

**A FOUNDING FATHER ON TRIAL: JEFFERSON'S RIGHTS TALK
AND THE PROBLEM OF SLAVERY DURING THE
REVOLUTIONARY PERIOD**

*William G. Merkel**

ABSTRACT

Thomas Jefferson's one-time image as a serious opponent of slavery has been heavily criticized by academics for nearly fifty years. Indeed, Jefferson's reputation as a principal and principled progenitor of the American political tradition suffered badly in the closing decades of the twentieth century as historians, cultural commentators, and legal scholars focused on his racism, personal commitments to slavery, and intimate relationship with Sally Hemings—the enslaved Monticello domestic who was almost certainly the mother of one or more of his children.

But while progressive thinkers soured on Jefferson at the close of the twentieth century—many libertarians, small government enthusiasts, neo-federalists, and champions of civic virtue remained committed to ideals and rhetoric they associated with Jefferson more than with any other Founding Father. When the Tea Party movement exploded onto the national political scene in the 2010 election, critics of the modern American state were quick to laud Jefferson as the favored spokesman of an allegedly simpler and purer alternative to the corrupted and degenerate federal government of the present. The original conception of America the Tea Party claimed to favor was, its members maintained, quintessentially Jeffersonian.

* Associate Professor, Charleston School of Law; Visiting Associate Professor, University of South Carolina School of Law, 2011-2012; J.D. Columbia; D. Phil. (history) Oxford. Thanks to Colin Bonwick (Keele), Richard Carwardine (Oxford), S. Max Edelson (Virginia), Sarah Barringer Gordon (Pennsylvania), Alex Glashauser (Washburn), Greg Gordon (North Dakota), Thomas Grey (Stanford), Daniel Howe (Oxford, UCLA), Jeffrey Jackson (Washburn), David Thomas Konig (Washington University St. Louis), Larry Kramer (Stanford), and Peter Onuf (Virginia) for their helpful comments and advice regarding earlier versions of this Article. Special thanks to Larry Crow and Sara Salehi for excellent work as research assistants at Washburn Law School and the University of South Carolina School of Law, respectively; to the International Center for Jefferson Studies at Monticello for two generous research fellowships; and to Professor Rebecca Hollander-Blumhoff and the members of the Midwest Regional Junior Faculty Forum at Washington University St. Louis School of Law for probing and stimulating discussion.

Clearly, the Jefferson image retains power in contemporary political debates. But which image of the complex third President and drafter of the Declaration of Independence is most accurate, and which is most legitimately harnessed by citizens fighting to define the American creed in our times? Was Jefferson essentially a hypocritical racist who favored small government to protect slaveholder interests, or was he at heart a champion of universal liberty who envisioned a special role for the United States in human destiny?

*In this Article, I analyze the intricate relation between slavery, freedom, and the birth of the American creed by reassessing the earliest period of Jefferson's public career when he practiced law in Virginia's colonial capital Williamsburg, served as a member of the colonial assembly—the House of Burgesses—authored the Summary View of the Rights of British North America in 1774 (“Summary View”), and served as the principal draftsman of the Declaration of Independence in 1776. After exploring Jefferson's legal education and the law of slavery in late colonial Virginia, the Article surveys Jefferson's seven-year career as a property lawyer. It analyzes in detail Jefferson's argument in *Howell v. Netherland*, a freedom suit appealed to the General Court of Virginia in 1770, and then considers his rhetoric respecting African slavery and alleged plans for political enslavement of British North America in his classic early constitutional state papers—the Summary View and the Declaration of Independence. The natural rights arguments Jefferson employed in *Howell v. Netherland*, the Summary View, and the Declaration of Independence reflected a philosophy essentially inimical to human slavery. At the same time, the nuanced understanding of estates in land that Jefferson developed as a student and practitioner caused him to think in terms of conflicting and multivalent interests in property instead of Romanesque conceptions of dominium or absolute and unconditional ownership. This historically conditioned understanding of property equipped Jefferson to question the propriety and defensibility of objectification of human beings.*

Later in life, when he took a leading role in forming the policies of the new American nation, Jefferson deprioritized claims for African American liberty. But in the early 1770s, Jefferson, provincial slaveholder and common lawyer that he was, embraced progressive antislavery tenets as yet little different from those animating the nascent antislavery vanguard in England and the North. Rather than the antinomian libertarian radical revered by extreme elements in the Tea Party movement or the Calhounite defender of the Slave Power reviled by some outspoken contemporary progressives, Jefferson of the Revolutionary period emerged as a sincere opponent of slavery.

Tragically, as the revolutionary crisis unfolded, Jefferson learned by degrees the political utility of embracing an ever more cautious and conditional mode of discourse respecting antislavery goals, and an ever more gradual approach to solving the problems of political

and moral legitimacy of an avowedly democratic and republican polity that remained (like Jefferson himself) heavily dependent economically and culturally on the enslavement of fellow human beings. As early as 1776, the pragmatic Jefferson was well on the way to understanding the severe limits circumscribing plausible antislavery for a Southern politician hoping to forge an American union committed to republican principles in what was still a decidedly monarchical and imperial world.

I. THE JEFFERSON IMAGE.....	597
II. JEFFERSON THE LAWYER	603
A. Jefferson's Legal Education.....	603
B. The Legal Profession in Eighteenth-Century Virginia...	604
C. Jefferson's Law Practice	607
D. Slavery and Property Law in Eighteenth-Century Virginia	610
E. Slavery, Status, and the Statutory Law	613
III. <i>HOWELL V. NETHERLAND</i>	618
A. A Natural Rights-Based Indictment of Human Bondage	620
B. Howell's Distant Echoes	627
C. Jefferson's Failed Manumission Bill.....	629
IV. POLITICAL SLAVERY AND THE SUMMARY VIEW	636
A. Human Bondage and Political Slavery	636
B. Colonial Grievances and the Rights of Englishmen	637
C. Slavery and the Politics of Blame	645
V. LIBERTY, SLAVERY & THE DECLARATION OF INDEPENDENCE.....	650
A. Drafting the Declaration	651
B. From English Liberties to Natural Rights	653
C. Condemning the Slave Trade	657
VI. CONCLUSION: THE NATURAL LAW FOUNDATIONS OF ANTISLAVERY.....	660

I. THE JEFFERSON IMAGE

After several decades in decline, Thomas Jefferson's tarnished image among progressives may be on the rise once more. Jefferson came under frequently heated attack in the closing decades of the twentieth century on account of his racism and deep involvement with slavery,¹ but even when his overall reputation was at its lowest

1. See, e.g., JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION* 99-101 (2001); Conor Cruise O'Brien, *Thomas Jefferson: Radical and Racist*, ATLANTIC MONTHLY, Oct. 1996, at 53; Michael Zuckerman, *The Power of Blackness: Thomas Jefferson and the Revolution in St. Domingue*, in ALMOST CHOSEN PEOPLE: OBLIQUE BIOGRAPHIES IN THE AMERICAN GRAIN 175, 209 (1993); Paul Finkelman, *Jefferson and Slavery: "Treason Against the Hopes of the World,"* in

ebb, Jefferson's strong stance in favor of separation of church and state, freedom of expression, and scientific inquiry continued to win praise from many advocates for intellectual freedom.² Indeed, when the Texas Board of Education decided in March, 2010 to purge Jefferson from approved high school history texts on the grounds that his faith in scientific progress could not easily be reconciled with conservative dogma, Jefferson was suddenly (if possibly only ephemerally) chic in left-leaning circles once more.³ Perhaps no other Founding Father enjoys the hipness that stems from being viewed as dangerous enough to warrant censorship by the radical right in the twenty-first century. Meanwhile, Jefferson's focus on an active, engaged populace as the root of constitutional legitimacy has found favor with eminent legal academics who question the countervailing model of judicial supremacy under the Constitution associated with Jefferson's great rival: Chief Justice John Marshall.⁴ Even in the area of slavery, where Jefferson's reputation has suffered most, several first-rate historians with strong progressive credentials have recently articulated cogent arguments that Jefferson's attachment to the slave power was far more tenuous than his modern critics allow, and that his commitments to antislavery principles were conversely much more significant than his detractors acknowledge.⁵ Meanwhile, at the other end of the political spectrum, populist reactionaries and Tea Party skeptics of government have enlisted Jefferson as the leading authority for the claim that "tyrannical"

JEFFERSONIAN LEGACIES 181, 210-11 (Peter S. Onuf ed., 1993). See Benjamin Schwarz, *What Jefferson Helps to Explain*, ATLANTIC MONTHLY, Mar. 1997, at 60-72, for a balanced assessment of Jefferson and many of his late twentieth-century detractors.

2. See generally FRANCIS D. COGLIANO, THOMAS JEFFERSON: REPUTATION AND LEGACY 147-55 (2006) (discussing Jefferson and the separation of church and state, and recent efforts to recontextualize his understanding of the relations between religion and secular authority). Interestingly, even Leonard Levy, who perhaps did as much as anyone to usher in the modern phase of skeptical, posthagiographic Jefferson studies, acknowledges Jefferson's *bona fides* respecting religious liberty. LEONARD W. LEVY, JEFFERSON & CIVIL LIBERTIES: THE DARKER SIDE 4-9 (1963).

3. On the contemporary culture of chic (*vel non*) surrounding the "Founding Fathers" and Jefferson's status therein, see Francis D. Cogliano, *Founders Chic*, 90 HIST. 411 (2005). On the Texas Board of Education's decision to delist Jefferson from the state-sponsored curriculum, see James C. McKinley Jr., *Conservatives on Texas Panel Carry the Day on Curriculum Change*, N.Y. TIMES, Mar. 13, 2010, at A10, and Carl Zimmer, *The Enlightenment Goes Dark*, DISCOVER MAG., Mar. 12, 2010, <http://blogs.discovermagazine.com/loom/2010/03/12/the-enlightenment-goes-dark/>.

4. See, e.g., LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 35-72 (2004); BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY 136-41 (2005).

5. See, e.g., SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN 218-53 (2005); Jeffrey L. Pasley, *Politics and the Misadventures of Thomas Jefferson's Modern Reputation: A Review Essay*, 72 J. S. HIST. 871 (2006).

regimes are subject to popular control and revolutionary annulment (thereby conveniently ignoring Jefferson's insistence on exhaustion of legal and democratic remedies before popular majorities turn *in extremis* to revolutionary means).⁶

Clearly, as contested as it is, Jefferson's image continues to matter in American constitutional politics. Jefferson's reputation has a history as long as that of the United States, and given its conflicted trajectory, there is little reason to believe that the Jefferson image will cease to be hotly disputed in the years to come. Jefferson—while often widely revered—has never been universally beloved. Indeed, Jefferson was famously controversial during his own lifetime: While the third President was an “apostle of liberty” to his supporters, he was a wild-eyed zealot to his critics, and little more than a scheming hypocrite to his staunchest opponents. Hotly contested while he lived, Jefferson's reputation has ebbed and flowed no less violently since his death. For more than two centuries now, Jefferson's public image has been co-opted or disowned by one side or another in deontological national struggles focused on order and liberty, individualism and the collective good, localism and federal authority,

6. On Jefferson's belief that legal remedies must be exhausted prior to resorting to popular revolution, consider this well-known passage from the second paragraph of the Declaration of Independence: “[P]rudence indeed will dictate that governments long established should not be changed for light & transient causes: and accordingly all experience hath shewn that mankind are more disposed to suffer while evils are sufferable than to right themselves by abolishing the forms to which they are accustomed.” Thomas Jefferson, “original Rough draught” of the Declaration of Independence, in 1 THE PAPERS OF THOMAS JEFFERSON, 1760-1776, at 424 (Julian P. Boyd ed., 1950) [hereinafter 1 JEFFERSON PAPERS]. See *infra* Part V.A. Tea Party leaders including Sharron Angle and Michele Bachmann often quote or paraphrase Jefferson's letter of January 30, 1787, to James Madison commenting in the wake of Shays' Rebellion that “a little rebellion now and then is a good thing, and as necessary in the political world as storms in the physical,” Letter from Thomas Jefferson to James Madison (Jan. 30, 1787), in 11 THE PAPERS OF THOMAS JEFFERSON, 1 January to 6 August 1787, at 93 (Julian P. Boyd ed., 1955) [hereinafter 11 JEFFERSON PAPERS], or his November 13, 1787 letter to William Stephens Smith, again expressing sympathy for Shays' Rebellion (“God forbid we should ever be [twenty] years without such a rebellion”) and famously suggesting that “[t]he tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. It is it's natural manure.” Letter from Thomas Jefferson to William Stephens Smith (Nov. 13, 1787), in 12 THE PAPERS OF THOMAS JEFFERSON, 7 August 1787 to 31 March 1788, at 356 (Julian P. Boyd ed., 1955) [hereinafter 12 JEFFERSON PAPERS]; see also Jonathan Chait, *Maybe Find a Better Defense of Michele Bachman*, NEW REPUBLIC (Jan. 13, 2011, 10:25 AM), <http://www.tnr.com/blog/jonathan-chait/81433/maybe-find-better-defense-michelle-bachmann> (Michele Bachmann quoting Jefferson as an authority that a revolution every now and then is a good thing); Greg Sargent, *Sharron Angle Floated Possibility of Armed Insurrection*, WASH. POST, June 15, 2010, http://voices.washingtonpost.com/plum-line/2010/06/sharron_angle_floated_possibil.html (Sharron Angle citing Jefferson as an authority for the proposition that it is good “to have a revolution every twenty years”).

the utility of history, and even the meaning of meaning.⁷

Controversy surrounding the Jefferson image has been as multifaceted as the man himself, but in recent decades, Jefferson's involvement with African American slavery has attracted more critical reaction and damning reassessment than any other aspect of his life and work.⁸ To be sure, heightened popular and academic scrutiny has served a useful corrective purpose. Many hagiographic writers in the mid-twentieth century were quick to gloss over Jefferson's connections to human bondage, but today, most academic and popular observers rightly acknowledge that Jefferson's complex and troubled (or simply troubling?) relationship with slavery was animated by attitudes towards African Americans that were often more malign than magnanimous. The glaring contrast between the avowal of liberty in the Declaration of Independence and the practice of slavery in Jeffersonian America now angers and engages critical scholars in terms strikingly similar to those employed by some of Jefferson's most trenchant coetaneous critics in the late eighteenth and early nineteenth centuries.⁹ Why indeed, one might ask with Dr. Johnson, were the loudest yelps for liberty heard from the drivers of Negroes?¹⁰

When Jefferson died on July 4th, 1826—fifty years exactly since the first public reading of his celebrated proclamation in favor of universal liberty—almost all of his remaining slaves passed with his exhausted estate into the hands of receivers and thence to the auctioneer.¹¹ Jefferson freed only five slaves in his will, all members

7. The classic study of Jefferson's image from his death to the mid-twentieth century remains. *See generally* MERRILL D. PETERSON, *THE JEFFERSON IMAGE IN THE AMERICAN MIND* (1960). COGLIANO, *supra* note 2, revisits various aspects of Jefferson's reputation and legacy and takes the story forward to the present day. The express linkage of Jefferson to the problem of discovering the meaning of meaning goes back at least to 1874, when biographer James Parton mused, "[i]f Jefferson was wrong, . . . America is wrong. If America is right, Jefferson was right." Gordon S. Wood, *The Trials and Tribulations of Thomas Jefferson*, in *JEFFERSONIAN LEGACIES*, *supra* note 1, at 395 (footnote omitted).

8. *See, e.g.*, Finkelman, *supra* note 1; O'Brien, *supra* note 1; ZUCKERMAN, *supra* note 1; GARRY WILLS, "NEGRO PRESIDENT": JEFFERSON AND THE SLAVE POWER (2003).

9. *See, e.g.*, PAUL FINKELMAN, *Preface* to *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON*, at ix (2d ed. 2001) [hereinafter FINKELMAN, *Preface*] ("[D]espite Jefferson's fine words and our belief in this credo, it is clear that liberty was not available to most African-Americans at the time of the founding. . . . I argue that Jefferson himself, who owned over 150 slaves when he wrote the Declaration, did not in fact believe that blacks were entitled to the same rights as other Americans.").

10. Johnson's famous query "[H]ow is it that we hear the loudest yelps for liberty among the drivers of negroes?" first appeared in the pamphlet *Taxation No Tyranny: An Answer to the Resolution and Address of the American Congress* (1775). *See* JAMES BOSWELL, *LIFE OF SAMUEL JOHNSON* 876 (World's Classics ed. 1980) (1791).

11. *See* FAWN M. BRODIE, *THOMAS JEFFERSON: AN INTIMATE HISTORY*, 633-34

of the Hemings family, and so very probably blood relatives of his long deceased wife, Martha.¹² Two of the manumitted, Madison and Easton Hemings, were very likely his own sons.¹³ In life as in death, then, Jefferson's politics, fortunes, and family remained inextricably entwined with race-based slavery. Jefferson's earliest memory was journeying on horseback pillowed in the arms of a trusted slave; he ended his days a slave master in a society still deeply committed to the "peculiar institution."¹⁴

For all these intimate and abiding associations with slavery,

(1974).

12. It has long been widely assumed that Jefferson's father-in-law, John Wayles, lived in more or less open concubinage with an enslaved woman, Betty Hemings, who was relocated to Monticello along with ten of her twelve children and more than 100 other slaves after Wayles's death in 1774. Sally Hemings, born in 1773, was among those who came to Monticello with her mother Betty Hemings. The question whether any members of the next generation of Hemings were the children of Thomas Jefferson and Sally Hemings (presumably Mrs. Martha Wayles Skelton Jefferson's half-sister) has galvanized heated debate, impassioned denial, and painstaking genetic analysis. See, e.g., Eugene A. Foster et al., *Jefferson Fathered Slave's Last Child*, 396 NATURE 27, 27 (1998); Eric S. Lander & Joseph J. Ellis, *Founding Father*, 396 NATURE 13, 13-14 (1998). The official position of the Thomas Jefferson Memorial Foundation is that Thomas Jefferson's paternity of some of Sally Hemings's children is highly probable. See THOMAS JEFFERSON MEMORIAL FOUNDATION, INC., STATEMENT ON THE TJMF RESEARCH COMMITTEE REPORT ON THOMAS JEFFERSON AND SALLY HEMINGS 2 (2000), available at http://www.monticello.org/sites/default/files/inline-pdfs/jefferson-hemings_report.pdf (discussing the genetic findings of the *Nature* study which concluded that the father of Hemings's children was a Jefferson, but not necessarily Thomas Jefferson). Some prominent voices still defend the old scholarly consensus that a relationship between Sally Hemings and Thomas Jefferson was unlikely. See generally SCHOLARS COMMISSION ON THE JEFFERSON-HEMINGS MATTER, THE JEFFERSON-HEMINGS CONTROVERSY REPORT OF THE SCHOLARS COMMISSION 345-52 (Robert F. Turner ed., 2011) (discussing the minority views of Professor Paul A. Rahe regarding Jefferson's paternity of Hemings's children). I am unaware that any historians or Jefferson descendants have ever expressed reservations about the assumptions that John Wayles cohabited with Betty Hemings and was Sally Hemings's father.

13. The persons freed in the will were Burwell (no surname), John Hemings, Joe Fossett, Madison Hemings, and Eston Hemings. BRODIE, *supra* note 11, at 630. Sally Hemings, fifty-four years old in 1827, was not emancipated. See *id.* at 631. Madison Hemings, aged twenty-one, and Eston Hemings, aged eighteen, were her sons; her other light-skinned children had already "run away" or passed into the white community. See *id.* at 630.

14. On Jefferson's earliest memory, see *Tuckahoe*, MONTICELLO.ORG, <http://www.monticello.org/site/research-and-collections/tuckahoe> (last visited May 13, 2012). The euphemism "peculiar institution" came to reflect the increasingly sectional character of slavery in the United States as gradual emancipation took hold in the North from the 1780s through 1840s. The phrase regained wide currency in the mid-twentieth century thanks to Kenneth M. Stampp, who challenged conceptions of slavery as an essentially benign and paternalistic institution that had been popularized in the apologist writings of historians Ulrich Bonnell Phillips and William Dunning during the first half of the century. See generally KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH (1956).

however, Jefferson's antislavery legacy is not as hollow as many recent commentators—Joseph Ellis, Paul Finkelman, and Conor Cruise O'Brien among them—insist.¹⁵ Despite his now well-documented racism, Jefferson never accepted the legitimacy of slavery. The man who played a leading role in ushering thirteen American colonies towards independence could also see himself as the target of a justifiable revolution by his own slaves. In 1800, when a major uprising of Virginia slaves under the leadership of Gabriel (or Gabriel Prosser) was betrayed at the final hour, Jefferson urged Governor James Monroe to deport, rather than execute, the slave conspirators on the grounds that their actions were legally justified.¹⁶

This was hardly the only action of Jefferson's long life that could plausibly be called "antislavery." His proposed Constitution for Virginia of 1783 included an emancipation clause that would have freed all persons born to enslaved mothers in the state after 1800.¹⁷ The Draft Constitution for Virginia was no thought experiment or philosophical flight of fancy but a serious plan to recast the state's fundamental law at a time when constitutional revision seemed likely in the Old Dominion. On the national plane, Jefferson's draft of the Territorial Governance Act (or Ordinance) of 1784, contained a provision which would have prohibited slavery in all of the new American nation's western territories after 1800 had it not failed to pass by the narrowest possible margin.¹⁸ And in December 1806, with the federal constitutional prohibition against slave trade abolition scheduled to sunset in 1808, President Jefferson successfully implored Congress to abolish the slave trade at the earliest possible juncture.¹⁹ Jefferson made other antislavery

15. ELLIS, *supra* note 1, at 90, 95-96, 106, 113; Finkelman, *supra* note 1, at 181-96; O'Brien, *supra* note 1, at 68-72.

