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Although antebellum southerners referred to slavery as "our peculiar institution," it was neither peculiar nor an institution. Nor was it, as southern political economists in particular tried to claim, merely one of several alternate forms of economic organization. To the contrary, as the abolitionists perceived and as much of the southern intelligentsia would come to proclaim, the master-slave relation constituted the foundation of southern society—the foundation of the South’s polity, economy, jurisprudence, and moral values.

In that sense southern society as a whole ranked as "peculiar"—that is, as different. For although slavery continued to exist in Cuba and Brazil, nowhere else during the modern era had it extruded a ruling class strong enough to shape society in its own image. And even in the Old South the slaveowners found themselves enmeshed in a world market, at the center of which lay an antithetical system of free labor, and a developing Atlantic polity and system of moral values based upon the principle of man’s property in himself. Inside
the South the need to defend slavery drove the proslavery intelligentsia from attempts at accommodation with the world of the trans-Atlantic bourgeoisie to a desperate effort to project an alternate world order at once supremely reactionary and necessarily new. As Lewis P. Simpson has observed with his customary insight:

Such a society, I have suggested, would not have been prior to any other society; it would have been more nearly a totally novel one. It would have required new modes of thinking and feeling and new modes of literary expression. A new kind of literary mind.¹

The inner conflict alluded to by Simpson, here and in his other fine studies, rent the South. Among other manifestations it compelled a bifurcation of southern law, as if to render the economy unto Caesar and social relations unto God. Mark Tushnet demonstrates in his seminal book, *The American Law of Slavery*,² that the jurists struggled manfully to isolate the master-slave relation from common-law considerations of contracts and torts, which concerned relations among free whites. In the end for reasons he delineates, they failed, or rather, they scored only partial successes that exposed and exacerbated the deep contradictions in the southern social order.

The attempt to make the southern legal system conform to a slave society that was in, but not of, a trans-Atlantic bourgeois world, occurred roughly during the first half of the nineteenth century when the role of the legal system was emerging as a central issue in American economic development. The South had a special advantage in meeting the challenge to reconcile the claims to scientific status of the emergent disciplines of political economy and jurisprudence. In Jacob Nunez Cardozo of South Carolina and George Tucker of Virginia, the South boasted two of the best economic brains in the United States.³ And a southern legal establishment that ranged from St. George Tucker down to Thomas Ruffin and John Belton O'Neall had its own claims to distinction.

We do not yet have an adequate history of antebellum southern law apart from the law of slavery and, to some extent, the criminal law. Most historians of antebellum American law (an outstanding group of scholars today) have had little to say about the South and do not seem to have asked themselves

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to what extent slavery, considered as a social system, shaped the development of commercial, contract, and tort law. Even Richard B. Morris, whose studies remain peerless in their particular sphere, has concerned himself primarily with limited questions of labor legislation and economic regulation. Hence it is not yet possible to assess for the South the specific role of the law in southern economic growth. Tushnet, however, has posed such questions in his book, and Thomas D. Morris, in particular, has begun to examine the impact of slavery on the law of torts. To the extent that bifurcation could be effected, southern law, apart from the law of slavery or "Negro law," could be made to resemble northern, with the courts of each section interdependent in the working-out of the common law. Matters did not go smoothly, but we do not yet know the extent or specific content of the ensuing difficulties. Our immediate and more modest concern lies with the bearing of southern economic thought on the judicial process in the South.

Both southern political economy and southern law, like northern economy and northern law, bore the firm imprint of the political economy and law of Great Britain. The decades following the Revolution failed to yield as sharp a break in either political economy or law—or, for that matter, in economic relations—as the conquest of American independence might have seemed to promise. Similarly, those decades promoted the illusion that North and South might develop harmoniously within a single legal and intellectual framework. Not until the Missouri Compromise and the crisis of nullification did the long evolving incompatibility of the interests of the two regions, and the potential harshness of the conflicts between them, become inescapable. By the 1830s, as the emergence of abolitionism and the proslavery argument testified, a noticeable number of northerners and southerners were viewing the differences between the regions as outweighing the similarities and were identifying slavery as the decisive issue. Earlier, there had been many reasons for viewing their respective developments as compatible and indeed complementary within a single political, legal, and economic system. In retrospect, it is easy to see that the protection of slavery as the foundation of a distinct society strongly influenced southern views and practices. But until the 1820s and 1830s, the specific nature of northern development masked the depth of the structural and ideological divergence between the two regions.

Our preliminary exploration of the relation between southern political economy and southern law rests upon the judgment that, ultimately, the dominant social relations of southern slave society blocked the development of southern political economy, while compelling the bifurcation of southern law identified by Mark Tushnet. During the late eighteenth and early nineteenth centuries, the full significance of slavery for southern society remained hidden. The southern economy, like the northern, remained predominantly

agricultural, but with an export sector dependent largely on a nonsouthern commercial bourgeoisie. Southern jurisprudence could attempt to remove slavery from the sphere of the market relations that constituted the point at which law and political economy were most likely to intersect. Slavery, the dominant form of labor, was supposed to belong to domestic relations. Reality proved messier than this myth. The myth, nonetheless, approximated reality closely enough to make the theoretical distinction plausible and to permit southern thinkers considerable latitude to follow the advanced theoretical developments without directly calling into question the social relations upon which their society rested. Their work did not even depart radically from that of their northern colleagues, who were also operating within the assumptions of merchant capital—in contrast to the assumptions of industrial capitalism—and who also harbored deep but, as events would prove, different fears concerning the labor question. In fact, southern political economists, as individuals, never perfectly represented the norm of southern society, not qualifying as "good old boys." The same may be said of most intellectuals, but the southern political economists, in their diversity and atypicality, strikingly represent the international culture of port cities that characterized the Atlantic world of merchant capital. Like the commercial centers, they both sank roots in their society and were not of it, mediated between different worlds and different discourses. But whereas northern political economists and the southern bar came increasingly, over time, to be integral members of their societies, the southern political economists, like southern political economy itself, remained tangential. Their commitment to southern society shaped their work and led, ultimately, to its deadlock; just at the point at which northern political economists were moving into the role of policy makers.

No more in the North than in the South did law and political economy proceed precisely in tandem. Yet as Morton J. Horwitz has cogently argued, during the first third of the nineteenth century, eighteenth-century notions of inescapable moral dimensions of legal relations gave way to an increasingly impersonal and, ultimately, formalistic understanding of the law: "Law, once conceived of as protective, regulative, paternalistic, and, above all, as a paramount expression of the moral sense of the community, had come to be thought of as facilitative of individual desires and as simply reflective of the existing organization of economic power." Horwitz traces this development by investigating changing attitudes towards water rights, insurance, and related matters. His argument rests overwhelmingly on examples drawn from the North, and we have no comparable study for the South. But since the core of the argument depends upon changing attitudes towards contracts, it offers the starting point for a rough comparison. Recent work suggests that the 1820s did, in fact, constitute the watershed in the emergence of a wage labor force and factory production in New England. Thus we may provisionally assume

an intimate relation between the legal developments Horwitz discusses and the beginnings of industrial capitalism and its special labor problems in the North. However much northern law and political economy, like their southern counterparts, had sought to contain the labor question within the vestiges of paternalism and a community ethos, the rise of industrial capitalism, with its inevitable corollary of a landless, wage labor force, shoved northern thinkers irreversibly into new paths.

The leading southern jurists and political economists had no call to take second place to their northern counterparts. But the disembedding of the labor question from its safe domestic enclaves confronted them with a quandry and a roadblock. In effect, their commitment to slavery—or, the commitment of those who foresaw the demise of slavery to the society to which they belonged—forced them to continue to separate problems that their northern counterparts increasingly sought to homogenize. Southern political economists, even such a staunch proslavery advocate as Louisa S. McCord, could remain attached to liberal political economy as expressed by writers like Garnier and Bastiat so long as it was understood to apply to market relations in human laborers rather than in labor-power. But serious political economists like T. R. Dew, who envisaged the withering away of slavery in response to the challenge of economic development in general and industrialization in particular, had increasing difficulty in applying their work to the specific conditions of their own society, at least on terms that the majority of their fellow southerners could accept.

