]

32. See Unknown, Student Notes, LHS, citing sources in margins; George Gould, Student Notes, LHS. W. Hamilton Bryson, "The History of Legal Publishing in Virginia," *University of Richmond Law Review* 14 (1979): 161, 176; Thomas Hunter, "The Institutionalization of Legal Education in North Carolina, 1790–1920," in *The History of Legal Education in the United States*, vol. 1, ed. Steve Sheppard (Hackensack, NJ: Salem Press, 1999), 408; Michael H. Hoeflich, *Legal Publishing in Antebellum America* (New York: Cambridge University Press, 2010), 179; Erwin C. Surrency, *A History of American Law Publishing* (New York: Oceana Publications, 1990), 29; and Daniel J. Hulsebosch, "Empire of Law: Chancellor Kent and the Revolution in Books in the Early Republic," *Alabama Law Review* 60 (2003): 377–78. Apprentice reading lists also contained recommendations for philosophical and historical texts, but such texts do not seem to have hindered the transmission of a technical legal culture.

33. Reeve published *The Law of Baron and Femme* in 1816 and Gould published *A Treatise on the Principles of Pleading in Civil Actions* in 1832. Tapping Reeve, *The Law of Baron and Femme* (New Haven, CT: Oliver Steele, 1816); and James Gould, *A Treatise on the Principles of Pleading in Civil Actions* (Boston: Lilly and Wait, 1832).

34. See Joseph Story, *Commentaries on the Law of Bailments with Illustrations from the Civil and the Foreign Law* (Cambridge, MA: Hilliard and Brown, 1832), §214, §216.

35. For more on the national focus of legal texts in America, see Hulsebosch, "Empire of Law," 387; Surrency, *History of American Law Publishing*, 30; and Hoeflich, *Legal Publishing*, 177–78.

36. Reeve, *Law of Baron and Femme*, i. As Angela Fernandez has pointed out, Reeve was criticized for failing to accurately depict the state of the common law. Such criticisms demonstrate the practical expectations of the readers of American treatises. See Fernandez, "Tapping Reeve," 69.

37. Hoeflich, *Legal Publishing*, 34.

The national focus of American legal literature (and education at Litchfield) helped emphasize the legalistic and technical aspects of American legal culture. In the early nineteenth century, federal courts still held relatively limited jurisdictional power; only in 1816 did the Supreme Court assert its authority to review state court decisions on federal law, and expansions of federal jurisdictional power still faced significant opposition. Law differed, sometimes substantially, from state to state, as did bar admission standards. Moreover, communal rules continued to govern many legal proceedings. In the South, local judges sometimes ignored legal norms in favor of informal standards that credited the opinions of those formally excluded from the justice system. Nevertheless, students and lawyers embraced a nationally focused, technical legal education, believing that it prepared them for legal practice. A lawyer reading a commentary or treatise aimed across jurisdictions could not be sure the arguments he read would stand up in his local court, but he would be steeped in the forms and modes of technical legal argumentation that he shared with other members of the bar.[38]

Georgia Supreme Court

Nisbet's work on the Georgia Supreme Court, on which he served from 1846 to 1853, illustrates the reach of a legalistic culture. The Georgia Supreme Court is a surprising place to find strong legal links to the North. By the 1830s, white Georgians were increasingly voicing proslavery sentiments in response to abolitionist challenges from the North, which threatened the racial underpinnings of political system that had recently expanded the vote to include poor white men. Although the state was home to a significant number of unionists, its voters' devotion to slavery and plantation agriculture was clear. Unionists and secessionists premised their disagreements on who best could preserve the institution, and even unionists at the Georgia Convention of 1850 threatened secession under certain circumstances. By the mid-nineteenth century, the cotton economy was again booming, generating even stronger support for slavery from a state with the most slaves and slaveholders in the lower South. For

38. See Alison L. LaCroix, "Federalists, Federalism, and Federal Jurisdiction," *Law and History Review* 30 (2012): 237–43; Edwards, *People and Their Peace*, 251–55; and Huebner, *Southern Judicial Tradition*, 5–8. Although the content of professional legal culture is not the primary focus of her book, Laura Edwards provides convincing evidence of its spread in the South and of Tapping Reeve's role in its production. See ibid., 220–55.

white Georgians, the "laws of nature and of God . . . sanctioned and recommended slavery."[39]

Historians have found such sentiments reflected in the jurisprudence of Southern appellate courts. They have observed politicization and divergence from Northern courts, both to secure slavery and to shape doctrinal rules suited to a slave society. Unlike like their Northern counterparts, many Southern judges appeared to have attempted to slow the growth of industrialization, fearing that it would disrupt the Southern plantation economy. Howard Schweber has documented Southern jurists' reluctance to embrace the movement toward modern negligence doctrine that eased the way for economic innovation in the North. Even the few judges intent on boosting economic development did so as a means to strengthen the Southern slave economy. Southern judges thus appear to have demonstrated a commitment to "[s]ectional politics" and slavery that deeply shaped their jurisprudence. In short, Southern jurists "implemented the pro-slavery ideas circulating in southern culture." Not until the 1870s, according to these scholars, did Southern and Northern jurisprudence converge.[40]

Scholarship on the Georgia court, labeled by one scholar as "the most conservative antebellum court," tends to confirm the view of a judiciary intent on defending slavery. Watson W. Jennison, for example, places Nisbet's fellow judge Joseph Henry Lumpkin at the "vanguard of the southern movement promoting proslavery ideology in the legal realm" and labels him the "architect of the state's slave regime." Timothy Huebner likewise finds that Lumpkin's "preoccupation with social improvement and the creation of an ideal society" based on slavery "often overshadowed his devotion to legal niceties." Other scholars emphasize the efforts of the Georgia Court to ensure that legal issues generated by railroads did not disturb the Southern social order. In short, the court's jurisprudence appeared to have demonstrated a "sectional perspective," in which slavery was the key issue.[41]

39. Drew Gilipin Faust, "Introduction," in *The Ideology of Slavery: Proslavery Thought in the Antebellum South, 1830–1860,* ed. Drew Gilpin Faust (Baton Rouge: Louisiana State Press, 1981), ix, 9–10. Freehling, *Road to Disunion*, 164, 524; and Anthony Gene Carey, *Parties, Slavery, and the Union in Antebellum Georgia* (Athens: University of Georgia Press, 2012), 15.

40. Huebner, *Southern Judicial Tradition*, 5, 81–87; Schweber, *Creation,* 2, 226–40, 260; and Brophy, *University*, xix.

41. A.E. Keir Nash, "Fairness and Formalism in the Trials of Blacks in the State Supreme Courts of the Old South," *Virginia Law Review* 56 (1970): 77; Watson W. Jennision, *Cultivating Race: The Expansion of Slavery in Georgia, 1750–1860* (Lexington: University of Kentucky Press, 2012), 289–90; and James L. Hunt, "Law, Business, and Politics: Liability for Accidents in Georgia, 1846–1880," *Georgia Historical Quarterly* 84

Although this perspective is clearly present in many of the courts' decisions, so too is a commitment to legalism: to the forms of legal argumentation that Nisbet and other lawyers had learned as young lawyers. In his time on the court, Nisbet and the other two justices—Lumpkin and Hiram Warner—authored 1,163 opinions. More than 1,000 of these cases involved civil disputes.[42] Few cases called for the court to settle legal issues that garnered widespread attention from the public or offered clear opportunities for judges to intervene in ongoing political disputes.[43] Eighty percent of the court's cases did not explicitly involve enslaved people. The cases instead mostly dealt with the legal rules governing suits and economic transaction in Georgia: Were account books sufficient evidence in a contract dispute?[44] Were declarations admissible in a case over a disputed land sale?[45] Had a litigant failed to follow proper procedures when he did not post security before appealing a suit for breach of contract related to the construction for a mill dam?[46] Had a creditor followed the proper procedure when he foreclosed against a debtor?[47]

The issues in these cases seemed even more removed from their social and economic context when translated into legal language: "[S]hall the plaintiffs be compelled to go behind the books thus verified by the clerks who kept them, and resort to each of the sub-agents who participated in the transaction and sale of this produce?"[48] "Is a defendant who is sued, *individually*, upon a contract which he himself has made with the plaintiff, entitled to appeal from a verdict rendered against him, without giving security, by proving that the contract on which the action was brought, was made for the benefit of the estate, which he represented as executor,

(2000): 265–66. Lumpkin encouraged the development of a diversified Southern economy and promoted a paternalistic conception of slavery, which he believed "had both divine origins and biblical justifications." Huebner, *Southern Judicial Tradition*, 88, 86, 96, 97. See also Brophy's analysis of Lumpkin. Brophy, *University,* 212–26.

