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## Petigru College

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ESSAY

PETIGRU COLLEGE\*

WILLIAM SHEPARD MCANINCH\*\*

*Do I contradict myself?  
Very well then I contradict myself,  
(I am large, I contain multitudes.)\*\*\**

I. INTRODUCTION

I do not recall noticing the bronze letters, "Petigru College," on arriving at the old law school building at the University of South Carolina for my interview for a faculty position in February 1969. Nor did they impress me until one day when, after teaching there several months, a student pointed them out and told me about the man behind the name, James Louis Petigru. I was delighted to learn that this conservative, southern law school was named after a lawyer who had been a South Carolina abolitionist.

My initial delight, however, was misplaced. At least one other legal historian has shared my delusion. In 1988, Whitney North Seymour, Jr., a highly regarded former United States Attorney for the Southern District of New York, published an article which creates the misleading impression that Petigru opposed slavery.<sup>1</sup> Seymour's otherwise accurate account relates numerous examples of the principled manner in which Petigru lived and practiced his profession.<sup>2</sup>

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\* This essay is dedicated to the memory of Dr. George C. Rogers, Jr., 1918-1997, former chairman of the Department of History of the University of South Carolina. George epitomized the ideal scholar and gentleman.

\*\* Solomon Blatt Professor of Law, University of South Carolina. Earlier versions of this essay were presented to the Loblolly Society of Columbia, South Carolina, and at a faculty colloquium at the School of Law of the University of South Carolina. The author is grateful for helpful suggestions by both audiences, for research assistance by Michael Truesdale, and for editorial suggestions by Terry Seligmann.

\*\*\* WALT WHITMAN, *Song of Myself*, in *LEAVES OF GRASS* 22, 72 (Bantam Books 1983) (1892).

1. Whitney North Seymour, Jr., *Heroes of the Bar: James Louis Petigru, Esquire*, N.Y. ST. B.J., Oct. 1988, at 48.

2. See *id.* But see JAMES OSCAR FARMER, JR., *THE METAPHYSICAL CONFEDERACY: JAMES HENLEY THORNWELL AND THE SYNTHESIS OF SOUTHERN VALUES* 26 (1986) (calling Petigru "admired eccentric" that "could be tolerated without fear."); Lacy Ford, *James Louis Petigru: The Last South Carolina Federalist*, in *INTELLECTUAL LIFE IN ANTEBELLUM CHARLESTON* 152,

Seymour manipulates Petigru's life and legend to encourage today's lawyers to practice their profession in a more principled fashion. This particular encouragement bears constant repetition.<sup>3</sup> Over the years Petigru's example has been used to support numerous causes, some not nearly as worthy as others. William and Jane Pease devote the first chapter of their recent, thorough biography of Petigru to his legend and its use for various partisan purposes, including the suppression of political dissent.<sup>4</sup>

Petigru's life is legendary. How could an out-spoken Unionist, an implacable and articulate foe of the Negro Seaman's Act,<sup>5</sup> the South Carolina Oath of Allegiance,<sup>6</sup> the Confederate Sequestration Act,<sup>7</sup> and secession in general, be eulogized by confederate officers at a Charleston cemetery in 1863 with Union forces only twelve miles away?<sup>8</sup> Furthermore, why would the New York and Massachusetts Historical Societies devote special meetings to honor his memory?<sup>9</sup>

This essay first sketches the facts of his life with some emphasis on education, featuring Petigru as both student and teacher, and highlighting his connections with the University of South Carolina. It then discusses Petigru's political beliefs and political career, focusing on two contradictory themes: his strong belief in the federal union as the best guarantor of individual liberties through the rule of law, and his attitude toward slavery. Each theme reappears in the section on his practice of law, which describes both his day-to-day practice and some of his high-profile cases. The essay concludes by reflecting on those bronze letters with which it began.

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157-59 (Michael O'Brien & David Moltke-Hansen eds., 1986) (arguing that Petigru adopted Federalist views partly to ingratiate himself with the Charleston aristocracy).

3. One almost hesitates to open the advance sheets for fear of reading about the discipline of still more of our peers in the bar.

4. WILLIAM H. PEASE & JANE H. PEASE, JAMES LOUIS PETIGRU: SOUTHERN CONSERVATIVE, SOUTHERN DISSENTER 8 (1995). In 1919 during the Red Scare, John P. Thomas Jr., the then president of the South Carolina Bar, praised Petigru's loyalty to the United States during the time leading up to secession, and suggested that one with Petigru's loyalty to the federal government would suppress the "fanatical minorities" who posed a threat to the American way of life. *Id.* at 8 (quoting John P. Thomas, Jr., James L. Petigru, Lawyer and Citizen, Address to the Joint Session of Georgia and South Carolina Bar Associations (May 30, 1919), *reprinted in* 41 MERCER L. REV. 637, 650 (1990)).

5. Act of Dec. 19, 1835, 7 S.C. Stat. 470.

6. Act of Dec. 19, 1833, 8 S.C. Stat. 568.

7. Act of Aug. 30, 1861, ch. 61, Confederate States of America Stat. 201.

8. PEASE & PEASE, *supra* note 4, at 1.

9. John P. Thomas, Jr., James L. Petigru, Lawyer and Citizen, Address to the Joint Session of Georgia and South Carolina Bar Associations (May 30, 1919), *reprinted in* 41 MERCER L. REV. 637, 649 (1990).