The forbidden subject remained the specifics of labor relations under conditions in which they understood development to require a market in labor-power and social order to require the perpetuation of slavery. They and others could argue about the social consequences of the prevailing form of labor, as for example in the treatment of Malthus discussed below; but increasingly they had trouble with the idea of value as the cornerstone of theories of political economy. They could not, in short, accept the subjective theory of value that equated value with market price without directly threatening the proslavery ideology; they could not continue to defend an objective theory of value without exiling themselves from what appeared to be the cutting edge of their discipline. In practice, southern political economists joined their northern counterparts in embracing the subjective theory and in promoting the new view of the law that encouraged economic development. But this new view logically led those who held it to reject, together with the objective theory of value, the southerners' moral condemnation of the free-labor system as a heartless abandonment of laborers to misery and starvation, and the southerners' celebration of slavery as a paternalistic system of protection for laborers. For the subjective theory of value proclaimed the facilitation of individual desires as the reflection of natural law, as well as of prevailing economic relations. Since the condition of enslavement contradicted the legitimacy of the expression of the individual desires of the majority of laborers, southern political economists faced a dilemma: either the slave should be seen as an independent economic
agent and should, accordingly, be liberated and transformed into a proletarian, free to sell his or her labor-power in conformity with the laws of the market, or the slave should be seen as a thing—a simple unit of fixed capital to be bought and sold like any other non-human commodity.

Living intimately with slaves, southern political economists knew better than to accept the latter view; living intimately with others strongly committed to a slave society, they knew better than to accept the former, except as a theoretical projection for some distant future. The older paternalistic ethos had masked the starkness of the choice by proclaiming the virtues of hierarchy and dependency. Even after the Revolution and the triumph of a republican ideology, many in the North as well as the South had persisted in viewing many kinds of labor relations as domestic matters. The discrediting of that compromise confronted the southerners with the contradictions within their own views. In this perspective, it should hardly appear surprising that the period that witnessed the beginnings of significant industrialization in the North, the triumph of the subjective theory of value in political economy and jurisprudence, and the growing formalism of the law itself, also witnessed the emergence of the militant proslavery argument in the South. In effect, the proslavery theorists picked up the relay from the southern political economists, who were doomed to choose between marginality in political economy or marginality in southern society.

Southern jurists had faced variants of this problem from the start. The dual character of the slave as chattel and as person had posed the issue sharply. Southern slave law developed in response to it or as an attempt to come to terms with it. The extreme cases pertained to such dramatic occurrences as the master's murder of a slave, the slave's murder of a master, or murder among slaves. One who could kill with intent was capable of intent—had a will—and required appropriate punishment. Thus, in the famous juridical phrase, the slave was not in fact in the condition of a horse; the slave's humanity had to be recognized despite all legal fictions. The southern bar wrestled with these problems and others. But by the 1820s, especially in response to the growing sophistication of laws of the market and to the growing practice of hiring out slaves, the questions of the agency of slaves and the liability of masters became more complex and more common.

An illustration arose in cases in which slaveowners brought suit against those to whom they had rented slaves for damages in connection with accidents to the hired slaves. Both the high court of North Carolina, led by Thomas Ruffin, and the high court of Georgia, led by Joseph Lumpkin, rejected the fellow-servant rule as inapplicable in slave cases. But whereas Ruffin invoked a contract rationale to deny damages to the slaveowner, Lumpkin offered a confused version that virtually set it aside. Like Ruffin, he also rejected a tort rationale, but unlike Ruffin he awarded damages on the grounds that "humanity to the slave" required that he be given special protection by those responsible for him at the moment. Lumpkin thereby demonstrated that slavery imparted a special paternalistic sensibility to the law, but he failed
to notice that it threatened to play havoc with the laws of contracts and torts.' Ruffin's more sophisticated ruling raised problems of a different order.

Ruffin ruled that the price at which the slave was hired-out included the cost of his insurance. In so doing, he ruled in accordance with basic economic theory. None of the South's leading political economists—Thomas Cooper, T. R. Dew, Cardozo, Tucker, or others—would have contradicted him. These political economists were also college educators who taught many of the leaders of the southern bench and bar. Their theoretical teachings pointed toward the separation of the master-slave relation from the business aspects of slavery, which were to be settled according to the practices and attitudes of the capitalist marketplace. These attitudes toward slavery as business reflected the attitudes towards market transactions in general. Thus, Thomas Cooper, in annotating Justinian's Institutes, advanced the seller's knowledge of the hidden defects of a slave as an example of the illegitimacy of caveat emptor. But it is also possible that commitment to the values of a slave society led at least some southern political economists to persist in eighteenth-century attitudes longer than their northern counterparts. When Cooper opposed cavear emptor in 1818, he did not depart radically from prevailing views of North or South; when he did so again in 1841, he placed himself in opposition to dominant northern views and, signally, praised the South Carolina bench for having "revolted at" the doctrine.

Yet, the southern political economists, who had themselves been trained at law and who in some cases qualified as accomplished legal scholars, had little to say about the bearing of political economy on the problems that slavery created for the judicial system and contributed, if indirectly, to the tendency to categorize slave law apart from market questions. Thus, the southern jurists had no incentive to turn to southern political economists for guidance since those political economists held views almost indistinguishable, in this respect, from their northern counterparts. All stood comfortably within the range of doctrine that derived from Adam Smith and extended from the followers of Ricardo on the one side to the followers of Lauderdale and Malthus on the other.8

Southern political economists had a special reason for rejecting traditional notions of just price and equity in favor of a will theory of contract and the further separation of contract law from extramarket moral considerations. If the master-slave relation was inherently paternalistic—and even the political economists celebrated slavery as the unity of capital and labor9—the economy

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7. See Gorman v. Campbell, 14 Ga. 137 (1853); Ponton v. Wilmington & Weldon Ry. Co., 51 N.C. (6 Jones) 245 (1848). See also Tushnet, supra note 2 (Tusnett's analysis of Gorman and Ponton); T. Morris, supra note 4, at 569-99 (problem of suits by those whose property had been damaged by slaves of another).


9. See T. R. Dew, LECTURES ON THE RESTRICTIVE SYSTEM DELIVERED TO THE SENIOR
to which it gave rise was preeminently commercial. The South produced the exportable commodities, especially cotton, that laid the foundation for the rise of a genuine national economy in the United States.\textsuperscript{10} Earlier than other American producers, the southern planters, as well as the merchants with whom they were normally allied despite particular antagonisms, needed the kind of reliable and uniform pricing system that the world market offered. They could appreciate the uses of contract to protect them against sudden changes within that dynamic system of uniform pricing. At the least, they showed little inclination to support the introjection of ethical and other noneconomic considerations into the pricing of commodities, and their understandable commitment to international free trade biased them toward laissez faire in general.

Thus the southern political economists could take ground similar to their northern counterparts, who were supporting the emergence of a modern theory of contract, without offending their slaveowning and commercial constituents. And they could divide among themselves on the issue that most dangerously threatened the planter-merchant alliance: the relation of federal to state jurisdiction over commercial law. For the merchants typically preferred the federal to the state courts since the federal courts were increasingly prodevelopmental and promercantile, whereas the state courts, while not always hostile, were at best inconsistent and unreliable.\textsuperscript{11} As the sectional crisis deepened and as southern opposition to the federal courts grew more intense for political reasons, the political economists appeared decreasingly relevant, and the constitutional and political theorists took center stage.

The early warnings of John Taylor of Caroline reverberated with increasing force throughout the antebellum period. For whatever the purely economic arguments in favor of a national commercial law independent of the decisional law of the state courts (as reflected for example, in \textit{Riddle v. Mandeville} and \textit{Bank of the United States v. Weisiger}) the constitutional and political implications looked more and more threatening to the South.\textsuperscript{12}

To settle for another illustration let us take a closer look at value theory. With the possible exception of Thomas Cooper, whose views on value theory reflected some confusion, the southern political economists, like their northern counterparts, did reject the objective labor theory of value in favor of a radical subjectivism that equated the value of a commodity with its market price. As Morton Horwitz has shown, this shift opened the way to the overthrow of traditional notions of equity and to the enthronement of modern

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\textit{Political Class of William and Mary College} 10 (1969) (one of most extravagant and conical statements of this principle).


ideas of contract. For southern slave society, which required a moral defense of slavery based upon a paternalistic rather than a market vision of the proper relation of capital to labor, the shift threatened an ideological debacle. During the 1840s and 1850s, when the pro-slavery argument reached high tide, those who defended slavery invoked political economy to try to prove, as Senator James H. Hammond of South Carolina did in his famous "Cotton is King" speech, that the world needed slave-produced staples. They did not invoke political economy, at least not effectively, to sustain the moral claims of slavery. It remains noteworthy, although little noted, that they more often than not paraded the economic views of such proslavery northerners as David Christy and T.P. Kettel. Indeed, their massive propaganda effort, \textit{Cotton is King and Pro-Slavery Arguments}, featured a lengthy economic polemic by Christy, not Tucker or Cardozo or even Cooper, Dew, J.D.B. DeBow, or Louisa McCord, although the articles on law, morals, religion, political theory, and other subjects were written by southerners.