42. Sorted into the categories that modern lawyers use, they most commonly involved real property, estate planning, commercial law, finance and banking, corporate governance, and family law.

43. Judicial issues with obvious political valence have received significant interest from commentators. See, for example, Horwitz, *Transformation*; and Peter Karsten, *Heart vs Head: Judge-Made Law in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1997).

44. *Fielder, Bros. & Co. v. Collier*, 13 Ga. 496 (1853).

45. *Brown v. Upton*, 12 Ga. 505 (1853).

46. *McCay v. Devers*, 9 Ga. 184 (1850).

47. See, for example, *Johnson v. Hall,* 5 Ga. 384 (1848); *Central Bank of Georgia v. Whitfield*, 1 Ga. 593 (1846); *Brown v. Chaney*, 1 Ga. 410 (1846); and *Mahaffey v. Petty*, 1 Ga. 261 (1846).

48. *Fielder, Bros. & Co. v. Collier*, 499,

and that he was authorized, by the will of his testator, to make such contracts?"[49] "[Is] a Justice of the Peace, in [Georgia] . . . a collecting officer . . . ?"[50] Were "[t]he admissions of the claimant . . . good against his title, in favor of the plaintiff in execution, but not in favor of it, in his own behalf."[51] In these cases, prosaic legal issues, rather than the social relations of slavery, took center stage. Judges and lawyers understood these cases as presenting technical legal questions that demanded technical legal answers. Such an approach helped screen out the messy, socially grounded disputes that underlay the disputes. Accomplished lawyers could disagree about the proper outcomes in such cases, but they agreed that such disputes were fundamentally about the law.

These decisions helped shape Georgia's law, and formed the backdrop for economic transactions. If, for example, the Supreme Court had upheld the trial court's refusal to admit a creditor's account books as proof of transactions, large-scale businesses using modern accounting techniques would have encountered difficulty establishing legal claims.[52] More generally, by clarifying rules governing the actions of executors, creditors, and justices of the peace, the court increased the predictability of economic and legal transactions in a slave society. These cases, however, generally lacked the broad political intrigue, clear economic stakes, or direct connection to slavery that attracts the attention of historians.[53] Nisbet and his fellow

49. *McCay v. Devers,* 184–85.

50. *Johnson v. Hall,* 389.

51. *Brown v. Upton*, 507.

52. *Fielder, Bros. & Co. v. Collier*, 13 Ga. 496 (1853).

53. Even historians such as Thomas Morris who draw attention to the legalism of Southern judges focus on the laws directly related to slavery rather than to the broader system of Southern (and national) law. See, for example, Morris, *Southern Slavery*, 424–28. For examples of the run-of-the-mill cases seen by the Georgia Supreme Court, see *N. Owsley & Son v. Woolhopter*, 14 Ga. 124 (1853) (cotton debt); *Elkins v. State*, 13 Ga. 435 (1853) (liquor licensing); *Dougherty v. W. Bank of Ga*. 13 Ga. 287 (1853) (proper procedure for redeeming bank notes); *Wyche v. Winship*, 13 Ga. 208 (1853) (question of parol evidence in note redemption); *Stamper v. Griffin*, 12 Ga. 450 (1853) (evidentiary questions related to land sale); *Crawford v. State*, 12 Ga. 142 (1852) (jury instructions in homicide); *Prothro v. Orr*, 12 Ga. 36 (1852) (debt and statutory drafting); *Gilbert v. Hardwick* 11 Ga. 599 (1852) (will administration); *Murphy v. Justices of Inferior Court*, 11 Ga. 331 (1852) (evidentiary question related to duties of official in sale of runaway slave); *Guerry v. Durham*, 11 Ga. 9 (1852) (estate dispute involving equity procedures); *Hotchkiss v. Newton*, 10 Ga. 560 (1851) (contract case over castings hinging on evidentiary issues); *Beall v. Blake*, 10 Ga. 449 (1851) (evidentiary and equity issues in will case); *Rolfe v. Rolfe*, 10 Ga. 143 (1851) (evidence in debt dispute); *Faircloth v. Freeman*, 10 Ga. 249 (1851) (duty of sheriff); *Davis v. Lowman*, 9 Ga. 504 (1851) (evidentiary and procedural issues in inheritance case); *Mobley v. Mobley*, 9 Ga. 247 (1851) (jurisdiction); *Wellborn v. Williams*, 9 Ga. 86 (1850) (land sale and vendor's lien); *Grant v. McLester*, 8 Ga. 553 (1850) (dispute over notes paid to assume clerkship); *Hardwick v. Hook*, 8 Ga. 354

judges were not intentionally expanding the rights of slaveholders or explicitly shaping doctrine to accommodate a slave society; rather they were using the rules and language of the common law and early statutory law that they shared with Northerners to resolve questions presented to them by Southern litigants.[54]

Even the roughly 20% of cases that directly involved slavery typically hinged on legal issues in fields other than the law of slavery. For a lawyer such as Nisbet, the question of whether children had been properly granted slaves in a will was a matter of the law of estates.[55] The question of whether or not a constable followed the proper procedure when he seized slaves to satisfy a debt in foreclosure was a question of debt and commercial relations.[56] The question of whether the continued possession of borrowed slaves was a "conversion" of property rooted in a rightful owner was a question vested in the fundamental law of property.[57] Cases such as these

---

(1850) (procedural and evidentiary issues in case involving judgment to be paid in slaves); *Settle v. Alison,* 8 Ga. 201 (1850) (evidentiary issues related to selling of slave); *Baldwin v. Lessner*, 8 Ga. 71 (1850) (procedural issues related agreement for use of mill); *Bird v. Adams*, 7 Ga. 505 (1849) (statute of limitations for note); *Stroud v. Mays*, 7 Ga. 269 (1849) (dispute over power of jury in case related to sale of slave who died); *Williams v. Turner*, 7 Ga. 348 (1849) (competition between ferries involving evidentiary issues); *Dougherty v. Bethune*, 7 Ga. 90 (1849) (estoppel in case related to railroad bank notes); *Brewer v. Brewer*, 6 Ga. 587 (1849) (paying of court costs); *Wilcoxson v. Myrick*, 6 Ga. 410 (1849) (execution for seizure of slave); *Perry v. Higgs*, 6 Ga. 43 (1849) (court procedure); *Frederick v. City of Augusta*, 5 Ga. 561 (1848) (tax of municipal corporation); *Doe v. Lancaster*, 5 Ga. 39 (1848) (land titles and ejectment); *Hall v. Page*, 4 Ga. 428 (1848) (trover, garnishment); *Barron v. Chipman*, 4 Ga. 200 (1848) (sheriff's duties related to seizing slaves); *Smith v. Thompson*, 3 Ga. 23 (1847) (proper service of writs); *Cairns v. Iverson*, 3 Ga. 132 (1847) (cross suits in inheritance dispute); *Carter v. Buchanan*, 2 Ga. 337 (1847) (trover, procedure for multiple actions); *Guerry v. Perryman*, 2 Ga. 63 (1847) (procedure involving multiple suits); *Brown v. Chaney*, 1 Ga. 410 (1846) (promissory note procedure and evidence); and *Hardee v. Stovall, Simmons & Co.* (1846) (procedural dispute between creditors).

