

## CHAPTER FOUR

### “What Shall be Property?”

Defenders of slavery argued that emancipation *post nati* contradicted Lockean ideals of property and slavery. The state breached the absolute dominion of slaveholders when it confiscated the children of slaves. Slaves had forfeited their right to life and thus their right to procreation. Yet under Randolph’s proposal, the state not only recognized a slave’s right to procreation, it bestowed liberty on the progeny of such procreation. In essence, emancipation *post nati* dissolved what proslavery delegates considered the Lockean foundation of slavery. Additionally, Randolph’s proposal stipulated that slaveholders should forfeit a portion of the property, the children of their slaves, without compensation. Such mandated forfeitures violated the principle of just compensation. That principle protected property owners from excessive government taking. Proslavery delegates believed that that principle, as specified in the Fifth Amendment of the Bill of Rights, protected their interest from uncompensated taking. Within their conceptions of Lockean philosophy, governments were instituted to protect the right of property. Any action by the government against private property, and without subsequent compensation, contradicted the very premises of government.

Unable to accept the conditions of Randolph’s plan, William Brodnax proposed an alternative that signaled a willingness of the proslavery delegates to make concessions. He stipulated that the principle of just compensation must be maintained. His proposal implied that funding for compensation could be obtained from the federal government, but more likely, it would have necessitated a tax increase on the citizens of Virginia. Emancipationist delegates were familiar with the proslavery arguments that emphasized the financial burdens imposed by the dual expenses of colonization and compensation. While Virginians may have been amenable to a tax increase that allowed for the colonization of free blacks, they surely would have balked at the more substantial cost of abolition. One emancipationist delegate proclaimed that for slaveholders “to contend that *full value* shall be paid for slaves by the commonwealth, now, or at any future period of their emancipation, [was] to deny all right of action upon this subject whatsoever.”<sup>1</sup>

Facing this predicament, emancipationist delegates adopted a new and more radical argument. This argument emphasized the right of eminent domain and the inherent police powers of the state. Emancipationists argued that when a species of property became so harmful that it threatened the public safety, the state had the responsibility to confiscate or destroy that property. This assertion challenged traditional views about property, affirmed the principle of eminent domain, and called for an expansion of government police powers. Such an argument directly contradicted Locke’s assertion that “the *Supreme Power* cannot take from any Man any part of his *Property* without his own consent. . . . For a Man’s *Property*, is not at all secure, though there

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<sup>1</sup> *The Speech of Charles Jas. Faulkner (of Berkeley) in the House of Delegates of Virginia on the Slave Question* (Richmond: T.W. White, 1832), 15.

be good and equitable Laws to set bounds of it between him and his Fellow Subjects, if he who commands those Subjects, have Power to take from any private Man, what part he pleases of his *Property*, and use and dispose of it as he thinks good.”<sup>2</sup> It was this principle upon which government in Virginia had been organized.

This radical doctrine had been implied during the anti-slavery speeches of Moore and Bolling, but it became more fully developed in the speeches of emancipationist delegates, Charles Faulkner, William Ballard Preston, and James McDowell. Faulkner argued that the necessity of the situation warranted the application of eminent domain powers without providing compensation to the slaveholders. Preston extended Faulkner’s argument and challenged the perception of “Constitutional” guarantees for property and slavery. He asserted that the inherent police powers of the state endowed the legislature with the authority to abolish slavery. McDowell summarized the arguments of Faulkner and Preston and explained the necessity of action.

*“A Measure of Self-Defence” -- Speech of Charles Faulkner*

As a representative of Berkeley, a northwestern county that bordered Maryland, Charles Faulkner was concerned about the growth of slavery in his region. Faulkner himself claimed ownership of one human being, but this paradox seems not to have troubled him. The percentage of slaves in Berkeley had increased consistently over the preceding decades.<sup>3</sup> Faulkner commenced his anti-slavery argument, therefore, by contesting the exclusivity of eastern delegates to decide this issue. The growth of slavery in the western region of the state made the issue a concern of all delegates. “There is no portion of the commonwealth more deeply . . . interested in that question, than the country west of the Blue Ridge.”<sup>4</sup>

Faulkner compared the predicament faced by western delegates to that faced by the Virginia assemblies in colonial days. “We are now in the situation in which your section of the country was . . . a century ago, -- when impressed with the growing evils of slavery, you implored the British throne to forbid the further introduction of slaves into this state. That petition was spurned. And history records the consequences -- the consequences to them -- the consequences to you. This . . . is the crisis of our fate.” Accordingly, for Faulkner, it was “the solemn duty of the western delegation [to] arrest the further march of slavery to the west.” Faulkner emphasized that the emancipationist cause in the West was “not . . . a crusade against

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<sup>2</sup> Laslett, ed., *Two Treatises*, 406-407.