Since such economic questions as the tariff and government support for internal improvements figured large in sectional disputes, the participation of political economists in the evolving proslavery argument was to be expected. The political economists were also typically lawyers, and throughout the United States the laws and the courts were emerging as a principal terrain of struggle over contending economic policies. Increasingly, the law, presumably guided by economic theory, was advancing, retarding, or to some extent shaping economic growth and development.

In the South discussions of economic policy and the proper function of the law in relation to economic growth could no more be separated from discussions of slavery than could any other important question. Hence, the political economists, often with misgivings, found themselves strategically placed to bring their young and confident science to bear on the vexing question of the interrelation of economic growth, the legal system, and slavery. These political economists defended slavery, some with great passion, some with hardly any. Yet they did not do a good job of it, and by the 1850s their influence within the proslavery intelligentsia was declining. Their voices dropped to a whisper as southern thought became absorbed by the "proslavery argument."

George Tucker's attitude toward slavery is especially revealing since it has

\begin{footnotes}
\footnote{14. But see infra notes 56, 68, 72-79 (articles of Louisa McCord indicating attempts to invoke political economy).}
\footnote{15. \textit{Cotton Is King and Pro-Slavery Arguments} (E. N. Elliott ed. 1860). The notion that those who defended slavery preferred Christy and Kettel because of their superior ability will not bear scrutiny. Neither could rank with Cardozo or Tucker.}
\footnote{16. See Horwitz, \textit{supra} note 12.}
\footnote{17. DeBow played a significant role during the 1850s as a statistician, editor, and propagandist, but hardly as a theoretical economist. See O. C. Skipper, J. D. B. DeBow: \textit{Magazinist of the Old South} (1958).}
\end{footnotes}
occasioned sharp disagreement among his modern interpreters. For Robert C. McLean, Tucker's biographer, he was basically an apologist for slavery and dishonest in his expressions of distaste. For Tipton Snavely, the author of an able study of his political economy, he was in fact opposed to slavery on both moral and economic grounds and was honestly trying to find a conservative, socially safe way to remove it. Since Tucker wrote numerous books and articles, many of which discussed slavery, we must at least admire his skill in befuddling his readers for more than a century. We suspect that McLean, the literary scholar, is close to the truth in detecting a good deal of dissembling in Tucker's moral and political stance, but that Snavely, the economist, is correct that Tucker regarded slavery as an obstacle to economic development and would have liked to see it go. Tucker's economic analysis could provide comfort to those who could settle for a defense of slavery that called for patience and nonintervention with the economic laws that would bury it in God's, and the labor market's, good time. But it could provide no comfort to those who had to repel the mounting moral and political assault on slavery and who were increasingly taking high ground in defense of their way of life. Tucker, as a political economist, was an admirably self-critical man who, throughout his life, tried to correct errors and learn from experience. His outstanding work on statistics and population trends demonstrates his commitment to test theory against changing reality. Yet on the politics of slavery he ended his life in equivocation.

The southern political economists faced a contradiction between their commitment to social science and their commitment to a social system the principles of which represented the direct opposite of the principles that underlay the capitalist system on which their economic theory was based. They could provide ringing endorsements of slavery as an efficient labor system, but they could not offer much hope for its future in an industrializing world. The clearer and more sophisticated a given political economist was, the more pessimistic he was likely to be about the future of slavery in the modern world. Hence, it should come as no surprise that by the 1840s the defense of slavery was passing into the hands of social philosophers, and "sociologists," as some started to call themselves in the 1850s—such men as Nathaniel Beverley Tucker, George Frederick Holmes, George Fitzhugh, and Henry Hughes—who degenerated or repudiated political economy. Nor should it come as a surprise that the contradiction between the commitment to science and the commitment to slavery appeared sharply in the attitude of the political economists and their late antebellum social critics toward the law itself.


The first half of the nineteenth century was also the period in which the legal profession was struggling to take scientific ground. Not only the political economists, but their social critics, had been trained for the law. Tucker, a notably successful lawyer, paid especially high tribute to the legal profession. Noting that the leading men in public life were trained at law, he remarked, "The profession of the law, in countries where the knowledge of civil and political rights is much cultivated, especially fits men for public enjoyments." The law, he continued, instills high moral values: "In the higher departments of the profession, no class of men have a more exalted sense of honor, or the obligations of conscience."

The southern political economists, like most of the northern, took a positive attitude toward economic development and regarded industrialization as inevitable. Indeed, DeBow, the South's most vigorous economic promoter and journalist, although by no means its most accomplished economic theorist, led the movement to expand southern manufacturing in the 1850s. Although a militant defender of slavery and a secessionist, he remained passionately committed to economic development. Not all of the southern political economists were happy about the industrialization they agreed was inevitable. The more conservative (Cooper, Dew) used the argument from inevitability to oppose government support. Let manufacturing develop slowly and naturally, they argued, and the evils that must accompany it will be more easily minimized and controlled. Misguided attempts at government intervention and protection at law will only intensify those evils while in fact retarding the progress of industrialization anyway. Nathaniel Ware did take protectionist ground, but he was an isolated voice among the political economists of the South.

Cardozo and Tucker, who advocated manufacturing for the South, assigned a more important if still limited role to the government, but they too preferred primary reliance upon market forces. Even they said little about general incorporation laws, for example, although they might have been expected to press for them. Thomas Cooper had grudgingly conceded some role to joint stock companies, although he clearly preferred the assignment of unlimited liability that accompanied partnerships. On another vital issue they again fell silent. The Old South tolerated grazing and foraging practices normal in prebourgeois societies but antithetical to capitalist forms of landownership. Not until the overthrow of the slaveholding regime did bourgeois fencing laws come into being on a general scale. Yet the antebellum political economists, who abstractly defended bourgeois property rights, avoided the

22. Id. at 122.
23. See T. COOPER, LECTURES ON THE ELEMENTS OF POLITICAL ECONOMY, 131-32 (1971); DEW, supra note 9, at 105-06; N. WARE, NOTES ON POLITICAL ECONOMY AS APPLICABLE TO THE UNITED STATES. See generally, A. KAUFMAN, CAPITALISM, SLAVERY, AND REPUBLICAN VALUES: AMERICAN POLITICAL ECONOMISTS, 1819-1848 (1982).
issue.\textsuperscript{24} As a group, southern political economists showed little enthusiasm for doing battle over controversial legal issues, except for those that concerned banking, no matter how implicitly important they might now seem to those who read their economic writings.

None of the political economists condemned manufacturing or extolled agriculture extravagantly. Some, like Cardozo, Tucker, Ware, and DeBow openly advocated industrialization and the rapid economic development it implied, but only DeBow argued that industrialization would strengthen slavery. The others either explicitly or implicitly argued that it would eventually undermine slavery by rendering slave labor unprofitable. Their arguments varied, and more often than not reflected some version of Malthusian population theory. In the end, however, they defended slavery as necessary and even just in historical time and place but predicted its ultimate passing in the course of an economic development that included industrial progress.

No southern political economist followed the physiocrats in attributing exchange value solely to agricultural labor or followed them in any other important respect. Most explicitly disassociated themselves from the physiocrats, and some even criticized Adam Smith for having conceded too much ground to their insistence upon the centrality of agriculture to economic development.\textsuperscript{25} Those who praised agriculture relative to manufacturing and commerce rested their case on the presumed moral superiority of people who worked the land, not on presumed economic advantages. Even Daniel Webster, campaigning for rural votes, in Massachusetts, had to say that much.