54. Lawrence Friedman has also argued that the social aims of judges may not have affected their decision making as much as other historians have claimed. See Lawrence M. Friedman, "Losing One's Head: Judges and the Law in Nineteenth-Century American Legal History," *Law & Social Inquiry* 24 (1999): 253–79. He does not, however, see legal culture and legal tradition as significant forces in legal decision making. Ibid., 263, 277. Laura Edwards has noticed the links between Northern and Southern judge and lawyers, but she focuses on the language of rights rather than of legalism. Edwards, *People and Their Peace.*

55. See, for example, *Jordan v. Thornton*, 7 Ga. 517, 517 (1849) (holding that children were absolute owners of slaves deeded to their mother in trust).

56. See *Hopkins v. Burch*, 3 Ga. 222, 222 (1847) (proper procedure for a constable levy "lands and negroes" from Act of 1811).

57. See *Adams v. Mizell*, 11 Ga. 106, 108 (1852).

relied on the same kind of legal reasoning and dealt with the same legal categories—laws governing executors, contracts, constables, or conversions—that Northern lawyers used in cases about nonhuman property. The approach was similar enough for Northern lawyers and judges to cite the Georgia Supreme Court, even in the 1850s and 1860s. In just one example, judges in Michigan, Pennsylvania, and Ohio, relied on the reasoning of a Georgia case, which outlined the power of the state legislature, even though the reasoning had been applied to a law regulating, among other things, the work of slaves on steamboats.[58] In the contentious buildup to the Civil War, legal language could be applied not only in divisive but also in unifying ways.

Nisbet's commitment to this uniform approach was so strong that it also appeared in cases in which he and the court assumed explicitly proslavery positions; it can be found, for example, in *Neal v. Farmer*, an 1851 case brought by Nancy Farmer, in which she sought damages from another slaveholder whose slave had killed her slave. The jury found for Farmer and awarded her $825 as compensation. The defendant challenged the verdict because in Georgia, a plaintiff could not sue for damages in cases that would have been common law felonies, "until the offender [had been] prosecuted to a conviction or acquittal."[59] He argued that because his slave had not been prosecuted, Farmer had no right to bring the suit. By the time the case reached the Georgia Supreme Court, it presented the question of whether the killing of a slave qualified as a common law crime. The question was not, as some commentators have written, whether murdering a slave was a crime. Except for two notorious exceptions, it clearly was.[60] Instead, the case raised the issue of whether the murder

58. The courts cited these cases both before and after the Civil War. See *Sears v. Cottrell*, 5 Mich. 251, 259 (1858), *Warren v. Commonwealth*, 37 Pa. 45, 51 (1861), and *Reckner v. Warner*, 22 Ohio St. 275, 278 (1872), citing *Flint River Steamboat Co. v. Foster*, 5 Ga. 194 (1848); see also *People v. Vasquez*, 49 Cal. 560, 561 (1875), citing *Berry v. State*, 10 Ga. 511 (1851), a case stemming from larceny by a slave; *Emerson v. Atwater*, 7 Mich. 12, 15 (1859), citing *Miller v. Cotton,* 5 Ga. 341 (1848), a case disputing inheritance of slaves; and *Howland v. Conway*, 12 F. Cas. 730, 732 (S.D.N.Y. 1848), citing *Bryan v. Walton*, 14 Ga. 185 (1853), a case related to the appointment of a guardian for a free person of color.

59. *Neal v. Farmer*, 9 Ga. 555, 559 (1851) (citing *Adams v. Barrett*, 5 Ga. Rep. 404 [1848]).

60. The case has been misinterpreted. See, for example, Louise Weinberg, "Methodological Interventions and the Slavery Cases; Or, Night–Thoughts of a Legal Realist," *Maryland Law Review* 56 (1997): 1316 n.77; and "What We Talk about When We Talk about Persons: The Language of Legal Fiction," *Harvard Law Review* 114 (2011): 1748 and n.11. Section twelve of the 1798 Georgia Constitution mandated that people who killed slaves be punished as if the slave were "a free white person." The law contained two exceptions—one for slave "insurrection," and another for "accident[al]" death as

was a *common law* crime; that is, whether there was sufficient precedent in case law for it to qualify as a crime even without Georgia's explicit law on the subject.[61]

For Nisbet, the issue before the court was "of great interest and gravity."[62] Neal's argument required him to show that slavery had existed in England before the American Revolution, and, therefore, that the common law against murder applied to slaves in Georgia.[63] He argued that the existence of villeins, a class of servants who, according to Blackstone, "belong [ed] both they and their children … to the lord of the soil" provided a British precedent for chattel slavery.[64] In an opinion laced with learned citations, Nisbet and the court disagreed. Nisbet stressed that "the Law of Villenage had gone into disuse in England one hundred and fifteen years before the settlement of Georgia," and was therefore "no part of the Common Law in 1732."[65] Moreover, according to Nisbet, "the unconditional ['pure'] slavery of the African race, as it exists in Georgia," differed greatly from ancient villeinage.[66] In other words, he came to the same conclusion that his Litchfield teachers, Reeve and Gould had: slavery was foreign to the common law. Nisbet made an argument whose building blocks even lawyers with abolitionist sentiments would have to acknowledge.

Nisbet went on to make statements in support of slavery, but in nonbinding dicta. The benefits of the common law, Nisbet wrote, could not apply to both master and slave: "two races of men living together, one in the character of masters and the other in the character of slaves, cannot be

---

a result of "moderate correction"—but neither applied in *Neal*. See Ga. Const. of 1798 art. IV., § 12. The Constitution's clause was put into effect by a bill passed by the Georgia legislature in 1799. An Act to Carry into Effect the 12th Section of the 4th Article of the Constitution, 1 Cobb's Digest 982 (1852). Punishment for murder was hanging without clergy, and for manslaughter it was branding. Ibid.

61. Determining which acts were deemed to be common law crimes required the analysis of English case law, which applied the designation to actions from smuggling sheep to homicide. Blackstone, *Commentaries*, vol. 4, 152, 176.

62. *Neal v. Farmer*, 560. Nisbet drew attention to the difficulty of the legal questions at issue and noted that he and the other justices were "pleased to record [their] sense of the value of the discussion which this cause has elicited at the hands of the counsel." Ibid., 560.

63. Ibid.

64. Ibid. Nisbet made this point by citing Blackstone, *Commentaries*, vol. 2, 92–93; William Temple, *An Introduction to the History of England* (London: Richard Simpson, 1695), 59; and Sharon Turner, *History of the Anglo-Saxons*, vol. 3, 3rd ed. (London: Longman, Hurst, Rees, Orme, and Brown, 1820).

65. *Neal v. Farmer*, 566.