<sup>3</sup> *U.S. Census*. In 1810, the slave population was 13.3 percent of the total population. By 1820, that number had grown to 16.9 percent and in 1830, slaves made up 18.2 percent of the county’s total population. There were, at that time, 1919 slaves in Berkeley.

<sup>4</sup> *Speech of Faulkner*, 7.

eastern principles and eastern interests. . . . It is with us a necessary measure of self-defence.”<sup>5</sup>

At the outset of the debate in the legislature, William Goode had argued that discussion of emancipation was causing other states to legislate against the further importation of slaves. Faulkner turned this proslavery argument to his favor. He asserted that once other states had closed their doors to this domestic traffic, western Virginia would become the only market where eastern slaveholders could sell their surplus slaves. He challenged that “if the proposition was now submitted . . . to prohibit the further introduction of slaves west of the Blue Ridge . . . [would] such a proposition . . . meet the concurrences of the gentleman from Mecklenburg [Goode], and those who act with him? I am sure it would not . . . Because you thus-deprive the east of the only market now open to them, for the disposition of their surplus slaves.” Faulkner parodied the rhetoric of the internal improvement debates. “An era of commercial intercourse is thus fondly anticipated . . . between east and west. New ties and new attachments are now to connect us more closely in the bonds of an intimate and fraternal union. Human flesh is to be the staple of that trade, human blood the cement of that connexion.”<sup>6</sup>

After questioning the motives of proslavery delegates, Faulkner turned his attention to the supposed inviolability of property. He challenged Brodnax’s compromise as impractical and proposed that any emancipation plan was contingent upon ideological concessions by the slaveholders. Although he only hesitantly endorsed Randolph’s plan, Faulkner disputed the proslavery position that *post nati* emancipation violated slaveholders’ property rights. He argued that Randolph’s plan did not “violate any such right of property, as is incumbent upon this body to respect under the existing pressure of public danger in this commonwealth.” Faulkner questioned how defenders of slavery could “define the rights, which the slave holder has ... which *may* or *may not come* into potential existence ten years hence?”<sup>7</sup>

The delegate from Berkeley further developed his critique of the Lockean conception of property rights. He offered a different interpretation of the relationship between property and society. “Property is the creature of civil society .... [slaveholders] hold their slaves -- not by any law of nature ... but solely by virtue of the acquiescence and consent of the society in which they live.” Faulkner argued that an individual’s right to property was subservient to the consent of the society. “So long as that property is not dangerous to the good order of society, it may and will be tolerated.” But if property became pernicious and placed the order and tranquility of society in jeopardy then “the right by which they [individuals] hold their property is gone. Society ceases to give its consent.” Faulkner exclaimed that this was “the supreme law of society -- a law above and paramount to all other laws.”<sup>8</sup>

<sup>5</sup> *Ibid.*, 7-8.

<sup>6</sup> *Ibid.*, 9-10.

<sup>7</sup> *Ibid.*, 13-14.

<sup>8</sup> *Ibid.*, 14.

Admittedly, slaveholders possessed a legal right to their ownership of slaves. The right to slave property was established by the legislative enactments of the state. "But it is a right subordinate to the GREAT *rights* of the community . . . it may be enjoyed so long as it is compatible with the public safety -- but no longer." According to Faulkner, since the legislature enacted laws claiming slaves as property, it could also amend the law and "divest them of that quality." Furthermore, he distinguished between the actions of a government taking private property for a beneficial public project and "condemning or removing private property which is ascertained to be a positive wrong to society." Faulkner contested that in circumstances where property is injurious to the society, there was no legal requirement for compensation.<sup>9</sup>