A positive attitude toward manufacturing did not imply a commitment to government intervention, supportive legislation, or a prodevelopmental judiciary. Views differed on these matters, but rarely was a voice raised in favor of strong legal regulation. In this respect, too, the southern political economists turned away from the physiocrats, who, paradoxically, had called for absolute sovereignty without popular representation to enforce laissez faire through a kind of centralized anti-government, which they called "legal despotism." Only Cooper approached physiocratic ground, and he only implicitly, by denying that self-interest would normally serve the common good,


\textsuperscript{25} See Hahn, supra note 24, at 15-16; Dew, supra note 9, at 1-2, 16; J. N. Cardozo, Notes on Political Economy, 7 (1972) [hereinafter cited as Notes]; J. D. B. DeBow, Industrial Resources of the United States and More Particularly, of the Southern and Western States 72 (1966). The common attribution of physiocracy to leading southern intellectuals received its principal sanction in Vernon Louis Parrington, Maincurrents of American Thought, and has been carried to extraordinary lengths in William Appleyam Williams, Contours of American History. See V. L. Parrington, II Maincurrents of American Thought (1928); W. A. Williams, Contours of American History (1960). Regrettably, the attribution rests on no evidence at all. Indeed, physiocracy had few followers in any part of the United States. See D. R. McCoy, The Elusive Republic: Political Economy in Jeffersonian America 45-46 (1980).
but even or indeed especially he would have nothing to do with any version of "legal despotism."  
Contrary to widespread assumption, southern political economists did not embrace radical versions of laissez faire doctrine either. Most displayed caution and moderation and introduced considerable qualifications into their arguments against government intervention and for free trade. To be sure, such outright interventionists and tariff advocates as Nathaniel Ware were rare outside the ranks of the practical industrialists who wrote on economic policy. But almost all the others avoided extreme positions and looked to Adam Smith rather than Ricardo for guidance. At that, most went further than Smith in making concessions to the role of government in economic development.

Cardozo, for example, called for state aid for economic development and even suggested that the slave states should temper their constitutional scruples and accept some federal aid. He did not, however, approve of countercyclical government spending, and in his precocious analysis of business cycles took the orthodox view that the economy must be left free to right itself. Tucker's views ranged close to those of Cardozo, but he did call for workhouses to employ honest laborers during periods of distress. Indeed, Tucker, throughout his work, left room for considerable government action to promote economic growth, although apart from his extensive discussions of banking, he remained general enough to avoid ruffling regional sensibilities. Thus, he defended patent laws and similar legal support for socially necessary monopolies, as well as laws to restrict child labor.

Others introduced their own qualifications. Recall in this context, Cooper's angry rejection of the principle of caveat emptor and his demand that the courts protect consumers against unprincipled sellers. And from Cooper to DeBow, political economists perceived that the state would have to do something about mass education both as a spur to the economy and to protect a republican polity. Even the characteristic opposition to federal, in contradistinction to state, action often rested on direct political or constitutional

29. See Tucker, supra note 21, at 221-23.
30. See Introduction, supra note 3, at 14, 20-22; Conkin, supra note 3, at 152.
31. Institutes of Justinian, 555-56 (T. Cooper ed. 1841); Dorfman, Introduction to Cooper, Lectures on the Elements of Political Economy (1829). Rejection of caveat emptor was not incompatible with radical free-trade theory. See Horwitz, supra note 12, at 180.
32. Cooper, supra note 23, passim; Skipper, supra note 17, at 45, 68.
considerations. DeBow, for example, opposed homestead legislation primarily on the grounds that it would open the South to an influx of free soilers.13

Cooper and Dew had set the tone earlier in their opposition to federal support for the international commercial interests and, specifically, to any attempt to protect American merchants on the high seas or in foreign waters. They charged that most modern wars arose from unwarranted government concern for private commercial interests, which ought to be left to assume all the risks of their profitable trade.14 In general, then, the southern political economists held a wide range of views on the proper relation of the law to the economy and, more important, held about the same range of views as their northern counterparts, with whom they shared a commitment to a common body of economic theory.

On the vexing tariff question the political economists, even in South Carolina, proved much less volatile than many politicians. Cooper, a political fire-eater by the standards of the 1820s and early 1830s, did support a hard line during the nullification crisis and asked if the South ought not to calculate the value of the Union. Yet, earlier, in the wake of the War of 1812, while still living in the North, he had joined leading South Carolinians in supporting a tariff to build up manufacturing in the interests of national defense. More damaging to his credibility once he removed to South Carolina, he had added to the argument from national defense, an argument from the need to employ the poor. His turnaround appears to have been conditioned by political fears of a strong central government rather than by his free-trade economic views, which never became as extreme as his political views.15

Dew, who often followed Cooper’s lead in political economy, also avoided extreme ground on the tariff question and noted that perhaps one industry (agriculture, of course) might deserve a measure of protection. Accordingly, he expressed some sympathy for the English Corn Laws.16

Cardozo provides the most interesting case, for he took a leading part in mobilizing public opinion in Charleston against the protective tariff. A moderate nevertheless, he sided with the Unionists during the nullification crisis and launched a formidable attack on those who were trying to force a confrontation. Cardozo, while criticizing the tariff, offered an economic and statistical analysis to demonstrate that the actual cost to the agricultural states fell far short of the figures advanced by the nullifiers. The tariff, in his view, was a small, not a big, evil and did not justify talk of a constitutional crisis. He even courageously warned against the negative economic effects of too rapid a reduction in tariff rates.17

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33. See Skipper, supra note 17, at 63.
34. See Cooper, supra note 23, at 197 and passim; D. Malone, The Public Life of Thomas Cooper 99-100 (1926); Dew, supra note 9, at 132.
35. See McCoy, supra note 25, at 247.
36. See Dew, supra note 9, at 126-27.
37. See Cardozo, The Tariff: Its True Character and Effects, Practically Illustrated, in Notes, supra note 25, at app. II; see also Leman, supra note 28, at 78.
At a much lower level of technical analysis and economic reasoning, DeBow followed in the southern laissez faire tradition and insisted that he supported free trade, but he bent far enough before the sugar planters and industrialists to eschew radicalism on the subject. Determined to promote southern manufacturing, he tried to keep the pages of his *Review* open to reasoned debate.\(^8\)

Southern political economists generally supported free trade, criticized protectionism, and advocated restraint in government intervention in the economy. But compared with the constitutional theorists from John Taylor of Caroline to John C. Calhoun to Alexander Stephens, their defense of southern rights seems tepid. Each political economist introduced his own special qualifications and his own items to be included in Adam Smith's list of exceptions. Most advocated political moderation and denied, explicitly or implicitly, that federal intervention in the economy was ruining the South. The Disunionists, Cooper and DeBow, proved only partial exceptions, for their disunionism did not rest on their economic analyses, however much they used economic arguments to score debaters' points. In short, southern political economists, whether moderate or radical on slavery, had little to offer the proslavery argument even in its narrow formulation as a neo-Jeffersonian argument for limited government and free trade. No consistent attitude toward state or even federal intervention in the economy emerged from their work, nor did a consistent view of the character and function of the legal system in general.

Their preference for laissez faire, and attachment to the idea that the government which governs best governs least, required special qualification because of the exigencies of slavery, and the most radical of the free traders had to call for firm government intervention to defend their preferred social system. From John Taylor of Caroline at the beginning of the century to the militant free trader Louisa McCord in the waning years of the old regime, they understood, even if they did not always wish to discuss, the necessity for shaping the legal system in a special way. That is, even those who looked to a free market to guarantee property and social safety had to advocate stern interference in that market to secure slave property.

It is by no means obvious that they should have had to do so. They might well have been expected to want to restrict the role of government to the good old Smithian principle of intervention only against such market obstructions as monopoly, foreign aggression, and crimes against property. The political economists ought to have had an easy time since southern jurisprudence tended during the nineteenth century to distinguish sharply between master-slave relations and market relations, even if those market relations concerned slave property. Even in criminal cases, law and custom favored punishment of slaves by masters so far as possible; the courts primarily took up cases of murder, arson, assaults on whites, and others not readily handled on the plantation.