16. See William G. Merkel, *To See Oneself as a Target of a Justified Revolution: Thomas Jefferson and Gabriel's Uprising*, 4 AM. NINETEENTH CENTURY HIST. 1 (2003) [hereinafter Merkel, *Jefferson and Gabriel's Uprising*] (discussing Jefferson's response to Gabriel's Uprising); Letter from Thomas Jefferson to Governor James Monroe (Sept. 20, 1800), in 7 THE WRITINGS OF THOMAS JEFFERSON, 1795-1801, at 457 (Paul Leicester Ford ed., 1896) [hereinafter 7 JEFFERSON WRITINGS] (urging the Governor to "stay the hand of the executioner").

17. In the end, Virginia summoned no constitutional convention in 1783, and the Constitution of 1776 remained in force until 1830, but Jefferson's proposal was reprinted in early editions of the *Notes on the State of Virginia*. See THOMAS JEFFERSON, DRAUGHT OF A FUNDAMENTAL CONSTITUTION FOR THE COMMONWEALTH OF VIRGINIA (1785), reprinted in NOTES ON THE STATE OF VIRGINIA 213-14 (William Peden ed., 1954) [hereinafter NOTES ON VIRGINIA].

18. See THOMAS JEFFERSON, *Plan for Government of the Western Territory*, in 6 THE PAPERS OF THOMAS JEFFERSON 581, 604 (Julian P. Boyd ed., 1952) [hereinafter 6 JEFFERSON PAPERS].

19. See Sixth Annual Presidential Message from Thomas Jefferson to the United States Senate and House of Representatives (Dec. 2, 1806), in 3 THE WRITINGS OF THOMAS JEFFERSON 414, 421 (Andrew A. Lipscomb & Albert E. Bergh eds., 1904)

overtures during the Revolutionary period,²⁰ but the focus in this Article is on three papers Jefferson authored as a young lawyer and legislator during the years immediately preceding independence.

II. JEFFERSON THE LAWYER

A. *Jefferson's Legal Education*

After two years reading arts and sciences at the College of William and Mary, Jefferson commenced his legal studies in late 1762 under the supervision of George Wythe in Williamsburg.²¹ Wythe practiced at the General Court, the highest tribunal in the colonial capital, and also held an appointment at the college, where he had taught Jefferson classics.²² William and Mary did not yet offer law as a degree course, but in 1779 the College appointed Wythe to the first law professorship in the United States.²³ Wythe, one of the great legal educators in American history, went on to train generations of lawyers, including John Marshall, James Monroe, and Henry Clay; taken together, Wythe and his pupils numbered among the leading lights of the American Bar for over a century.²⁴ Prior to the establishment of the professorship and institution of lecture courses at the College, Wythe took on pupils in his chambers. His

[hereinafter 3 JEFFERSON WRITINGS].

20. In *Notes on Virginia*, Jefferson reported that the Committee of Revisors (Jefferson, Edmund Pendleton, and George Wythe), who were charged shortly after independence with undertaking a revision of Virginia's laws for submission as individual bills to the state legislature, drafted a proposed statute to provide for comprehensive gradual emancipation linked to colonization of the freed persons to locations outside the commonwealth. See NOTES ON VIRGINIA, *supra* note 17, at 137-38, 286 n.4. This plan was to be presented as an amendment to Bill No. 51 on slavery, once that bill was brought forward, but was not included in the report the Revisors made to the Assembly, lest its publication prior to actual legislative deliberation provoke a fatal conservative backlash. See *id.* The amendment was never moved and no transcript of it survives. See 7 JEFFERSON WRITINGS, *supra* note 16, at 68. Jefferson's explanation that the emancipation scheme was kept out of the public light for reasons of legislative strategy appears credible given the extreme reaction to other emancipation proposals of the era. See Letter from St. George Tucker to Thomas Jefferson (Aug. 2, 1797), in 29 THE PAPERS OF THOMAS JEFFERSON 488-89 (Barbara B. Oberg ed., 2002) [hereinafter 29 JEFFERSON PAPERS] (discussing the reception of St. George Tucker's emancipation proposal submitted to the Virginia General Assembly in 1797. Tucker stated he "ought to blush to acknowledge myself the Author").

21. FRANK L. DEWEY, THOMAS JEFFERSON LAWYER 9-11 (1987). There are two biographies of Wythe: WILLIAM CLARKIN, SERENE PATRIOT: A LIFE OF GEORGE WYTHE (1970), and IMOGENE E. BROWN, AMERICAN ARISTIDES: A BIOGRAPHY OF GEORGE WYTHE (1981).

22. CLARKIN, *supra* note 21, at 40-41, 71.

23. See CLARKIN, *supra* note 21, at 40-57, 142-43; JULIAN P. BOYD & W. EDWIN HEMPHILL, THE MURDER OF GEORGE WYTHE 4-5 (1955) [hereinafter BOYD, MURDER OF GEORGE WYTHE].

24. CLARKIN, *supra* note 21, at 154-58, 192-93.

standard mode of instruction during the 1760s, followed by Jefferson and his contemporaries, included directed reading, supervised drafting of pleadings and instruments, moot courts (said to be a Wythe invention), and attendance at the General Court and Williamsburg Hustings.²⁵

There is no doubt that Jefferson's preparation for a legal career was uncommonly thorough by the standards of his or any other age, but the familiar claim that he studied law for five years is probably somewhat misleading.²⁶ Frank Dewey, who laboriously reconstructed Jefferson's legal education and career by consulting relevant post-1769 correspondence, public records, newspaper articles, and Jefferson's case book, fee books, and docket books, concludes that Jefferson began his work with Wythe in November 1762, went home to Shadwell shortly thereafter to read Coke's *Institutes* and other foundational texts in law and the humanities, and returned to Williamsburg in October 1763 for two years of closely supervised instruction.²⁷ In October 1765, Jefferson passed his first bar examination, allowing him to practice in the county court of any Virginia county where he took the oath. But Jefferson never practiced before county magistrates.²⁸ A year after admission on the county level, Jefferson became eligible to present himself for a second examination and consideration for admission to the General Court in Williamsburg. He was admitted and immediately opened his practice, embarking upon a seven-year career as an attorney.²⁹

B. *The Legal Profession in Eighteenth-Century Virginia*

A.G. Roeber's careful study of lawyers and courts in eighteenth-century Virginia has elucidated tensions and conflicts between two models of justice that persisted in the colony (and indeed in the English speaking world) throughout the colonial and revolutionary eras.³⁰ The dominant pattern throughout the period was one of local justice, administered by amateur squires sitting as county

25. DEWEY, *supra* note 21, at 12-15.

26. *See id.* at 9-17 (detailing inconsistencies in the account of Jefferson's studies).

27. *Id.* at 17.

28. *See id.* at 18-25 (discussing the makeup of courts Jefferson practiced before).

29. *Id.* Jefferson's case book, fee books, and docket books, containing minimalist entries respecting the names of clients, costs advanced and fees charged, pleas entered, disposition, and money collected or written off, were long accessible only in manuscript form in the dispersed collections of the Library of Congress, the Massachusetts Historical Society, and the Huntington Library when Dewey completed his book, but are now published in a two volume set: *JEFFERSON'S MEMORANDUM BOOKS: ACCOUNTS, WITH LEGAL RECORDS AND MISCELLANY, 1767-1826* (James A. Bear, Jr. & Lucia C. Stanton eds., 1997).

30. *See generally* A.G. ROEBER, *FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE, 1680-1810* (1981).

magistrates, supervising more or less deferential, but at times independent, juries before which professional and law-trained advocates enjoyed no advantages (and indeed encountered considerable resentment), and in which metropolitan law (reduced to statute by legislatures, memorialized by learned treatise writers, or committed to print in the opinions of appellate judges) was often less important than local norms and expectations.³¹ At the opposite pole was professional law, practiced by full-time specialists, adjudicated before learned courts, and governed by the law known to scholars and established by authorities.³² In the mother country, this was the law of King's Bench and Common Pleas, the law of the Inns of Courts and of Chancery, the law of London, not of the justices of the peace and the country squires.³³ In Virginia, to the extent that metropolitan law was enforceable, it was the law practiced before the General Court. As Roeber explains, throughout the course of the century, local magistrates turned away enumerable reform efforts in the House of Burgesses designed to shift power to trained judges and practitioners.³⁴ However, by Jefferson's day, the General Court, for the first time, was exercising substantial authority as a court of appeals with jurisdiction as to both law and equity, reviewing decisions by the county magistrates, and as a court of first instance for felonies, pleas of the crown (private prosecutions of less serious felonies and misdemeanors not brought by the Attorney General in the name of the King), and important commercial matters over which the magistrates had lost jurisdiction.³⁵ The General Court, including the Royal Governor, comprised the same twelve individuals who sat as the Governor's Privy Council (in which they heard what we would today call government law and administrative law matters).³⁶ In an arrangement that surely would have troubled Montesquieu,³⁷ but was typical of colonial British America, the Council also exercised legislative functions (as the upper house) and executive duties (as advisers to the Governor).³⁸

31. *See id.* at 41-72.

32. *See id.* at 95-111 (discussing Virginia court's development from 1720-1750 and what lawyers thought about changes to the laws).

33. *See id.* at 16-24, 44.

34. *See id.* at 44-45, 66-68.

35. *See id.* at 44, 56-57, 150.

36. *See DEWEY, supra* note 21, at 18-19.

37. Even as he celebrated the mixed Constitution of England in which powers were in fact not strictly separated, Montesquieu famously endorsed relatively strict separation of powers in *BARON DE MONTESQUIEU, 1 THE SPIRIT OF LAWS XI*, at 149-82 (Thomas Nugent trans., Julian Hawthorne ed. 1900). Contrast Madison's classic defense of partial blending of the powers of the three branches of the national government in the U.S. Constitution in *THE FEDERALIST NO. 51* (James Madison).

38. *DEWEY, supra* note 21, at 18.

The bar was bifurcated in colonial Virginia, but the division of function was not between barristers and solicitors as it was in England. Rather, county court practitioners and General Court practitioners were precluded from appearing in the others' courts, except that barristers (trained in England at the Inns of Court), who were admitted to the General Court, were not excluded from the county courts.³⁹ Attorneys admitted to county practice were far more numerous, serving each of the fifty-seven counties and the Borough of Norfolk during the late colonial period, with various lawyers active in most counties, and county lawyers typically appearing in several adjoining jurisdictions.⁴⁰ General Court lawyers were far less numerous (approximately ten during Jefferson's tenure) and more highly esteemed.⁴¹ But their practice was less lucrative, with fees set by the legislature lower than those set for similar service in the county courts.⁴² There was seldom a majority in the Burgesses in favor of attracting trained lawyers to the colony, and setting low statutory rates was one way the "country" majority could keep power from migrating from magistrates to the "court."⁴³ While attorneys admitted to the General Court were expected to be more learned in the law, the practical reality is that they were also required to be men of independent means.⁴⁴ Jefferson ultimately gave up the practice in part because it was not financially sensible to keep it open, his large client base and high reputation notwithstanding.⁴⁵ But his time as a member of the colonial capital's elite bar solidified his reputation in the province, and it allowed him to enhance his connections among leading and influential men who shortly became principal figures in the Revolution and cultivate a broader political base than he already enjoyed as a member of the

39. *Id.* at 2-3; ROEBER, *supra* note 30, at 57-60.

40. *See* DEWEY, *supra* note 21, at 1, 125.

41. *See id.* at 1-2, 4.

42. *See id.* at 6.

43. *See* ROEBER, *supra* note 30, at 95-100. The court/country divide formed a prominent trope in late seventeenth- and early eighteenth-century British political thought. *See id.* at 73. In this mode of discourse, courtiers, contractors, financiers, M.P.s, and government officers formed a distinct interest from that of the country at large. *See id.* at 96-111, xviii-xix. In the eyes of opposition thinkers, the ruling oligarchy in Restoration and Augustan England was inherently suspect, and laws and policies crafted in the capital were most likely calculated to sap the vitality of the more virtuous country. *See id.* at xvii-xviii. The same thought pattern played itself out in miniature in Virginia, where the colony's institutions and social forms consciously imitated those of England. *See id.*; J.G.A. POCKOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 401-22 (1975) (stating the paradigm in the larger imperial context).

44. DEWEY, *supra* note 21, at 6-7.

45. *See id.* at 107, 111; *see generally id.* at 83-93 (discussing the problematic financial aspects of Jefferson's practice more generally).

Burgesses for Albermarle.⁴⁶

C. Jefferson's Law Practice

Jefferson was a thoroughly professional lawyer, and his academic, cosmopolitan temperament was better suited to a legal career in the colonial "metropolis" than to lawyering at the county assizes, where oratory and showmanship (not among Jefferson's great gifts) rated highly, and where there was far less time for research, analysis, and reference to published authority.⁴⁷ And yet he was a Westerner, attuned to Western interests, and his clientele included settlers in recently established counties of the Shenandoah Valley and the forward slopes of the Alleghenies.⁴⁸ While Jefferson never argued at the county hustings or assizes, he attended court regularly in Albermarle and Augusta, trawling for clients who wished to appeal, bring other matters to the General Court, or, most especially, have titles to land registered in the capital.⁴⁹ Apart from perfecting land claims and representing parties to title disputes (a ubiquitous concern owing to conflicting grants, multiple surveys, and numerous subsequent sales and devises), Jefferson's business focused on contested inheritances.⁵⁰ These involved interests in land and, in a great many cases, interests in slaves.⁵¹

In a forthcoming study, David Konig argues that Jefferson developed a reputation as the leading authority on using the writ of detinue to assist heirs who wished to keep slave families intact when dispersal loomed likely to satisfy all creditors and legatees.⁵² Indeed, as late as 1808, practitioners were still seeking (and receiving) the

46. See *id.* at 113. The desire to spend more time with his new wife and supervise work on his newly begun home at Monticello also figured in his decision to give up his General Court practice. See *id.* at 111-12. For a more detailed account of Jefferson's relationship with Martha, see DUMAS MALONE, *JEFFERSON THE VIRGINIAN* 159-60 (1948).

47. See ROEBER, *supra* note 30, at 107-08, 245 (noting the differences between trained professional lawyers and the Western tradition of lay practice in country courts).

48. DEWEY, *supra* note 21, at 26-27.

49. *Id.* at 26-30.

50. *Id.* at 32-33.

51. See *id.* at 26-33. David Thomas Konig of Washington University in St. Louis, who is completing a comprehensive study of Jefferson's legal thought and career, reports that Jefferson argued six freedom suits (all of them pro bono) between 1767 and 1776. See David Thomas Konig, *Antislavery in Jefferson's Virginia: The Incremental Attack on an Entrenched Institution* 3-5 (June, 18 2006) [hereinafter Konig, *Antislavery*] (unpublished conference paper) (on file with author).

52. David T. Konig, *The Papers of Thomas Jefferson: The Legal Commonplace Book*, in *THE PAPERS OF THOMAS JEFFERSON* (forthcoming 2d. ed.); David T. Konig, *Nature's Advocate: Thomas Jefferson and the Discovery of American Law* (forthcoming) (on file with author).

President's advice on this use of the writ.⁵³ Careful parsing of Jefferson's case book, fee books, and docket books will also allow Professor Konig to make an important and fascinating revelation: while it is widely known among scholars that Jefferson took an appeal of a freedom suit on behalf of a bound servant,⁵⁴ Konig has now established that Jefferson argued appeals in six freedom suits during his seven year career at the bar.⁵⁵ He took all of the cases pro bono and advanced filing fees and court costs on account of the clients.⁵⁶ Jefferson did argue once on behalf of a master in a freedom suit, but the fact that he took six pro bono cases on behalf of claimants for freedom is significant.⁵⁷ *Howell v. Netherland* is the only one of these in which Jefferson's argument survives, so some speculation is required to form a generalized opinion.⁵⁸ It appears that the claimants were all of mixed descent, typically (although not in Howell's case) seeking freedom on account of Indian ancestry.⁵⁹ This suggests that Jefferson was more receptive to demands for liberty on the behalf of persons not wholly African in heritage, but it is also true that non-African descent was by far the strongest and most likely argument to establish wrongful detention in servitude. The number of cases, and the fact that Jefferson financed them, also implies that Jefferson was emotionally invested in the cause. His reasoning in *Howell v. Netherland* cannot be explained away as a mere dutiful or mercenary exercise in advocacy on behalf of a suitor who presented himself at the law office.⁶⁰

When Jefferson plied his trade in Virginia, the common law was still very much the law of the writ system. Dating back to the Middle Ages, this highly elaborate and formalistic corpus of law (coextensive with the common law itself) did not elevate form over substance, but rather blended form and substance into one.⁶¹ In the classic words of

53. Konig, Antislavery, *supra* note 51, at 7.

54. This is the case of *Howell v. Netherland* which was decided in 1770. *See infra* Part III; 1 THE WRITINGS OF THOMAS JEFFERSON, 1760-1775, at 373-74 (Paul Leicester Ford ed., 1892) [hereinafter 1 JEFFERSON WRITINGS].

55. Konig, Antislavery, *supra* note 51, at 10.

56. *See id.* at 8-11.

57. *See id.* at 11-12.

58. It is highly unlikely that the General Court published an opinion in *Howell v. Netherland*. Jefferson's argument or "opinion" is available in 1 JEFFERSON WRITINGS, at 373-81. Jefferson explains that the Court gave judgment immediately after he presented his argument for Howell without waiting for George Wythe to answer on behalf of the claimant, Netherland. *Id.* at 374 n.2. This strongly suggests that the court did not give a written answer to the claims Jefferson developed. *See discussion infra* Part III; Konig, Antislavery, *supra* note 51, at 8-11.

59. *See* Konig, Antislavery, *supra* note 51, at 11.

60. *Id.* at 8-11, 14.

61. Anglo-American legal history is an enormous subject that has generated an abundance of first-rate scholarly analysis, going back many generations. For England, J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY (4th ed. 2002), is an

Frederic William Maitland, under the writs, “[e]ach procedural pigeon-hole contains its own substantive law.”⁶² It is a familiar aphorism that causes were routinely lost because the wrong form of action was chosen. Jefferson’s legal commonplace book reveals that he was meticulous, even obsessive, about pleading; it is likely that he read and summarized every English case illustrating the form, nature, and function of the various writs available in Virginia in either treatises or reporters.⁶³ König relates, in his unpublished manuscript, that Jefferson was reputed to be a master of pleading, not just in the sense of correctly reproducing the required form of words to allow a cause to be heard and remedied, but also in creatively tailoring ancient and complex devices to serve novel and contemporary purposes.⁶⁴

Jefferson’s use of detinue, a charge of unjust detainer (i.e. retention) but not unlawful taking of property, as a tool to address contested dispensation of a decedent’s slaves has been mentioned above.⁶⁵ The unsuccessful defendant in a detinue suit had the option of surrendering the property to the claimant or paying money damages, that is, converting the property and acquiring ownership by means of a forced sale.⁶⁶ By the eighteenth century the writ was seldom used in England, but it became a mainstay in Virginia and other Southern courts to fill gaps in the common law created by the absence of English precedent on slavery and property in the form of slaves.⁶⁷ During his Williamsburg days, Jefferson copied reports of Virginia cases argued and determined in the General Court, including a number in which he participated, and others dating back

excellent modern introduction with a thorough bibliography. For the United States, LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (2d ed. 1985), is still good but dated; it can be usefully supplemented by STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY: CASES AND MATERIALS* (6th ed. 2006).

62. F.W. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW: A COURSE OF LECTURES* 3 (A.H. Chaytor & W.J. Whitaker eds. 1968). The writs relevant to slave-related adjudication in Virginia were detinue, trespass, debt, case, trover, and assumpsit. See BAKER, *supra* note 61, at 53-96. Detinue is discussed in the main text. See *id.* at 384-85. Trover differed from detinue in function in that the former required wrongful taking of the contested property prior to the suit. *Id.* at 397-98. Trespass has been called (rightly or wrongly) the ancestor of actions in intentional tort, while case has been labeled (again, rightly or wrongly) the forbear of negligence. *Id.* at 402-09. These actions were relevant with respect to wrongs committed by another’s slaves (the disputes centered on whether either master or slave could be held accountable). *Id.* at 475-77. Assumpsit was an action for nonperformance of a contract. *Id.* at 475.

63. DEWEY, *supra* note 21, at 105-06 (“Jefferson’s notes bristle with citations and quotations . . .”).

64. König, *Antislavery*, *supra* note 51, at 3-4, 6-7.

65. See *supra* text accompanying notes 52-55.

66. THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619-1860*, at 6 (1996).

67. See *id.* at 6-10.

to the 1730s.⁶⁸ These reports were published posthumously and now comprise the earliest run of entries in the official reporter for the Commonwealth's high court.⁶⁹ Half of the cases in Jefferson's Reports concern slave property, and most of these involve highly complex arguments respecting actions in detinue.⁷⁰ According to König, Jefferson was often retained by other counsel to handle the aspects of their cases covered within that writ, and Jefferson never represented parties seeking to remove slaves from their current habitation.⁷¹ This is revealing, for it means that in practice, notwithstanding his well-known commitment to equal inheritances, Jefferson used his expertise in pleading to thwart efforts by claimants unhappy with their inheritance to take newborn children from their enslaved mothers and to break up existing families by removing individuals from the decedent's family seat to the plantations of disappointed heirs and legatees.⁷² König concludes that defense of these actions, along with Jefferson's arguing of freedom suits as discussed above, contributed to his now forgotten reputation as a vexatious "negro lawyer[]," one of a handful in Williamsburg during the late colonial period who provoked the ire of champions of unbridled property rights in human beings.⁷³

D. Slavery and Property Law in Eighteenth-Century Virginia

Jefferson's understanding of property was not by nature absolute and individualistic. When he thought of property, he did not think first and foremost of a thing (or a human chattel) that a possessor could control completely, against which the outside world had no countervailing claims. Instead, like his professional colleagues and fellow country squires throughout the English-speaking world, his core conceptions of property focused on the English system of estates in land—bundles of conflicting, circumscribed, limited, multivalent interests, still rooted in corporate feudalism, and not necessarily attuned to the dictates of liberal capitalism that were then quickly permeating the law of contract.⁷⁴ The interests in real property that formed the dominant trope of aristocratic, genteel, and yeomanly self-image in Jane Austen's England and in Rhys Isaac's Virginia were legally defined by a complex maelstrom of doctrines extending to fee tail, joint tenancies, estates *pur autre vie*, nonpossessory rights

68. See 1 JEFFERSON WRITINGS, *supra* note 54, at 373-81.

69. *Id.* at 373-81, 399-412.