In rejecting Lockean philosophy, Faulkner asserted the government's right of eminent domain. He argued that not only did the state have the right to take property without the consent of the owner, but it could do so without affording compensation in cases of necessity. He believed that the current crisis, which he attributed to the persistence of slavery, called for the legislature to adopt this method of action. "So great and overshadowing are the evils of slavery -- so sensibly are they felt by those who have traced the causes of our national decline," that the immediate removal of the entire slave population was justified by "the great law of state necessity." Accordingly, for Faulkner, Randolph's plan represented the most reasonable compromise available to proslavery delegates. Delegates who defended slavery should willingly accept this compromise because it deferred emancipation and guaranteed the slaveholder his current slave property. Faulkner contended that "if slavery be conceded to be an evil," and he pointed out that "no one has yet asserted otherwise, can the *equity* of such a compromise be questioned?"<sup>10</sup>

### *We will be Heard! -- The Speech of William Ballard Preston*

Charles Faulkner argued that the right of property was subordinate to the interests of society. Society could abolish slavery, at anytime, without infringing upon natural property rights. For slaveholders to maintain that emancipation *post nati* violated their right of property was illogical. Faulkner believed that defenders of slavery, instead of contesting *post nati* emancipation, should embrace the plan because it made allowances for slaveholders' current property. This anti-slavery argument, based upon Faulkner's views concerning the relationship between property and society, was amplified by William Ballard Preston.

William Ballard Preston embodied the charisma and the youth of the western delegates who championed emancipation during the legislative debate. Preston received his education from Hampden-Sydney College and owned a one hundred and twenty acre plantation in Montgomery County. In 1832, his public career was just beginning; he was serving only his second term in the House of Delegates. Yet, as the son of a governor, he came from a prominent family that had

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<sup>9</sup> *Ibid.*, 14-15.

<sup>10</sup> *Ibid.*, 15.

consistently served in public office and advanced the western interests of the state.<sup>11</sup>

Preston delivered his speech after offering an amendment to the resolution of the select committee. On Monday, January 16, 1832, after nearly a week of debate on the floor, the Select Committee on the Coloured Population delivered a resolution declaring any attempt by the present legislature to abolish slavery inexpedient. Preston proposed amending the committee resolution by substituting the word “inexpedient” with the word “expedient.”<sup>12</sup> Preston’s amendment was one of the resolutions voted upon by the House at the close of the debate. Like Randolph’s substitute, this amendment reversed a proslavery motion. Unlike Randolph, however, Preston did not stipulate a specific emancipation scheme. His amendment simply called upon the legislature to enact emancipation legislation. Preston’s speech justified his amendment and asserted the legality and the necessity of the state to act in such a manner.

Preston focused his argument on two themes that extended Faulkner’s conception of property as a right subordinate to the consent of society. The first theme of Preston’s argument addressed the perceived constitutional protections for slavery, while the second examined the sufficiency of necessity for emancipation. Like Faulkner, Preston was dismayed by the attempts of eastern delegates to deny western representatives participation in any legislative proceedings on slavery. Preston warned that the western delegates would not submit to such exclusion and proclaimed to the eastern delegates that “we will be heard!”<sup>13</sup>

Preston denied the proslavery claim that the Federal Constitution protected slavery. He challenged defenders of slavery who invoked the Fifth Amendment, which stipulated “that private property shall not be taken for public uses, without just compensation,” as a guarantee for slavery. In so doing, Preston anticipated the Supreme Court decision, *Barron v. Baltimore*. He claimed that the amendment only applied “to those cases in which the Federal Government,” was compelled to take private property for public uses in the “exercise of her powers, and within the sphere of her constitutional rights.” Preston elaborated his argument contending that the Fifth Amendment restricted the activities of the Federal Government, and “by which the States and the

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<sup>11</sup> Preston Family Papers, Newman Library, Virginia Tech; Virginia Land Tax Books, Montgomery County, 1831, Library of Virginia; *Bicentennial Register*. Preston served in the House of Delegates from 1830 -32. For a time he served as the Commonwealth Attorney for Floyd County. He returned to the General Assembly serving as a senator from 1840-44 and again as a delegate in 1844-45. Preston served in the U.S. House of Representatives from 1847-49 and then served as Secretary of the Navy from 1849-1850. He was a delegate to the 1861 Secession Convention and one of a three member delegation who met with Abraham Lincoln that April in a failed attempt to negotiate a compromise. Subsequently, he served as a member of the Confederate Senate until his death in 1862.

<sup>12</sup> *House Journal*, 99.