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38. *See* DeBow, *supra* note 25, *passim* (DeBow's own views and attempts to promote discussion).
The cases the courts did accept as wholly within their purview concerned the relations between free men, usually between whites. The courts normally followed common-law procedures in cases of contract and tort, although the human nature of slave property constantly introduced contradictions and difficulties. We might therefore expect that those who espoused laissez faire would have eagerly, if somewhat perversely, applied their favorite doctrine to justify the discretion of the master so far as consistent with social safety and to insist that the courts support the force of the market in all cases concerned with economic property. Time after time, however, the political economists, like the jurists, found that the slave system generated peculiar difficulties.

John Taylor of Caroline encountered those difficulties early. Property and natural interests, he argued, arise without the aid of municipal law. Indeed, that notion of property became the foundation of his political philosophy and political economy and, as Paul Conkin has observed, virtually led him to deny that ill-gained property ought to be considered as property at all. For Taylor, since the paper-money system he so hated was making slaves out of all honest producers, the forms of property it generated lacked any legitimacy. Yet Taylor defended slave property as legitimate if troublesome, without stopping to consider the argument that slave property itself should be considered a creation of municipal law.

Rather, Taylor applied the legal talent that had made him one of the highest paid luminaries of the Virginia bar to a consideration of the ancillary problem of the free Negro. He denounced "the policy of introducing by law into society, a race, or nation of people between masters and the slaves, having rights extremely different from either, called free negroes and mulattoes." Taylor viewed the free Negroes in relation to masters and slaves, rather than as an additional group in a biracial but multi-class society because, as he frankly admitted, he was primarily concerned with making slavery work as the basis of southern society. He accused the free Negroes of undermining social order in general and agriculture in particular by encouraging dissatisfaction and insubordination among the slaves and especially for disrupting the rural economy. First, the free Negroes, in Taylor's jaundiced view, constituted an unproductive class that lay as a tax upon society. Second, they lived primarily by stealing and trading in the goods stolen by slaves and therefore disrupted plantation discipline and undermined productivity. Momentarily dropping racialist arguments, he described "the free Negro class" as forced into depravity and

39. See Morris, supra note 4, at 569-99.
41. Conkin, supra note 3.
42. See, e.g., T. Cobb, An Inquiry Into the Law of Negro Slavery in the United States of America (1968) (leading legal discourse to come from the slave states).
vice: "Cut off from most of the rights of citizens, and from all the allowances of slaves, it is driven into every species of crime for subsistence; and destined to a life of idleness, anxiety, and guilt."45

Taylor could not long avoid racist ground since he professed a philosophy that ought to have led him either to advocate ways of encouraging free Negroes to accumulate property or to leave them to the fate of the market in a well policed society. He did not, however, rail so about the poor whites, who were also widely criticized for living in vice, crime, and idleness. Instead, Taylor limited his indictment, which was grossly exaggerated when not dishonest, to free Negroes and he called for their removal. In gentle moments he wanted the government to pay for their resettlement in the West or in Africa. In harsh moments, which came in the same book, he suggested stern measures of repression. His concern for national safety took some strange forms, for he demanded that slaves who were convicted of stealing be sold out of Virginia—that is, sold to sister slave states, which were not amused by the suggestion.46 It took only one short step from Taylor's hysterical outbursts to George Fitzhugh's cool proposal to the enslavement of the free Negroes.47

Taylor, in short, dropped all willingness to rely on the market and on government restraint in confronting what he himself identified primarily as an economic question once it became clear that the slaveowners could not take care of themselves—or rather, that the interest of the slaveowners as a class must prevail over the liberties of the individual slaveowners. Thus, he proposed more stringent laws to compel masters to feed and clothe their slaves well enough to discourage stealing.48

Taylor's successors, who more readily than Taylor, qualified as political economists, often had to dissent from reigning attitudes, no matter how great their devotion to slavery and the dominant agricultural interests of their own states. Southern planters talked a good deal about laissez faire and limited government, but normally they meant little more than a revenue tariff and low taxes. When they needed protection at law, they expected to get it. As debtors, for example, they generally approved of anti-usury laws to keep interest rates low. No serious political economist rushed to support them. To the contrary, from Dew to Cardozo, the political economists defended orthodox doctrine and tried to convince planters and farmers that such laws were neither just nor enforceable, nor even in the planters' interest. Tucker, basically a Clay Whig who took a positive attitude toward judicious government intervention in the economy, softened the blow by criticizing the usury laws while providing an economic analysis to defuse the issue. Tucker insisted that the laws would have negative effects on the economy if enforced, but he provided an analysis of interest rates to show that the laws were easily

45. TAYLOR, supra note 43, at 117.
46. Id. at 118, 357, 358.
47. See G. FITZHUGH, WHAT SHALL BE DONE WITH THE FREE NEGROES, Appendix to G. FITZHUGH, SOCIOLOGY FOR THE SOUTH, OR THE FAILURE OF FREE SOCIETY at 259-71 (1854).
48. See TAYLOR, supra note 43, at 357.
circumvented. He concluded that the laws should be repealed but warned that repeal, like the laws themselves, would have little practical effect on the economy. Once again, political economy had little to offer those slaveowners who sought a strong legal hand to protect their special interests. In one sphere of jurisprudence the political economists did offer maximum support to those who sought protective legislation, but they did so as individuals in a manner divorced from their political economy. As citizens of a slaveowning society they called for resolute measures to crush abolitionism at the federal as well as state level. Cardozo, one of the more moderate of South Carolina's leading intellectuals, bitterly denounced the abolitionist crusade against property and demanded such measures as discretionary power for postmasters to intercept incendiary literature. In a sense the political economists had an easier time than many others, for although generally committed to laissez faire, most followed Adam Smith in granting government specific powers to protect property and provide for national defense. Cardozo invoked national defense to justify government aid to steamship companies, much as Cooper had once invoked national defense to justify tariffs. The political economists' often well-reasoned espousal of laissez faire left them room to advocate legislative and judicial protection of slave property and thereby kept them out of trouble. Whether as moderates or extremists, they ranged themselves within the proslavery camp. They also managed to avoid offense to the agricultural interest that predominated among the slaveowners. Hence, they qualified as safe men—safe, but uninspiring. They simply could not bring their scientific work as political economists to bear, in a theoretically significant way, on the proslavery argument or its emerging judicial corollary, which called for considerable legal regulation of the labor force, free as well as slave. They thereby rendered themselves largely beside the point.

Proslavery theorists, including the political economists, ritually denounced English and northern capitalists for leaving their poor to starve and claimed that the laboring classes of the South enjoyed the protection of a superior social system. Daniel Hundley of Mississippi, among others, announced that the South had few paupers and required neither a system of poor relief nor a system of farming-out the indigent to the highest bidder. In fact, the South had many whites who could not make ends meet and with whom it often dealt harshly. From colonial times to secession poor whites were forced into one or another kind of enforced apprenticeship and virtual servitude. Neither

49. See G. TUCKER, THE LAWS OF WAGES, PROFITS & RENT INVESTIGATED 83-91 (1964); see also DORFMAN, supra note 3, at 856-57; KILBOURNE, supra note 11, at 47 (conflict between merchant and planter interest).
50. See LEIMAN, supra note 28, at 176.
51. See D. R. HUNDLEY, SOCIAL RELATIONS IN OUR SOUTHERN STATES 258 (1979).
the proslavery social theorists nor the political economists paid attention to this social policy or examined its legal foundations and implications. The southern intellectuals acted as if the "social question" existed only in Europe and the North and had no counterpart in the South—as if the existence of black slavery rendered white labor immune to exploitation and misery. They knew better, and when it suited the purposes of some special pleading, they took some note. But in general they minimized all such problems or ignored them altogether.

The southern political economists, then, had joined their northern counterparts in rejecting an objective labor theory of value and in embracing a subjective theory that equated value with market price and had joined their northern counterparts in promoting a new view of the law that encouraged economic development. The attempt of the radical proslavery theorists to substitute moral philosophy or sociology for political economy thus represented an attempt to capture the legal system in a war between contending moralities or, as they preferred to see it, between morality and amorality.