70. König, Antislavery, *supra* note 51, at 12-13.

71. *Id.*

72. *Id.* at 14.

73. *Id.* at 3-4.

74. For discussion of the emergence of a legal system in America from English and colonial influences see generally MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1780-1860 (1977).

and limitations of others' rights such as easements and servitudes (each with its negative counterpart, each enforceable by instrument or operation of law), and covenants that ran with the land.⁷⁵ Alienation was further conditioned by the Rule Against Perpetuities, the Rule in *Shelley's Case*, and the Doctrine of Worthier Title.⁷⁶ These principles spawned varied contingent current and future interests subject to eventual claims and conditions embodied in such forms as the fee on condition, fee subject to condition subsequent, and fee subject to reversion.⁷⁷ For every owner or tenant the law recognized multiple possible future replacements.⁷⁸ The current possessor had duties to these persons (many not yet in existence or even ascertainable) that restricted what the "owner" could do with lands and buildings currently in his or her custody.⁷⁹

75. *Id.* Conflicted interests in landed estates and the status attendant thereto inspired a whole genre of "inheritance novels." See, e.g., JANE AUSTEN, *PRIDE AND PREJUDICE* (Janet Todd ed., Cambridge Univ. Press 2006) (1813); FANNY BURNEY, *EVELINA OR A YOUNG LADY'S ENTRANCE INTO THE WORLD* (J.M. Dent & Sons Ltd. 1958) (1778); SAMUEL RICHARDSON, *CLARISSA OR THE HISTORY OF A YOUNG LADY* (Angus Ross ed., Penguin Books 1985) (1747-48). One particularly poignant literary perspective on the vicissitudes engendered by complex interests in estates in land is WILLIAM MAKEPEACE THACKERAY, *THE LUCK OF BARRY LYNDON: A ROMANCE OF THE LAST CENTURY* (Edgar F. Harden ed., Univ. of Mich. Press 1999) (1844) (published in 1844 but set in the mid-eighteenth century). Redmond Barry takes the name Barry Lyndon when he marries the wealthy widow of Lord Bullingdon. But he holds only a life estate *pur autre vie* in the estate, which will devolve to his step-son, Viscount Bullingdon, who holds a future interest in the form of a fee simple subject to condition precedent and will take upon the death of his mother provided he has reached maturity. See generally *id.* RHYS ISAAC, *THE TRANSFORMATION OF VIRGINIA: 1740-1790* (2d ed. 1999), is a brilliant study of role playing in genteel Virginia, laying great emphasis on the land as setting.

76. The Rule Against Perpetuities holds that no contingent future interest in land shall vest in interest, not in possession, unless it must vest, if it vests at all, within twenty-one years plus the period of gestation of a life in being at the time of its creation. BLACK'S LAW DICTIONARY 1331 (6th ed. 1990). The Rule in *Shelley's Case* holds,

when the ancestor[,] by any gift or conveyance[,] takes an estate of freehold, and in the same gift or conveyance an estate is limited[,] either mediately or immediately[,] to his heirs in fee or in tail; . . . 'the heirs' are words of limitation of the estate, and not words of purchase.

1 Coke's Reports 256 (1581). The Doctrine of Worthier Titles holds that "[a]t common law[,] where [a] testator undertook to devise to an heir exactly [the] same interest in land as such heir would take by descent, descent was regarded as the 'worthier title' and [the] heir took by descent [not] by devise." BLACK'S LAW DICTIONARY 1607 (6th ed. 1990). The point to introducing these restraints against alienation is that notions along the lines of "it (or he or she) is mine, and therefore I can do with it as I please" do not so readily resonate in Jefferson's culture as we might assume.

77. See A.W.B. SIMPSON, *A HISTORY OF THE LAND LAW* 208-41 (2d ed. 1986); BAKER, *supra* note 61, at 248-97.

78. BAKER, *supra* note 61, at 248-97.

79. *Id.* at 228-41.

The land law has changed in England and the United States, yielding to statutory reform and simplified modern conventions, and the notions just described seem exotic now to all but the passing generation of American property lawyers and law professors. For Jefferson, however, they were fundamental to a seemingly timeless way of life and to his livelihood. That legally cognizable interests in real property were not absolute but conditional for Jefferson matters profoundly because for most of the eighteenth century in Virginia slaves were legally defined as real property, not personal property.⁸⁰ The difference between real property and personal property was significant. In the words of Virginia Attorney General John Randolph in 1768:

The natural property of land is, that it is fixed and permanent: its legal properties, that it shall descend to heirs in various manners; shall be subject to widows' dowers, shall not be liable to execution; cannot be aliened but by writing; shall give its proprietor a right of voting at elections: cannot be demanded but by action real Again the natural properties of personal estate are, that it is moveable and perishable: its legal properties that it shall be distributed among the next of kin equally; shall be liable to execution; may be aliened without writing; shall not give a right to vote; must be demanded by action personal⁸¹

In practice, the Virginia courts of the eighteenth century treated slave property as real property for some purposes and personal property for others, while affording slaves more protection than chattels against claims of creditors but less than land.⁸² An owner's legal interest in a slave might therefore be limited, not in favor of the slave, but in favor of other white persons who might claim a countervailing interest or a different stick in the bundle of ownership rights attached to the enslaved person.⁸³ The fact that slaves were, within limitations, real rather than personal property restricted the ability of creditors to seize them to satisfy debts of a decedent.⁸⁴ It had important consequences respecting the dower's third when husbands died intestate.⁸⁵ And it meant that slaves could be—and sometimes were, especially on great plantations—entailed, to

80. MORRIS, *supra* note 66, at 66-71. A statute of 1705 defined slaves as real property, except in cases of ownership by merchants, factors, and agents. *Id.* at 66. A 1727 statute allowed slaves to be entailed with estates. *Id.* at 67. The Burgesses attempted to change the law in 1748, but the proposed reversion was disallowed by the Crown in 1751. *Id.* at 69. Slaves were not reclassified as chattels personal until a statute of 1792. *Id.* at 71.

81. *Id.* at 63 (citations omitted).

82. *Id.* at 64, 66 (citation omitted).

83. *See id.* at 66-67.

84. *See id.* at 67.

85. *See id.*

preserve the grandeur of an estate passing to the eldest son or favored heir.⁸⁶ In part because they were classified as real property in eighteenth-century Virginia, slaves were not objects over which a master could, as a matter of course, assert absolute legal authority.⁸⁷

E. Slavery, Status, and the Statutory Law

As a property lawyer, Jefferson litigated cases involving claims to human beings as objects.⁸⁸ The notion that human beings were things that could be owned was counterintuitive to eighteenth-century enlightened sensibilities. It was already anomalous in the early modern common law of the seventeenth century, especially as that law came down to Jefferson, enveloped in the Whiggish, freedom-favoring mythology by his favorite commentator, Lord Coke.⁸⁹ True, the law of England had once tolerated a level of subjugation approaching that of slavery, but villeinage was defunct by the time the English came to North America, and even a statute of Edward VI that had allowed two years enslavement as punishment for vagrancy was a distant memory.⁹⁰ Given the assumption that holding people as property was, by the time Virginia was established, an un-English practice, much probing, path breaking, and insightful scholarship has focused on the seventeenth-century decision (or haphazard sequence of events?) that established a different rule for black persons, teaching that even if England was too pure an air for a Russian slave to breathe without immediately becoming free, the air of Virginia was sufficiently sullied to allow holding an African in perpetual bondage.⁹¹

86. *See id.*

87. *See* William G. Merkel, *Jefferson's Failed Anti-Slavery Proviso of 1784 and the Nascence of Free Soil Constitutionalism*, 38 SETON HALL L. REV. 555, 584-91 (2008) [hereinafter Merkel, *Jefferson's Failed Antislavery Proviso*].

88. Konig, *Antislavery*, *supra* note 51, at 3-4.

89. *See* DEWEY, *supra* note 21, at 10-11; *cf.* EDWARD DUMBAULD, THOMAS JEFFERSON AND THE LAW 104 (1978); DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 58 (1994). *See generally* EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND (Photo reprint 1985) (1832) (discussing the development of English common law).

90. The 1547 law providing that vagrants would be sold as slaves (to serve two years) was repealed in 1549. MORRIS, *supra* note 66, at 41-42; *see also* DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN WESTERN CULTURE 35-40 (1966) [hereinafter DAVIS, SLAVERY IN WESTERN CULTURE] (discussing the demise of villeinage).

91. *Cartwright's Case*, not reprinted directly in any contemporaneous reporter, but discussed at length in *Somerset*, reputedly held that "[i]n the Eleventh of *Elizabeth*, one *Cartwright* brought a Slave from [Russia], and would scourge him, for which he was questioned; and it was resolved, [t]hat *England* was too pure an [a]ir for slaves to breathe in." 2 JOHN RUSHWORTH, HISTORICAL COLLECTIONS 468-69 (1721) (recounting *Cartwright's Case* in an unattributed hearsay report published over one hundred years after the case was decided); *see* DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770-1823, at 487 (1975) [hereinafter DAVIS, SLAVERY IN THE

Many points are debated respecting the legitimization of slavery and the process by which blackness became equated with slave status. Winthrop Jordan is doubtless correct that the cultural history of English and European perceptions of the color black fostered attitudes of hostility long before Virginians came into contact with Africans.⁹² David Brion Davis is certainly right that the long history of antagonism and Manichean struggle between the Islamic and Christian worlds made the European mind receptive to dehumanized portrayals of the other, the exotic, and the alien.⁹³ The Handlins are probably not wrong that when blacks were first landed—and sold—in Virginia in 1619 there was not yet a consensus among white Virginians that Africans must be slaves.⁹⁴ Whether the Handlins are also right that no such consensus emerged until the 1660s,⁹⁵ or T. H. Breen and Stephen Innes are correct in asserting that equation of blackness and slave status did not take root until 1690 or 1700 is harder to say.⁹⁶ Questions of chronology and provenance respecting the crystallization of assumptions undergirding the North American colonial slave law are perhaps irresolvable owing to paucity and ambiguity of evidence. There are documents (but not that many of them) on either side of any contentious historiographic issue regarding the nonstatutory seventeenth-century law of slavery.⁹⁷ Customary law, of course, mirrors social practice and expectations, and common law doctrines in Virginia (both “country” and “court”) adapted and changed by necessity as the colony evolved between 1660 and 1730 from a plantation economy whose principal labor force consisted of white servants for terms of years to one whose estates were worked almost wholly by African slaves for life.⁹⁸

AGE OF REVOLUTION]; George Van Cleve, *Somerset's Case and Its Antecedents in Imperial Perspective*, 24 L. & HIST. REV. 601, 614 (2006).

92. WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812*, at 3-43 (1968).

93. David Brion Davis, *Slavery—White, Black, Muslim, Christian*, N.Y. REV., July 5, 2001, at 51-53 [hereinafter Davis, *Slavery—White*] (reviewing PETER LINEBAUGH & MARCUS REDIKER, *THE MANY-HEADED HYDRA: SAILORS, SLAVES, COMMONERS, AND THE HIDDEN HISTORY OF THE REVOLUTIONARY ATLANTIC* (2000), and LAMIN SANNEH, *ABOLITIONISTS ABROAD: AMERICAN BLACKS AND THE MAKING OF MODERN WEST AFRICA* (2000)).

94. See Oscar Handlin & Mary F. Handlin, *Origins of the Southern Labor System*, 7 WM. & MARY Q. 199, 199, 202-03 (1950).

95. *Id.* at 203.

96. T.H. BREEN & STEPHEN INNES, “MYNE OWNE GROUND”: RACE AND FREEDOM ON VIRGINIA'S EASTERN SHORE, 1640-1676, at 5, 11-17 (1980).

97. See generally John C. Coombs, *The Phases of Conversion: A New Chronology for the Rise of Slavery in Early Virginia*, 68 WM. & MARY Q. 332 (2011) (discussing the contested reading of primary sources and provenance of Virginia slavery).

98. EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL*

By Jefferson's day, this much was certain, and long reduced to statute:⁹⁹ a Virginia Act of 1662 declared that "all children born[] in this country [shall be] held bond or free only according to the condition of the mother,"¹⁰⁰ thus establishing the rule of *partus sequitur ventrem*, eventually the rule in all the slaveholding British North American colonies, but unknown in English law.¹⁰¹ Thereafter, children born to enslaved women in Virginia would be slaves for life, and in 1677 the Burgesses decreed that baptism and conversion would not alter the status of a slave, whether born in Virginia or outside the colony.¹⁰² A 1670 statute addressed the status of persons imported into the colony as laborers, and pronounced that non-Christians who came by sea (i.e., from Africa or the West Indies) would be slaves, but that those who came by land (i.e., American Indians) would serve for a term of years.¹⁰³ This distinction was blurred when the colonial legislature declared in 1679 that Indians taken prisoner in war could be held as slaves, and three years later that Indians sold into the colony from other jurisdictions were to be classified as slaves, not servants.¹⁰⁴ But the Burgesses performed another about face in 1691, reversing the policies of 1679 and 1683 and settling on the rule that all American Indians brought into the

OF COLONIAL VIRGINIA 295-315 (1975). Some thirty years after its initial publication, Edmund S. Morgan's *American Slavery, American Freedom: The Ordeal of Colonial Virginia* remains balanced, powerful, and convincing in its analysis of Virginia's transition from indentured servitude to African slavery. Morgan stresses the following as factors contributing to the switch to African slavery: increasing life expectancy of Virginians (slave and free), which made slaves for life more attractive investments than servants for a term of years; the rising profitability of Chesapeake tobacco compared to West Indian sugar, which made Virginia slave prices more attractive to importers; and the lifting of the Royal Africa Company's monopoly in 1698, which augmented the supply of slaves. Morgan suggests the transition accelerated in the 1670s and was largely complete by 1710. *Id.*

99. For a detailed analysis of the statutory history of slavery see MORRIS, *supra* note 66, at 43-49. See also William M. Wiecek, *The Statutory Law of Slavery and Race in the Thirteen Mainland Colonies of British America*, 34 WM. & MARY Q. 258, 258-80 (1977) (discussing colonial statutes pertaining to slavery and race).

100. 2 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 170 (William Waller Hening ed., 1823) [hereinafter STATUTES AT LARGE OF VIRGINIA]; see MORRIS, *supra* note 66, at 43-44 (discussing the rule of *partus sequitur ventrem*).

101. The commonplace notion that the rule was unknown in English law requires clarification: While the principle was unknown respecting human status, it reflected long-established and accepted practice regarding livestock. See T. CLARKSON, THOUGHTS ON THE NECESSITY OF IMPROVING THE CONDITION OF THE SLAVES IN THE BRITISH COLONIES, WITH A VIEW TO THEIR ULTIMATE EMANCIPATION; AND ON THE PRACTICABILITY, THE SAFETY, AND THE ADVANTAGES OF THE LATTER MEASURE 8 (3d ed. 1823).

102. 2 STATUTES AT LARGE OF VIRGINIA, *supra* note 100, at 260.

103. *Id.* at 283.

104. *Id.* at 490-91; *Hudgins v. Wrights*, 11 Va. (1 Hen. & M.) 134, 137-38 (1806).

colony thereafter would be free persons.¹⁰⁵

In 1705, with slavery well on its way to supplanting indentured servitude as the colony's principal labor system, Virginia enacted a comprehensive law on slaves and servants.¹⁰⁶ The statute recited many of the prior acts, codified a police regime, penalized servants and slaves who absented themselves from plantations, and made clear that Christians of Christian parentage newly brought into the colony could not be held as slaves but only as servants for five years.¹⁰⁷ Finally, in 1723, the colony stiffened its already daunting obstacles to manumission, requiring special permission from the Governor and Council and mandating seizure of any person a master attempted to free without authorization.¹⁰⁸ Thus, when Jefferson entered onto the public stage in the 1760s, it was taken as social fact—buttressed by long settled written law—that whites could not be slaves unless they descended from African slaves in the maternal line, that no one with Indian lineage (on the maternal side) could be held in slavery after 1691; that Indians could only be held in slavery if it were proved that they descended of Indians enslaved in Virginia or brought as slaves into Virginia during the period from 1679-1691; and that blacks would be slaves (excepting the small segment of the population descended from Africans who attained freedom before the color line solidified in the later decades of the seventeenth century).¹⁰⁹ The equation of African and slave status (absent other descent), unclear as it had been in the early and middle seventeenth century, was now nearly absolute. Prior to the Manumission Act of 1782, special permission to emancipate particularly named individuals or classes was rarely granted, and in the pre-Revolutionary period, the free black population numbered less than 0.3 percent of Virginia's total non-Indian population.¹¹⁰

Slaves then were property, and Africans and African Americans—with few exceptions—were slaves. That slaves were real and not personal property may have, for the reasons discussed above, mitigated the conceptualization of African Americans as objects of complete dominion by their masters. So too did the fact that slaves

105. *Hudgins*, 11 Va. (1 Hen. & M.) at 137-38.

106. 3 THE STATUTES AT LARGE OF VIRGINIA, *supra* note 100, at 447.

107. *Id.*

108. *Id.* at 250.

109. The best summary of these race-based presumptions respecting slavery and freedom is contained in the opinions of Virginia Supreme Court of Appeals Judges St. George Tucker and Spencer Roane in *Hudgins*, 11 Va. (1 Hen. & M.) at 137-43. See also ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 51-55 (1975) (discussing *Hudgins v. Wrights*).

110. See JOHN H. RUSSELL, THE FREE NEGRO IN VIRGINIA, 1619-1865, at 10-13 (1913); IRA BERLIN, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH 46-47 (1974).

could undeniably have agency—and the criminal law, the law of private wrongs, and the law of contract had to confront the issues of when and to what degree the fiction of objectification would trump the reality of willed (or negligent) consequential action.¹¹¹ In the eighteenth century (but not in the nineteenth), slaves seldom had counsel in judicial proceedings, and issues of individual black agency were largely beyond the scope of Jefferson's property practice, focused as it was on things, the right to possession of things, and (in the context of freedom suits) eligibility *vel non* of humans to be fictive things or escape objectification. In one important context, Jefferson did confront squarely the legal ramifications of purposeful African American action and planned action, but this occurred long after he closed his practice, when Gabriel's Uprising forced him to consider whether slave rebellion was justified (it was, at least as a matter of legal theory; however, violent white reaction and refusal to allow the rebels to plead justification was excusable necessity).¹¹²

A final preliminary point about Jefferson's legal knowledge and lawyerly disposition merits noting here, before moving on to consideration of his principal early writings involving slavery. This concerns his ability, felicity, and profundity in legal argumentation. Bernard Schwartz, the eminent constitutionalist and editor of *Bolling v. Bolling*, a compilation of documents related to a highly complex property dispute argued by Jefferson and Wythe, remarked that the rigor and insight characterizing Jefferson's and Wythe's opposed "opinions" (as arguments were then called) in *Bolling* is striking, indeed humbling.¹¹³ Schwartz's assessment is well merited. Jefferson's brief to the court—written without the assistance of a clerk, the aid of online search engines and databases, and access to compiled reporters of decisions¹¹⁴—surpasses in thoroughness, logic, and depth of understanding any memorandum from a large modern law office that I have seen. Perhaps, like the art of building cathedrals and tall ships, the skills of the elite common lawyers of old have been lost to the ages.

In recent decades, many historians have depicted Jefferson as impulsive and emotive, as a superficial glosser and sheener, rather than a serious political thinker.¹¹⁵ But those familiar with Jefferson's lawyerly method and legal scholarship—including his

111. See MORRIS, *supra* note 66, at 132-58, 249-321, 354-68.

112. See Merkel, *Jefferson and Gabriel's Uprising*, *supra* note 16, at 17-22 (discussing Gabriel Prosser's uprising and Jefferson's reaction).

113. See BERNARD SCHWARTZ, BARBARA WILCIE KERN & R.B. BERNSTEIN, THOMAS JEFFERSON AND *BOLLING V. BOLLING*: LAW AND THE LEGAL PROFESSION IN PRE-REVOLUTIONARY AMERICA 112-21 (1997).