II. HIS LIFE<sup>10</sup>

He was born James Louis Pettigrew near Abbeville, South Carolina, in 1789.<sup>11</sup> His Scots-Irish, alcoholic father soon lost his own modest inheritance, forcing the growing family to move in with the father's French Huguenot brother-in-law at Badwell Farm, a moderately successful back-country concern populated by, among others, several slaves.<sup>12</sup> Fortunately for Petigru, his father's passions included books as well as liquor, and both mother and father encouraged his intellectual pursuits.<sup>13</sup> Such direction was especially important because rural, up-country South Carolina at the dawn of the nineteenth century was culturally isolated with few educational opportunities.<sup>14</sup>

Petigru enrolled at age fifteen in a nearby academy.<sup>15</sup> Though housed in a log cabin, the school had an excellent master, Moses Waddel, and a solid reputation.<sup>16</sup> Petigru did so well in his two years there that Waddel asked him to stay on as a teacher, but Petigru declined the offer.<sup>17</sup> With modest financial support from his uncle and mother he enrolled in South Carolina College in 1806.<sup>18</sup>

Chartered in 1801, the college, which ultimately became the University of South Carolina, did not begin operations until 1805.<sup>19</sup> Exempted from requirements in Greek, Latin, and other subjects because of his education with Waddel, Petigru enrolled as a sophomore<sup>20</sup> and graduated at the top of his class<sup>21</sup> despite his having to work part-time and live off campus.<sup>22</sup> Such deprivations may have been advantages in disguise, insulating him to some extent from the drunken revelry for which the college became known, then,<sup>23</sup> as well as now. His insulation was far from complete, however, as Petigru drank to excess on occasion.<sup>24</sup>

10. This section provides no more than a sketch of Petigru's life. It omits most aspects of his personal life, including his admirable lifelong devotion to and support of his immediate and extended families in spite of financial hardships and other disappointments, such as his wife's drug addiction. PEASE & PEASE, *supra* note 4, at 70.

11. *Id.*, at 12. Petigru changed the Scots-Irish spelling of his name (Pettigrew) to the French Huguenot version when he moved to Charleston. *Id.* at 17-18.

12. *Id.* at 14.

13. *Id.* at 15.

14. 1 DANIEL WALKER HOLLIS, SOUTH CAROLINA COLLEGE 6 (1951).

15. PEASE & PEASE, *supra* note 4, at 16.

16. *Id.*

17. *Id.*

18. *Id.*

19. 1 HOLLIS, *supra* note 14, at 3.

20. PEASE & PEASE, *supra* note 4, at 16.

21. WILLIAM J. GRAYSON, JAMES LOUIS PETIGRU 46 (1866).

22. PEASE & PEASE, *supra* note 4, at 16. The non-affluent Petigru was in a distinct minority at what was known as a rich man's institution. 1 HOLLIS, *supra* note 14, at 5-6, 130-31.

23. 1 HOLLIS, *supra* note 14, at 53-55.

24. PEASE & PEASE, *supra* note 4, at 18 ("Never a teetotaler, he enjoyed his wine and, some

Two aspects of his time in college merit special mention. One was his close friendship with William Grayson, the son of a wealthy Beaufort family.<sup>25</sup> Though differing substantially on subsequent political developments, they remained close friends for life, and Grayson wrote Petigru's first biography.<sup>26</sup> The other was his participation in the Clariosophic Society, a debating organization.<sup>27</sup> Founded the year Petigru entered the college, the Clariosophic Society still has a handsome meeting room on the top floor of Legare College on a portion of the University campus known as the "Horseshoe."<sup>28</sup> Here he developed not only the lawyer's skills of thinking on his feet and making persuasive arguments, but also a keen interest in politics and political theory.<sup>29</sup>

The master of his secondary school was not the only one to recognize Petigru's potential as a teacher. While at South Carolina College, Petigru taught part-time at the Columbia Academy,<sup>30</sup> and after graduating became the master of a school in the small village of Eutaw, where he became friends with Daniel Elliot Huger, a prominent local planter.<sup>31</sup> Shortly thereafter, Huger helped Petigru secure a position at the more prestigious Beaufort College where he served for a brief time as acting president.<sup>32</sup> Years later Petigru stated that had he been appointed president of the school, a position he had wanted, he probably would have remained in academia.<sup>33</sup> This remark prompted Grayson to speculate that had Petigru remained in teaching, no doubt he ultimately would have ascended to the presidency of South Carolina College.<sup>34</sup> As Grayson observed, "[a]ny body can make a lawyer or politician, but where could such a college president be found within the limits of the country?"<sup>35</sup> Given Petigru's accomplishments within his chosen profession, Grayson's speculation may not have been far off the mark.

critics thought, often drank beyond moderation.").

25. GRAYSON, *supra* note 21, at 42; PEASE & PEASE, *supra* note 4, at 17.

26. GRAYSON, *supra* note 21. Petigru's lifelong friendship with Grayson is an example of the "old boy network" from which early graduates of the college often benefited. 1 HOLLIS, *supra* note 14, at 259-60.

27. PEASE & PEASE, *supra* note 4, at 16.

28. In Petigru's time, both the Clariosophic Society and its competitor, the Euphradian Society, which today has a meeting room in Harper College on the horseshoe, shared meeting space in the chapel in Rutledge College, the first building of South Carolina College. 1 HOLLIS, *supra* note 14, at 232 (calling the building that housed the chapel the "Old South Building"). Petigru served as president of the Clariosophic Society at South Carolina College. Clariosophic Society 1806-1892, (Feb. 25, 1809) (unpublished notebook, located in University of South Carolina Archives Warehouse, Columbia, South Carolina), and once moderated an interesting debate on slavery. *See infra* note 94.

29. PEASE & PEASE, *supra* note 4, at 17.

30. *Id.* at 18.

31. *Id.* at 18-19.

32. *Id.* at 19.

33. GRAYSON, *supra* note 21, at 65.

34. *Id.*

35. *Id.* at 66.

South Carolina College selected Petigru to give the keynote address at the college's fiftieth anniversary.<sup>36</sup> The address has been described "as one of the most important documents in the history of the institution" because of its discussion of the college's origins.<sup>37</sup> Though Petigru left Carolina College to practice law, he took an active interest in the college and tried, on two occasions, to influence important personnel decisions, apparently for political reasons.<sup>38</sup>

While teaching in Beaufort, Petigru read law with a local attorney and was admitted to the bar in 1812.<sup>39</sup> This was an unfortunate time to start a law practice. The War of 1812 greatly hindered the local economy, which depended on exporting agricultural products to England.<sup>40</sup> With little money in circulation, attorneys' fees were not a top priority.<sup>41</sup> During his first several years as an attorney Petigru made more money from teaching law to apprentices than from its actual practice.<sup>42</sup> This practice perhaps was sometimes primarily a function of his love for teaching, at other times of his need for money.<sup>43</sup>

Clients eventually began to seek his services. His developing reputation and the efforts of his mentor, Daniel Huger, resulted in his election by the legislature as solicitor for the Beaufort District in 1816.<sup>44</sup> That same year he married Jane Amelia Postell, the daughter of a prosperous local planter.<sup>45</sup> Three years later, again in large part due to Huger's influence, Petigru moved to Charleston to become a junior partner of the politically well-connected James Hamilton. In 1822, Petigru took over his thriving practice after Hamilton's election to Congress.<sup>46</sup> By this time Petigru had become such a well-respected player in the South Carolina legal community that he was selected by the

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36. 1 HOLLIS, *supra* note 14, at 4-5.