The fear that political economy offered inadequate support for slavery emerged with full force during the 1850s. George Fitzhugh of Virginia struck hardest—so hard that many contemporaries and subsequent historians have tried to dismiss him as an isolated eccentric. Actually, he was driving to the end arguments that had begun to emerge early in the century, and he was articulating a reactionary viewpoint that embarrassed many of his fellow slaveholders primarily because the viewpoint expressed more than they thought safe to admit. Be that as it may, Fitzhugh denounced political economy as the philosophy of a world economic system in which slavery had no future, and he called for the overthrow of political economy through the overthrow of the world market itself. Slavery, he argued, must everywhere be reconstituted regardless of race, or it will everywhere disappear. Slavery in one form or another offered the best system for the laboring classes. He therefore repudiated laissez faire and all its works and directed heavy fire against its demand for limited government and nonintervention in human affairs. The world, he declared, was too little governed, men subjected to too few laws. The masses required protection, security, discipline. Social hierarchy and class rule must be established at law and in practice. He regretted the passing of laws of entail and called for vigorous legal and political intervention in economic and social life.

However doctrinaire and extreme, Fitzhugh had more company than is generally recognized. In particular, two of the South's most talented intellectuals, George Frederick Holmes of Virginia and Henry Hughes of Mississippi,

53. Those who advocated an expansion of manufactoring did argue that factories could absorb unemployed and underemployed whites. See, e.g., W. Gregg, Essays on Domestic Industry (1941).
54. See Horwitz, supra note 12, at 252.
55. See Fitzhugh, Sociology for the South (1965); Fitzhugh, Cannibals All! Or, Slaves Without Masters (1960); see also Genovese, supra note 1, at Part Two.
joined in the attack on political economy and advocated widespread legal regulation of the economy and larger society. Both justified slavery as a positive good apart from race. The reserved, scholarly, generally careful Holmes suggested that slavery existed in many countries and could be justified morally, although he did not follow Fitzhugh in endorsing the enslavement of all laboring classes. Hughes, who used legalistic arguments to deny that the South's social system, which he called "warranteeism," was slavery at all, advocated some form of warranteeism for the whole human race.

Holmes qualified his attack on political economy by suggesting that he meant only to offer constructive criticism for a young and still struggling discipline. Louisa McCord of South Carolina read him as attacking her reversed political economy at its root, and she appears to have been closer to the truth than Holmes wanted to admit even to himself. In any case, she went straight to her polemical hatchet and rained blows down on the head of poor Holmes, who as an English and Virginia gentleman could hardly bring himself to return a lady's abuse.  

Political economy, Holmes argued, was not solving the social question raised by a rapidly developing world capitalism. How could it, when it was itself rent by contending schools; when political economics could not even agree on the definition of such basic concepts as value, capital, labor, and rent; when, like science in general, political economy was leading men toward the false hope that technology and money-making would deliver both their bodies and their souls. Holmes criticized the political economy of laissez faire for generating a "fatal" theory of government. He wanted legally enforced hierarchy and social restraint. He accepted a wisely qualified democracy but had little patience with the notion that government should govern as little as possible.

Holmes remained quiet about the southern legal system per se and, in fact, about southern conditions in general. In part perhaps because he remained a British citizen, he preferred to write about other peoples and about abstract subjects rather than to criticize explicitly the conditions in his adopted country. For like Fitzhugh and Hughes, he seems to have had serious reservations about the actual workings of the southern slave system and to have favored a policy of cautious legal reform to protect slaves and restrain irresponsible masters.

In some respects Henry Hughes, who has received much less attention than Fitzhugh and Holmes, emerges as the most fascinating of the proslavery theorists, for he pointed toward a modern corporate state. Mussolini would have liked him. Although not attacking political economy as a discipline,

Hughes in practice reduced it to the economic component of a broader science of sociology. He published his Treatise on Sociology in 1854, the year that Fitzhugh published his Sociology for the South. Those books marked the introduction of the word “sociology” into American discourse, and for good measure, so far as we know, Hughes was the first American to substitute “economics” for “political economy” in his writing.

Hughes stated the principles of his economic sociology clearly: “The first end of society is the existence of all... Its second end is the progress of all.... Personal subsistence and personal security are the means of existence.... The economic system is the organ of subsistence; the political system is the organ of security.” \(^{58}\) He thereupon redefined political economy as the union of the two and left no doubt that the economic must be subordinated to the political—that the economy must be organized and regulated to provide subsistence, security, and welfare for all. “The best form of society, to realize the existence and progress of all, is that in which the societary power is perfectly associated, perfectly adapted, and perfectly regulated.” \(^{59}\)

Thus, Hughes demanded that the laboring classes be “warranted”—guaranteed a living. “Everything ought to be stopped until that is done.” \(^{60}\) But, he added, “Everybody ought to work. Labor whether of mind or body, is a duty,” which should be enforced at law. \(^{61}\) He emphasized the role of state power, which he placed at the center of the social system. The state must capitalize labor obligations, must establish hours of work and rest, must set wages, must regulate and supervise the whole of economic life.\(^{62}\)

By the 1850s, then, a southern school of sociology was emerging to defend slavery on much higher ground than political economy had been able to take or that any political economist had been willing to consider, and that higher ground included a mounting call for a revolution in jurisprudence. Only the intransigent Fitzhugh actually denounced political economy as a bourgeois swindle, but Holmes, despite disclaimers, came close. Hughes bypassed the issue as such and tried to treat political economy as economics—the economic aspect of a sociology that in effect repudiated the principles of every school of political economy recognized as reputable. Taken together, the work of these men, which reverberated in less rigorous and contentious form throughout the southern intelligentsia, exposed the ultimate incompatibility of the “science” of political economy with the social philosophy appropriate to a slaveholding society. That incompatibility was exposed fully in the contrary attitudes toward the law and its proper role in economic as well as social life.

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59. See Hughes, supra note 58, at 61.

60. Id.

61. Id. at 95-96.

62. Id. at 106-110.
Antebellum abolitionists and many modern historians have generally dismissed as transparent hypocrisy one of the leading corollaries of the extreme proslavery argument—the assertion that only slavery prevented the extermination of the blacks; that, if emancipated, they would prove incapable of competing in the market place and would starve to death. This argument also appeared in the work of the South’s most militant abolitionist, Hinton Helper, a violent Negrophobe who boldly welcomed the expected result. Like Fitzhugh and other proslavery theorists, he regarded the slaveholders as the protectors of the blacks.63

Those social theorists who normally stood apart from political economy were by no means alone in their views. McCord and DeBow combined racism with what they perceived to be the laws of political economy to come to similar conclusions. Even Tucker, who quietly rejected the view that blacks were genetically inferior and who thought them capable of slow progress, had little to offer as an alternative to the Fitzhugh thesis. For if he expected an eventual end to slavery, he also expected a general degradation of labor in the process of economic development. He dropped the subject there, but surely, in the vicious competition for jobs that would follow, the culturally deprived blacks of George Tucker would have fared no better than the genetically inferior blacks of Louisa McCord. Cardozo, too, implicitly rejected extreme racism and saw the blacks as climbing out of slavery into some form of serfdom or peonage. He too dropped the matter there, but he left the impression that only disaster would await blacks who entered the market without white protection.64

Thus, Tucker and Cardozo expected economic development to lead to emancipation in one form or another, but in such a way that boded ill for the emancipated. McCord and DeBow simply wished to stand pat; they ignored the implications of Tucker’s and Cardozo’s reasoning. Fitzhugh and Holmes rejected the reasoning root and branch, considered all such political economy no more than mere speculation, and looked to the strengthening of municipal law to bolster and extend slavery and thereby save the blacks and the laboring classes in general. Paul Conkin, analyzing Tucker’s view that economic development would eventually eliminate slavery by driving down the price of free labor, justly observes, “Surely, no one ever offered a gloomier reason for eventual emancipation.”65

In several ways the southern political economists inadvertently prepared the way for those social theorists who would repudiate political economy in an effort to take high ground in the defense of slavery. Typically, political economists who followed either Ricardo or such anti-Ricardians as Lauderdale and Malthus wasted little time on the poor, the unemployed, and other

63. See H. Bailey, HINTON R. HELPER: ABOLITIONIST-RACIST (1965) (account of Helper’s racial views).
64. See TUCKER, supra note 49, at 46-50; TUCKER, supra note 21, at 109-118; LEIMAN, supra note 28, at 183-86.
65. See CONKIN, supra note 3, at 161.
casualties of progress. Even when they displayed some sympathy for the plight of those who lived in constant insecurity and fear of starvation (not all of them bothered to do that much) they denied that much could or should be done about it.