114. See *id.* at 115.

115. See, e.g., FINKELMAN, *Preface*, *supra* note 9, at 170-75 (claiming Jefferson was more concerned with his own welfare than his opposition to slavery).

colleagues, both friend and foe, with direct experience with his work and subsequent commentators who have familiarized themselves with his legal endeavors—have been nearly uniformly impressed with the erudition and skill of his lawyering. As Schwartz concludes:

[Jefferson] received what was probably the best legal education in the colonies under the tutelage of George Wythe He built up a successful practice and, as John W. Davis once put it, “if he had not been called away to public life . . . , he would still have won his place in the history of Virginia as one of the brightest ornaments of an illustrious bar.” In 1790, John Marshall could list Jefferson among the “ablest men and soundest lawyers” of the day. As [Willard Sterne Randall reports] “By the time he decided to abandon his legal practice . . . , he represented many of the colony’s wealthiest and most prominent citizens, including many of the leading lawyers.” Jefferson’s legal knowledge was summarized after his death by James Madison: “The Law itself he studied to the bottom, and in its greatest breadth, of which proofs were given at the Bar which he attended for a number of years, and occasionally throughout his career.” . . . Edmund Pendleton thought [Jefferson] qualified to be a judge; according to Justice Lewis F. Powell, “Jefferson almost certainly could have had a judgeship had he wanted it.” Long after Jefferson had given up his practice, Aaron Burr (certainly no admirer) was heard to say of him, “Our president is a lawyer, and a great one too.”¹¹⁶

In his dealings with slavery, Jefferson was sometimes on the right side of history and morality, and sometimes on the wrong. Over the course of his long life, his various values and ideals ebbed and flowed. However his faith in the law, and in the ultimate triumph of justice, remained—like his involvement in slavery—a constant. As an advocate, statesman, citizen, and philosopher, his thoroughly legal mindset shaped the formulation and expression of his thoughts and actions respecting slavery throughout his adult life.

III. *HOWELL V. NETHERLAND*

Jefferson’s earliest fully-documented systematic and philosophical examination of slavery comprises his written argument in the April 1770 case of *Howell v. Netherland*, in which he presented an intricate appeal to the General Court seeking to overturn the dismissal of a freedom suit on behalf of a male bond-servant whose great-grandmother had been white.¹¹⁷ The case comes down to us in Jefferson’s compilation of mid-eighteenth-century Virginia cases assembled shortly before his death and not published until 1829. Over fifty years had passed before Jefferson noted down his

116. SCHWARTZ, *supra* note 113, at 24-26 (footnotes omitted).

117. 1 Jeff. 90 (Va. Gen. Ct. 1770), reprinted in 1 JEFFERSON WRITINGS, *supra* note 54, at 373-74.

recollections of the General Court's summary judgment against his client, delivered directly after he made his oral argument, and before opposing counsel—Jefferson's mentor and law teacher George Wythe—had spoken.¹¹⁸ The vividness of these impressions, preserved so long after the fact in the margin notes of Jefferson's *Collection of Cases*, attests to the importance of the incident in the mind of an idealistic young attorney. These recollections also suggest that the elderly Jefferson found it worthwhile to illustrate just how unripe the issue of antislavery had been for the Old Dominion when he himself was of a zealous age, possessed of weapons more than fervent prayers.¹¹⁹

After giving birth to a mixed-race child, Howell's white great-grandmother was bound over to labor for a five-year term.¹²⁰ Her child, Howell's "mulatto" grandmother, was bound over for thirty-one years, during which time she in turn gave birth to Howell's mother, who also was made to serve an appointed master for thirty-one years.¹²¹ Because Howell was born during his mother's term of service, his mother's master felt entitled to hold him to a thirty-one year term as well.¹²² But when that master died, Howell sought his freedom and retained Jefferson to argue that he should not be bound over to a new master for the balance of his thirty-one years.¹²³

Paul Finkelman has suggested that Howell was only one-eighth African and hence very nearly white in appearance.¹²⁴ Jefferson's attempts to win his client's liberty, Finkelman implies, had less to do with opposition to African American slavery than with the principle

118. *Id.* at 379-81.

119. In a 1814 letter to Edward Coles, declining an invitation to head a revived antislavery movement, Jefferson wrote:

I am sensible of the partialities with which you have looked towards me as the person who should undertake this salutary but arduous work. But this, my dear sir, is like bidding old Priam to buckle the armour of Hector "tremantibus aequo humeris et inutile ferruncingi." No, I have overlived the generation with which mutual labors & perils begat mutual confidence and influence. This enterprise is for the young; for those who can follow it up, and bear it through to its consummation. It shall have all my prayers, & these are the only weapons of an old man.

Letter from Thomas Jefferson to Edward Coles (August 25, 1814), *reprinted in* 9 THE WRITINGS OF THOMAS JEFFERSON, 1807-1815, at 478-79 (Paul Leicester Ford ed., 1898) [hereinafter 9 JEFFERSON WRITINGS]. Fervent prayers became a favorite expression of Jefferson's old age, particularly as a means of expressing his assumption that matters (often related to slavery) were beyond his direct control.

120. *Howell*, 1 Jeff. at 90, *reprinted in* 1 JEFFERSON WRITINGS, *supra* note 54, at 374 n.2.

121. *Id.*

122. Konig, Antislavery, *supra* note 51, at 8.

123. *Id.*

124. See Finkelman, *supra* note 1, at 138 (mentioning that Howell's great-grandmother was white and great-grandfather may have been half-white).

that white persons should be immune from the species of bondage that was commonly the lot of black Virginians.¹²⁵ But Finkelman's supposition about Howell's appearance is a guess, and Jefferson did not argue that Howell was entitled to freedom because he was legally white. Moreover, the magistrate court had not freed Howell on inspection, as courts generally did with white-looking (or Indian-looking) plaintiffs in freedom suits.¹²⁶ In fact, the lower court did not grant Howell his liberty at all, and the General Court did not call that decision into question.¹²⁷

There are at least two possible explanations for the failure to free Howell on grounds of racial exemption from slavery. First, *if* the case hinged on the question of slavery or freedom, then Howell almost certainly must have been less than seven-eighths white and descended from other African American forebears in addition to the man who "illegally" fathered his grandmother. Had Howell been a white looking *slave*, one would expect him to have been freed on those grounds alone, unless the putative owner could prove the petitioner's mother had been lawfully held in slavery. A second explanation for the decision not to set Howell free emphasizes that his case was not really a freedom suit in the conventional sense. Jefferson's argument stressed Howell's status as a bound-servant,¹²⁸ and to the extent that Jefferson was seeking to end his client's obligation to serve as a bound laborer rather than win his freedom from slavery, whiteness would not have been a dispositive, or even a relevant issue. But whether the issue before the court was understood in terms of slavery and freedom or of bound servitude and liberty, Jefferson's analysis built on premises inimical to human bondage.

A. *A Natural Rights-Based Indictment of Human Bondage*

Jefferson's argument was methodical and meticulous. The version preserved in the *Collection of Cases* appears to be Jefferson's

125. *See id.*

126. *See* DUNCAN J. MACLEOD, *SLAVERY, RACE AND THE AMERICAN REVOLUTION* 109-26 (1974) (discussing freedom suits in the Revolutionary period). Dr. MacLeod stressed the frequency of decisions for freedom based on inspection during conversation with the author. *See* *Hudgins v. Wrights*, 11 Va. (1 Hen. & M.) 134 (1806) (discussed below); COVER, *supra* note 109, at 51-55. In the Court of Chancery, George Wythe held that Wright and his family were presumptively free because of Indian appearance and because the Virginia Declaration of Rights of 1776 created the presumption—not overcome in this case—that all persons were free. COVER, *supra* note 109, at 51. Justice St. George Tucker, for the Court of Appeals, upheld the decision on the grounds of appearance but disowned the Court of Chancery's alternative basis for the decision founded in the Declaration of Rights. *Id.* at 53.

127. *See generally* Howell v. Netherland, 1 Jeff. 90 (Va. Gen Ct. 1770), *reprinted in* 1 JEFFERSON WRITINGS, *supra* note 54, at 373-74.

128. *Id.* at 375-76.

written summary of his own oral “opinion,” taken down immediately after the case was heard, but annotated with margin and footnotes half a century later in preparation for publication in the *Collection*. No other record of the case (either written submissions by counsel or formal opinion by the court) seems to have been preserved. In his opinion, Jefferson argued in the first place that even if Howell was legally detained by his first master, he could not be aliened (i.e., sold or devised), and in the second place, that Howell could not legally be detained in slavery at all.¹²⁹ Both arguments rely on the plaintiff’s white ancestry, but they proceed to build on that fact in a manner that calls into question the moral legitimacy of slaveholding irrespective of the color of the bondmen.¹³⁰

The argument Jefferson put to the General Court reflected a precocious sense of legal realism and a visionary devotion to rights theory far removed from the narrow statutory substance of the case. Jefferson’s opinion ranged beyond his core claim that there was no legislative authority for holding his client to bound labor and developed, at length, into a full-fledged indictment of slavery on grounds of natural law and natural rights. Since the arguments of opposing counsel have not been preserved, we simply do not know whether George Wythe intended to press a claim that Howell was his client’s slave and not merely bound to labor for a term of years. We have only Jefferson’s opinion to go on, and Jefferson’s analysis assumes that there was no legal basis—and no case at bar—for holding Howell as a *de jure* slave for life.¹³¹ And yet, as the unfortunate offspring three generations removed of an illegal union, Howell was being held in *de facto* slavery by a putative master who intended to enforce an uncompensated obligation to serve the balance of a term amounting to well over half a productive lifetime in eighteenth-century Virginia.¹³² Thus, even if Jefferson’s antislavery rhetoric did not apply directly to his client’s formal legal status, it was all too relevant to Howell’s actual station in life. And Jefferson’s natural rights-based indictment of slavery carried potentially far wider implications, for it called into question all claims of property rights in human beings not reducible to particular acts of the legislature sanctioning enslavement of clearly defined classes of individuals.

The first plank of Jefferson’s argument develops an equal rights

129. *Id.* at 375.

130. *Id.* at 376, 380.

131. *Id.* at 380–81.

132. See Bob Ruegsegger, *18th Century Medicine*, VIRGINIA GAZETTE (Jan. 5, 2011, 8:54 AM), www.vagazette.com/articles/2011/01/06/slide_show/doc4d23c7123e605032593571.prt (discussing life expectancy in eighteenth-century Virginia).

reading of the law governing covenants of apprenticeship,¹³³ while the second expounds a radical interpretation of Virginia's statutes on offspring of mixed union.¹³⁴ In both planks, Jefferson places great weight on the natural law's abhorrence of all forms of slavery. Perhaps not surprisingly, the court dismissed these sentiments out of hand.¹³⁵ According to Jefferson, after he presented his oral argument, "Wythe, for the defendant, was about to answer, but the Court interrupted him, and gave judgement in favour of his client."¹³⁶ The youthful Jefferson was thus rebuked dismissively by an arm of the Virginia government for an attempt to put broad antislavery principles into practice. This was doubtless a memorable, and probably a very humiliating, experience. The General Court in 1770 included two peers of the realm, Jefferson's closest friend, and several of his mentors.¹³⁷ The court was comprised of John Blair, William Nelson, Thomas Nelson, Richard Corbin, William Byrd III, Philip Ludwell Lee, John Tayloe II, Robert Carter III, Robert Burwell, John Page, George William Fairfax, and James Harrocks—all leading men of the colony or scions of its most eminent families.¹³⁸ Before his sudden death in October, the popular and respected Norborne Berkeley, the Baron de Botetourt, held the Governor's chair and led the General Court's sessions.¹³⁹ Jefferson's relationship with Botetourt was not as close as the young Virginian's connection to Botetourt's predecessor, Lieutenant Governor Francis Fauquier, had been. But in the deferential and still quasi-aristocratic society of the late eighteenth-century Old Dominion, Jefferson deeply coveted the esteem of the colony's leading men.¹⁴⁰ To have his carefully crafted argument rejected before the public galleries of the court was chastening, and in due course Jefferson learned to avoid discussion of race and slavery in Virginia's public fora.¹⁴¹ But the argument in *Howell v. Netherland* possesses a brashness the twenty-seven-year-old Jefferson had not yet learned to eschew regarding Virginia's most delicate issues, and it therefore makes a particularly interesting study.

133. *Howell*, 1 Jeff. at 90, reprinted in 1 JEFFERSON WRITINGS, *supra* note 54, at 373-75.

134. *Id.* at 375-81.

135. *Id.* at 373-74 n.2.

136. *Id.*

137. See DEWEY, *supra* note 21, at 18.

138. *Id.*

139. See *id.* (citing 6 THE EXEC. J. COUNCIL OF COLONIAL VA., 34, 113, 228-29 (1966)).

140. See MALONE, *supra* note 48, at 128.

141. See 9 JEFFERSON WRITINGS, *supra* note 119, at 477-79 (describing Jefferson's rueful reflections and circumspect attitude in his August 25, 1814, letter to Edward Coles).

Jefferson began Howell's appeal by reasoning that punishing the offspring of mixed unions ran counter to the colonial legislature's intent when it acted to curtail "miscegenation," or interracial union. In Jefferson's words, "the purpose of the act [of 1705] was to punish and deter women from that confusion of species, which the legislature seems to have considered as an evil, and not to oppress their innocent offspring."¹⁴² However, an earlier statute suggests Jefferson was likely wrong about the legislative intent of 1705; the Burgesses, council, and governor probably did desire to stigmatize, shackle, and shame the children of mixed unions.¹⁴³ As Edmund S. Morgan explains, the 1705 Act revised an Act of 1691—Jefferson's chronology of miscegenation statutes stopped off one short of the original.¹⁴⁴ The preamble to the 1691 Act decried "that abominable mixture and spurious issue which hereafter may encrease in this dominion, as well by negroes, mulattoes, and Indians intermarrying with English, or other white women, as by their unlawfull accompanying with one another."¹⁴⁵ So while Jefferson is right that the Burgesses intended "to punish and deter women from that confusion of species . . . [they] seem[ed] to have considered as an evil," his notion that the Burgesses did not intend "to oppress [the women's] innocent offspring" is hard to square with the preamble to the predecessor statute that the Burgesses did not disown.¹⁴⁶ Its emphasis on abominable mixture and spurious issue strongly suggests that the children, as much as parents, were the targets of the Burgesses' ire. In any case, the fact that the scholarly Jefferson was historically mistaken is less important for present purposes than his argumentative method and the assumptions his technique reveals.¹⁴⁷

142. Howell v. Netherland, 1 Jeff. 90 (Va. Gen Ct. 1770), reprinted in 1 JEFFERSON WRITINGS, *supra* note 54, at 374.

143. Cf. MORGAN, *supra* note 98, at 335 (citing III Henning 86-87 (1691 Act), 453-54 (1705 Act)).

144. *Id.* at 335.

145. *Id.*

146. 1 JEFFERSON WRITINGS, *supra* note 54, at 374.

147. For Jefferson, living in an age that saw itself as benevolent, sentimental, and enlightened, the late seventeenth-century legislature's intent to punish children for the sins of their forbears is now so alien as to be unimaginable—or at least incapable of intuition without the benefit of access to the statutory language articulating this now otherworldly purpose. According to Edmund Morgan, the Burgesses' underlying design in both 1691 and 1705 was to divide white laborers from black, instill among lesser whites a sense of racial solidarity transcending class antagonisms, and to forestall another Bacon's Rebellion. See MORGAN, *supra* note 98, at 335-36. If Morgan is right, Jefferson's own prejudices, and those of his time, become testimonials to the completeness of the Burgesses' success. By Jefferson's day, white solidarity was so firmly rooted in Virginia that common cause among rebellious blacks and whites had become inconceivable. *But see* DOUGLAS R. EGERTON, GABRIEL'S REBELLION: THE

Based on his misreading of the legislature's intent sixty-five and eighty years earlier, Jefferson maintained that far from wishing to punish the children of mixed union, the Burgesses had "made cautious [that is meticulous, as opposed to timid] provision for the welfare of the child, by leaving it to the discretion of the church wardens to choose out a proper master."¹⁴⁸ This master, having been selected by the wardens, entered into a covenant to provide sufficient food, clothing, and lodging for the child, in consideration of which the child was to labor for the master until the age of thirty-one.¹⁴⁹ To sell the ward, Jefferson reasoned, would break the covenant, which in turn would release the ward from his obligation to labor.¹⁵⁰ Jefferson's analysis, then, relied on a rights-based understanding of master-servant relations. He built his argument on his interpretation of the "covenant" between Howell and his master—a covenant that the court clearly did not recognize; a covenant, in fact, that the court would not even consider.

Jefferson's notion of covenant implied an equality of the mulatto bond servant and his master before the law. When arguing that a master could never withdraw his obligation to provide his ward with the necessities of life, Jefferson instructed the court that "[t]he servant may as well set up a right of withdrawing from his master those personal services which he, in return, is bound to yield him."¹⁵¹ The suggestion that nonwhite servants, bound to an extended term of labor by operation of the state's antimiscegenation laws, had rights

VIRGINIA SLAVE CONSPIRACIES OF 1800 & 1802 (1993) (advancing a revisionist argument that leaders of the foiled insurrection of 1800 envisioned establishment of a biracial artisan republic). Egerton's evidentiary basis for his conclusions is questioned sharply in JAMES SIDBURY, *PLOUGHSHARES INTO SWORDS: RACE, REBELLION AND IDENTITY IN GABRIEL'S VIRGINIA 1730-1810*, at 60 n.7, 74-75, 81 n.54, 83 n.57, 88 n.66, 130-31 nn.37-38 (1997). Consider the charged response to Lord Dunmore's Proclamation in 1775 as evidence that white Virginians saw cooperation among white soldiers and armed former slaves as per se illegitimate. While Jefferson eventually expressed fears of black uprisings—and these expressions grew more frequent after the Haitian Revolution and the Gabriel plot—he remained generally unconcerned or indeed enthusiastic about uprisings by white farmers and workers. Compare Letter from Thomas Jefferson to James Madison (Jan. 30, 1787), reprinted in 11 JEFFERSON PAPERS, *supra* note 6, at 93 (Jefferson's famous comment in the wake of Shays' Rebellion in Massachusetts that "a little rebellion now and then is a good thing, and as necessary in the political world as storms in the physical"), with Letter from St. George Tucker to Thomas Jefferson (Aug. 22, 1797), reprinted in 29 JEFFERSON PAPERS, *supra* note 20, at 515, and Merkel, *Jefferson and Gabriel's Uprising*, *supra* note 16, at 11-14 (discussing Jefferson's reflections on the Haitian Revolution). The feelings of racial solidarity engendered by the early legislators in Virginia had grown to operate from top to bottom, as well as bottom to top, of the social scale. Perhaps, in the long run, the Burgesses were more successful than they would have wished to be.

148. *Howell v. Netherland*, 1 Jeff. 90 (Va. Gen Ct. 1770), reprinted in 1 JEFFERSON WRITINGS, *supra* note 54, at 374.

149. *Id.* at 374-75.

150. *Id.* at 374.

151. *Id.* at 374.

analogous to those of workers who had freely contracted to labor in return for valuable consideration, was a nonstarter for law-finders in Virginia's race-based slave plantation society. But Jefferson did not stop here. "These servants bear greater resemblance to apprentices than to slaves[.]" he continued.¹⁵² "[O]n the death of the first master, they go to his executor as an apprentice would, and not to his heir as a slave. . . . Now it is well known that an apprentice can not be aliened" ¹⁵³ Thus, according to Jefferson, Howell's apprenticeship ceased with the death of his master, and he could not be passed on to a new owner. Not so, however, in the court's eyes. It may have been well known that apprentices could not be aliened, but the claim that mixed-race servants bound by operation of statute were really apprentices was unacceptable. Virginia's legal system would not countenance a series of gradations from black slavery to white freedom. That these were absolutely irreconcilable and distinct social conditions remained beyond debate in a court of law.¹⁵⁴

Jefferson's fundamental premise advanced in the second plank of his opinion was that freedom is humankind's natural condition, and that absent any positive law to the contrary, an individual is absolutely entitled to personal liberty.¹⁵⁵ To this end, Jefferson strictured the court in no uncertain language:

I suppose it will not be pretended that the mother being a servant, the child would be a servant also under the law of nature, without any particular provision in the act. Under the law of nature, all men are born free, every one comes into the world with a right to his own person, which includes the liberty of moving and using it at his own will. This is what is called personal liberty, and [it] is given him by the author of nature, because necessary for his own sustenance. The reducing the mother to servitude was a violation of the law of nature: surely then the same law cannot prescribe a continuance of the violation to her issue, and that too without end¹⁵⁶

Jefferson then cites the German jurist Pufendorf to support this natural law doctrine.¹⁵⁷ His reliance on the noted natural law

152. *Id.* at 375.

153. *Id.*

154. An absolute legal barrier between white freedom and black slavery was firmly in place long before 1770. These legal categories developed markedly from the 1660s onwards and were first codified at the close of the seventeenth century. The best accounts of this process remain Edmund S. Morgan's *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA*, *supra* note 98, and Oscar & Mary F. Handlin's *ORIGINS OF THE SOUTHERN LABOR SYSTEM*, *supra* note 94.

155. 1 JEFFERSON WRITINGS, *supra* note 54, at 375-77.

156. *Id.* at 376.

157. *Id.* (citing SAMUEL VON PUFENDORF, *OF THE LAW OF NATURE AS NATIONS*, book 6, ch. 3, § 4, at 383-84 (Basil Konnet trans., 3d ed. 1717). On Pufendorf and natural law, see generally LEONARD KRIEGER, *THE POLITICS OF DISCRETION: PUFENDORF AND*

theorist is instructive. In contradistinction to positivists like Grotius, Hobbes, and Bentham, Pufendorf assumed that fundamental, universal principles of justice informed both municipal law and the law of nations, and suggested that laws violative of these principles were presumptively invalid, and in some circumstances, should not be enforced.¹⁵⁸ Here, Jefferson's invocation of Pufendorf anticipated the higher law constitutionalism Salmon Chase brought to bear against slavery before the Civil War.¹⁵⁹ More immediately, Jefferson's argument prefigures the noted *Somerset* case of 1772, which eventually led to the termination of slavery within England (but not, of course, the Empire).¹⁶⁰ In that case, Lord Chief Justice Mansfield, for the Court of King's Bench, held that slavery was indeed in violation of the law of nature, and that it took positive man-made law to impose slavery upon society and upon individuals.¹⁶¹ Lord Mansfield found no such positive law existing in England in 1772.¹⁶² His decision ultimately resulted in recognition of freedom for some 15,000 former slaves living in England and Wales.¹⁶³

A detailed comparison of Jefferson's argument in *Howell* with Granville Sharp's advisory brief, Francis Hargrave's argument, and

THE ACCEPTANCE OF NATURAL LAW (1965).