66. Ibid.

governed by the same laws."[67] Applying the common law to slaves inevitably would lead to an expansion of rights, and the abolition of slavery. Nisbet felt compelled to frame even these remarks in legal terms. He elaborated on the argument, made by Reeve and others, that slavery required the ratification of positive law; that is that it needed to be officially legalized by lawmakers. According to Nisbet, every time a court in the North enforced a contract for the sale of a slave it implicitly ratified the institution.[68] Slavery in Georgia, he argued, had been positively ratified by the British Trustees of the Colony in 1751. A slave owner's possession derived from "the original captor," and Georgia law and the Federal Constitution "*confirmed*" rather than initiated possession.[69] In support of these statements, Nisbet cited a pair of cases from the "Courts of Massachusetts."[70] Nisbet criticized what he considered to be a confusing use of legal terminology in those opinions, but he agreed with their analysis: explicit statutory law was not needed to ratify slavery.[71]

Despite Nisbet's ideologically charged conclusions in *Neal,* his opinion relied on legal language and structures respected by Northern and Southern lawyers alike. That Nisbet's reasoning shared so much in common with the reasoning of his Litchfield teachers, and that he cited Northern opinions as authorities, illustrates the strength and persistence of the legal ties that linked North and South, even in the middle of the nineteenth century. Nisbet's use of legal language not only allowed him to communicate with a Northern audience, it also affirmed his ties to that audience.[72] For historians who sometimes see legal reasoning as window dressing for decisions driven by proslavery sentiment, this common language lacks significance.[73] Although support for slavery clearly influenced decision making, historians who overemphasize its influence understate the devotion to legalism that opinions such as *Neal* represent as well. Northern lawyers could have disagreed with the outcome or legal reasoning in *Neal*, as

67. Ibid., 579.

68. Ibid., 573.

69. Ibid., 580.

70. *Commonwealth v. Aves*, 35 Mass. 193 (1836); and *Sim's Case*, 61 Mass. 285 (1851).

71. *Neal v. Farmer*, 581–82. Nisbet's criticism derived from the courts' use of the term "customary law." Nisbet surmised that it meant "the usages of the State where slavery exists, springing up under the slave trade, and sanctioned by the Law of Nations." Ibid. This is a plausible interpretation of the court's conclusion that rules could be established by "tacit acquiescence." 35 Mass. 212.

72. For more on the use of opinions to communicate with a Northern audience, see Reid, "Lessons of Lumpkin," 580–81, 624.

73. See, for example, Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven, CT: Yale University Press, 1978); and Fisher, "Ideology and Imagery," 1080–82.

did Neal's lawyer, who failed to win the suit on behalf of his client, and so did other Southern judges who came to opposite conclusions about the place of slavery in the common law.[74] They would have likely agreed, however, on how such decisions ought to be justified. At the same time that Nisbet was attacking the arguments honed by Northern lawyers, he was also affirming his ties to them.

Understanding cases in this way does not justify Nisbet's decisions morally, nor should it lead us to ignore the ideological commitments of the Georgia Supreme Court. But such case law illustrates the way that a lawyerly approach mattered to Southern lawyers, even in politically charged cases. This is not to say that the opinions were neutral, but rather to show that a coherent shared legal cultured allowed for disagreement at the margins.[75] Perhaps the best evidence of the role that formalism played in the court's decisions is that decisions made by Nisbet and his fellow justices, including some that explicitly involved enslaved people, continued to be cited after emancipation and even as recently as 2015.[76]

Other Southern judges shared Nisbet's legalism. Even scholars who focus on the divisiveness of legal debates over the law of slavery have observed that judges and litigants often relied on legal rules in the slave cases they study.[77] To a lawyer such as Nisbet, such rules were not merely

74. See Morris, *Southern Slavery*, 52–55, for a discussion of these cases.

75. Nash goes as far as to argue that Southern courts exhibited "fairness and integrity" in their cases involving black defendants. Nash, "Fairness and Formalism," 99.

76. See, for example, *Berry v. State*, 10 Ga. 511 (1851), which lawyers have cited 287 times, including as recently as 2015. The portion of the case most frequently cited relates to whether newly discovered evidence should lead to a new trial. The case also involved the matter of whether a "negro" could testify. *Berry v. State*, 521. Other cases frequently cited include *Nunn v. State*, 1 Kelly 243 (Ga. 1846) (right to bear arms); *Mitchum v. State*, 11 Ga. 615 (1852) (evidentiary questions and permissible topics for closing argument); *Roberts v. State*, 3 Ga. 310 (1847) (accountability for criminal acts); *Flint River Steamboat Co. v. Foster*, 5 Ga. 194 (1848) (requirements for jury trial); *Potts v. House*, 6 Ga. 324 (1849) (evidence); *Wright v. Hicks* 12 Ga. 155 (presumption of parentage); *Hightower v. Thornton*, 8 Ga. 486 (1850) (equitable power of creditors to corporation); and *Miller v. Cotten*, 5 Ga. 341 (1848) (wills). For more on the contemporary citation of slave cases, see Justin Simard, "Citing Slavery," *Stanford Law Review* 72 (forthcoming).

77. For example, Paul Finkelman has found that, at least before 1840, courts seemed to rely on legal technicality and to enforce slave law in ways that contradicted their sectional interest. Judges analyzed slave transit cases, for example, in terms of the technical field of conflict of laws, and judges in free states granted slave owners permission to travel without having their slaves seized. See Finkelman, *Imperfect Union,* 13, 46, 181; see also Cover, *Justice Accused,* 199, noting that judges "seemed very reluctant to resort to, and thus legitimate, substantial doctrinal innovations that might have made certain cases less a choice between law and morality and more a choice between alternative legal formulations"; and Brophy, *University*, 197–211, discussing Thomas Ruffin, who he finds to be representative of judges in the Antebellum Era because he "revered precedent" and "separated law from

window dressing. Nisbet and his fellow judges were building a legal framework that they saw as rational, refutable, predictable, and even elegant. Slave law's position as part of this culture did not lessen its power; it increased it. By allowing slavery to function within an established legal framework, Nisbet and other judges affirmed ties to the North and integrated their slave economy into a national legal and financial system.

Commercial Practice

These ties appear only abstractly in appellate cases; they appear more clearly outside of the courts, in Nisbet's day-to-day work as a lawyer. Although this routine work relied on the common law foundations established by formal legal rules, it looked very different. Papers from Nisbet's legal practice offer a rare window into the normally hidden world of the Southern commercial lawyer.[78] Surviving materials include extensive correspondence with clients, a diary that occasionally recounts his work, account books from his postwar practice, and other materials accumulated during his career as a lawyer. These incomplete sources cannot provide a comprehensive account of Nisbet's legal work, but their insight into the commercial routine of his practice illustrates the important role that Nisbet and other lawyers like him steeped in American legal culture played in facilitating commercial exchange between the North and South.

Nisbet approached his legal work with energy and alacrity. He developed a solo practice, then a partnership with his brother-in-law, Junius Wingfield, and later, a partnership with his brother, James A. Nisbet,

morality." This separation can also be found in Chief Justice John Marshall's opinions when confronting politically charged issues. See, for example, *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); and *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825).