Tucker and Cardozo, the most sophisticated of the southern political economists, said little. Others, who worked at a lower level of technical rigor and who risked greater inconsistency, said more. The sympathetic concern for laborers shown by Thomas Cooper might have been expected, for he had been a social and political radical in his early days in England and in the North during the Federal period and the struggle against the Alien and Sedition Acts. Even in his later proslavery and disunionist phase, he opposed legal restraints on trade unions and called for laws to balance the power, including the power at law, of the capitalists. Basically, he modified his general laissez faire stance to support a degree of legal intervention that would preclude unfair advantages to either labor or capital.66 Cooper's concern, then, had peculiar roots in his checkered ideological past.

The concern of others derived directly from their commitment to slavery and its attendant critique of labor conditions in free-labor societies. Thus, at the end of the antebellum period DeBow, who opposed trade unions, qualified a strong attack on government intervention in the economy with a plea for private aid to the needy: "The poor must be fed, the miserable must be relieved, or humanity ceases to perform her noble mission." Untouched by Malthusian population theory and related caveats of economic thought, he unwittingly, if indirectly and ambiguously, lent ideological support to those opponents of political economy who were calling for the legal protection of the poor, even if legal protection entailed their virtual enslavement. But then, DeBow, the advocate of laissez faire, limited government, and the virtues of the market, admired and published the work of George Fitzhugh, who hated all of them.

Southern political economists also contributed to the extreme proslavery argument of Fitzhugh and his peers by trying to defend slavery through the introduction of Malthusian population theory at a time when Malthus was coming under widespread, if not always coherent, assault in the North. Indeed, J.J. Spengler, the eminent historian of population theory, concludes an illuminating study of the impact of Malthus in the South: "Thus by the eve of the Civil War Malthus' doctrines had been woven and integrated into a perfect theoretical defense of slavery."68

Spengler notes that Tucker, after launching an early attack on Malthus, came around to a basically Malthusian standpoint from which he concluded that free labor would eventually become cheaper than slave and thereby compel emancipation. Spengler also notes that many southern writers (Cooper,

66. See Cooper, supra note 23, at 102-03; Dorfman, supra note 3, at 845; Conkin, supra note 3, at 146.
67. See DeBow, supra note 25, at 387-88; Dorfman, supra note 3, at 950.
Dew, Edmund Ruffin, James H. Hammond, Edward B. Bryan, Mathew Estes, among them) turned Tucker's argument around. Some argued that slave labor was cheaper than free, and others argued the reverse. But in one form or another they agreed that slavery protected society against the projected Malthusian subsistence crisis by checking population growth relative to food supply. According to diverse southern writers, as aptly paraphrased by Spengler, "under slavery the increase of the blacks was controlled by whites who were driven by pride to control their own numbers. Where free labor prevailed, the unbridled fertility of a prideless proletariat insured over-population and mass poverty and possibly social strife."69 Spengler's conclusion of a perfect economic defense of slavery does not follow, and indeed, it is startling to find him, among other recent scholars, forced to end with the economic ideas of George Fitzhugh, who hated political economy with a passion.70 Nothing so clearly illustrates the impasse into which southern political economy, Malthus or no Malthus, had fallen, than the emergence of its foremost enemy as the person called upon to sum it all up. For no matter how clever the pro-Malthusian political economists were as propagandists, they could neither escape the logic of Tucker's projection of the eventual extinction of slavery, nor escape the other contradictions that Malthusianism introduced into the defense of slavery.

Recall that Cooper, Dew, and those who followed them considered industrial development inevitable. The "Malthusian" defense of slavery, for which Malthus bore no responsibility, only makes sense on the assumption of a static economy—not the Ricardian "stationary state" of mature industrialization, but, to the contrary, a static economy that inhibits industrialization. Slavery is projected as a barrier to the generation of self-expanding labor force of blacks and to the entrance of whites into the labor market as unskilled and semi-skilled workers. None of these political economists was prepared to advance upon that assumption, however implicit it remained in each attempt to apply Malthusian reasoning.

J.H. Hammond, for example, could use Malthusian arguments to taunt the abolitionists with the deepening social crisis of the free-labor system, but he had to choke on their implications for the South. For he understood, better than most, that without economic diversification the South would be doomed with or without a Malthusian crisis. Either way, it would lack the economic, political, and military wherewithal to hold its own in an increasingly hostile world.71

No wonder that the argument, even in Spengler's careful and erudite

69. Id. at 135.
70. See J. C. Hite & E. J. Hall, The Reactionary Evolution of Economic Thought in Virginia, 80 VA. MAG. HIST. & BIOGRAPHY 476-88 (1972) (authors begin with fine insight that proslavery Virginians could not, in the end, swallow classical liberal doctrine, but their doctrine is badly marred by untenable reading of the texts).
reading, ends with Fitzhugh. Hammond and others like him were conversant with political economy but were no political economists. That is, they based their defense of slavery on philosophic and sociological arguments, which they buttressed by political economy when possible. Fitzhugh understood that the only hope for the survival of slavery lay in the conversion of the capitalist world to some form of unfree labor, and with it the destruction of the world market and the theory of political economy based on it.

The invocation of Malthusianism had other drawbacks, the most obvious of which was its assumption of a pauperless South (an assumption everyone knew to be a fiction) for at that very moment southern writers on economic subjects were urging economic diversification to absorb a swelling population of landless and bare-subsistence whites. Much more to the point, the polemics to which Spengler refers make the blithe assumption that masters could, should, and would restrict slave reproduction in the social interest. But how and why? Masters notoriously encouraged early “marriages” among their slaves and were often accused of slave-breeding. They deeply resented the charge that they deliberately fostered breeding by methods other than those considered respectable in all regimes—methods designed to encourage stable family life. They encouraged early “marriages” for two reasons: to promote social stability and to generate capital gains. The case for promoting social stability would not lessen because of adverse economic circumstances, and neither would the case for capital gains.

To the contrary, the sensible response of an individual slaveholder who faced a glut in either the cotton or slave markets would have been to try to increase volume to offset the decline in price. To some extent slaveholders did reduce cotton acreage in depressed times in order to reduce the cash outlay for food, but that practice, even if extended, would hardly discourage slave reproduction since it would lower the cost of rearing. And it is clear that the slaveholders generally believed that such interference in the life of the quarters would produce fierce reactions from the slaves and would disrupt plantation order and discipline.

In effect, the argument that slavery would check the growth of the black population implicitly called for massive state intervention in the master-slave relation. No responsible political economist ever advanced such an argument explicitly, and most at one time or another condemned it. The argument, then, was a propaganda ploy, not a serious attempt to ground the defense of slavery in political economy. For good measure, if advanced seriously, it would have opened a broadside attack on the southern legal system, which strained its every resource to protect the rights of slaveholders against state interference in the master-slave relation.

Again, it took Fitzhugh, Holmes, and Hughes, as well as political and literary intellectuals like Hammond and William Gilmore Simms, to raise such questions, and even they had to tread carefully. For them, Malthusian arguments, when they bothered to notice them, provided a gloss on their basic notion, derived from class, not narrowly economic, premises, that the masses everywhere had to be strictly regulated for their own good. Whether explicitly
as with Fitzhugh, apologetically as with Holmes, or ambiguously as with the others, they were using Malthus not only as a weapon against free-labor society but against political economy itself.

Louisa McCord, ruthlessly pro-market, tried to avoid these difficulties by explicitly accepting a bifurcation between political economy, understood as the science of the market, and labor relations, understood as a domestic matter. But even she implicitly recognized the intersection of political economy and the social question by expressing deep sympathy for the miserable workers of Great Britain, at least when her polemical purposes required it. She called upon the English ladies to stop worrying about the black slaves, who were well cared for and much loved by their masters, and to devote themselves to caring for their own free, white, laboring poor. Her polemic ranked as standard fare in a propaganda war, but she resolutely refused to examine its implications for the classical political economy she so fervently espoused.72

The political economists said little about the legal or social conditions of the laborers closest to home—the slaves. Like other southern intellectuals, they denied that their slaves had no protection under the law and referred to the provisions of the slave codes and to the court decisions that prohibited the murder of slaves and set minimum standards of treatment. Rarely, however, did they venture beyond a general comment on the slave standard of comfort relative to that of the laboring classes elsewhere. They were quick to contrast favorably the standard of comfort of the slaves to that of free Negroes, especially those in the North, but they fell strangely silent about the standard of comfort of the southern poor whites. At a time when religious leaders in particular were making futile efforts to secure legislation to protect slave families, the political economists remained unconcerned, although Tucker did speak out against laws that restricted or prevented emancipation. But only McCord and DeBow seem to have confronted the general issues boldly, and both opposed legal restrictions on the power of the masters. Neither would support proposals to tie the slaves to the land or render them inalienable for debt.73

Neither McCord nor DeBow argued from the economic principle that the state had no right to interfere with the masters' property. Rather, each noted in a somewhat different way that the welfare of the slaves depended upon their masters, and that any interference in the master-slave relation would do more harm than good. While compatible with a laissez faire ideology stretched to include property in man, their views suggested that the master-slave relation had a special character that placed it outside the purview of economic discourse.