158. See KRIEGER, *supra* note 157, at 87-88, 139-40, 145. For a short, insightful discussion of the divergence of natural law theory from positivism in the seventeenth and eighteenth centuries, see Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2604-11 (1997).

159. See COVER, *supra* note 109, at 172-74.

160. See *Somerset v. Stewart*, Loft 1, [1772], 98 Eng. Rep. 499 [508-09] (K.B.). The official report is more readily available in 20 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 51-52 (1816) [hereinafter STATE TRIALS]. In this case, Hargrave, arguing on behalf of the alleged slave, Somerset, refers to *Cartwright's Case* of the eleventh year of Elizabeth's reign, where it was held that "England was too pure an air for a slave to breathe in." STATE TRIALS, *supra* note 160, at 51-52. This, however, applied presumably only to whites.

161. STATE TRIALS, *supra* note 160, at 51-52.

162. Mansfield's holding endorsed, if somewhat reluctantly, Hargrave's contention that without any countervailing positive law, the English constitution and common law held no place for slavery. *Id.* Generally, however, Mansfield was no abolitionist. This emerges clearly in the correspondence of Sharp and Hargrave during the preparation and consideration of *Somerset*. See PRINCE HOARE, MEMOIRS OF GRANVILLE SHARP VOL. I, at 109 (1828) ("The Jury brought their verdict, [t]hat the Negro was no property, and that the defendants were guilty of the indictment. This verdict Lord Mansfield himself approved three times expressly, and yet afterwards refused to give judgment, on account of a doubt in his mind."). In fact, Sharp's indictment of Mansfield's proslavery tendency is quite damning. See DAVIS, SLAVERY IN THE AGE OF REVOLUTION, *supra* note 91, at 393.

163. Ruth Paley, *After Somerset: Mansfield, Slavery, and the Law in England, 1772-1830*, in LAW, CRIME AND ENGLISH SOCIETY, 1660-1830, at 164, 184 (Norma Landau ed., 2002).

Lord Mansfield's opinion in *Somerset* requires a long excursion into eighteenth-century legal theory respecting contract and liberty (and the nineteenth-century developments that explain the ultimate doctrinal significance of the eighteenth-century disputes), and this must wait until another day. In the meantime, it will be useful to note the long-term implications of the view that slavery contradicted natural law for common law cultures like England or Virginia, where law, evolving through precedent, is as likely to be proclaimed by judges as made by legislatures. As Hargrave pointed out in *Somerset*, Pufendorf was not actually opposed to slavery in all circumstances.¹⁶⁴ What the eminent natural law theorist had argued was that only positive law could support human bondage, and that without specific statutes or decisions, slavery was legally insupportable.¹⁶⁵ Once conceded, Pufendorf's and Jefferson's view that slavery violated natural law renders the institution's legality dependent on the willingness of the judiciary or the legislature to rediscover, reinvent, and reassert positive proslavery law over the years. In 1770, the General Court in Virginia would not even consider the Pufendorf doctrine because it did not want to open up a Pandora's box of antislavery eventualities. But if a higher and more distinguished court in the metropolis could come around to Pufendorf's position two years later in *Somerset*, it becomes clear that Jefferson stood on the threshold of an age where slavery would no longer be taken for granted. Over time, the Southern need to positively assert the legality of slavery became more and more clear to politically conscious slaveholders. At length, a stacked Supreme Court, and a solid Southern phalanx in the Democratic Party, maneuvered openly in *Dred Scott* and in the territorial controversies of the 1850s to impose just such positive law (in the form of tortured interpretation of constitutional text) on an increasingly unwilling nation.¹⁶⁶

B. Howell's *Distant Echoes*

From the empiricist's perspective, it is unfortunate that the *Howell* Court dismissed this freedom suit out of hand, rather than provide posterity with a written opinion. The case joined broader issues than an individual's claim for freedom on account of white ancestry. With a written opinion, we would know the precise points at which Jefferson's philosophical exposition jarred Virginia's

164. See FRANCIS HARGRAVE, AN ARGUMENT IN THE CASE OF JAMES SOMMERSETT A NEGRO, LATELY DETERMINED BY THE COURT OF KING'S BENCH 12-13 (1772).

165. See *id.* at 12-14, 36-39.

166. See generally *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978) (providing a detailed analysis of *Dred Scott v. Sanford*).

institutional rationale for bond service and know also specifically how the court rebuffed Jefferson's radical tenets. We could then form clearer notions of his acculturation into the ideology of the late colonial aristocracy and arrive at a better understanding of his need to temper youthful exuberance for liberty where it conflicted with Virginia's most fundamental interest in slavery. The General Court's swift dispensation of the appeal also relieved Wythe of the responsibility to respond to Jefferson's claims on Howell's behalf.¹⁶⁷ One can safely assume Jefferson's law tutor intended to offer more of an answer than a blunt demurrer, or a motion for summary judgment based on the appellant's failure to state a claim for which relief could be granted. If Jefferson had not stated a claim cognizable to the General Court, he had doubtlessly rejoined deeper issues about the nature and purpose of justice which had engaged both mentor and apprentice during Jefferson's long pupilage in Wythe's chambers, and perhaps occupied Jefferson and members of the court in private conversations pursued in the decade since he first came up to the capital in 1760.¹⁶⁸

Many years later, in 1806, the eighty-year-old George Wythe established himself as the South's leading antislavery jurist, when in a freedom suit brought by a Native American family in the Richmond District Court of Chancery, he ruled that slavery violated the Virginia Declaration of Rights proclamation that "all men are by nature equally free."¹⁶⁹ There is no little irony, then, that it should have been Wythe who opposed Jefferson's antislavery argument in 1770. Wythe and Jefferson remained close friends, occasional collaborators¹⁷⁰ (they worked together on the Committee of Revisors charged with systematizing Virginia's statutory law after independence), and frequent correspondents throughout their lives.¹⁷¹ It is worth considering whether Jefferson's youthful antislavery beliefs inspired Wythe to reconsider the legal posture of slavery over the years. Shortly after announcing his precocious antislavery opinion in *Hudgins v. Wrights*, Wythe and his African American ward Michael Brown were fatally poisoned by Wythe's jealous nephew, who hoped to inherit Brown's share of Wythe's estate as well as his own.¹⁷² Brown, it might be remarked, may have

167. *Howell v. Netherland*, 1 Jeff. 90 (Va. Gen Ct. 1770), reprinted in 1 JEFFERSON WRITINGS, *supra* note 54, at 373-74 n.2.

168. See DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 4-11 (1994) (discussing the searching character of Jefferson's study under Wythe).

169. VIRGINIA DECLARATION OF RIGHTS § 1 (1776). See COVER, *supra* note 109, at 50-55, for a cogent reconstruction and analysis of Wythe's reasoning, based on St. George Tucker's appellate opinion and contemporary newspaper reports.

170. MALONE, *supra* note 48, at 261-63.

171. See JEFFERSON AUTOBIOGRAPHY, *supra* note 188, at 21.

172. BOYD, MURDER OF GEORGE WYTHE, *supra* note 23, at 9, 11, 15.

been Wythe's son as well as his ward.¹⁷³

After Wythe's death, Virginia's Supreme Court of Appeals, per Justice St. George Tucker, quickly overturned the late Chancellor's radical antislavery pronouncement in the *Hudgins* case, while upholding the plaintiffs' freedom on the alternative grounds that they did not appear to be African, and hence enjoyed presumptive liberty absent proof that they were legitimately enslaved.¹⁷⁴ In essence, the high court in *Hudgins* rejected the second plank of the argument Jefferson had made in *Howell*¹⁷⁵ and embraced a narrower claim that the plaintiffs should be freed on inspection.¹⁷⁶ Interestingly, Wythe's will appointed President Jefferson to serve as guardian to Michael Brown and take responsibility for his continuing education.¹⁷⁷ Wythe, evidently, felt that the President would be a solicitous mentor to the teenage Brown, who had demonstrated remarkable intellect and ability.¹⁷⁸

William Freehling and Duncan MacLeod have pointed to Jefferson's influence on Edward Coles, a Jefferson disciple in Virginia, who as governor of Illinois successfully resisted efforts to constitutionalize slavery in the new state.¹⁷⁹ Freehling and MacLeod have both suggested that, in the Midwest, Coles was able to put into practice Jeffersonian antislavery goals that remained unattainable—and at length became unspeakable—in Virginia.¹⁸⁰ Jefferson's antislavery principles of 1770 may have had a similar impact in goading Wythe down the long road that led to his bold decision of 1806 divorcing the Commonwealth from slavery, a radical separation that the state's highest court quickly annulled and disowned. At the very least, Wythe's selection of Jefferson to serve as Brown's guardian implies a continued perception of Jefferson as open to manumission, and to the elevation of individual persons of color above the debased plane of slavery.

C. *Jefferson's Failed Manumission Bill*

Another formative episode for Jefferson during the 1769-70 judicial and legislative terms in Williamsburg involves his early mentor in the House of Burgesses, Richard Bland, and an attempt to move moderate antislavery legislation in the Burgesses. This

173. See COVER, *supra* note 109, at 52.

174. *Id.* at 53.

175. *Id.* at 98-99.

176. *Hudgins v. Wrights*, 11 Va. (1 Hen. & M.) 134, 141 (1806).

177. See Boyd, *supra* note 172, at 20-21; COVER, *supra* note 109, at 52.

178. Boyd, *supra* note 172, at 20-21.

179. WILLIAM W. FREEHLING, *THE ROAD TO DISUNION: SECESSIONISTS AT BAY, 1776-1854*, at 140-41 (1990); MACLEOD, *supra* note 126, at 145.

180. FREEHLING, *supra* note 179, at 140-41; MACLEOD, *supra* note 126, at 145.

incident requires careful deciphering because it is not recorded in any contemporaneous sources; the only two surviving accounts that mention it were written by Jefferson himself in old age. The first of these accounts is given in Jefferson's noted 1814 letter to Edward Coles, in which he declined to become even the figurehead of a revived antislavery movement.¹⁸¹ In apologizing for being too old to head the cause, Jefferson recalled the ideals of his youth and his first public antislavery effort during that early hour when the "quiet and monotonous course of colonial life ha(d) been disturbed by no alarm, and little reflection on the value of liberty."¹⁸² He remembers urging Richard Bland "to move for certain moderate extensions of the protection of the laws to these people,"¹⁸³ a motion that Jefferson then seconded. For his efforts, Bland "was denounced as an enemy of his country [and] was treated with the grossest indecorum."¹⁸⁴ Being a "younger member," Jefferson was "more spared in the debate," but this painful censure of his mentor endured in Jefferson's mind for some forty-five years and stifled his antislavery instincts even as a seventy-one-year-old ex-President.¹⁸⁵ These recollections reveal something important about Jefferson's self-image in retirement: he saw himself as having undertaken meaningful steps during his early career to relieve the injustices suffered by African Americans in Virginia, but social and political forces more powerful than he was had thwarted these designs in every instance, eventually convincing him of the infeasibility and finally the counterproductivity of antislavery efforts while Virginia remained unripe for emancipation.

Jefferson's reference to "certain moderate extensions of the protection of the laws to these people" is open to broad construction.¹⁸⁶ That iteration might encompass a variety of proposed reforms, perhaps including measures to provide greater security against excessive violence or "correction," or even expansion of civil rights for Virginia's free black population, still a very small segment of the community in 1770, but one about to undergo rapid increase.¹⁸⁷

181. Letter from Thomas Jefferson to Edward Coles (Aug. 25, 1814), *reprinted in* 9 JEFFERSON WRITINGS, *supra* note 119, at 477-79.

182. *Id.* at 477.

183. *Id.* Whether "these people" refers to slaves, freedmen, or all Africans is unclear.

184. *Id.*

185. *See id.*

186. *Id.*

187. Some commentators assert that Virginia enacted a free black civil rights bill in 1783. The statute in question merely sets out the requirements for acquiring Virginia citizenship in race-neutral, inclusive terms. *See* 11 STATUTES AT LARGE OF VIRGINIA, *supra* note 100, at 322-24. While the statute says nothing about restricting the civil rights of free blacks, its focus was doubtless on white immigration and on privileges and immunities of (former) citizens of other states, Britain, and European countries. *See id.* But its race-neutral language raises interesting ambiguities similar to those

Jefferson's second after-the-fact account of Bland's failed motion, however, spells out more clearly the reforms Bland and Jefferson had in mind. This account appears in Jefferson's autobiography.¹⁸⁸ There, Jefferson relates that, after election to the legislature in 1769, he "made one effort in that body for the permission of the emancipation of slaves, which was rejected."¹⁸⁹ The reference to *emancipation* in this context has misled some interpreters who have wished to portray Jefferson as an early abolitionist. That Jefferson meant what twentieth-century historians have called manumission—that is, grants of freedom to individual slaves, rather than a general program to end bondage—follows directly from his use of the term permission.¹⁹⁰ As Paul Leicester Ford points out with reference to this passage, Virginia law did not then permit slaves to be set "free upon any pretence whatsoever, except for some meritorious services, to be adjudged and allowed by the Governor and Council."¹⁹¹ Jefferson's autobiography, then, recalls an attempt as a young Burgess to do away with legal obstacles to manumission.¹⁹²

Such an attempt, while not amounting to a frontal assault against slavery, retains considerable significance. In 1769 or 1770, it placed Jefferson in the vanguard of progressive thinking on slavery-related issues in Virginia.¹⁹³ It attests also to a willingness to conceive of individual African Americans in human terms, and to

implied by Jefferson's later race-neutral discussions of citizenship in the new western states. See Merkel, *Jefferson's Failed Antislavery Proviso*, *supra* note 87, at 576-79.

188. THOMAS JEFFERSON, AUTOBIOGRAPHY OF THOMAS JEFFERSON 7 (Paul Leicester Ford ed., G.P. Putnam's Sons 1914) (1821) [hereinafter JEFFERSON AUTOBIOGRAPHY].

189. *Id.*

190. The famous Virginia statute of 1782 permitting manumission without special application to and license from the legislature likewise used the term emancipation to refer to individual grants of freedom as opposed to a comprehensive scheme abolishing domestic slavery. See 11 STATUTES AT LARGE OF VIRGINIA, *supra* note 100, at 39. Though commonly called the "Manumission Act" by writers in our own time, the General Assembly uses the terms manumission and emancipation interchangeably in the 1782 statute. See, e.g., RUSSELL, *supra* note 110, at 60; 11 STATUTES AT LARGE OF VIRGINIA, *supra* note 100, at 39.

191. 1 JEFFERSON WRITINGS, *supra* note 54, at 5 n.1 (citing *Acts of the Assembly*, 1769). Ford evidently desires to clarify for readers that Jefferson intended no motion for a general emancipation. He goes on to add that "[n]o trace of [Jefferson's] 'effort' is recorded in the *Journal of the House of Burgesses*." *Id.* Dumas Malone has commented that Ford's edition is "well annotated, though with a slight bias against Jefferson." MALONE, *supra* note 48, at 460. Ford is correct that no record of Jefferson's latent motion survives. But Ford is sloppy in other respects. He refers to the Act of 2 Geo. II preventing manumission except in cases of meritorious service, but while Henning reports a great many statutes for 1 Geo II and 3-4 Geo II, he lists no acts at all for 1728-29, when the Burgesses apparently were not in session.

192. See JEFFERSON AUTOBIOGRAPHY, *supra* note 188, at 7.

193. See *id.*

contemplate particular candidates for manumission.¹⁹⁴ Duncan MacLeod has suggested to me an alternative explanation, in that freedom to manumit would have enhanced the slaveowner's liberty of dispensing with his property as he saw fit.¹⁹⁵ There is no doubt that liberty in this sense of freedom to do what one pleased with one's own property resonated with Enlightenment political values. But MacLeod's freedom of alienation-based explanation for the manumission law is perhaps premised on an overly Roman and insufficiently Anglo-American conception of property. Eighteenth-century property owners in the English-speaking world understood and accepted estates other than absolute dominion as central features of their society.¹⁹⁶ The Roman notion of *dominium*,¹⁹⁷ referring to an individual's unbounded possessory interest in a parcel of real or personal property, was hardly unknown to English speakers.¹⁹⁸ Indeed, it was approximated by their own claims to many types of personal property, provided those claims were free of restraints and other forms of encumbrance.¹⁹⁹ But a Virginian's principal image of property focused squarely on real property, in the form of estates in land.²⁰⁰ And ownership of land was anything but absolute or unbounded. As illustrated poignantly in the novels of Richardson and Smollett (and for later generations Thackeray), a gentleman's landed estate was a complex and worrying thing, burdened by a diverse array of claims and obligations in the form of future interests, mortgages, nonpossessory interests, fees, conditions, time-bound tenures, and the daunting duo of the Rule in Shelly's Case and the Rule Against Perpetuities.²⁰¹ MacLeod is certainly not wrong that Virginians may have wished to be able to dispense freely with property in slaves, but based on their complex real life experiences with their estates in land, the "Lockean" vision of absolute liberty over one's possessions must have seemed more like a philosopher's parable than a reflection of reality.²⁰² All the more so in the context of slavery since slaves were

194. See *supra* note 191 and accompanying text.

195. Duncan MacLeod, author of *Slavery, Race and the American Revolution*, see *supra* note 126, and my Ph.D. advisor at Oxford University, and I had many conversations about alternative theories throughout the 1990s.

196. See SIMPSON, *supra* note 77, at 223-25 (discussing less-than-absolute estates).

197. The principal definition of *dominium*, according to Black's Law Dictionary, is "[i]n the civil and old English law, ownership; property in the largest sense, including both the right of property and the right of possession or use." BLACK'S LAW DICTIONARY 486 (6th ed. 1990).

198. See, e.g., THE INSTITUTES OF JUSTINIAN 70-86 (Thomas Cooper ed., trans., 1812).

199. See ISAAC, *supra* note 75, at 88-93, 131-34.

200. See *id.*

201. See *supra* note 78 and accompanying text; SIMPSON, *supra* note 77, at 208.

202. I use "Lockean" in the libertarian sense popular with many scholars of our own day. Locke himself was quite clear that the state had legitimate claims against private

considered real as opposed to personal property through most of the eighteenth century in Virginia.²⁰³

Liberal manumission laws, such as the one Jefferson and Bland proposed in 1769 or 1770, were not without consequence in terms of institutional slavery's long-term future. When permissive attitudes towards manumission became current just after the Revolution, they fostered ideals of conditional termination, helped carve out the first popular images of a free Virginia, and placed slavery on a course towards ultimate extinction north of Maryland. Virginia's influential manumission statute of 1782 led to freedom for nearly 30,000 before its repeal in 1806.²⁰⁴ During the twenty-four years it was on the books, Virginia's free black community increased from 0.3 percent to 3 percent of the state's total population.²⁰⁵ The Act was passed during Jefferson's first retirement, following the British raid on Richmond, his flight from the governor's residence to the mountains, and the death of his wife in the ensuing winter, so he had no hand in the legislation.²⁰⁶ Notwithstanding his unpleasant memories of the failure of his own bill twelve years before, it is a safe assumption that Jefferson supported the Act of 1782, since his draft constitution for Virginia of the same year, prepared in the expectation of a new constitutional convention in 1783, features a much more radical clause requiring emancipation of all slaves born after 1800.²⁰⁷

Jefferson's explanation for the failure of his effort to pass a manumission bill in the Burgesses in the 1769-70 session reveals a good deal about his attribution of blame for Virginia's slave society, and about his conflation of human and political slavery into a single

property, once the formation of a social compact brought government into existence.

203. The status of slaves as real property in eighteenth-century Virginia is discussed above. See *supra* notes 82-87 and accompanying text.

204. See RUSSELL, *supra* note 110, at 61. William Freehling, one of the leading scholars of the politics of slavery and secession, coined the phrase "conditional termination" to describe the cautious approach of Revolutionary era upper South leaders, like Jefferson, to questions of slavery's long-term fate (it should be abolished by local option when conditions became right) and contrasts that approach to the positive good doctrine (slavery was essential to the Southern way of life and should endure as a permanent institution) trumpeted by militant Southern nationalists like Calhoun during the antebellum period. See FREEHLING, *supra* note 179, 119-127, 156.

205. See BERLIN, *supra* note 110, at 46-47.

206. Jefferson's first retirement lasted from the end of his governorship in June 1781 until November 1782, when he took up the diplomatic assignment by Congress that eventually brought him to Paris in the summer of 1784. See MALONE, *supra* note 48, at 373-99.

207. The *Draught of a Fundamental Constitution* is reprinted in the first English edition of NOTES ON VIRGINIA. See *supra* note 17, at 209. For a discussion of Jefferson's emancipation proposal, see William G. Merkel, Race, Liberty, and Law: Thomas Jefferson and Slavery, 1770-1800, at 164-66 (2007) [hereinafter Merkel, Race, Liberty, and Law] (unpublished Ph.D. thesis, Oxford University) (on file with author and Bodlien Library, Oxford University).

rhetorical issue. “[I]ndeed,” Jefferson wrote, “during the regal government, nothing liberal could expect success. Our minds were circumscribed within narrow limits by an habitual belief that it was our duty to be subordinate to the mother country in all matters of government”²⁰⁸ Thus, in Jefferson’s mind, the colonial doldrums became accountable for legislative inaction. Jefferson blamed “[t]he difficulties with our representatives [on] habit and despair, not of reflection [and] conviction.”²⁰⁹ Not merely the colonial mindset, but the various levels of imperial governance thwarted progress, until “last of all the Royal negative closed the last door to every hope of amelioration.”²¹⁰ By this point, amelioration referred not so much to the condition of resident slaves, as to imperiled efforts to curtail importation of new slaves and other Anglo-American liberties at stake in Virginia’s contest with the British administration.