78. See Friedman, *History of American Law*, 589. But also see Gordon Morris Bakken, *Practicing Law in Frontier California* (Lincoln, NE: University of Nebraska Press, 1991); William H. Pease and Jane H. Pease, *James Louis Petigru: Southern Conservative, Southern Dissenter* (Athens: University of Georgia Press, 1995), 95–115; Thomas D. Russell, "The Antebellum Courthouse as Creditors' Domain: Trial-Court Activity in South Carolina and the Concomitance of Lending and Litigation," *American Journal of Legal History* 40 (1996): 331–64; John Anthony Moretta, *William Pitt Ballinger: Texas Lawyer, Southern Statesman, 1825–1888* (Austin: Texas State Historical Association, 2000), 63–110; and Sally E. Hadden, "DeSaussure and Ford: A Charleston Law Firm of the 1790s," in *Transformations in American Legal History: Essays in Honor of Professor Morton J. Horwitz*, ed. David W. Hamilton and Alfred L. Brophy (Cambridge, MA: Harvard Law School, 2009).

and son, James T. Nisbet.[79] Finally, he established a firm ("Nisbets and Jackson") with his brother, son, and a third lawyer, James Jackson, which continued after Nisbet's retirement in 1870. Nisbet and his partners worked for their neighbors, particularly wealthy planters, whom they assisted with transactions, wills, and estate management.[80] They appear to have devoted the bulk of their practice, however, to assisting creditors from outside the county. Nisbet's network of clients extended throughout the South, to other parts of Georgia, South Carolina, and Maryland.[81] Most surviving correspondence, however, came from creditors who lived in the North, especially in New York, the heart of finance in American commerce.[82]

These clients usually contacted Nisbet because they sought repayment of outstanding loans from debtors in Georgia. For the most part, the loans grew from business transactions in which merchants sold goods to Southern purchasers on credit. Debt was the flip side of Southern material culture. Nisbet worked on behalf of purveyors of musical instruments, hats and caps, "importers of wine, liquors and foreign produce," dealers in "butter, cheese, &c.," "Jobbers in Wooden & Willow Ware, Brooms, Brushes, Cordage, Twine, Mats, and French & German Baskets," "Importers of Brandies, wines and Havana segars, Dealers in fine groceries, and

79. James A. Nisbet attended the Litchfield Law School and was admitted to the bar in 1833. He worked for Nisbet and Nisbet after working for Poe and Nisbet. Later the firm was renamed "Nisbets, Cobb & Jackson." See Southern Historical Association, *Memoirs of Georgia: Containing Historical Accounts of the State's Civil, Military Industrial and Professional Interests, and Personal Sketches of Many of Its People*, vol. 1 (Atlanta, GA: Southern Historical Association, 1895): 576–78. For more on James T. Nisbet, see Lucian Lamar Knight, *Georgia's Landmarks, Memorials, and Legends*, vol. 2 (Atlanta, GA: Byrd Printing Company, 1914), 388.

80. See, for example, William Bullock to E.A. and J.A. Nisbet, January 28, 1853, DRML (discussing "sale of negroes" in Drayton, GA); and H. Green to E.A. and J.A. Nisbet, Feb. 17, 1859, DRML (discussing repossession of "a negro woman named Ann and her children" to satisfy a debt).

81. See A.G. Gibson to E.A. Nisbet, September 9, 1857, DRML (Barnesville, GA); A.C. Wyly & Co. to E.A. and J.A. Nisbet, May 3, 1860 (Atlanta, GA); and Ulna S. Lawton to E. A. Nisbet, June 20, 1854 (Lawtonville, SC).

82. For information on the power of New York businessmen in the nineteenth century, see Sven Beckert, *The Monied Metropolis: New York City and the Consolidation of the American Bourgeoisie, 1850–1886* (Cambridge: Cambridge University Press, 2003). Nisbet's records also contain correspondence with clients in other Northern hubs of commerce such as Baltimore and Philadelphia. See, for example, E.H. Stabler & Co. to E.A. and J.A. Nisbet, January 6, 1860, DRML (Baltimore, MD); Prince I. Patton & Co. to J.C. Plant, January 10, 1854, DRML (debt on behalf of a company based in Philadelphia); and William Goodrich & Co. to E.A. and J.A. Nisbet, January 9, 1855, DRML (request from Philadelphia to collect a debt of $156.65); and L. Haywood to E.A. and J.A. Nisbet, January 31, 1860 (request related to question for Boston-based chair company).

tobacco," and "Importers & Jobbers of Dry Goods."[83] These products allowed plantation owners to project their wealth and power and distinguish themselves from their neighbors; they helped transform "provincial American strivers" into "English country gentlemen."[84]

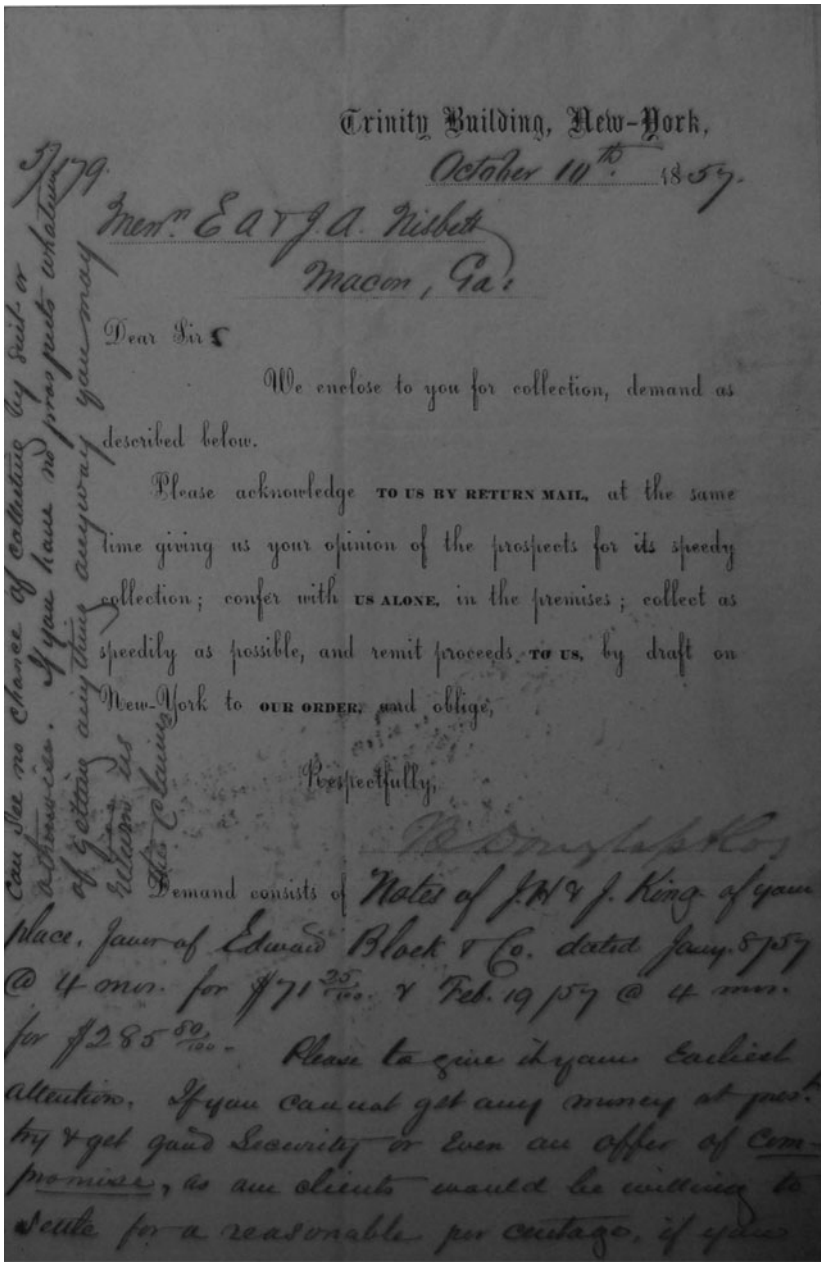
As Nisbet's diverse set of clients illustrates, the merchandise and debts that helped sustain Southern plantation culture traveled across sectional boundaries. Just as in other sectors of the nineteenth-century American economy, the risk created by far-flung transactions was mediated by law and lawyers.[85] Northerners came to Nisbet because they depended on Southern markets and because the national economy depended on debt to function. Scarcity of cash and the Southern agricultural economies' cyclical nature meant that most Northern businesses sold on credit.[86] Even in the second half of the nineteenth century, distance hindered collection. In a market full of impersonal and far-flung transactions, businesses encountered trouble tracking down debtors; even when they found them, they could not rely on personal pressure as a means to enforce payment. Moreover, many of the technologies that later helped to speed up communication and regulate the financial markets—credit reporting agencies,