37. *Id.* at 5.

38. *See id.* at 110 (describing Petigru's 1831 effort to oust Thomas Cooper, an outspoken Nullifier, from the presidency of the college); *see also* 1 HOLLIS, *supra* note 14, at 190-91 (relating Petigru's support of the unsuccessful efforts of Professor Francis Lieber, a strong nationalist, to become president of the college in 1855).

39. PEASE & PEASE, *supra* note 4, at 19.

40. *See* GRAYSON, *supra* note 21, at 72.

41. *Id.* at 72-73.

42. PEASE & PEASE, *supra* note 4, at 20.

43. In the past, apprenticeship was the standard method of entering the professions, and it was not until 1958 that applicants for the bar in South Carolina were required to be law school graduates. Rules for the Examination and Admission of Persons to Practice Law in South Carolina, Rule 5 (Michie 1962) (establishing for the first time a requirement for law school graduation).

44. PEASE & PEASE, *supra* note 4, at 20-21.

45. *Id.* at 22.

46. *Id.* at 21, 24-25. Hamilton subsequently became governor and was a strong Nullifier. *Id.* at 37. Nonetheless, he and Petigru remained friends for life. *See id.* at 117. This relationship was not unique. Petigru always seemed to retain the respect and friendship of those with whom he disagreed.

legislature as state attorney general.<sup>47</sup>

In spite of his comparatively rough, back-country origins, Petigru fit in easily with the rich and powerful. Indeed, thanks to his combination of intellect, learning, and social skills, he soon became an integral part of Charleston society's upper echelons, as evidenced by his election to the vestry of Saint Michael's Episcopal Church.<sup>48</sup> Petigru's flourishing law practice afforded him a fairly lavish lifestyle, which included a great deal of entertaining.<sup>49</sup> However, unlike his elite contemporaries, Petigru lacked inherited or otherwise accumulated wealth to fall back on in hard times. His lack of financial acumen, his generosity (especially his readiness to co-sign loans for his friends and firm commitment to full payment when his friends defaulted), and his wife's extravagances nearly bankrupted him on several occasions.<sup>50</sup> At the time of his death at age seventy-three, he was still working hard to make a living in spite of poor health.<sup>51</sup>

### III. POLITICAL BELIEFS AND POLITICAL CAREER

Petigru was first and foremost a political conservative whose strong belief in the rule of law led him to be an ardent Unionist. He was fond of saying, "I came in with the Constitution," referring as much to his political posture as to his date of birth.<sup>52</sup> He displayed an apprehension of rule by majority vote if not subject to constitutional constraints to protect minority interests.<sup>53</sup> Intellectually a Unionist and emotionally a Southerner,<sup>54</sup> he was a complex man who lived in complex times.

In the 1830s, the political issue in South Carolina was nullification.<sup>55</sup> The conflicts swirling around the issue provided the stage on which Petigru played out his political career. Congress provided the catalyst for nullification by enacting a tariff on imported textiles in 1828.<sup>56</sup> Many Southerners perceived the tariff to be a *de facto* tax on their cotton exports for the benefit of Northern textile mills.<sup>57</sup> The Nullifiers, also known as states' righters, claimed the state

47. *Id.* at 26.

48. PEASE & PEASE, *supra* note 4, at 36.

49. *Id.* (noting Petigru's "Sunday afternoon feasts").

50. *See id.* at 92-94.

51. GRAYSON, *supra* note 21, at 168.

52. Seymour, *supra* note 1, at 48.

53. PEASE & PEASE, *supra* note 4, at 61-62.

54. *Id.* at 172.

55. *See, e.g.,* GEORGE BROWN TINDALL, AMERICA: A NARRATIVE HISTORY 415-23 (2d ed. 1988).

56. Act of May 19, 1828, ch. 55, 4 Stat. 270; *see* IRVING H. BARTLETT, JOHN C. CALHOUN, 145-52 (1993).

57. *See* BARTLETT, *supra* note 56, at 139, 142; PEASE & PEASE, *supra* note 4, at 37.

had the power to reject a law enacted by Congress.<sup>58</sup> To Petigru, such a proposition posed a revolutionary threat to the country.<sup>59</sup> Should the nullification doctrine be recognized by realpolitik or otherwise, the constitutional union would be broken. Petigru believed that the best way to avoid that catastrophe would be to derail any effort at a formal declaration of nullification.<sup>60</sup>

In order to help persuade the legislature not to call a nullification convention, Petigru resigned his position as attorney general in 1831 to run for the state senate.<sup>61</sup> He narrowly lost, but later that year he was elected to a vacant seat in the state house of representatives,<sup>62</sup> a position he lost the next year in the Nullifiers' landslide of 1832.<sup>63</sup> After the election, a special convention was called that promptly adopted an ordinance nullifying the tariff, precluded its collection, and imposed a mandatory oath of allegiance to South Carolina upon all state officials.<sup>64</sup>

These were tense times in South Carolina.<sup>65</sup> Although the Nullifiers constituted a substantial majority throughout the state, the Unionists had their own dedicated adherents.<sup>66</sup> Physical fights during the 1832 election foreshadowed greater violence during the election of 1834.<sup>67</sup> Andrew Jackson's threat of military action,<sup>68</sup> and Congress enacting a compromise tariff in 1833<sup>69</sup> prompted the Nullifiers to rescind the bulk of the Nullification Ordinance,<sup>70</sup> although they retained the requirement of the oath of allegiance to the state.<sup>71</sup>

The Unionists, correctly perceiving that the scope of the oath could be expanded and used to preclude them from state office, promptly filed suit. They sought to invalidate the oath, but lost at the trial court level before a Nullifier judge.<sup>72</sup> Petigru and Thomas S. Grimké argued for the Unionists before the

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58. See BARTLETT, *supra* note 56, at 149-52.