<sup>13</sup> *Richmond Enquirer*, February 9, 1832.

people of the States are to be protected against that Government. It did not guarantee the right of property to individuals, particularly in the face of local or state laws to the contrary. "It is a *rule of action* for that Government, not a *charter of rights* to citizens of the States, in the mode, and manner, and tenure by which they hold their property."<sup>14</sup>

Preston continued his argument against Federal protections of slave property by citing the three-fifths clause. Disputing proslavery claims to this clause as a security, Preston suggested that the clause recognized slaves as persons; "persons entitled to a representation for three-fifths of their numbers." The clause did not define slaves as property. It merely defined their status as persons under the Federal standard. Accordingly, any defense of slavery grounded upon the Federal Constitution "to sustain and protect . . . this species of property, entirely fails."<sup>15</sup>

Neither did the Virginia constitution define slaves as property. Preston admitted that, in Virginia, slaves were property. But they were not made so by constitutional authority, they became "property under the Statutes of Virginia." Preston contested that the "provision in the Constitution which guarantees property to the citizen, refers exclusively to . . . common law definition of property." He provided an example, arguing that "there is no Statute by which your horse or your ox is declared to be property." Slaves, however, were an exception. "Slaves . . . were not property by the common law, [they] were made so by statutory enactments." And these statutes were now forming "an insurmountable barrier to those natural and unalienable rights" of slaves. Preston contested that "the slave has a *natural* right to regain his liberty."<sup>16</sup>

Preston further argued that a law enacted by statute could simply be repealed by statute. "The power which this Legislature possessed of declaring what *shall be* property, also enables it to declare what *shall not be* property." The abolition of slavery in Virginia could be accomplished in this session of the General Assembly by simply repealing the existing statutes that upheld slavery. Preston revived the central point of Faulkner's argument, claiming that when the public necessity for emancipation exceeded their necessity for retaining slaves, "then it is in the power of this or any subsequent Legislature to repeal this statute."<sup>17</sup> Preston, anticipating accusations that his argument violated Constitutional rights, proclaimed that he "attack them openly, [and] boldly." He justified his attack upon "that great law of necessity -- *self-preservation*." Preston also mirrored the concerns of Faulkner about the encroachment of slavery into the West. When the southwestern states prohibited the trade of slaves, "what will be the fate of the West? Those mountains amid which our security has been felt; will no longer be secure; our tall forest will fall before the stroke of the Eastern slave; our rich soil will be tilled by the hands of slaves; and our

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<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

free and happy country will become the home of the slave.”<sup>18</sup>

*This Trying Hour of Her Fortunes -- The Speech of James McDowell*

The argument of Preston, like that of Faulkner, represented a radical departure from previous attempts at emancipation. Randolph’s proposal for emancipation *post nati*, like those that had preceded it in Virginia, addressed the issue of slave property in Lockean terms. Until the speeches of Faulkner and Preston, the inviolability of property had remained unquestioned. Their speeches challenged the sanctity of property. A few days later, James McDowell reaffirmed that “the rights of private property and of personal security exists under every government, but they are not *equal*.” McDowell argued that “security is the primary purpose for which men enter into government; property, beyond a sufficiency for natural wants, is only a secondary purpose.” Private property was permitted by law because it afforded comfort and enjoyment for people. “When it jeopardizes the security of the public . . . then the original purpose for what it is authorised is lost.”<sup>19</sup>

McDowell, representing Rockingham County in the Shenandoah Valley, concurred with the relationship between property and government specified by his fellow western delegates. His speech, delivered in the closing days of the legislative debate, represented a summation of the emancipationist argument. In it he declared the need for the Virginia legislature to act on the question of abolition now. McDowell referred to the debate as the “trying hour of her [Virginia’s] fortunes.” He contended that “if there ever was a subject thrown before the public councils . . . which involved a crisis in their affairs, that subject is before us now.” He criticized proslavery delegates who claimed emancipation was inexpedient at this time and argued that abolition only became more difficult with “every hour of delay.”<sup>20</sup> McDowell challenged the proslavery assertion that it was imprudent to attempt to abolish slavery since the Founding Fathers had been unable to accomplish it and since, from their time, the situation had “changed for the worse.” According to McDowell, these changes in the circumstances of slavery, “upon which all legislation is now denounced, is precisely the change which justifies and requires it.” He argued that in previous generations slaves were less numerous and their labor was more necessary and more profitable. Furthermore, in the past, an open market for the domestic slave trade had siphoned of the excess population of slaves. These conditions had served to check the increase of the slave population and avert insurrection. Such conditions no longer existed. “Now, this outlet for the vicious or redundant portion of the people is closed -- the forests which burdened the labors of our ancestors

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<sup>18</sup> *Ibid.*

<sup>19</sup> *Speech of James M’Dowell of Rockbridge in the House of Delegates of Virginia, on the Slave Question: January 21, 1832* (Richmond, 1832), 15.