83. Firth, Pond, & Co. to E.A. and J.A. Nisbet, September 15, 1856, DRML (music company); Prince I. Patton & Co. to J.C. Plant, January 10, 1854 ("Hat and Cap Manufacturers"); B. Douglas & Co. to E.A. and J.A. Nisbet, October 10th, 1857, DRML, redeeming note on behalf of Edward Block & Co., see F.G. Duffield, "The Merchants' Cards and Tokens of Baltimore," *The Numismatist* 20 (1907): 65, 68 n.13, discussing importing business; J.S. Martin to E.A. and J.A. Nisbet, December 31 1860, DRML ("butter and cheese" merchants requesting redemption of note for $441.70); and Bradley Brothers to Nisbet and Nisbet, November 15, 1860, DRML ("Importers of Brandies"). Bradley Brothers apparently did a "large and apparently prosperous business … principally with the merchants of the Southern States, and on a credit"; see George P. Allen, *A History and Genealogical Record of the Alling-Allens of New Haven, Conn., The Descendants of Roger Alling, First, and John Alling, Sen., From 1639 to the Present Time* (New Haven, CT: Press of the Price, Lee, & Akins Co., 1899), 187. See also Allen McLean & Bulkley to E.A. and J.A. Nisbet, Sepember 9, 1859, DRML ("Importers & Jobbers").

84. Freehling, *Road to Disunion,* 27. As Daniel Lord Smail has noted in a much earlier period, goods such as these could serve as "sources of dignity" and vital "markers of identity." Daniel Lord Smail, *Legal Plunder: Households and Debt Collection in Late Medieval Europe* (Cambridge, MA: Harvard University Press, 2016), 3–4.

85. See Jonathan Levy, *Freaks of Fortune: The Emerging World of Capitalism and Risk in America* (Cambridge, MA: Harvard University Press, 2012), 1–6, 39–44.

86. For a discussion of the importance of credit to the Southern economy see Sven Beckert, *Empire of Cotton: A Global History* (New York: Vintage, 2014), 219–24; and Harold D. Woodman, *King Cotton and His Retainers: Financing and Marketing the Cotton Crop of the South, 1800–1925* (Lexington: University of Kentucky Press, 1968), 30–42, 132–38.



Trinity Building, New-York,
October 10th 1857.

3179.

Messrs E. & J. A. Nisbet
Macon, Ga.

Dear Sirs

We enclose to you for collection, demand as described below.

Please acknowledge TO US BY RETURN MAIL, at the same time giving us your opinion of the prospects for its speedy collection; confer with US ALONE, in the premises; collect as speedily as possible, and remit proceeds TO US, by draft on New-York to OUR ORDER, and oblige,

Respectfully,

B. Douglas & Co

Demand consists of Notes of J. W. & J. King of your place, favor of Edward Block & Co. dated Jany. 8 1857 @ 4 mos. for $71 25/100 & Feb. 19 1857 @ 4 mos. for $285 50/100. Please to give it your earliest attention. If you cannot get any money at present try & get good Security or even an offer of Compromise, as our clients would be willing to settle for a reasonable per centage, if you can see no chance of collecting by suit or otherwise. If you have no prospects whatever of getting any thing anyway you may return the Claim to us

https://doi.org/10.1017/S0738248019000300 Published online by Cambridge University Press

national banks, the railroad, and the telegraph—were still developing.[87] Especially given the unpredictable nature of the market, the work of collection ensured that this debt-fueled economy functioned. And the work of collection was often the work of lawyers.

Because the debt collection process was so vital to a functioning economy, creditors printed forms that they used to request the collection of notes. A letter from B. Douglas & Co., reprinted in figure one, is illustrative. The printed portion of the letter contains standard note-collection boilerplate, requesting Nisbet to acknowledge receipt of the letter, "give[] [his] opinion of the prospects for [the note's] speedy collection" and to "collect as speedily as possible."[88] The handwritten portion offers more detail, explaining the parties involved "J.H. and J. King," the debtors, and "Edward Block & Co.," the creditors, and noting the willingness of the creditors to "settle for a reasonable percentage."[89] Other forms like this came from Philadelphia, Baltimore, and elsewhere along with numerous handwritten requests.[90] The relatively small sums at stake confirm the prevalence of debt collection and the material culture it supported. In 1858, for example, Nisbet received a letter from D. Devlin & Co., New York merchants specializing in selling clothing to men and boys, asking him to redeem a note for just $30.[91] A standardized legal approach made it possible for creditors to collect across borders, even for small amounts.

Often, the creditor wrote directly, but other customers came to Nisbet from lawyers who were part of the financial infrastructure that generated benefits for slave owners. Attorneys would contact Nisbet, requesting the collection of loans on behalf of their clients, and they not only coordinated the work but also the payment.[92] Nisbet sent the money he recovered to a

87. See Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815–1848* (Oxford: Oxford University Press, 2007), 211–42, 563–69, 690–98; Woodman, *King Cotton*, 273–74.

88. B. Douglas & Co. to E.A. Nisbet & J.A. Nisbet, October 10, 1857, DRML.

89. Ibid.

90. See, for example, W.M. Goodrich & Co. to E.A. and J.A. Nisbet, January 9, 1855, DRML, writing from Philadelphia on behalf of Russel & Scott for collection of a note worth $156; Jabez D. Pratt to E.A. and J.A. Nisbet, February 9, 1859, DRML, writing from Baltimore on behalf of Egerton, Dougherty, Woods, & Co., operators of a steam-powered sugar refinery for collection of a note worth $446.43; Baltimore Board of Trade, *Statistics of the Trade and Commerce of Baltimore for the Year Ending December 31, 1857* (Baltimore: James Young, 1858), 34; Robertson, Hudson, & Pulliam to E.A. & J.A. Nisbet, December 25, 1857, DRML, documenting request of New York dry goods merchants; and H. Wilson, comp., *Trow's New York City Directory for the Year Ending May 1, 1857* (New York: John F. Trow, 1857), 699.

91. See D. Devlin & Co. to E.A. and J.A. Nisbet, October 19, 1858, DRML.

92. Jabez D. Pratt to E.A. and J.A. Nisbet, February 9, 1859, DRML.

lawyer, who would then pass it on to his client.[93] Work also flowed from collection agencies. Nisbet developed a strong relationship with the New York based Mercantile Agency of Dun, Boyd, & Co. Famous for their later work as credit reporters under the name Dun & Bradstreet, the agency also redeemed debts, and was deeply embroiled in Southern markets.[94] Nisbet worked regularly for them, collecting, notes held against Georgia residents for New Yorkers.[95] Referrals from agencies and other lawyers linked creditors with reliable lawyers in distant locations.

Lawyers like Nisbet actively cultivated ties to Northern creditors and their agents, advertising their ability to use not just law but also a meticulous out-of-court approach to debt collection to track down money in the South.[96] As their correspondence with Nisbet indicates, Northern merchants relied on their lawyers to navigate both the legal rules and the nonlegal obstacles that made debt collection difficult.[97] Lawyers understood how notes worked and how to redeem them in court, but they also lived in close proximity to debtors and could pressure, bargain, and threaten,

93. See Ward, Jackson, & Jones to E.A. and J.A. Nisbet, October 14, 1859, DRML, writing on behalf of their clients, the Planter's Bank of Savanah, Georgia.