59. See PEASE & PEASE, *supra* note 4, at 37.

60. See *id.*

61. *Id.* at 43.

62. *Id.*

63. *Id.* at 51-52.

64. Ordinance of November 24, 1832, 1 S.C. Stat. 329; see PEASE & PEASE, *supra* note 4, at 52. The ordinance forbade appeals to the United States Supreme Court from state court judgments validating the nullification ordinance, and further threatened with contempt of court any persons attempting such an appeal. 1 S.C. Stat. at 330.

65. See, e.g., PEASE & PEASE, *supra* note 4, at 51-52 (describing mob violence between Unionists and Nullifiers).

66. See *id.* at 52-54.

67. See *id.* at 51-52, 54, 63.

68. See *id.* at 54.

69. Act of July 14, 1832, ch. 227, 4 Stat. 583 (repealing parts of the Act of May 19, 1828, ch. 55, 4 Stat. 270).

70. Ordinance of March 15, 1833, 1 S.C. Stat. 390.

71. See PEASE & PEASE, *supra* note 4, at 58.

72. *Id.*, at 58-59.



three-judge court of appeals.<sup>73</sup>

The oath was fairly innocuous on its face: "I . . . do solemnly swear, (or affirm, as the case may be,) that I will be faithful, and true allegiance bear to the State of South Carolina."<sup>74</sup> Petigru argued that "the authors of this measure have set a definition [of] 'allegiance,' which makes it . . . a term of art, to express certain controverted opinions concerning the nature of the Constitution of the United States, and renders the oath . . . a complete criterion of party—in one word, a test oath."<sup>75</sup> The source of the oath, the Ordinance of 1833, forbade allegiance to any other government.<sup>76</sup> It authorized the General Assembly to require the oath of citizens and office holders, to prohibit all other allegiances, to define violations of the oath, and prescribe penalties for violations.<sup>77</sup>

Petigru's main arguments against the oath included a natural law appeal for recognition of the inherent liberty of the individual<sup>78</sup> and a claim that the oath necessarily violated the supremacy clause of the United States Constitution.<sup>79</sup> Petigru and the Unionists won the case, but on the narrow ground that the convention called to rescind the nullification of the tariff lacked the authority under the South Carolina Constitution to enact the oath requirement.<sup>80</sup>

It was a temporary victory. With a larger majority in the 1834 legislature, the Nullifiers were poised to enshrine the oath in the state constitution, a move likely to exacerbate an already volatile situation.<sup>81</sup> The Legislature invited Petigru to address a joint session of that body to help defuse the issue through compromise.<sup>82</sup> Petigru was instrumental in crafting a compromise that included a watered-down version of the oath.<sup>83</sup> However, the Nullifiers in the legislature

73. *State ex rel. M'Cready v. Hunt*, 20 S.C.L. (2 Hill) 1 (1834) (Arguments of counsel run for more than two hundred pages, with Grimké's argument beginning on page 14 and Petigru's on page 113. The opinion of the court begins on page 209.)

74. Act of Dec. 19, 1833, 8 S.C. Stat. 568, 570.

75. *M'Cready*, 20 S.C.L. (2 Hill) at 116.

76. See Ordinance of March 18, 1833, 1 S.C. Stat. 400 (mandating that "allegiance of the citizens of this State . . . is due to the said State; and that obedience only, and not allegiance, is due by them to any other power . . .").

77. Ordinance of March 18, 1833, 1 S.C. Stat. 400, 401.

78. *M'Cready*, 20 S.C.L. (2 Hill) at 120.

79. *Id.* at 121-22. After outlining this last argument, Petigru, apparently worn out, stated: "I have no inclination, nor strength, to pursue the argument." *Id.* at 122. Petigru could have argued that the understanding of the oath of allegiance to include a rejection of allegiance to any other government directly contradicts the requirement of an oath of allegiance by state officials to the federal constitution. See U.S. CONST. art. VI, cl. 3.

80. *M'Cready*, 20 S.C.L. (2 Hill) at 223 ("[T]hey rescinded the ordinance of nullification; but again nullified another act of Congress . . . commonly called the 'Force Bill.' Here ended their powers.").

81. PEASE & PEASE, *supra* note 4, at 62.

82. *Id.* at 64.

83. "I do solemnly swear, (or affirm,) that I will be faithful, and true allegiance bear, to the State of South Carolina . . . and preserve, protect and defend, the constitution of this State and of the United States." Act of Dec. 17, 1834, 8 S.C. Stat. 578, 578.

were hardly through. The following year they abolished the court of appeals.<sup>84</sup> This may have vexed Petigru not only because it was the court of appeals that had invalidated the earlier oath, but also because it was the venue in which he had successfully argued numerous appeals in his regular law practice.<sup>85</sup>

Although he later served another two-year term in the House of Representatives, by the middle of the 1830s Petigru's political career was over as a practical matter.<sup>86</sup> His vocal insistence on the necessity of the protections of the United States Constitution against the tyranny of the majority in South Carolina doomed any prospects of him garnering widespread political support during the prelude to secession.<sup>87</sup>

On the national scene President Jackson and President Lincoln considered Petigru for appointment to the United States Supreme Court<sup>88</sup> However, political machinations frustrated both appointments as well as a possible appointment as United States Attorney General by President Fillmore in 1850.<sup>89</sup> At Fillmore's personal urging, however, Petigru agreed to serve as United States Attorney for South Carolina. Petigru initially rejected this appointment, but when he could not persuade any other prominent South Carolinian to accept the office, he relented.<sup>90</sup>

Politically and philosophically out of tune with his time and place, Petigru was aware that his voice of dissent and calls for moderation were largely ignored, regardless of how well respected he may have been. His frustration is evidenced by his often quoted but apocryphal statement: "South Carolina—too small for a republic, too large for an asylum."<sup>91</sup>

Even a cursory review of Petigru's political beliefs must touch on his attitudes toward race and slavery. He was never an abolitionist in either word or deed, although in his student days at South Carolina College he moderated a debate in the Clariosophic Society when that body concluded that "justice

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84. Act of Dec. 18, 1835, 7 S.C. Stat. 334.

85. PEASE & PEASE, *supra* note 4, at 66.

86. *Id.* at 66-67.

87. *See id.* at 67.