In recent decades, several critical commentators have pointed to the self-interest involved in Virginia’s antislave trade policies and to the seeming hypocrisy of blaming Britain for injustice that Virginia was unwilling to end herself.²¹¹ There is some logic to this. After all, when Jefferson died in 1826, Virginia’s slaveowners were more solidly committed to the permanence of slavery than ever, while his immediate presidential successors, Madison and Monroe, lived on to see emancipation come to the British Empire a mere seven years later in 1833.²¹² And yet, not having lived through the thought process involved in colonial dependency ourselves, it is perhaps too easy to belittle the breadth of its debilitating tendencies. Many other participants in the momentous political debates leading up to independence voiced similar frustrations respecting the conservative colonial mentality concerning issues ranging far beyond slave trade legislation.²¹³ Nor were the Virginians’ protests about metropolitan interference with colonial efforts at slave trade abolition wholly disingenuous. After all, the royal veto *had* undone repeated attempts to prohibit slave importations.²¹⁴ Doubtless, many provincials

208. JEFFERSON AUTOBIOGRAPHY, *supra* note 188, at 7.

209. *Id.*

210. *Id.*

211. See ROBERT MCCOLLEY, SLAVERY AND JEFFERSONIAN VIRGINIA 116-20 (2d ed. 1973); see also Finkelman, *supra* note 1, at 190-92 (discussing Jefferson’s hypocrisies).

212. See The Slavery Abolition Act of 1833, 3 & 4 Will. IV c. 73; see generally ROBIN BLACKBURN, THE OVERTHROW OF COLONIAL SLAVERY, 1776-1848, at 293-329 (1988).

213. See generally GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1992) (discussing the transition from the monarchical to republican and then democratic mindsets).

214. See ISAAC, *supra* note 75, at 247-48 (discussing the Burgesses’ failed attempt to obtain the royal assent to legislation ending the slave trade to Virginia in 1772). McColley acknowledges the Burgesses had been trying to curtail, suspend, or abolish the trade for twenty years but had failed for want of the royal assent. See McColley, *supra* note 211, at 116-17. Indeed, an effort to lay imposts on slave importations had

supported slave-trade curtailment or abolition for reasons of interest as well as morality, but public policy choices rarely, if ever, flow from principles of ethics alone. And though we can say with hindsight that abolition of the slave trade did not lead directly to emancipation, for decades after the American Revolution the most progressive antislavery activists—including the members of Britain's Clapham Sect—continued to advocate slave trade abolition as the surest and most immediate step towards ending slavery itself.²¹⁵

Ultimately, Jefferson's view that the colonial mind frame stifled the development of antislavery principles and politics in Virginia is not a complete answer to implicit charges that his generation failed to realize their noblest ideals, but it is also more than an escapist, self-serving delusion.²¹⁶ When read in context, it emerges as internally consistent, perceptive, and self-critical. In the same 1814 letter to Edward Coles, Jefferson explained the failure of antislavery among the Revolutionary generation in the following terms:

From those of the former generation who were in the fulness of age when I came into public life, which was while our controversy with England was on paper only, I soon saw that nothing was to be hoped. Nursed and educated in the daily habit of seeing the degraded condition, both bodily and mental, of those unfortunate beings, not reflecting that that degradation was very much the work of themselves & their fathers, few minds have yet doubted but that they were as legitimate subjects of property as their horses and cattle. The quiet and monotonous course of colonial life has been disturbed by no alarm, and little reflection on the value of liberty. And when alarm was taken at an enterprize on their own, it was not easy to carry them to the whole length of the principles which they invoked for themselves.²¹⁷

This remarkable passage anticipates much of the hostile criticism revisionist scholars aimed at Jefferson in the 1960-70s and again in the 1990s.²¹⁸ Jefferson realized fully that even after Virginia threw off its colonial mentality, and even after an environmentalist view on the origins of apparent African inferiority gained acceptance, his own generation of political leaders continued to behave hypocritically in not applying their avowed principles towards African Americans. Tragically, having understood the

been vetoed as early as 1727. See 4 STATUTES AT LARGE OF VIRGINIA, *supra* note 100, at 182.

215. See DAVIS, SLAVERY IN THE AGE OF REVOLUTION, *supra* note 91, at 218-21.

216. JEFFERSON AUTOBIOGRAPHY, *supra* note 188, at 7; Letter from Thomas Jefferson to Edward Coles (Aug. 25, 1814), *reprinted in* 9 JEFFERSON WRITINGS, *supra* note 119, at 477.

217. Letter from Thomas Jefferson to Edward Coles (Aug. 25, 1814), *reprinted in* 9 JEFFERSON WRITINGS, *supra* note 119, at 477.

218. See *supra* Part I and accompanying notes.

injustice of his inaction, he did not feel able to act positively to undo the injustice for which he was in part responsible.²¹⁹

Twin refrains—one charging Britain with stifling Virginia’s antislavery and another confusing political enslavement to a despot with physical enslavement of one people by another—echo through the aging Jefferson’s memories of failed antislavery efforts as a young Burgess. The same themes animate Jefferson’s writing of the Revolutionary period itself, in his early political masterpieces, the *Summary View*, and the *Declaration of Independence*.²²⁰

IV. POLITICAL SLAVERY AND THE SUMMARY VIEW

A. *Human Bondage and Political Slavery*

Jefferson first approached the issue of American rights and liberties against Britain not primarily from the universal perspective of natural rights, which famously generated the tensions between liberty and slavery in the Declaration of Independence, but chiefly from the narrower perspective of Whig republicanism.²²¹ Indeed, a ready way for Whiggish slaveholders to assert colonial grievances against British policy and still avoid a head-on confrontation between slavery and natural rights ideology was to fuse the issues of human slavery and arbitrary political dependence.²²² This mode of discourse came naturally to a generation of thinkers reared in republican and commonwealth traditions, but to engage in such conflation did not

219. Letter from Thomas Jefferson to Edward Coles (Aug. 25, 1814), *reprinted in* 9 JEFFERSON WRITINGS, *supra* note 119, at 477-79.

220. JEFFERSON AUTOBIOGRAPHY, *supra* note 188, at 15-16.

221. See PETER A. DORSEY, COMMON BONDAGE: SLAVERY AS METAPHOR IN REVOLUTIONARY AMERICA 143 (2009). The civic republican, or Whig, interpretation of the American Revolution dominated historical writing about late eighteenth-century America for several decades beginning in the mid-1960s. Historians writing in this vein, including prominently J.G.A. Pocock, Bernard Bailyn, Gordon Wood, Lance Banning, and Drew McCoy, sought to recapture the mentality of the Revolutionary period by paying close attention to Revolutionary era discourse, focusing on its ubiquitous references to classical history and seventeenth- and eighteenth-century English opposition political thought. Central tenets of Whiggish republicanism included: celebration of liberty and virtue, fear of centralized power and corruption, distrust of standing armies and military adventures, suspicion of executive aggrandizement, and a preference for balanced government in which a deliberative, representative legislature had a principal voice. Republican thinkers prized personal independence as the basis of civic virtue among citizens participating in politics. The collapse of Athenian democracy, the Roman Republic, and, above all, the English Commonwealth, formed objective lessons in the fragility of republican institutions and culture, and served as admonitions to remain ever vigilant lest liberty and virtue vanish from the British Empire. The literature on Whig republicanism is vast. For a thoughtful general introduction, see Linda K. Kerber, *The Revolutionary Generation: Ideology, Politics, and Culture in the Early Republic*, in THE NEW AMERICAN HISTORY 25-49 (Eric Foner ed., 1st ed. 1990).

222. See DORSEY, *supra* note 221, at 143-44.

necessarily amount to conscious deception. In the 1770s, this species of confusion was so widespread, even in the metropolis, to suggest that many people perceived no real dichotomy between political subordination and actual slavery.²²³ As Francis Hargrave, councilor for the alleged slave Somerset, commented at the start of his famous argument before Chief Justice Mansfield:

I mean however always to keep in view slavery, not as it is in the relation of a subject to an absolute prince, but only as it is in the relation of the lowest species of servant to his master, in any state, whether free or otherwise in its form of government. Great confusion has ensued from discoursing on slavery, without due attention to the difference between the despotism of a sovereign over a whole people and that of one subject over another. . . . I desire to be understood as confining myself to the latter [type of despotism]; though from the connection between the two subjects, some of my observations may perhaps be applicable to both.²²⁴

When Jefferson began his analysis of issues of royal and parliamentary incursions against American liberty, he was not so clearheaded as Hargrave about the distinction between actual chattel slavery and metaphoric political slavery. The problem was compounded further by a second strain of dualism, because Jefferson's inquiries based on the rights of Englishmen led down different paths from those premised on natural rights. Both methodologies figure prominently in Jefferson's *Summary View* of July 1774, his first great public paper and his first systematic exposition of broad political principles.²²⁵

B. Colonial Grievances and the Rights of Englishmen

The first fundamental premise for the rights of British North Americans that Jefferson asserts is racial identity. In keeping with the Whig view of history, Jefferson maintained that English liberties were passed down intact from Saxons who "left their native wilds and woods in the North of Europe, had possessed themselves of the island of Britain then less charged with inhabitants, and had established there that system of laws which has so long been the glory and protection of that country."²²⁶ By the same process, all the liberties protected in the common law and the ancient Constitution accompanied the emigrants who settled America. As Jefferson reasons, "it is thought that no circumstance has occurred to

223. See *id.* (discussing the use of the metaphor of slavery to foster colonial and national interests as commonplace rhetoric in the Revolutionary era).

224. STATE TRIALS, *supra* note 160, at 25.

225. See discussion *infra* Part IV.B.

226. THOMAS JEFFERSON, A SUMMARY VIEW (1774), reprinted in 1 JEFFERSON PAPERS, *supra* note 6, at 121-22 [hereinafter A SUMMARY VIEW].

distinguish materially the British from the Saxon emigration.”²²⁷ Thus, in demanding that Crown and Parliament respect their liberties and privileges, Americans asserted the birth rights of their English race.

Such racial justifications for American rights involve a powerful sense of shared history as an additional wellspring of entitlement. In Jefferson’s eyes, the half century spanning the English Civil Wars and the Glorious Revolution culminated with the “establishment . . . of the British constitution . . . on it’s free and antient principles.”²²⁸ Thus, Whig heroes had secured rights that Jefferson construed both as Saxon legacies and products of valiant British reassertion. Moreover, Americans had participated in these seventeenth-century struggles themselves by resisting royal usurpations against colonial freedoms.²²⁹ When Jefferson laid an ethnic and historical claim to the rights of Englishmen, he stated a claim which by its very nature excluded African Americans, who had no part in either the Saxon or Commonwealth heritage. It was not necessary to consciously exclude blacks because they simply did not figure in the dialectic of Whig history. The liberties secured in the common law and British Constitution reflected centuries of struggle that had taken no notice of Africans. In the minds of white Americans drifting towards revolution, the republican ideology that shaped and guaranteed the liberties of the Anglo-American race had never extended to, or impacted upon, African slaves.

Barbara Jeanne Fields has suggested a similar explanation of English liberty’s indifference to African slaves in early colonial Virginia. According to Fields:

Africans and Afro-West Indians had not taken part in the long history of negotiation and contest in which the English lower classes had worked out the relationship between themselves and their superiors. Therefore, the custom and law that embodied that history did not apply to them. To put it another way: when English servants entered the ring in Virginia, they did not enter alone. Instead, they entered in company with the generations who had preceded them in the struggle; and the outcome of those earlier struggles established the terms and conditions of the latest one. But Africans and Afro-West Indians did enter the ring alone. Their forebears had struggled in a different arena, which had no bearing on this one.²³⁰

227. *Id.* at 122.

228. *Id.* at 131.

229. See generally RICHARD MIDDLETON, *COLONIAL AMERICA: A HISTORY, 1565-1776*, at 151-71 (3d ed. 2002) (discussing the Glorious Revolution in America).

230. Barbara Jeanne Fields, *Slavery, Race and Ideology in the United States of America*, *NEW LEFT REV.*, May-June 1990, at 95, 104. Fields’ point here is a cogent one, and indeed, Fields typically describes ideologies with piercing acumen. On the whole,

So when Jefferson invoked English liberties on behalf of Virginians in 1774, he did not bother to mention that those liberties did not extend to African Americans. This linkage between entitlement to the full benefits of republican principles and the racial identity of Americans contending for liberty pervades the *Summary View*.²³¹ When the English Commonwealth and Virginia agreed by solemn treaty in 1651 that Virginia should have free trade with the world, they did so without regard to the rights of Africans.²³² When Charles II rescinded this treaty, he did so without even thinking of the Africans living in Virginia.²³³ To Jefferson, there was no reason to consider how these seventeenth-century transactions might have any bearing on anyone not identified as British Americans.

Thus, Jefferson moved from the arena of political rights to the question of economic liberty.²³⁴ If African Americans were not here excluded by definition, as they were in the case of the rights of Englishmen, their economic interests were not likely to engender a sense of common identity with the white, slaveholding, political leadership of Virginia. With economic liberties, then, as with the English political heritage, there was no incentive for Jefferson or anyone similarly situated to argue the case for black freedom. Recalling eminent historian Jack P. Greene's argument that Jefferson's claim that all men were created equal extended only to those persons thought to possess political manhood, one might now put things slightly differently with respect to the colonial rights and grievances outlined in the *Summary View*.²³⁵ Neither with regard to claims based on the rights of Englishmen, nor respecting those centered on economic liberty, was there any impetus of logic or interest for politically animated white Virginians to make common cause with African slaves, or to include them within the orbit of the appeal against alleged Parliamentary tyranny.

Having set out his case that the rights of British North Americans were intolerably offended by the Coercive Acts, Jefferson was ready to assert independence from Parliament.²³⁶ "The true

however, her analysis is undermined by a quixotic commitment in denying the importance of race as a historical factor. This fixation obscures valuable insights that, among other things, might shed much light on Jefferson's thinking in the 1770s. *See id.*

231. *See, e.g.,* A SUMMARY VIEW, *supra* note 226, at 121-22, 132-33.

232. *See id.* at 123.

233. *See id.* at 124 (citing 12 Car. 2, c. 18 (Eng.), 15 Car. 2, c. II (Eng.), 25 Car. 2, c. 7 (Eng.)).

234. A SUMMARY VIEW, *supra* note 226, at 124-25.

235. *See generally* JACK P. GREENE, ALL MEN ARE CREATED EQUAL, SOME REFLECTIONS ON THE CHARACTER OF THE AMERICAN REVOLUTION, AN INAUGURAL LECTURE (1976).

236. A SUMMARY VIEW, *supra* note 226, at 126-29.

ground on which we declare these acts void," he argued, "is that the British parliament has no right to exercise authority over us."²³⁷ This assertion of independence follows a pattern of logic very similar to the argument in the Declaration of Independence: an introduction details the paper's purpose to its intended audience, then a philosophical premise is stated, an American perspective of proper relations within the British Empire laid down, a list of infractions developed, and finally a forthright proclamation of independence—from Parliament in the first case and from King in the second—brings the paper to a solemn and deliberate close. The structure of Jefferson's state papers makes familiar historiography,²³⁸ but it is worth keeping in view because it highlights starkly the principles upon which independence is asserted. Independence in the *Summary View* is not yet an abstract universal entitlement, but rather a right asserted on very specific grounds of British history. Under the terms of debate in the *Summary View*, American liberty is not something to which African-Americans had any claim. When debate shifted away from English liberties to natural rights in The Declaration of Independence, an argument with the very same structure and purpose created contradictions that by necessity loomed more prominently and complexly in Jefferson's mind. With the perspective of historical hindsight, we can make out the origins of these complexities in the *Summary View*'s Lockean depiction of a conspiracy against liberty.

With independence from Parliament already asserted, Jefferson returned to the Intolerable Acts not simply to detail particular grievances but to unmask the government's usurpatory design. "Single acts of tyranny may be ascribed to the accidental opinion of a day; but a series of oppressions, begun at a distinguished period, and pursued unalterably thro' every change of ministers, too plainly prove a deliberate, systematical plan of reducing us to slavery."²³⁹ This is of course very nearly the language of the Declaration; it is also very nearly the language of Locke's *Second Treatise*.²⁴⁰

237. *Id.* at 125.

238. See, e.g., THE DECLARATION OF INDEPENDENCE: THE EVOLUTION OF THE TEXT AS SHOWN IN FACSIMILES OF VARIOUS DRAFTS BY ITS AUTHOR (Julian P. Boyd ed., 1943) [hereinafter THE DECLARATION OF INDEPENDENCE: THE EVOLUTION OF THE TEXT]; The Declaration of Independence, in 1 JEFFERSON PAPERS, *supra* note 6, at 413-54; see generally A DECENT RESPECT TO THE OPINIONS OF MANKIND: CONGRESSIONAL STATE PAPERS 1774-1776 (James H. Hutson ed., 1975); PAULINE MAIER, AMERICAN SCRIPTURE: HOW AMERICA DECLARED ITS INDEPENDENCE FROM BRITAIN 97-153 (1999).

239. A SUMMARY VIEW, *supra* note 226, at 125.

240. In Section 225, Locke wrote:

[R]evolutions happen not upon every little mismanagement in public affairs. Great mistakes in the ruling part, many wrong and inconvenient laws, and all the slips of human frailty, will be born by the people without mutiny or murmur. But if a long train of abuses, prevarications and artifices, all

Jefferson's first mention of "slavery" in the *Summary View*²⁴¹ marks (respecting his surviving papers, at least) his first public, written use of the term before an audience larger than the General Court that heard *Howell v. Netherland*.²⁴² Here, the reference is to political, not human, slavery; it is all the more revealing, therefore, that the usage occurs in a so expressly Lockean context.

Locke can be seen quite properly as a bridge between common law and natural law, between civic humanism and the Enlightenment, and between the rights of Englishmen and natural rights. Jefferson was of course all of these things as well. Moreover, by Jefferson's day, progress had altered the balance between ancient and modern liberty, so that common law, civic humanism, and the rights of Englishmen were imbued more with a flavor of heritage, while natural law, enlightened reason, and natural rights acquired more a feel of practicability. But Jefferson became one thing more than Locke. His discourse spanned republicanism and egalitarian democracy, and in so doing, engendered a way of thinking about and governing society that could not forever coexist with human slavery. Even in the *Summary View*, Jefferson flirts with belief systems that would no longer accommodate discussion of slavery in exclusively metaphorical and political terms, and no longer take for granted that chattel slavery existed outside the ambit of political relevance.²⁴³

With reference to the late seventeenth century, and to Locke in particular, D. B. Davis has written of the "curious capacity of slavery for generating or accommodating itself to dualisms in thought."²⁴⁴

tending the same way, make the design visible to the people, and they cannot but feel what they lie under, and see whither they are going; it is not to be wondered, that they should then rouse themselves, and endeavour to put the rule into such hands which may secure to them the ends for which government was at first erected"

SECOND TREATISE OF GOVERNMENT 113 (C. B. Macpherson ed., 1980) (1690). The Declaration as adopted by Congress reads:

Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all Experience hath shewn, that Mankind are more disposed to suffer, while Evils are sufferable, than to right themselves by abolishing the Forms to which they are accustomed. But when a long Train of Abuses and Usurpations, pursuing invariably the same Object evinces a Design to reduce them under absolute Despotism, it is their Right, it is their Duty, to throw off such Government, and to provide new Guards for their future Security.

THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Thus, neither Locke nor Congress chooses the term slavery to refer to impending political despotism. Congress, in fact, pointedly altered Jefferson's choice of that phrase in earlier drafts. *See id.* at 413-33.

241. A SUMMARY VIEW, *supra* note 226, at 125.

242. *See* 1 JEFFERSON WRITINGS, *supra* note 54, at 373-81.

243. *See* Konig, Antislavery, *supra* note 51 at 1-2.

244. DAVIS, SLAVERY IN WESTERN CULTURE, *supra* note 90, at 119. According to

Without a doubt, this curious capacity lived on to touch Jefferson and other Southern champions of liberty who followed him; in fact, dualism on slavery became a Jeffersonian characteristic.²⁴⁵ But Davis also writes that Locke's "unquestioning acceptance of colonial slavery shows how remote abolitionism was from even the more liberal minds of the late seventeenth century."²⁴⁶ This was no longer true of Jefferson or of his age. When Jefferson moved beyond Whig-republican to equal rights-based denunciations of impending political slavery, he would have to confront his society's involvement with human bondage if his rhetoric was to remain credible. Before yielding to this necessity, he devoted nearly 7,000 words to strident denunciations of political enslavement in the *Summary View*.²⁴⁷ Before confronting a situation which threatened to saddle Jefferson, his own legislature, and his own constituents with blame, he heaped as much blame on the King and Parliament as he could muster.²⁴⁸

To the extent that this argumentative method betrays hypocrisy and self-service, these elements surface most clearly in Jefferson's lambasting of virtual representation. Virtual representation was a concept trumpeted in the 1760s by champions of parliamentary authority in the American colonies.²⁴⁹ It maintained that although colonials returned no members to Westminster, they were still represented in Parliament because every member of Parliament had the interests of all the Empire at heart.²⁵⁰ Jefferson saw this doctrine

Davis, Locke was able to dismiss the conflict between slavery and natural rights ideology by assuming that slavery existed exclusively outside the social contract. "For in Locke's view," writes Davis, "the origin of slavery, like the origin of liberty and property, was entirely outside the social contract. When any man, by fault or act, forfeited his life to another, he could not complain of injustice if his punishment was postponed by his being enslaved." *Id.* All of Locke's politics derived from the social contract, so slaves, justly captured in war, existed outside Locke's political realm. *See id.* at 119-21. But if anyone had convinced Locke of Jefferson's position, that slaves were captured not in just wars but by piracy, then, by force of logic, these slaves would have become relevant to Locke's politics. After all, Locke could scarcely go on maintaining that enslaved persons had forfeited their lives through fault or intentional act if they came to slavery because they or their ancestors had been unjustly seized. If Locke had abandoned the fiction that slavery originated in just war, he must surely have come round to the view that the slaves had had the social contract imposed upon them. In so doing, he would likely have approached Malcolm X's formulation that blacks did not land on Plymouth Rock, but rather that Plymouth Rock landed on them. MALCOLM X & ALEX HALEY, *THE AUTOBIOGRAPHY OF MALCOLM X* 219 (1992).