94. For the history of R.G. Dun & Co., see "D&B," in *International Directory of Company Histories*, vol. 121, ed. Derek Jacques and Paula Kepos (Detroit, MI: St. James Press, 2011); see also Scott Sandage, *Born Losers: A History of Failure in America* (Cambridge, MA: Harvard University Press, 2005). The *New York Times* published a letter from Dun, Boyd, & Co. to its subscribers, in which the firm tried to reassure Northern investors in Southern markets: "The tenor of the advices which reach us from all points South warrants us in saying that no one need doubt the honorable intentions of the Southern merchant, and that his indebtedness will be faithfully discharged as promptly as events permit. There will be delay in settlement, but this delay will not arise from any premeditated cause or present desire to postpone payment. The reclamations on cotton last Spring and at present have had their influence in producing a stringent money market." "The Political Crisis and Commerce: Failures of 1860 Compared with 1857—from the Office of the Mercantile Agency of Dun, Boyd & Co.," *New York Times*, January 3, 1861, 3.

95. See, for example, Dun, Boyd & Co. to E.A. and J.A. Nisbet, December 30. 1859, DRML; and Dun, Boyd, & Co. to E.A. and J.A. Nisbet, July 10, 1860. His work for Dun, Boyd, & Co. resumed after the war. See E.A. Nisbet, Ledger, 1865–1870, DRML.

96. See John Merryman to James T. Nisbet, April 29, 1855, DRML, noting meeting in the "Spring of 1853;" Letter to E.A. and J.A. Nisbet, March 27, 1860, DRML, introducing secretary of Humboldt Insurance in Newark, NJ; and John S. Martin to E.A. Nisbet, December 31, 1860, sending note for collection worth $441.70 and noting that he was referred by a fellow New Yorker. See Hopkins, Allen, & Co. to E.A. & J.T. Nisbet, April 24, 1856, DRML, writing that they had "received your circular and [were] honored with a prominent place among your references in this city."

97. For detailed analysis of debt collections practices in court, see Russell, "Antebellum Courthouse," 331–64.

something that merchants found difficult to accomplish from a distance.[98] Lawyers' standardized approach to debt collection allowed them to work effectively, even with clients hundreds of miles away. Although the legal rules related to debt redemption remained an important backdrop to the work that Nisbet and other Southern lawyers undertook, much of Nisbet's debt collection work took place outside the courts.[99] Training and practice in legalism had prepared Nisbet to approach the problem of debt collection methodically and made him reliable enough for hundreds of clients to trust him to pursue debtors and make settlements, even away from the watchful eye of a judge. Lawyers like Nisbet thus extended the shadow of the law, handling cases that could have overwhelmed the courts.

Just as his work on the Georgia court had helped tie Georgia to Northern lawyers, Nisbet's commercial practice, premised on the ties of a national legal culture, had a clear place within the context of a national economy reliant on slave production. Recent scholarly work on the history of Southern capitalism has highlighted the importance of the Southern economy to the development of American commerce. We now know that slaveholders pioneered accounting methods, that Southerners "[strove] for technological advancement," that the Southern economy shared financial links with national and international markets and that it helped to develop these markets, that enslaved people served as loan collateral and were even securitized, that slave-grown commodities were key to the Northern economy, and that the slaveholder demand for products encouraged Northern industrial activity.[100] In short, plantation owners were among the most

98. See Advertisement for Nisbets & Jackson, Attorneys at Law, November 1, 1872, DRML. 217.

99. Nisbet's papers and books from the 1850s to the 1870s demonstrate numerous examples of out-of-court negotiation. Clients frequently preferred settlement and expressed their willingness to compromise, or at least delegated the decision on whether to settle to Nisbet. Only rarely did cases land in federal or state court. Suit actually seemed to be, as Nisbet put it in an advertisement, "the last alternative." See, for example, G.W. Robert to E.A. Nisbet, July 27, 1855, DRML discussing settlement; Copy of E.A. and J.A. Nisbet to B.A. Fahnstock, Hull & Co. October 24, 1859, DRML, reporting on settlement negotiations; Allen, McLean, & Bulkley to E.A. and J.A. Nisbet, September 9, 1859, DRML, noting "willingness to accept … settlement"; Agency People Bank to E.A. & J.A. Nisbet, March 18, 1858, DRML, instructing Nisbet to give debtor "as much time as [he could] without inconvenience or risk"; John Priestel, Jr. to E.A. Nisbet and Junius Wingfield, July 26, 1848, DRML, discussing prospects of settlement; and John S. Martin to E.A. and J.A. Nisbet, Dec. 31, 1860, encouraging firm to "use [its] best judgment" in redeeming note."

100. See Seth Rockman, "The Future of Civil War Era Studies: Slavery and Capitalism," *Journal of the Civil War Era* 2 (2012), http://journaloftheciviwarera.org/forum-the-future-of-civil-war-era-studies/the-future-of-civil-war-era-studies-slavery-and-capitalism/ (accessed April 30, 2019); Caitlin Rosenthal, *Accounting for Slavery: Masters and Management*

https://doi.org/10.1017/S0738248019000300 Published online by Cambridge University Press

successful businessmen in America and the South was "easily one of the richest and most developed regions of the world."[101]

Slave owners or merchants on the receiving end of a visit from Nisbet may not have appreciated his collection efforts, but without the presence of Nisbet and lawyers like him, Northern firms would have been much less likely to risk lending money to Southerners who desired Northern goods. By facilitating collection, lawyers encouraged Northern businessmen to sell their goods in Southern markets and helped to provide the fruits of Northern manufacturing and importation to Southern slaveholders. Routine commercial collection helped make slaveholding pay even as contentious cases threatening to undermine the institution—and the economic framework that supported it—gained traction in court.

A practice focused primarily on work for businessmen outside the state earned Nisbet a lot of money. According to his relatives, he accumulated a fortune of $100,000 before the Civil War.[102] This sum put Nisbet in the upper echelon of Southern elites. An average Southern estate in 1860 was worth just $3,978, and an average Northern estate was worth only $2,040.[103] Although Nisbet's debt collection practice made him wealthy, he viewed this work as a relatively unimportant aspect of his professional

(Cambridge, MA: Harvard University Press, 2018); Aaron Marrs, *Railroads in the Old South: Pursuing Progress in a Slave Society* (Baltimore, MD: John Hopkins University Press, 2009), 12; John Majewski, *Modernizing a Slave Economy: The Economic Vision of the Confederate Nation* (Chapel Hill: University of North Carolina Press, 2014); Edwards, *People and Their Peace*, 78–79; Richard Holcombe Kilbourne, Jr., *Debt, Investment, Slaves: Credit Relations in East Feliciana Parish, Louisiana, 1825–1885* (Tuscaloosa: University of Alabama Press, 1995); and Bonnie Martin, "Slavery's Invisible Engine: Mortgaging Human Property," *The Journal of Southern History* 76 (2010): 817–66. Beckert, *Empire of Cotton*, xvi–xviii. Although these questions have generated significant attention recently, they have deep roots; see Eric Eustace Williams, *Capitalism and Slavery* (Chapel Hill: University of North Carolina Press, 1994 [originally published in 1944]); and Douglass C. North, *The Economic Growth of the United States, 1790–1860* (Englewood Cliffs, NJ: Prentice–Hall, 1961), 101–21.