88. *Id.* at 69-70, 161.

89. *Id.* at 153.

90. JAMES PETIGRU CARSON, *LIFE, LETTERS AND SPEECHES OF JAMES LOUIS PETIGRU* 280-83 (1920).

91. PEASE & PEASE, *supra* note 4, at 156. This author could find no direct verification that Petigru made this statement. The Peases' source for this statement is a life-and-letters biography by James Blyth Allston which was published serially in the *Charleston Sunday News* from 1899 to 1900 and later compiled in a scrapbook entitled *Life and Times of James L. Petigru*, now in the Charleston Library Society. Letter from William H. Pease to William S. McAninch (Dec. 17, 1996) (on file with author); PEASE & PEASE, *supra* note 4, at 225. In the letter, Dr. William Pease noted that Allston, a nephew by marriage of Petigru, probably had the quotation as a part of direct family lore rather than as a second-hand story picked up on the street. During a presentation by the author of this essay to the Loblolly Society of Columbia, South Carolina, one of the members observed: "Well, if he didn't say it, he should have!"

require[s] the manumi[s]sion of slaves in the [s]outhern [s]tates.”<sup>92</sup> While he considered the institution of slavery a wrong against humanity and opposed its expansion into newly admitted states, Petigru accepted its existence in the South and never called for its abolition.<sup>93</sup>

Petigru owned slaves from the time of his marriage in 1816 throughout his life.<sup>94</sup> In times of prosperity he had as many as twenty-two slaves in Charleston to tend to his house and office.<sup>95</sup> He prided himself on being a “good master”<sup>96</sup> and noted with particular satisfaction his improvement of the standard of living of the slaves on a plantation he purchased on the Savannah River.<sup>97</sup> There is no readily accessible record, however, of any efforts by Petigru on behalf of the slaves on an Alabama cotton plantation he invested in which proved to be a financial disaster.<sup>98</sup>

While he emancipated only one of his own slaves in forty-seven years of slave ownership,<sup>99</sup> Petigru did help his clients work their way around South Carolina’s statutory ban on private emancipation.<sup>100</sup> For example, he worked for years to secure the freedom of slaves one of his clients had attempted to free in his will.<sup>101</sup> Petigru not only won the case but also got a special bill of emancipation passed through the legislature, helped secure money to purchase two family members who had been wrongfully sold, and sent the entire family to Liberia.<sup>102</sup> During his second term in the legislature, Petigru assisted disenfranchised freed blacks by introducing special legislation for the emancipation of family members.<sup>103</sup> Also to Petigru’s credit is the legislative rejection of his efforts to codify state law<sup>104</sup> perceived as too lenient towards slaves and freed blacks.<sup>105</sup> On the other hand, during his practice of law,

92. Minutes of meeting of the Clariosophic Society for Feb. 25, 1809, CLARIOSOPHIC SOCIETY MINUTES 1806-1811 (located in University of South Carolina Archives, Columbia, South Carolina).

93. See CARSON, *supra* note 90, at 347-48.

94. PEASE & PEASE, *supra* note 4, at 134, 166.

95. *Id.* at 134.

96. *Id.*

97. *Id.* at 86.

98. *Id.* at 92 (describing the financial disaster with no mention of the slaves).

99. *Id.* at 134.

100. PEASE & PEASE, *supra* note 4, at 137.

101. *Id.* at 137-38.

102. *Id.*

103. *Id.* at 82.

104. *Id.* at 145.

105. *Id.* at 167-69. Ultimately, Petigru’s proposed code was relied upon extensively by D.T. Corbin, one of the three reconstruction commissioners, when he drafted the code enacted in 1869. See Act of Mar. 9, 1869, 14 S.C. Stat. 207 (1869); William Lewis Burke, Jr., *A History of the Opening Statement from Barristers to Corporate Lawyers: A Case Study of South Carolina*, 37 AM. J. LEGAL HIST. 25, 44 n.150 (1993) (noting that the inside cover of a copy of Petigru’s code in the South Caroliniana Library and numerous pages of the volume contain extensive notations in Corbin’s hand).

Petigru never challenged the validity of the onerous criminal justice system applicable to these groups.<sup>106</sup> Moreover, there is no record of his comment, let alone condemnation, of the closed court trials in Charleston that sentenced to death thirty-five slaves allegedly involved in the aborted Denmark Vesey slave uprising.<sup>107</sup>

In general Petigru's attitudes towards slaves and blacks were quite progressive for his time. For example, Petigru played a key role in preventing the destruction of a newly erected church for slaves when irate citizens wanted to destroy it following some local black-against-white violence.<sup>108</sup> In an 1841 commencement address at Oglethorpe University, Petigru noted the inferiority of the "savage" to the "civilized" race; but then remarkably, in the context of antebellum South Carolina, observed that the problem with the former was primarily their lack of knowledge—a problem which could be solved through education.<sup>109</sup>

#### IV. THE PRACTICE OF LAW

For fifty years Petigru worked as a successful and highly respected attorney. His clients ranged from banks, railroads, and wealthy planters to poor widows and more than his fair share of pro bono cases. Although his practice started slowly in 1812 in rural Beaufort County, his reputation grew rapidly, especially after his move to Charleston.<sup>110</sup> His broad general practice emphasized trust and probate, debt settlement, commercial law, corporate law, and real estate.<sup>111</sup> During the 1840s, he appeared in one quarter of all the cases in the Charleston County Court of Equity, and, it is speculated, in a similar percentage of cases in the Court of Common Pleas.<sup>112</sup> Between 1819 and 1860, he appeared in 355 appellate cases in South Carolina, winning fifty-eight

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106. PEASE & PEASE, *supra* note 4, at 134-35.

107. *Id.* at 30-31.

108. *Id.* at 136-37. In his remarkable book about slavery on the rice plantations to the north of Charleston, Charles Joyner makes the following interesting observation about planters' mixed motivations for promoting Christianity among the slaves:

The rice planters supported such attempts at religious instruction of the slaves in part out of genuine concern for the slaves' spiritual welfare. The religion they taught to the slaves, however, was a highly selective form of Christianity, which stressed obedience in the here and now as much as salvation in the hereafter.

CHARLES JOYNER, *DOWN BY THE RIVERSIDE: A SOUTH CAROLINA SLAVE COMMUNITY* 156 (1984).