245. *See* PETERSON, *supra* note 7, at 172.

246. DAVIS, *SLAVERY IN WESTERN CULTURE*, *supra* note 90, at 121.

247. A SUMMARY VIEW, *supra* note 226.

248. *Id.*

249. *See* ROBERT MIDDLEKAUFF, *THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763-1789*, at 115 (rev. ed. 2005).

250. *See, e.g.*, SOAME JENYNS, *THE OBJECTIONS TO THE TAXATION OF OUR AMERICAN*

as a poor apology for Parliament's proclaimed right to levy internal taxes in America, as indeed it was. But his rhetoric reveals a good deal more than this. "Can any one reason be assigned," Jefferson argues:

[W]hy 160,000 electors in the island of Great Britain should give law to four millions in the states of America, every individual of whom is equal to every individual of them in virtue, in understanding, and in bodily strength? Were this to be admitted, instead of being a free people, as we have hitherto supposed, and mean to continue, ourselves, we should suddenly be found the slaves, not of one, but of 160,000 tyrants, distinguished too from all others by this singular circumstance that they are removed from the reach of fear, the only restraining motive which may hold the hand of a tyrant.²⁵¹

Thus, Jefferson returns to the symbol of slavery to argue that Americans will not submit to virtual representation.²⁵² But America and Virginia were very much practitioners of virtual representation in their own right. Jefferson refers to "four millions in the states of America."²⁵³ He cannot mean four million electors, because as he knew all too well, there were nowhere near that many in British North America. There were, by his reckoning, perhaps four million people, including Native Americans, women, slaves, minors, and other disenfranchised.²⁵⁴ Even an assumption of universal white manhood suffrage—and Virginia, for instance, had nothing of the sort until the 1850s²⁵⁵—leaves women, slaves, and minors virtually

COLONIES BY THE LEGISLATURE OF GREAT BRITAIN, BRIEFLY CONSIDER'D (1765), *reprinted in SOURCES AND DOCUMENTS ILLUSTRATING THE AMERICAN REVOLUTION 1764-1788 AND THE FORMATION OF THE FEDERAL CONSTITUTION*, at 18 (Samuel Eliot Morison ed., 2d ed. 1967) (1923); George Grenville, *Speech in the Debate on the Address: House of Commons* (Jan. 17, 1766), *reprinted in THE DEBATE ON THE AMERICAN REVOLUTION, 1761-1783*, at 97 (Max Beloff ed., 2d ed. 1972).

251. A SUMMARY VIEW, *supra* note 226, at 126.

252. Slavery, of course, was the ultimate symbol of complete submission to absolute power. Here the metaphor is especially poignant because Jefferson refers to the slavery of a whole class of people, Americans, to another class of people, English. Notwithstanding the many ways that slaves did resist, described by writers like Blassingame and Genovese, for the abstracted purposes of theories of political liberty, Jefferson here represents the submission of African slaves in Virginia as total and absolute, like the inmates in Elkins' prison camps. *Cf.* STANLEY M. ELKINS, *SLAVERY: A PROBLEM IN AMERICAN INSTITUTIONAL AND INTELLECTUAL LIFE* 103-15 (1959) (comparing slavery to Nazi concentration camps).

253. A SUMMARY VIEW, *supra* note 226, at 126.

254. A modern day academic estimates the total population in 1774 at nearer to 2.5 million. *See* J. Potter, *The Growth of Population in America, 1700-1860*, in *POPULATION IN HISTORY* 631, 638 (D.V. Glass & D.E.C Eversley eds., 1965).

255. *Compare* VA. CONST. art. III, § 1 (1851) ("Every white male citizen of the commonwealth . . . shall be qualified to vote . . ."), *with* VA. CONST. of 1830, art. III, § 14 (1830) ("Every white male citizen of the Commonwealth . . . being possessed, or whose tenant for years, at will or at sufferance, is possessed, of an estate of freehold in

represented, subsumed within the vote of their *pater familias*, on the grounds that they had no political will of their own, or more accurately, that their interests were encompassed within those of the master of their household. Simply indicting Jefferson for not anticipating current political sensibilities, or condemning the past for being less inclusive than the present, might not be historically instructive. But Jefferson's approach to virtual representation is interesting for the additional reason that it suggests what he viewed as the stakes in his debate with the King. Among America's alleged four million people, Jefferson insists that those who possessed political manhood would not be bludgeoned into submission. Collectively, this group spoke for the whole society. In this passage about political entitlement wrongly assailed, Jefferson takes for granted that the rest of the nation is subsumed within his and the politically competent citizens' voices. When he uses the metaphor of slavery, Jefferson does not question that he actually does speak for this other part of North America—the part that includes three quarters of a million slaves. In so doing, Jefferson ascended to the outer limits of credible audacity for republican denunciations of political slavery.

This type of audacity became a standard feature of Virginia's Revolutionary self-assertion, and a similar style resurfaced as a principal bulwark in the South's rhetoric of liberty during the antebellum years. The author of the *Summary View*, like the Fire-eaters of the nineteenth century,²⁵⁶ felt compelled to an ongoing, repetitive re-assertion of his liberties. In both instances, the key issue was to avoid backsliding into political slavery. What differentiated the politics of Virginia in 1774 from those of, say, South Carolina in 1850, were the specific elements of liberty emphasized by the respective votaries. Fire-eaters were jealous of liberties that touched the security, mobility, and moral sanctity of their property in human beings and equated threats to self-determination in this sphere with enslavement.²⁵⁷ Spurred on by Parliament's partial suspension of local governance and jury trial in Massachusetts, Jefferson championed liberties that touched more closely on personal sovereignty, and which appeal more closely to our own morality. To Jefferson, the counterpoint of liberty and slavery was, if anything, more convincing and compelling than to the Fire-eaters. His rhetoric equated evisceration of legal right and status to enslavement. In this regard, the slave with no right to due process,

land . . . shall be qualified to vote . . .").

256. See, e.g., WILLIAM J. COOPER JR., *LIBERTY AND SLAVERY: SOUTHERN POLITICS TO 1860*, at 233-34 (1983) (discussing the political radicals and secessionists, or Fire-eaters, in the crisis of 1848-1850).

257. *Id.* at 268-69.

no standing at law, and no recourse to the courts painted a far more poignant picture than the Fire-eaters' image of a slave who had no right to take other slaves into Kansas.²⁵⁸ Jefferson's metaphor was the same as Ruffin's or Rhett's, and as a slaveholder, his audacity was of a similar vein; but his zeal was for liberties—or to use what later became a jurisprudential term of art—which are far more fundamental.²⁵⁹

C. *Slavery and the Politics of Blame*

Due process rights were essential to Jefferson, and their possession was incompatible with human or political slavery. Of equal status as a core liberty, and as a counterpoint to slavery, was government by representative legislature. Not only Parliament, however, but the King as well, stood accused of waging war on American legal and political liberty. To Jefferson, a royal veto over the various legislatures within the Empire was a necessary check against jurisdictional expansion by aggressive and interested legislatures, such as the Parliament at Westminster.²⁶⁰ But in the “wanton exercise of [the royal veto] power which we have seen his majesty practise on the laws of the American legislatures,”²⁶¹ Jefferson perceived a direct attempt to reduce America to political slavery. And reaching the King's misuse of this power to block Virginia's efforts to ban slave importations, Jefferson moved at long last, and with some deftness, to the issue of actual human slavery, an issue which had loomed inescapably larger with each of his rhetorical thrusts against figurative bondage.

258. For more information about militant support for slavery's expansion into the Kansas and the Kansas-Nebraska Crisis, see FREEHLING, *supra* note 179, at 536-65.

259. See generally COOPER, *supra* note 256 (discussing the rhetoric of liberty in the pro-slavery politics of the antebellum South); FREEHLING, *supra* note 179, at 289-307 (discussing the same issue). Edmund Ruffin of Virginia and Robert Barnwell Rhett of South Carolina were leading champions of slavery's expansion into the Western territories—they advocated secession to assure the future of slavery in an independent South if the United States would not acquiesce in slavery's continued westward expansion within the Union. Both men figured prominently among Fire-eaters openly advocating secession as early as at the Nashville Convention of 1850. See *id.* at 481. Over the course of the twentieth century, the United States Supreme Court developed a jurisprudence of fundamental rights rooted in constitutional values far removed from the concerns of slaveholders to protect property claims in human beings. The modern Supreme Court's case law on fundamental rights has focused on procedural protections for human liberty, political participation, equal rights, privacy, freedom of expression, free exercise of religion, and freedom from religious establishment. See, e.g., DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY, 469-813 (4th ed. 2009). I maintain that these concerns come closer to Jefferson's core values expressed during the period 1770-76 than do slaveholder interests.

260. See A SUMMARY VIEW, *supra* note 226, at 129.

261. *Id.* at 129-30.

“For the most trifling reasons, and sometimes for no conceivable reason at all,” Jefferson complained, “his majesty has rejected laws of the most salutary tendency. The abolition of domestic slavery,” he continued, “is the great object of desire in those colonies where it was unhappily introduced in their infant state.”²⁶² From a factual standpoint, this last statement was most certainly wrong.

It is true that in 1774 many Virginians wished for a suspension—if not abolition—of the slave trade.²⁶³ It is also true that in 1774, Jefferson favored an eventual end to slavery in Virginia. But it is by no means true that Virginians, Southerners, or even Americans generally shared this view.²⁶⁴ It would be next to impossible to quantify attitudes towards slavery on the eve of independence, but it is probably quite safe to say a majority of Virginians supported the institution. In the newspaper reels I have examined, there are many more notices for runaways, slave sales, and hiring-out than there are letters or editorials condemning human slavery.²⁶⁵ One must ask whether Jefferson here engaged in naiveté, in wishful thinking, or in false advertisement. Whatever the case, with this statement Jefferson went firmly on record as morally opposed to slavery. Its introduction, after all, was labeled an unhappy occurrence. But he also managed to avoid direct culpability. Slavery was introduced in Virginia’s infancy and came down to Jefferson’s generation as an unwanted legacy.

The next link in Jefferson’s argument is not quite logical. He contends that “previous to the enfranchisement of the slaves we have, it is necessary to exclude all further importations from Africa.”²⁶⁶ If

262. *Id.*

263. ISAAC, *supra* note 75, at 247-48.

264. See generally MACLEOD, *supra* note 126; LARRY E. TISE, PROSLAVERY: A HISTORY OF THE DEFENSE OF SLAVERY IN AMERICA, 1701-1840 (1987); MCCOLLEY, *supra* note 221.

265. See, e.g., *Transcriptions of Virginia Gazette Runaway Slave Ads*, COLONIAL WILLIAMSBURG FOUNDATION, <http://www.history.org/history/teaching/runaway.cfm> (last visited June 20, 2012). But see, e.g., Agreement of Virginia Delegates on August 1, 1774, VIRGINIA GAZETTE (Purdie & Dixon), Aug. 11, 1774, at 1-2, available at <http://research.history.org/DigitalLibrary/VirginiaGazette/VGImagePopup.cfm?ID=4148&Res=HI&CFID=13781328&CFTOKEN=21124183>; Opposition to Slave Trade in Carolina Cnty, Va.; Fairfax Ctny., Va; Hanover Cnty., Va.; and Nansemond Cnty., Va., VIRGINIA GAZETTE (Pinkey), Nov. 24, 1774, at 1-3, available at <http://research.history.org/DigitalLibrary/VirginiaGazette/VGImagePopup.cfm?ID=4416&Res=HI&CFID=13781328&CFTOKEN=21124183>.

266. A SUMMARY VIEW, *supra* note 226, at 130. In this context, enfranchisement has nothing to do with voting but merely liberation from slavery. In the Oxford English Dictionary, James Murray informs that today’s more familiar usage comes down from Johnson’s derivation of En + Franchise, which, though not quite accurate, became generally influential. Johnson’s Dictionary was published in 1755, but Jefferson was no fan of his (or any Tory writers), even before the quip about the loudest yelps for liberty. It is quite inconceivable that Jefferson had in mind an early Fifteenth Amendment or Voting Rights Act when he referred to “enfranchisement,” although the

not epistemologically impregnable, this contention was nevertheless genuine. Jefferson was hardly alone in viewing slave trade abolition as a prerequisite for emancipation; all but the most radical Quakers held this view then, and for decades after.²⁶⁷ Indeed, in 1775, in one of his early contributions to the *Pennsylvania Journal*, even that most committed of radicals, Thomas Paine, argued that independence might be necessary in order for Americans to put an end to the slave trade.²⁶⁸ Still, it is worthwhile to pause and consider the implications of Jefferson's sequential logic. Charging the King for failure of slave trade abolition removed the onus of blame and allowed Jefferson to maintain the moral high ground while he belabored the metaphor of political enslavement.²⁶⁹ No action was possible on African slavery because the necessary first step of excluding further African importations "by prohibitions, and by imposing duties which might amount to a prohibition, have been hitherto defeated by his majesty's negative."²⁷⁰ Thus, Britain was responsible not only for the imposition of slavery in the first place but also for its continuation into the enlightened 1770s. In his condemnation, Jefferson now waxed righteous and indignant. His Majesty had "preferr[ed] the immediate advantages of a few British corsairs to the lasting interests of the American states, and to the rights of human nature deeply wounded by this infamous practice."²⁷¹ To Jefferson's critics from Dr. Johnson onwards, these passages seem hypocritical in the extreme.²⁷² Rather than extricating himself or his society from slavery, Jefferson blamed spatially and temporarily distant actors for his involvement in crimes against humanity. But while one may find fault with Jefferson's allocation of blame, his condemnation of slavery is, in itself, irreproachable, as he labels the

term's two meanings are logically related, as the authors and interpreters of both the Fourteenth and Fifteenth Amendments would discover.

267. See DAVIS, SLAVERY IN THE AGE OF REVOLUTION, *supra* note 91, at 408-68; FREEHLING, *supra* note 179, at 134-38.

268. See Letter from "Humanus," PENNSYLVANIA J., Oct. 18, 1775, reprinted in MONCURE DANIEL CONWAY, THE LIFE OF THOMAS PAINE 24 (1970). Whether Paine, who had only arrived in America in 1774, formed this opinion independently, or whether he based his assertion on Jefferson's *Summary View*, is an interesting question.

269. A SUMMARY VIEW, *supra* note 226, at 130 (referring to "his majesty" and "his deviations from the line of duty").

270. *Id.*

271. *Id.* The reference to corsairs is itself powerfully racially inflected, unmistakably invoking the image of North African pirates kidnapping and enslaving Caucasians in the Mediterranean. For a provocative discussion about the role of the image of the North African corsair in Revolutionary era American thought, and Jefferson's response to the North African threat first as a diplomat in Europe and then as President, see MICHAEL B. OREN, POWER, FAITH AND FANTASY: AMERICA IN THE MIDDLE EAST 1776 TO THE PRESENT 17-40 (2007).

272. See *supra* Part I and accompanying text.

slave trade piracy and enslavement of Africans an injury to human nature. Who, one may well ask, among the world's politicians, had said more in 1774?²⁷³

Jefferson's temerity in pursuing the political slavery analogy even while he championed rights of slaveholders—never, however, their pretended rights to hold slaves—made confrontation with the issue of Virginia's involvement with slavery inevitable. By finally grappling with the problem, he deflated a sense of tension in his reading audience.²⁷⁴ A skillful framing of the issue within the royal veto question allowed Jefferson to downplay slavery's obvious centrality to readers, who, while attuned to republican rhetoric, were also sensitive to natural rights doctrines, and even to ascending sentimentalism. Still, there remained something awkward about saddling England with all the blame for oppression in Virginia. Jefferson would encounter this awkwardness in far greater measure when he drafted the Declaration,²⁷⁵ which appealed to a much wider audience and involved so much more self-justification. In 1774, however, in what was still an intra-Empire argument about English liberties, Jefferson was happy to dispense with the issue by merely broaching it. This allowed him to get back to his driving purpose with renewed vigor and emphasis, and rejoin his attack on political enslavement.

Back on the offensive, Jefferson's writing is at its best, both in its rhetorical power and in its richness to an historian. "[D]oes his majesty seriously wish, and publish it to the world," demanded Jefferson, "that his subjects should give up the glorious right of representation, with all the benefits derived from that, and submit themselves the absolute slaves of his sovereign will?"²⁷⁶ Perfidious Albion²⁷⁷ was selling out the very core of America's birth-right:

273. Not until 1820 did the United States pass a law equating maritime slave trading with piracy. 3 Stat. 600 (1820). This act imposed the death penalty. *Id.* The slave trade abolition statute that Jefferson signed in 1807 imposed fines between \$1,000 and \$20,000 and prison terms of two to ten years. 2 Stat. 426-30 (1807).

274. That is, his British and Northern audiences. Virginians, one might suppose, would have relished his relentless and shameless audacity. See generally ROBERT A. FERGUSON, *READING THE EARLY REPUBLIC* (2004); JAY FLIEGELMAN, *DECLARING INDEPENDENCE: JEFFERSON, NATURAL LANGUAGE, AND THE CULTURE OF PERFORMANCE* (1993); ANDREW BURSTEIN, *THE INNER JEFFERSON: PORTRAIT OF A GRIEVING OPTIMIST* (1995) (on the sensibilities of the reading audience).

275. See Jefferson's "original Rough draught" of the Declaration of Independence, in 1 JEFFERSON PAPERS, *supra* note 6, at 423.

276. A SUMMARY VIEW, *supra* note 226, at 131.

277. For information on the origins and connotation of "Perfidious Albion," see H.D. Schmidt, *The Idea and Slogan of "Perfidious Albion,"* 14 J. HIST. IDEAS, Vol. 14 604, 604-16 (1953). The phrase "Perfidious Albion" dates back to the Middle Ages and frequently suggests disillusion by a foreign observer who had formerly celebrated cultural, political and diplomatic ideals associated with England, only to be

English liberties—the right to government by a representative legislature—and in so doing denying even America’s Englishness.²⁷⁸ Americans might as well be African slaves.

Jefferson’s indictment of His Majesty moves onwards, employing uncommonly forceful and revealing invective:

One of the articles of impeachment against Tresilian and the other judges of Westminster Hall in the reign of Richard the second, for which they suffered death as traitors to their country, was that they had advised the king that he might dissolve his parliament at any time: and succeeding kings have adopted the opinion of these unjust judges. Since the establishment however of the British constitution at the glorious Revolution on it’s [sic] free and antient principles, neither his majesty nor his ancestors have exercised such a power of dissolution in the island of Great Britain; and when his majesty was petitioned by the united voice of his people there to dissolve the present parliament, who had become obnoxious to them, his ministers were heard to declare in open parliament that his majesty possessed no such power by the constitution. But how different their language and his practice here! . . . When the representative body have lost the confidence of their constituents, when they have notoriously made sale of their most valuable rights, when they have assumed to themselves powers which the people never put into their hands, then indeed their continuing in office becomes dangerous to the state, and calls for an exercise of the power of dissolution. Such being the causes for which the representative body should and should not be dissolved, will it not appear strange to an unbiased observer that that of Great Britain was not dissolved, while those of the colonies have repeatedly incurred that sentence?²⁷⁹

This last phrase is most telling of all. Why, indeed, were the loudest yelps for liberty heard from the drivers of Negroes? Without doubt, perceptions of a double standard regarding the British government’s respect for English liberty on the one hand, and disregard for American liberty on the other, seemed most alarming to someone living day in and day out in a society defined by the double standard between black slavery and white freedom.²⁸⁰ In the *Summary View*, Jefferson obsessed over the rights of Englishmen

disappointed by the policies England or Britain ultimately directed towards the observer’s state. It gained wide currency among supporters of the French Revolution who had expected Britain to support seemingly progressive changes in France.

278. *Id.*

279. A SUMMARY VIEW, *supra* note 226, at 131 (citations omitted).

280. Edmund Burke commented early and insightfully on the Southern slaveholders’ propensity towards jealous guardianship of their own liberty. See Edmund Burke, *Speech on Conciliation with America*, in ON EMPIRE, LIBERTY, AND REFORM: SPEECHES AND LETTERS 62-134 (David Bromwich ed., 2000).

and their foundation in British history.²⁸¹ The British Constitution embodied the struggle, culmination, distillation, and permanent fixation on liberty's triumph over British history.²⁸² Not only did African American slaves have no role or stake in these trials and triumphs, but in Jefferson's mind, their very exclusion from this legacy became an instructive exhortation for him to carry on the fight.²⁸³

V. LIBERTY, SLAVERY & THE DECLARATION OF INDEPENDENCE

When Jefferson rejoined his struggle for America's fundamental liberties in the Declaration of Independence, he entered a far larger arena and played for far higher stakes. He now spoke officially for a much wider constituency—thirteen states instead of one—and addressed a much wider audience—the enlightened world as opposed to the Virginia delegation and the Westminster government. The game, however, remained substantially the same. Speaking on behalf of a slaveholding people, Jefferson asserted the right to avoid political enslavement. The complexities engendered by the new, wider parameters led to revisions, adjustments, and one fundamental deletion respecting slavery as the Declaration made its way from Jefferson's hand to committee, from committee to the floor, from the floor to ratification, and finally, from ratification to publication before the world.