Thus political economy had little or nothing to say about the legal aspects of the social condition of the slaves. It tried to view the slaves, much as it viewed free laborers, as objects in the market, but it constantly came up against the peculiarities of their anomalous condition as both persons and property.

73. See Tucker, supra note 15, at 115-18; Skipper, supra note 17, at 95.
It could provide guidance to the courts in matters of a strictly business nature, as it did for the high court of North Carolina on the contractual liability of those who rented slaves, but it proved helpless in all matters that transcended the business relations of whites to whites. And since the most critical problems of the master-slave relation transcended matters of business, the political economists in effect announced that they had little to offer the legal system at its most exposed and vulnerable point. In social theory, jurisprudence, and practical policy, they had created a void that their critics among the new social theorists steadily tried to fill.

The ultimate irreconcilability of a commitment to economic science and to slave society appeared with special clarity in the work of Louisa Susanna (Cheves) McCord, a quintessential Charleston lady, the daughter of the great Langdon Cheves and wife of a protege of Thomas Cooper. Louisa McCord greatly admired Frederic Bastiat, whose sweeping attack on protectionism and socialism she translated into English and whose work she commented upon in *Southern Quarterly Review*.

Her accolades notwithstanding, her own work could be shown to contradict that of Bastiat on a number of questions, including slavery itself, which Bastiat condemned.

Among southern political economists she ranks as probably the most optimistic, for she seems to have been little troubled by the implications of Malthusian population theory or Ricardo's "stationary state." For her, political economy was no dismal science. While rejecting notions of perfectibility, she insisted that the world was steadily progressing; that her own age was the greatest ever; and that the best was yet to come. A tough and resourceful polemicist, she poured out her wrath on such formidable opponents as Henry Carey and Harriet Beecher Stowe, and indeed on the whole of the socialist, abolitionist, and feminist movements, while she did not spare such misguided supporters of slavery as Holmes and Fitzhugh.

McCord defended laissez faire in uncompromising language. Like her hero Bastiat, she wanted no government interference in the economy and only those few laws deemed absolutely necessary for social order. A caustic champion of slavery, and by extension of the position of women, which she cheerfully acknowledged to be a form of slavery, she was well-read and acute, but as a political economist neither original nor technically sophisticated. Her defense of slavery led her into ambiguities that brought to the fore the dilemma of political economy in a slave society.

At first glance, McCord's defense of slavery appears to rest upon no more than a racism that ranked as extreme even in the slave South. She not only attributed racial inferiority to blacks, she supported the pseudo-scientific thesis of Josiah Nott, Samuel Cartwright, and others, according to which blacks constitute a separate species. Had she left matters there, she could have argued that the science of political economy applied to the activities and talents of blacks.
whites and that blacks lived and worked under a different set of physical, moral, and social determinants. From that point of view she could have supported special laws to protect racial inferiors without doing violence to her general opposition to legal interference in economic and social life. Instead, she bravely took up the "social question" in a many-sided way.

McCord joined a long line of southerners from Cooper to the proslavery extremists of the 1850s in repudiating the egalitarianism of the Declaration of Independence. Like the others, although more frankly than many, she insisted that individuals and even some European nations, not merely the colored races, were fitted for different ranks and positions in life. Slavery in varying degrees and forms existed everywhere; individuals, nations, and the female sex were fitted by their very nature to labor for and seek the protection of more competent people.  

McCord denied that wage labor, no matter how miserable its condition, should be considered slavery, for she insisted upon adherence to well defined legal concepts. But she asked whether starving free workers could really be free—that is, she questioned the significance of her own purely formal, legal definition. Faithful to her commitment to classical political economy, she refused to condemn free-labor societies, which she graciously credited with struggling with the social question as best they could. But this concession came immediately after a harsh attack on English capitalists for abdicating the responsibility toward their workers which the slaveholders accepted toward their slaves. Elsewhere, she denouned Carey for attributing waste to the slave system. What he called waste, she retorted, is the cost of taking care of the laborers in our charge.

McCord did not notice that she was simultaneously advancing mutually exclusive theories of the proper function of the law. On the other hand, she praised political economy, which she virtually equated with laissez faire doctrine, as being "alone, with its great and simple truths" the carrier of a promise of "real regeneration." And, after a scornful attack on all theories of legal intervention in the market, she sneered, "Leave us alone to our old vulgar practice of buying and selling" until you have something better to offer. On the other hand, she implicitly advocated the most sweeping legal protection of the laboring classes—the very view she explicitly denounced.

Once again she was compelled to take racial ground. In fact so satisfied was she that southern masters loved and protected their slaves that she opposed further legal interference with the master-slave relation. Southern society, in her view, did not have perfect, and therefore objectionable, slavery, for the slaves had all the legal rights society dared offer them.

76. See L. McCord, Diversity of the Races; Its Bearing Upon Negro Slavery, 19 S.Q. Rev. 392-419 (1951); L. McCord, Carey on the Slave Trade, 25 S.Q. Rev. 120, 167-68 (1854).
77. See L. McCord, Diversity of the Races; Its Bearing Upon Negro Slavery, 19 S.Q. Rev. 416-17 (1851).
79. See L. McCord, Carey on the Slave Trade, 25 S.Q. Rev. 120 (1854).
No, it was the workers of England and other free-labor societies who needed legal protection. She did not quite say so, nor could she without repudiating her radical laissez faire doctrines—without repudiating those specific theses of Bastiat on the law, which she never tired of praising. Yet, what other conclusion would follow from her critique of labor conditions in England? She contrasted the legal protection of the southern slaves with the lack of protection for the English workers in a way that left no doubt of her preference for the former. She specifically praised the laws against child abuse under slavery and bled over the lack of such laws in England. She ended with a proud boast that slavery protected its laborers better than any alternate system.

If these assertions, comparisons, and preferences did not add up to a call for legal intervention to protect the white laboring classes to provide them with at least minimum sustenance and security, what did they add up to? McCord had an answer of sorts. In her attack on Holmes she retreated to racial ground and suggested that a significant portion of the white race might be especially fitted for freedom, not only relative to blacks but to all non-whites. She thereupon projected a future for whites that would approach as closely as possible a standard of equality within the race. But in view of her tough-minded attitude toward individual differences, she was in effect projecting a kind of Social-Darwinist process, which could hardly give much aid and comfort to those proslavery theorists who were increasingly conscious of the need to offer a morally superior alternative to the cannibalism of the bourgeois marketplace. The implications of her solution were especially chilling for the southern yeomen and laboring classes. For if Fitzhugh and Hughes had to go through contortions to disguise the implication that the southern lower-class whites would also be better off as slaves, McCord was getting dangerously close to the suggestion that they would solve their own problem by dying off in a process of survival of the fittest.

McCord's political economy, like all southern political economy, ended in an all-out war with the social philosophy, not to mention the sensibility, inherent in the slavery she so warmly embraced—the slavery she un成功fully tried to treat, in her economic writings, as simply a special case of labor organization. For slavery would not die down. It would return again and again to reveal itself as a foundation of a society incompatible with the larger trans-Atlantic world the political economists were interpreting and extolling. And therefore it revealed itself as incompatible with all attempts to take scientific ground, whether in economic, jurisprudence, or, for that matter, in sociology.

82. See L. McCord, Carey on the Slave Trade, 25 S.Q. Rev. 120, 179 (1854); L. McCord, Uncle Tom's Cabin, 23 S.Q. Rev. 87, 89 (1853).