109. PEASE & PEASE, *supra* note 4, at 135.

110. *See id.* at 24-25.

111. *See id.* app. C, at 178.

112. *Id.* at 98. Appendices A, B, and C of the Peases' monograph provide detailed statistical information on Petigru's practice in the Charleston County Court of Equity and on appeal. *Id.* at 177-78.

percent of them.<sup>113</sup>

While Petigru is remembered more for his politically significant cases than for his day-to-day practice, it is the latter that developed his enviable reputation as an attorney. Even discounting the glowing rhetoric expected in a memorial, it is hard not to be impressed with the following description of Petigru:

He never was a mere lawyer to his clients. He was a friend, and a sincere friend; and, when called on for his counsel, he never stopped at expounding the law, but placed before his clients the duties their positions required. With him, *honor* was worth more than property; and he frankly and freely counseled the course that high morals required his clients to pursue, irrespective of law.<sup>114</sup>

However, Petigru the lawyer was, after all, human and not without his shortcomings. After imprudently telling one of his first clients that he would surely win, Petigru lost at trial, lost on appeal, and ended up paying the judgment out of his own pocket rather than admit the loss to his client.<sup>115</sup> He blamed the loss of an important case in the Florida Supreme Court on the "ignorance of Judges,"<sup>116</sup> and toward the end of his career he lost a case because of his acknowledged failure to read South Carolina appellate opinions.<sup>117</sup>

Petigru's willingness to speak eloquently and effectively for unpopular clients and causes is exemplified by his pro bono representation of Reuben Smalle.<sup>118</sup> Smalle moved from Massachusetts to the rural South Carolina Lowcountry to work as a woodcutter.<sup>119</sup> A sharp trader with an apparently obnoxious personality, Smalle quickly alienated the whites in the rural area and compounded that problem by associating with slaves.<sup>120</sup> Rumored to be an abolitionist bent on undermining local ways,<sup>121</sup> prominent local planters accused him of a minor crime, and subsequently convicted and whipped him.<sup>122</sup> Petigru's Beaufort friend and biographer, William Grayson, suggests that the

113. See *id.* app. A, at 177. (table detailing Petigru's appellate court cases by decade).

114. Hon. R. Barnwell Rhett, Statement at the Proceedings of the Bar of Charleston, S.C., Mar. 25, 1863, reprinted in MEMORIAL OF THE LATE JAMES L. PETIGRU 26-27 (Charleston, S.C., Walker, Evans & Cogswell, Printers 1880).

115. Seymour, *supra* note 1, at 50.

116. PEASE & PEASE, *supra* note 4, at 121.

117. *Id.* at 116-17.

118. See GRAYSON, *supra* note 21, at 155-56; PEASE & PEASE, *supra* note 4, at 142-45; Seymour, *supra* note 1, at 49-50.

119. PEASE & PEASE, *supra* note 4, at 142.

120. *Id.* at 143.

121. GRAYSON, *supra* note 21, at 155.

122. PEASE & PEASE, *supra* note 4, at 143.

only law involved up to this point was administered by “Judge Lynch.”<sup>123</sup>

Petigru represented Smalle in an action against the planters in federal district court in Columbia.<sup>124</sup> The planters’ attorney tried to appeal to the jury’s prejudice against the Yankee abolitionist (and to tar Petigru with the same brush), and actually praised his clients’ resort to lynching.<sup>125</sup> Petigru’s argument stressed the crucial civil liberties issue underlying the case—everyone is threatened when taking an unpopular position becomes a punishable offense.<sup>126</sup> The jury returned an astonishing \$2500 verdict in Smalle’s favor.<sup>127</sup>

In addition to his challenge to the oath of allegiance requirement, Petigru openly challenged the constitutionality of two other notorious provisions of that era—the South Carolina Negro Seaman’s Act<sup>128</sup> and the Confederate Sequestration Act.<sup>129</sup> The South Carolina Negro Seaman’s Act provided:

[I]n case any vessel shall arrive in any port or harbour of this State, from any other State or foreign port, having on board any free negro or person of color, employed on board such vessel, as a cook, steward or mariner, or in any other employment, it shall be the duty of the sheriff of the district in which such port or harbour is situated, immediately on the arrival of such vessel, to apprehend such free negro or person of color . . . and to confine him or her closely in jail, until such vessel shall be hauled off from the wharf, and ready to proceed to sea.<sup>130</sup>

The statute further mandated that the captain of the vessel pay for the seamen’s incarceration.<sup>131</sup>

The British were able to negotiate changes to similar statutes in other southern states, but the apparently caustic personality of the British consul precluded such relief in South Carolina.<sup>132</sup> The British consul retained Petigru to challenge the statute.<sup>133</sup> Petigru argued that South Carolina’s statute was invalid because it was contrary to a treaty between Britain and the United States providing for the liberty of their citizens when accompanying commercial ships

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123. GRAYSON, *supra* note 21, at 155.

124. PEASE & PEASE, *supra* note 4, at 143. Presumably, jurisdiction in the federal court was based upon diversity of citizenship with Smalle claiming to be a Massachusetts citizen. All official records of the case were destroyed by fire.

125. *Id.* at 143-44.

126. *See id.* at 144.

127. *Id.*

128. Act of Dec. 19, 1835, 7 S.C. Stat. 470.

129. Act of Aug. 30, 1861, ch. 61, Confederate States of America Stat. 201.

130. Act of Dec. 19, 1835, 7 S.C. Stat. 470, 471.

131. *Id.* at 470-72.