101. J. William Harris, "Preface," in *Southern Society and its Transformations, 1790–1860*, ed. Susanna Delfino, Michele Gillespie, and Louis M. Kyriakoudes (Columbia: University of Mississippi Press, 2011), 1–8; Robert E. Wright, "Corporate Entrepreneurship in the Antebellum South," in *Southern Society and its Transformations, 1790–1860*, ed. Susanna Delfino, Michele Gillespie, and Louis M. Kyriakoudes (Columbia, MS: University of Mississippi Press, 2011), 197–216: 208.

102. E.A. Nisbet, Diary, November 28, 1869, annotated by Junius W. Nisbet, DRML July 7, 1927.

103. Lee Soltow, *Men and Wealth in the United States, 1850–1870* (New Haven, CT: Yale University Press, 1975), 65.

life.[104] The cases in private practice that interested him tended to be those that involved abstruse doctrinal questions, rather than the collection work that occupied a significant portion of his time as a lawyer.[105] Nor did Nisbet indicate that he saw any connection between his collection work and the maintenance and development of the South's slave society or the American economy. Legalism may have prepared Nisbet to become a successful debt collector, but its focus on difficult questions of law blinded him to the significance of such straightforward work.

War and Reunion

As Nisbet continued his debt collection practice, sectional tensions heightened. Nisbet, however, never hid his proslavery views from Northern clients. He worked closely with Northern merchants in the 1850s and 1860s, even as secession became more likely and as Nisbet grew to support it. Nisbet's ties with the North may have encouraged his early Unionist leanings, but they did not prevent him from vigorously supporting secession when he joined the cause. During the war, Nisbet's correspondence with Northern clients stopped, and his legal practice slowed dramatically. He and other Southern lawyers, however, continued to practice using the same forms and addressing many of the same legal issues as before the war.[106] Nisbet also took time away from his law office to sell bonds to fund the Confederate government and to run—unsuccessfully—for governor of Georgia.[107]

Despite his support for secession and the Confederate government, Nisbet had little difficulty rekindling ties with Northern clients after the war ended. In August 1865, only three months after the Confederacy surrendered, Nisbet's legal correspondence with Northerners resumed: the collection department of the Office of the Mercantile Agency of

104. Ibid. He had returned to "the exciting strife of the Bar," only because his family needed the money. E.A. Nisbet, Diary, February 7, 1870, DRML; and E.A. Nisbet, Diary, December 10, 1853, DRML.

105. See, for example, E.A. Nisbet, Diary, December 29, 1853, DRML, in which Nisbet discusses his pride in applying a difficult legal doctrine. He enjoyed such cases so much that he did not even mind losing them. E.A. Nisbet, Diary, March 10, 1854.

106. William M. Robinson, *Justice in Grey; A History of the Judicial System of the Confederate States of America* (Cambridge, MA: Harvard University Press, 1941), 83, 140.

107. Ezra J. Warner and W. Buck Yearns, *A Biographical Register of the Confederate Congress* (Baton Rouge: Louisiana State University Press, 1975), 148; and James Horace Bass, "The Georgia Gubernatorial Elections of 1861 and 1863," *The Georgia Historical Quarterly* 17 (1933): 176–77.

Philadelphia wrote, asking about the status of two cases.[108] Other letters followed: from the Bankers and Government Loan Agents in New York offering to serve as agents, from another New Yorker with an attempt to settle a case, from still others looking to collect money, and from Washington, D.C., following up on a sale of land.[109] Nisbet's surviving account books were soon filled with the long-distance debt work that characterized his earlier practice. The Civil War did little to change the demand for the legal facilitation of interstate commerce.

Nisbet, who had lost much of his estate during the war, resumed his practice reluctantly.[110] He was afraid that reckless decisions by newly appointed Republican judges would threaten the legal order that he had helped build.[111] But the money was still good, and his skepticism turned to pleasant surprise when he began winning cases. He even found the "Radical" circuit judge he argued before in the Federal District Court to be "fair, unpretending and respectable as to ability."[112] As it had for most of his professional life, a devotion to legalism offered a lucrative way for Nisbet to overcome political differences. As long as judges and lawyers met the standards of professionalism—as long as they followed legal rules and continued to speak a familiar legal language—a unified American legal culture would continue to function, even without a moral core. As for Nisbet, he rebuilt his practice and left his heirs nearly $25,000.[113] The sum dwarfed the estate of the average Georgian, who, according to the 1870 census, held only $831 of real and personal property.[114]

108. R.G. Dun & Co. to E.A. and J.A. Nisbet, August 28, 1865, DRML. Other lawyers also quickly resumed correspondence. See Max Bloomfield, *American Lawyers in a Changing Society, 1776–1876* (Cambridge, MA: Harvard University Press), 298–301.

109. Henry Hews & Co. to E.A. and J.A. Nisbet, December 20, 1865, DRML; Letter to E. A. and J.A. Nisbet, October 30, 1865, DRML; R.G. Dun & Co. to E.A. and J.A. Nisbet, October 20, 1865, DRML, writing on behalf of John F. Raithbone; and Letter to E.A. and J.A. Nisbet, January 29, 1866, DRML. Nisbet's firm was also dealing with the consequences of war for his clients. See, for example, Andrew J. Hansell to E.A. Nisbet, July 5, 1866, DRML, discussing use of Confederate currency.

110. E.A. Nisbet, Diary, November 28, 1869, DRML.

111. E.A. Nisbet, Diary, December 15, 1869, DRML.

112. E.A. Nisbet, Diary, May 3, 1870, DRML.

113. See E.A. Nisbet, Diary, November 28, 1869, DRML, discussing loss of "the greater part of" his estate during the war. According to his relatives, Nisbet's property was valued at $25,000 at his death. See E.A. Nisbet, Diary, November 28, 1869, annotated by Junius W. Nisbet, DRML.

114. See Joshua L. Rosenbloom and Gregory W. Stutes, "Reexamining the Distribution of Wealth in 1870," Working Paper 11482 (National Bureau of Economic Research, 2005), http://www.nber.org/papers/w11482.pdf (accessed April 30, 2019).

Understanding the place of Nisbet's work within the context of a legalistic profession devoted to commercial routine contextualizes the divisive and instrumental law of slavery and economic development on which many scholars focus. Historians as diverse as Morton Horwitz and Peter Karsten are not wrong to give attention to the doctrine-shifting, politically charged cases found in nineteenth-century jurisprudence.[115] Their scholarship has helped to explain the motivation and effects of legal decision making. Yet these cases were decided amidst many others whose political stakes were much less clear, and whose decisions were often couched in a legalistic language intelligible to lawyers across the country. For every judicial opinion about a runaway slave or slave hiring, judges considered dozens of routine commercial cases, and for every one of those, lawyers collected hundreds of debts. The maintenance of slavery depended on the slave codes and fugitive slave laws that have garnered the most attention from historians, it is true. And there is no doubt that doctrinal shifts helped pave the way for commercial exchange. The day-to-day work of Southern lawyers, however, is a key but long overlooked element of such maintenance and exchange. This work helped keep business moving, even if its practitioners' legalism prevented them from seeing its significance.

Near the end of his life, when Nisbet described his profession's development, he spoke proudly of the professional bar that he and his colleagues had built. Lawyers, he believed, came to success through "hard work, diligent study, persistent energy" and "integrity."[116] They had developed an "*esprit du corps* of kindliness as well as of pride & honor" and made the legal profession "the most honorable … amongst men."[117] Northern lawyers, even those whom Nisbet might have termed members of the Radical Party, would have agreed. Legalism and the embrace of routine commercial practice allowed them to work together and to agree on a conception of the profession's value and its service of right and justice, isolated from its social and economic effects.

115. Horwitz, *Transformation*; and Karsten, *Heart vs Head*.
116. E.A. Nisbet, Diary, October 8, 1870, DRML.
117. Ibid.