<sup>20</sup> *Ibid.*, 3-6.

have disappeared, and the peculiar staple [tobacco] which rewarded them has been scattered far and near through the Union.”<sup>21</sup>

McDowell concluded his argument for the necessity of emancipation. “If I was to judge from the tone of our debate . . . there is not a man in this body . . . who would not have thanked the generations that have gone before as if, acting as *public* men, they had brought this bondage to a close -- who would not have thanked them, if, acting as private men on private motives, they had relinquished the property which their kindness has devolved upon us?” Turning from the past, McDowell examined the future. What was the price of inaction? “Slavery has come down to us from our fathers, and the question is shall we hand it over to our children? . . . Shall we perpetuate the calamity we deplore and become to posterity the objects . . . of cursing? Possessed of slaves as a private property by the act of our ancestors, shall we transmit it as such throughout an indefinite future?”<sup>22</sup> McDowell thought this contrary to the best interests of the state. He endorsed abolition.

### *Summary*

McDowell’s speech represented a consolidation of the emancipationist positions expressed during the legislative debate. He incorporated the ideas of Moore and Bolling, which claimed that slavery was detrimental to the economy and contrary to social order, with the assault upon the inviolability of property, which was waged by Faulkner and Preston. His central message was clear and concise. The increasing evils of slavery outweighed any perceived necessities. Traditional proslavery arguments that emphasized the state’s economic dependence upon slave labor rang hollow in the midst of diminished prosperity. Following the fear and panic in the wake of the Southampton insurrection, arguments for slavery as a means of racial control appeared absurd. Justification for slavery, therefore, rested exclusively on the right of the slaveholders to retain their private property. Faulkner and Preston had challenged this right on the grounds of public necessity. They had invoked the concept of eminent domain, the right of the state to take or destroy property, without the consent of the owner, in the larger public interest. Faced with the acknowledged evil of slavery, the state was released from its customary payment of compensation. Furthermore, Preston argued that the power inherent in the state to enact legislation, the police power of the state, conferred a reciprocal power to alter or abolish previous legislation, especially legislation harmful to the state. The law of public safety was a higher law than that of private property.

Clearly the framework of the debate had changed. What started as a sincere attempt at abolition, now threatened ideological conceptions of property and the role of government as well. The radical argument of the emancipationists signaled a corresponding change in the defense of

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<sup>21</sup> *Ibid.*, 7-8.

<sup>22</sup> *Ibid.*, 10.



slavery. Faulkner had anticipated the new course which the debate would take. "It may be very plausible in our opponents to contend that the time has not yet arrived, when a resort to this great law of state necessity can be justified. But to assert that there does not exist in every community an inherent, absolute, and undeniable right to protect itself from destruction, even by the sacrifice of private property, is what no writer on public law ever yet dared to question. It is a right superior to all law, and founded in the moral justice and physical power of a community to prostrate whatever may endanger its tranquility or existence."<sup>23</sup> This right, which Faulkner referred to, that was superior to all law and beyond question was the right of the government to preserve itself and its people.

The argument of the emancipationist, like that of the proslavery advocates, solely reflected the interests of the white population. Defenders of slavery wanted to protect white property interests, while emancipationist wanted the government to ensure white safety. This concept of government acting to protect the welfare of its people was just emerging during the early republic. The prevailing political philosophy of the Revolutionary age believed that governments were contracted to protect natural liberties from restraint, not to actively establish liberties. Under natural rights philosophy, such government action would be absurd. How could governments create freedom when freedom was already the natural state of man? This was the ideology of those who defended slavery. In order to uphold their principles of government, defenders of slavery altered their rhetoric in the defense of slavery. No longer would they recognize slavery as a necessary evil.

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<sup>23</sup> *Speech of Faulkner*, 15.