132. PEASE & PEASE, *supra* note 4, at 139.

133. *Id.* at 138.

into each other's ports.<sup>134</sup> In addition, Petigru argued that local or state law unconstitutionally impairs contracts when it modifies treaties with another country without that country's consent.<sup>135</sup>

Selecting an appropriate court was Petigru's first problem. Federal courts had a jurisdictional minimum of \$500 in actions for damages,<sup>136</sup> a sum substantially in excess of the charges for boarding the seamen in jail.<sup>137</sup> While a state court would likely be hostile to any challenge to the statute, Petigru reasoned such challenge would be the quickest route to the United States Supreme Court.<sup>138</sup> He further realized, though, that victory in the Supreme Court might prove hollow should South Carolina ignore the Court's pronouncements and continue to enforce the statute.<sup>139</sup> Petigru's strategy quickly was undermined by the doctrine of mootness. His appeal from the state trial court's denial of habeas corpus on behalf of a detained seaman was dismissed because the seaman already had been released from jail when his ship left port.<sup>140</sup>

Avoiding both the jurisdictional and mootness problems, Petigru brought an assault and battery and false imprisonment action for substantial damages in federal court against the sheriff on behalf of a Negro seaman who had been detained for eight days while his ship was in port.<sup>141</sup> The sheriff pleaded the Negro Seaman's Act as justification.<sup>142</sup> The trial judge rejected Petigru's challenges to the statute, and the jury returned a verdict for the defendant sheriff.<sup>143</sup> The British ultimately dropped the planned appeal to the United States Supreme Court, and a new, more diplomatic consul negotiated an amendment to the act which allowed Negro seamen to remain on board ship while in port rather than in jail.<sup>144</sup> An interesting aspect of his representation of the British consul in this litigation is that Petigru was, at the same time, the United States District Attorney for South Carolina.<sup>145</sup>

The Confederate Sequestration Statutes, attempting to confiscate the property and wealth owned by and owed to people in the Union states, provided

134. *Id.* at 139.

135. *Id.* Petigru cited an opinion of John C. Calhoun, while Secretary of State, for the proposition concerning the inability to modify treaties by local action. *Id.*

136. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78.

137. PEASE & PEASE, *supra* note 4, at 139-40.

138. *Id.* at 140.

139. *Id.*

140. *Ex parte Pereira*, 40 S.C.L. (6 Rich.) 59, 60 (1853).

141. *Roberts v. Yates*, 20 F. Cas. 937, 937 (C.C.D.S.C. 1853).

142. *Id.* at 938.

143. *Id.*

144. Act of Dec. 20, 1856, § 3, 12 S.C. Stat. 491, 492; PEASE & PEASE, *supra* note 4, at 141-42.

145. PEASE & PEASE, *supra* note 4, at 141-42. This fact prompted the Peases to speculate that "if there was not active collaboration with Washington, there was at least knowledgeable assent . . ." *Id.* at 142.

Petigru with another opportunity to champion individual rights. These statutes initially required that all debts owed to residents of the United States be paid instead to the treasury of the Confederate States.<sup>146</sup> Shortly thereafter, in response to a United States general sequestration statute, the Confederate Congress required the sequestration of all property of every description owned by "any alien enemy."<sup>147</sup> Under penalty of criminal sanction, other provisions required that attorneys, agents, and trustees speedily provide information regarding all property subject to confiscation.<sup>148</sup>

The provision of the act requiring an attorney to reveal his clients' properties that were subject to sequestration affected Petigru personally. Courts issued writs of garnishment against Petigru and other attorneys requiring them to appear in court to answer questions designed to provide the information required by the statute.<sup>149</sup> Former United States Circuit Court Judge Andrew Magrath, one of Petigru's former pupils, heard the consolidated cases in Confederate District Court in Charleston.<sup>150</sup>

Petigru began his argument by explicitly refusing to answer questions concerning his clients' properties, grounding his position in natural law: "[A]s St. Paul says, I was born free and will not forfeit that freedom which I inherit from my free mother. I will not submit to be commanded where there is no right to command."<sup>151</sup> Petigru's argument based on natural law and states' rights was ironic coming from a slave-owning Federalist. Petigru argued that the Confederate Congress lacked the authority to enact the sequestration statute and, in doing so, infringed upon the inherent sovereignty of the state.<sup>152</sup> Petigru noted that many had perceived the primary problem with the United States Constitution was that it did not sufficiently cabin the powers of the federal government, resulting in an unwarranted diminution of the sovereignty of the states.<sup>153</sup> Though patterned closely on the U.S. Constitution, the Confederate Constitution attempted to more narrowly circumscribe the specific powers granted to its central government.<sup>154</sup> Since the Confederate Constitution

146. Act of May 21, 1861, ch. 53, Confederate States of America Stat. 151. Such confiscation statutes were hardly novel. *See, e.g.,* *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (addressing the propriety of a Virginia confiscation statute enacted during the Revolutionary War).

147. Act of Aug. 30, 1861, ch. 61, Confederate States of America Stat. 201, 201; PEASE & PEASE, *supra* note 4, at 162-63.

148. Act of Aug. 30, 1861, ch. 61, §§ 2, 3, Confederate States of America Stat. 201, 201.

149. PEASE & PEASE, *supra* note 4, at 163-64.

150. *Id.* at 163.

151. THE SEQUESTRATION CASES 22 (1861). This book can be found in the South Carolina Legal History Room at the Coleman Karesh Law Library, University of South Carolina School of Law.

152. *Id.* ("[T]he Constitution of the Confederate States . . . positively, plainly and without equivocation excludes any encroachment on the full and entire sovereignty of the several States.").

153. *Id.* ("Under the United States Sovereignty was the root of bitterness.").

154. The language of the spending clauses in the two documents provide a good example of



contained no provision authorizing writs of garnishment to compel attorneys and other citizens to divulge private information, Petigru argued that those sections of the sequestration statute were invalid.<sup>155</sup> He analogized the writs of garnishment to general warrants, which presumably the Confederate Congress lacked the authority to enact.<sup>156</sup>

Petigru was not the only lawyer in this case whose argument was ironic. Representing the Confederate States, acting District Attorney C.R. Mills argued that the Confederate Congress enacted the sequestration statutes pursuant to a necessary, incidental power which existed in relation to the war power.<sup>157</sup> Naturally, Mills made no explicit reference to *McCulloch v. Maryland*,<sup>158</sup> but the implicit reference to that case did not escape Petigru. Petigru thundered in response, "What shall be said of the monstrous fallacy of making this [*McCulloch's* expansive interpretation of the Necessary and Proper clause] a precedent for establishing a Court of Star Chamber as incident to captures on land."<sup>159</sup>

Judge Magrath upheld the validity of the substantive provisions of the sequestration acts finding them within the power of the Confederate Congress<sup>160</sup> and not repugnant to the law of nations<sup>161</sup> or to natural law.<sup>162</sup> Responding to the argument of attorney J.W. Wilkinson, who did not contest

this constriction. Compare U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power . . . to pay the Debts and provide for the common Defence and general Welfare of the United States . . ."), with C.S.A. CONST. art. I, § 8, cl. 1 ("The Congress shall have power . . . to pay the debts, provide for the common defence, and carry on the government of the Confederate States; but no bounties shall be granted from the treasury; nor shall any duties or taxes on importations from foreign nations be laid to promote or foster any branch of industry . . ."). See generally CHARLES ROBERT LEE, JR., *THE CONFEDERATE CONSTITUTIONS* 178-79 (Greenwood Press 1974) (providing a side by side comparison of the two constitutions and the spending clauses).

155. THE SEQUESTRATION CASES, *supra* note 155, at 22 ("The Writ of Garnishment, as it is called, is illegal and unwarranted.").

156. *Id.* at 23.

157. *Id.* at 18.

[This power is] plainly and necessarily included in the war-making power, which power is expressly given to Congress and expressly forbidden to the States. From the very nature of the case all powers incidental to the carrying on of the war must be exercised by the common agent of all the States engaged in the war, to insure uniformity.

*Id.*

158. 17 U.S. (4 Wheat.) 316 (1819). The Confederate States' attorney could have hardly stomach an explicit reference to the expansive interpretation of the necessary and proper clause in *McCulloch*.

159. THE SEQUESTRATION CASES, *supra* note 155, at 23.

160. *Id.* at 53-57. "[I have] not the slightest doubt that the power is in the Congress of the Confederate States to confiscate in time of war, the property of public enemies, within the territories of the Confederate States; I cannot sustain in the proposition which challenges its constitutionality or impeaches its validity." *Id.* at 57.

161. *Id.* at 47-53.

162. *Id.* at 57-59.

the Acts' basic validity, Magrath ruled as a matter of statutory construction that the Act was not intended to intrude upon the attorney-client privilege. An attorney asserting this privilege would not have to respond to questions pursuant to a writ of garnishment.<sup>163</sup> Shortly after this case the Confederate Congress amended the statutes to abolish the writs of garnishment.<sup>164</sup>

## V. CONCLUSION

Petigru was a remarkably able lawyer and a complex, principled individual. Constrained by time and place, he pursued justice for rich and poor alike—often invoking lofty principles of natural law while being cared for by slaves.

The Bar of Charleston's memorial with its glowing resolutions and numerous individual orations, speaks eloquently to Petigru's fine qualities as a lawyer and as a man, as do the proceedings of the Historical Societies of Massachusetts and New York.<sup>165</sup> Some twenty years after his death, Alexander Lawton extolled Petigru's virtues in a thirty-three page address delivered at the 1882 American Bar Association annual meeting.<sup>166</sup>

The preface to the Charleston Bar's eulogy suggests that Petigru never suffered because of his principled and sometimes unpopular positions.<sup>167</sup> Being hired at a handsome salary to codify the state's laws on the eve of the Civil War supports this assertion. Nonetheless, the claim is misleading because his principles sometimes imposed hardships on him. One of Petigru's strongest commitments, and one that every lawyer should emulate, was to honor his word, no matter the cost. For him the cost was occasionally high, such as when he doggedly insisted on making good the debts of his friends.

Now that I know more about the man behind the Petigru name, I understand how fine a name "Petigru College" was for the law school. He was not superman, and his life did contain glaring contradictions. He was, however, widely recognized as an outstanding attorney. He was a man of principle, courageously representing politically unpopular issues and clients. He had close ties to the University of South Carolina and devoted considerable energy to the teaching of law.

"Petigru College," the bronze letters with which this essay began, first

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163. *Id.* at 62 ("I consider . . . the privilege . . . a good defence to the requirement of the Writ; and that it protects the defendant, either as a party or a witness, in not making further answer to the matters, which have been communicated to him in his professional capacity.").

164. See Act of Feb. 15, 1862, ch. 71, Confederate States of America Stat. 260, 261.

165. See *supra* text accompanying note 9.

166. ALEXANDER R. LAWTON, ANNUAL ADDRESS BEFORE THE AMERICAN BAR ASSOCIATION AT SARATOGA SPRINGS, N.Y., AUG. 9, 1882, at 177 (Philadelphia, George S. Harris & Sons 1883) (available in the South Caroliniana Library).

167. MEMORIAL OF THE LATE JAMES L. PETIGRU 4, 8 (Charleston, S.C., Walker, Evans, & Cogswell, Printers 1880).

appeared on what is now Currell College, near the top of the Horseshoe, when that newly constructed building was dedicated as the law school in 1919.<sup>168</sup> In 1950, the letters were transferred to the new law building at the corner of Green and Pickens Streets<sup>169</sup> which remained the law school's home until 1972. Why those letters remain on a building that now houses the bursar's office, is less comprehensible. The current law school possesses only a replica of the letters in a cabinet in the law school's lobby.

Why is the present law school building not dedicated to Petigru? The Petigru Society attempted to dedicate the building in his honor;<sup>170</sup> but the pragmatic administration declined, hoping instead to add to the school's then minuscule endowment by finding a well-heeled alumnus willing to part with a million dollars for fifty years or so of fame. Unfortunately, however, a quarter of a century later our law school is still the "Your Name Here" Law Center and our endowment is still inadequate.

In the midst of the University's capital campaign, is it too much to hope that there are alumni out there who, perhaps too modest to envision their own names on the law school, would donate money on the explicit condition that it be named what it should have been named in the first place? Of course, were we operating in the spirit of Petigru, we would simply change the name ourselves without regard to potential financial consequences.

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168. 2 DANIEL WALKER HOLLIS, UNIVERSITY OF SOUTH CAROLINA: COLLEGE TO UNIVERSITY 342 (1956).

169. *Id.*

170. PEASE & PEASE, *supra* note 4, at 10-11 (chronicling the efforts of the Petigru Society, an informal association of law students, to dedicate the law school building to Petigru).

The short-lived Petigru Society was subsequently reincarnated as the Petigru Public Interest Law Society, a law student organization that encourages the practice of law in the public interest. The Society raises funds in various ways, including the sale of T-shirts emblazoned with Petigru's perhaps apocryphal statement, "South Carolina—too small for a republic, too large for an asylum." *See supra* note 91.