In Congress, on June 7, 1776, Richard Henry Lee proposed Virginia's motion for American independence.²⁸⁴ After two days of debate, the Continental Congress postponed further action on the motion until July 1, so that delegates still bound by instructions not to sever ties with Britain could refer back to their states for new instructions.²⁸⁵ To forestall any additional delay, Congress, on June

281. See generally A SUMMARY VIEW, *supra* note 226.

282. See generally IAN LOVELAND, CONSTITUTIONAL LAW: A CRITICAL INTRODUCTION, 19-29 (2d ed. 2000); H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 CHI. KENT L. REV. 403, 442-459 (2000); J.G.A. Pocock, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY, A REISSUE WITH A RETROSPECT (1987).

283. This notion of black exclusion was not the only logical interpretation of real commonwealth ideology. In regions where slavery was neither fundamental nor pervasive, the opposite decision could be reached. Hargrave and the counsellors for Somerset maintained that, at least in England, African people did inherit the common law, the Constitution, and their respective abhorrence of slavery. See HARGRAVE, *supra* note 164, at 8-9. The framers of the Massachusetts Constitution thought much the same. In this expansive view of the rights inherited from British whiggery they discovered the genius of America's future democratic society.

284. Richard Henry Lee, *Resolution of Independence* (June 7, 1776), in 1 JEFFERSON PAPERS, *supra* note 6, at 298.

285. Thomas Jefferson, *Notes of Proceedings in the Continental Congress* (June 7 to

11, appointed a Committee of Five to place a declaration in readiness, assuming that independence was inevitable following the King's withdrawal of protection from his American subjects.²⁸⁶ This Committee consisted of Jefferson, John Adams, Benjamin Franklin, Roger Sherman, and Robert Livingston.²⁸⁷ They, in turn, elected Jefferson to draft the fateful document.²⁸⁸

A. *Drafting the Declaration*

By the time the Committee asked Jefferson to draft a Declaration, tensions inherent in Virginia's simultaneous denunciations of political slavery and practice of human slavery had intensified markedly, even from his first broaching the issue in the *Summary View*. In November 1775, Lord Dunmore, Virginia's last Royal Governor, issued a ship-board proclamation as he fled the rebellious Old Dominion, guaranteeing freedom to all slaves who would enlist for the Crown.²⁸⁹ There is strong textual evidence in drafts of the Declaration that Dunmore's proclamation weighed heavily on Jefferson's sense of security, on his conscience, and on his self-image. Much of the beauty of the Declaration in its final form lies in its universality and its transcendence of the contradictions particular to revolutionary Virginia. However, in their revelation of the tensions with which Jefferson wrestled as he strove toward the universal, the drafts make fascinating reading.

Jefferson's ethnocultural basis for rights assertion emerges clearly in his earliest attempt at what would become the Declaration, a section of a first draft for his proposed Constitution for Virginia.²⁹⁰ Jefferson drafted this in Philadelphia, even as Lee's motion was pending in Congress.²⁹¹ He sent it home with George Wythe when his friend and law teacher (and opposing counsel in *Howell*) quit the Congress to participate in the creation of Virginia's new constitution.²⁹² Jefferson's attentions remained divided as he wrote America's Declaration; frequently his mind turned anxiously to Virginia, where a new republican constitution was in creation, and where his wife was experiencing another difficult and precarious

Aug. 1, 1776), in 1 JEFFERSON PAPERS, *supra* note 6, at 309.

286. *Id.* at 313, 414.

287. *Id.* at 313.

288. See MAIER, *supra* note 238, at 97-143 (discussing the Committee's role; arguing that its contributions are generally underappreciated).

289. JOHN MURRAY, PROCLAMATION OF EARL OF DUNMORE (Nov. 7, 1775), available at http://www.blackloyalist.info/assets/lord_dunmore/lorddunmore.jpg.

290. See Thomas Jefferson, *Third Draft by Jefferson* (before June 13, 1776) in 1 JEFFERSON PAPERS, *supra* note 6, at 356-65.

291. See *id.* at 415 (Jefferson mailed Lee a copy of a "Rough draught" of the Declaration).

292. *Id.* at 336, 345.

pregnancy.²⁹³ When Virginia was on his mind in the early stages of his drafting, a local perspective sometimes colored his Continental discourse.²⁹⁴

A section of the proposed Virginia Constitution corresponds to the section of the Declaration containing charges against the King; it lists the “black catalogue of unprovoked injuries”²⁹⁵ that drove Virginia to seek independence. Jefferson enumerates sixteen charges, divided into three groups. The first relates to the King’s “waging war” against American political liberty, the last to what Locke called the act of “unkinging” a century before.²⁹⁶ For present purposes, the middle group is the most interesting. This relates to George III’s war against the American people. Here, Jefferson identifies the people as a distinct and definable race. In Jefferson’s eyes, the King waged war by “prompting our negroes to rise in arms among us; those very negroes whom by an inhuman use of his negative he hath refused us permission to exclude by law.”²⁹⁷ This obvious reference to Lord Dunmore’s proclamation affords clear textual evidence that at the time of the Declaration, Jefferson’s “us” did not encompass African Americans as Virginians, but rather excluded “them” as a separate and potentially threatening presence “among us,” a presence Virginia would have liked to legally debar.²⁹⁸

Two further charges in the proposed Virginia Constitution suggest Jefferson’s heightening sense of American racial identity. He indicted the King for “endeavouring to bring on the inhabitants of our frontiers the merciless Indian savages whose known rule of warfare is an undistinguished destruction of all ages, sexes, &

293. See MALONE, *supra* note 48, at 235-36, 241.

294. *Id.*

295. This phrase, which aptly captures Jefferson’s thinking, originates in the First Continental Congress’s Draft Address to the People of Great Britain and Ireland of 1774, drafted by Richard Henry Lee. See Thomas Jefferson, Third Draft by Jefferson (before June 13, 1776) in 1 JEFFERSON PAPERS, *supra* note 6, at 356-65.

296. SECOND TREATISE OF GOVERNMENT 235-36 (C. B. Macpherson ed., 1980) (1690).

297. *Id.* at 418.

298. Peter Onuf has argued that Jefferson saw white and black Virginians locked in a permanent state of war, caused by slavery. Even in times of external peace, Onuf argues, low intensity hostilities between white and black continued in Jefferson’s eyes. Dunmore’s Proclamation merely allowed these hostilities to come out into the open. See PETER S. ONUF, JEFFERSON’S EMPIRE: THE LANGUAGE OF AMERICAN NATIONHOOD 156-58 (Univ. Press of Va. 2000). In Race, Liberty, and Law, Merkel makes the case that Onuf accurately captures Jefferson’s sensibilities during wartime, but that between the American and Haitian Revolutions, Jefferson was able to contemplate some measure of peaceful post-emancipation coexistence between whites and blacks in Virginia. Only with the expulsion and extermination of the white colonial population in the former St. Dominique did Jefferson’s mind harden permanently against the continued presence of a large African American population in a post-slavery United States. See Merkel, Race, Liberty, and Law *supra* note 207, at 125-30, 242-52, 290-97.

conditions of existence.”²⁹⁹ Thus, one force defining the American race is its distinctness from the aboriginals, and simultaneously, the threat of violence inherent in that distinctness. That threat of violence spoke directly to Jefferson as a deeply protective husband and father. Distinctions defining white and Indian parallel closely those distinctions separating white from black. The overlap is particularly interesting, in the light of the greater esteem and higher desire for integration Jefferson generally held for Native Americans compared to African Americans. There were many times when the mere presence of native peoples in the new country did not seem threatening or disturbing to Jefferson, but this bloody civil war to define national destiny could not be one of them.³⁰⁰

A further charge against the King, revealing much about Jefferson’s conception of American racial identity, relates to foreign mercenaries. The mercenaries came, Jefferson charges, “to compleat the works of death, desolation, & tyranny already begun with circumstances of cruelty & perfidy so unworthy the head of a civilized nation.”³⁰¹ This language resounds in ethno-cultural images. If the Hessians were foreign, then the English were not. To be American would no longer entail subjection to English government, but, at the same time, to be un-English was to be foreign to America, and to be foreign to America was to be un-English. Moreover, the English nation was a civilized nation (even if ruled by an unworthy King), which suggests strongly a counterpoint in this political dynamic of peoples who were not civilized, namely blacks and Indians. Again, it seems Lord Dunmore’s proclamation weighed heavily on the draftsman of independence. So in this short preliminary fragment, Jefferson, still writing in a Virginia frame of mind, effects a fairly exclusionary definition of his people: they can be neither un-English, uncivilized, Indian, African, nor enslaved.

B. *From English Liberties to Natural Rights*

The next precursor to Jefferson’s Declaration is called the composition draft³⁰² by the late Julian Boyd, the longest serving editor-in-chief of Jefferson’s papers. It reflects the state of the

299. Composition Draft of that Part of the Declaration of Independence Containing the Chargers Against the Crown, in 1 JEFFERSON PAPERS, *supra* note 6, at 418-19.

300. Regarding Jefferson’s attitudes towards Native Americans, and the light these cast on his opinions of African Americans, see my discussion of *The Notes on the State of Virginia* in Merkel, Race, Liberty, and Law, *supra* note 207, at 133-41. *But see* ANTHONY F.C. WALLACE, JEFFERSON AND THE INDIANS: THE TRAGIC FATE OF THE FIRST AMERICANS (1999) (for another and more damning account).

301. Composition Draft of the Part of the Declaration of Independence, in 1 JEFFERSON PAPERS, *supra* note 6, at 419.

302. Fragment of the Composition Draft of the Declaration of Independence, in 1 JEFFERSON PAPERS, *supra* note 6, at 420-23.

developing text in mid-June 1776, after the Committee had delegated the drafting to Jefferson, but before he submitted the original rough draft to them. Reassembled from several fragments, the composition draft expresses Jefferson's first consciously American—and not merely Virginian—perspective. Perhaps surprisingly, its vision of the American people is in some respects even narrower than that of the draft constitution for Virginia. Here the King is charged with “send[ing] over not only soldiers of our common blood but Scotch & foreign mercenaries to invade and deluge us in blood.”³⁰³ When political dispute waxes into blood feud, what part could alien Africans hope to play? And how pure the American blood becomes here, excluding in Jefferson's eyes even the Scots, suggesting that American nationhood derived not from all the peoples of Britain but only from England itself.³⁰⁴ For Anglo-Americans who perceived their Englishness slighted by the British government, the American Revolution became a family quarrel among (putatively) equal claimants to the status rights incumbent on English nationhood—a struggle in which Africans could play no part.

However, even as Jefferson ascends his greatest heights of ethnocentricity, his logic begins to shift towards a potentially more universal perspective. Following immediately on the heels of the remonstrance against the blood feud, Jefferson wrote, and then himself deleted, that British policy was “too much to be borne even by relations. [E]nough then be it to say, we are now done with them.”³⁰⁵ When the parties to a family quarrel no longer acknowledge their familiarity, they are left to struggle not over systems of relations, but over principles. And unlike a quarrel over Anglo-American family matters, a struggle over principles might become broad enough to touch more pointedly on African American status and interest. In this altered context, it might even become necessary for slaveholding revolutionaries to develop and articulate a rationale justifying the inapplicability of revolutionary principles to the slaves. By the time Jefferson's text evolved into what is called the original rough draft, this very problem was beginning to bubble beneath the

303. *Id.* at 420 (Jefferson's own deletions appear here in parenthesis). Note also the now seldom heard verse six of *God Save the King*, highly topical when the future anthem was first performed in 1745: “Lord grant that Marshal Wade / May, by thy mighty aid, / Victory bring, / May he sedition hush, / And like a torrent rush, / Rebellious Scots to crush, / God save the King!” RICHARD CLARK, *THE WORDS OF THE MOST FAVOURITE PIECES, PERFORMED AT THE GLEE CLUB, THE CATCH CLUB, AND OTHER PUBLIC SOCIETIES*, at xiii (1814).

304. See generally T.H. BREEN, *TOBACCO CULTURE: THE MENTALITY OF THE GREAT TIDEWATER PLANTER ON THE EVE OF REVOLUTION* (1985) (stressing anti-Scottish sensibilities in Virginia as a reflection of hostility towards the frequently Scottish factors of British banks and merchant houses who represented their firms in Virginia).

305. Composition Draft of the Part of the Declaration of Independence Containing the Charges Against the Crown, in 1 JEFFERSON PAPERS, *supra* note 6, at 420.

smooth surface of Revolutionary rhetoric.³⁰⁶

The original rough draft is the version Jefferson submitted to the Committee of Five. The Committee made few changes, none of which related directly to slavery.³⁰⁷ Nevertheless, three of those changes raised interesting philosophical implications concerning slavery's increasingly contradictory place in the new Republic.

Jefferson's original of the Declaration's famous preamble read:

When in the course of human events it becomes necessary for a people to advance from that subordination in which they have hitherto remained, & to assume among the powers of the earth the equal & independent station to which the laws of nature & of nature's god entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the change.³⁰⁸

Here, the Committee made two changes. Jefferson's "advance from that subordination in which they [] have hitherto remained" gives way to "dissolve the political bands which have connected them with another."³⁰⁹ The Committee, more Whiggish here than even Jefferson, denied that the colonials were ever, in theory or in legitimate practice, subordinate to England. Hence, they were never, nor could they ever be, political slaves. Not perhaps to the Committee, but to most readers, this free station would reaffirm a seemingly unbridgeable gap between the political rights of white and black Americans.

Secondly, the Committee substituted "separate and equal station" for Jefferson's "equal & independant."³¹⁰ The implications of this change are subtle and debatable, but the replacement of the term "independent" by the term "separate" may imply a shift away from notions of preserving America's perfect Englishness towards visions of creating a new and novel commonwealth. This too would suggest the Committee's pushing Jefferson away from his older notion of Englishness as a title to rights and towards the vision of

306. See Jefferson's "original Rough draught" of the Declaration of Independence, in 1 JEFFERSON PAPERS, *supra* note 6, at 423-28.

307. But see MAIER, *supra* note 238, at 97-143 (arguing that the Committee's contributions to the final product have been undervalued and Jefferson's overestimated).

308. Jefferson's "original Rough draught" of the Declaration of Independence, in 1 JEFFERSON PAPERS, *supra* note 6, at 423.

309. Jefferson's "original Rough draught" of the Declaration of Independence, in 1 JEFFERSON PAPERS, *supra* note 6, at 423; THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

310. See Jefferson's "original Rough draught" of the Declaration of Independence, in 1 JEFFERSON PAPERS, *supra* note 6, at 423; THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

natural entitlement to rights that won the Declaration everlasting fame. In any case, it is perhaps not the subtle qualifiers of equality, but the introduction of equality itself into the Declaration, that became most important to the future of slavery.

It is in the very next sentence that Jefferson writes his most famous words, “all men are created equal.”³¹¹ In this original draft, the phrasing is actually “equal & independant,” echoing the couplet concerning America’s political station as it stood before the Committee’s alteration.³¹² The original rough draft continues “that from that equal creation they derive rights inherent & inalienable,” which the Committee alters to “they are endowed by their Creator with certain unalienable Rights.”³¹³ The Committee’s more visible and active creator imbues all men with an arguably still firmer claim to equality, and renders future claims of separate white and black creation more dubious under America’s fundamental charter of liberty. Perhaps because some Committee members felt a closer relation to God than did Jefferson, African Americans’ latent and future claims to the triad of life, liberty, and happiness became more surely enshrined in the language of the Declaration.³¹⁴

As the earliest complete version of the Declaration, the original rough draft is more important for what it reveals about Jefferson’s vision and language that carried over into the final form, than for its evidence of Jefferson’s phrases that did not survive editing by the Committee. If the Committee made equality more firmly universal by invoking the Creator, Jefferson is due great credit for casting the national charter as an appeal to universal rights and to equality rather than merely as an appeal to the rights of Englishmen and to liberty. In the history of constitutionalism, this represented a truly revolutionary break from the past and pointed to a potentially limitless expansion of natural rights into law and governance.³¹⁵ The original rough draft corresponds very nearly to the Declaration’s final published form. Here, for the first time, Jefferson moves beyond cataloging offenses of the British Administration to an exposition of philosophical justifications for independence. Here, also for the first time, appears the famous passage denouncing the King’s complicity in the slave trade.³¹⁶ That passage, however, would not survive

311. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

312. Jefferson’s “original Rough draught” of the Declaration of Independence, in 1 JEFFERSON PAPERS, *supra* note 6, at 423.

313. *Id.* at 423; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

314. See Paul K. Conkin, *The Religious Pilgrimage of Thomas Jefferson*, in JEFFERSONIAN LEGACIES, *supra* note 1, at 19-49 (on the evolution of Jefferson’s religious beliefs during this period).

315. See generally DAVID ARMITAGE, *THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY* (2007).

316. Jefferson’s “original Rough draught” of the Declaration of Independence, in 1

debate on the Floor of the Continental Congress.

C. Condemning the Slave Trade

The Committee of Five reported on June 28th.³¹⁷ Congress, sitting as the Committee of the Whole, debated Lee's Resolution for independence on July 1st and 2nd.³¹⁸ On the 2nd, Congress voted in favor of independence and took up the Declaration reported by the Committee of Five.³¹⁹ Jefferson's own *Notes of Proceedings in the Continental Congress*—proven by Boyd to be a contemporaneous or nearly contemporaneous account³²⁰—reveal the author's sensitivity to changes made on the Floor. As Jefferson writes, "the pusillanimous idea that we had friends in England worth keeping terms with, still haunted the minds of many. for this reason those passages which conveyed censures on the people of England were struck out, lest they should give them offence."³²¹

As Jefferson moves to an explanation of the deletion of the slave trade passage, his sensitivity waxes still more acute:

[T]he clause too, reprobating the enslaving the inhabitants of Africa, was struck out in complaisance to South Carolina & Georgia, who had never attempted to restrain the importation of slaves, and who on the contrary still wished to continue it. our Northern brethren also I believe felt a little tender (on that) under those censures; for tho' their people have very few slaves themselves yet they had been pretty considerable carriers of them to others.³²²

Jefferson's characterization of the deleted passage is thoroughly revealing. It is the enslaving of inhabitants of Africa, and not the keeping of African American slaves, that he censures. The blame resides in the kidnapping, not in the maintenance of the institution. In this light, Virginia, in desiring to arrest the trade, appears more virtuous than England, South Carolina, Georgia, or New England. With no countervailing security interest in the African trade, Jefferson's moral sense gave him free reign to combat the trade with a zeal he could never bring to bear on the institution itself.

The indictment that Congress debated and deleted struck at the King with especial adamancy. Jefferson's semi-famous words charged

JEFFERSON PAPERS, *supra* note 6, at 426.

317. *Id.* at 414.

318. *Id.*

319. *Id.*

320. Boyd argues that Jefferson's *Notes* were written in August, 1776. He proves they could not possibly have been set down later than 1783. *Id.* at 307-08.

321. Thomas Jefferson, Notes of Proceedings in the Continental Congress (June 7-Aug. 1, 1776), in 1 JEFFERSON PAPERS, *supra* note 6, at 314.

322. *Id.* at 314-15.

that the King had:

waged cruel war against human nature itself, violating it's most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating & carrying them into slavery in another hemisphere or to incur miserable death in their transportation thither. this piratical warfare, the opprobrium of *infidel* powers, is the warfare of the *Christian* king of Great Britain. determined to keep open a market where *Men* should be bought & sold, he has prostituted his negative for suppressing every legislative attempt to prohibit or to restrain this execrable commerce. and that this assemblage of horrors might want no fact of distinguished die, he is now exciting those very people to rise in arms among us, and to purchase that liberty of which he has deprived them, by murdering the people on whom he also obtruded them: thus paying off former crimes committed against the *Liberties* of one people, with crimes which he urges them to commit against the *lives* of another.³²³

Dumas Malone, who usually lauds Jefferson's antislavery efforts, argues that this "was one of those rare Jeffersonian passages which are consciously rhetorical and betray a striving for effect."³²⁴ The biographer is perhaps right that "[f]rom the literary point of view this omission was no loss,"³²⁵ but he is too quick to dismiss its ideological consistency. The purged language forms part of a coherent whole, explaining Jefferson's justification to himself of a natural rights basis for American independence, notwithstanding his beloved Virginia's deep involvement with human bondage.

It seems odd perhaps that so sympathetic a Jeffersonian as Malone—a son of New South, Mississippi, who, while not particularly troubled by problems of race and slavery, devoted more than fifty years to recreating Jefferson's life and times—should view the Virginian's blaming the King for slavery as a self-conscious endeavor.³²⁶ That but for the withholding of the royal assent, slave importations into Virginia would have ceased in 1772 is a belief Jefferson held sincerely and accurately.³²⁷ That this belief also buttressed his sense of virtue is true, but that does not necessarily mean that it was illegitimate. All modern scholars of slave trade abolition, from Williams, to Anstey, to Davis, to Haskell,³²⁸ agree

323. *Id.* at 317-18.

324. MALONE, *supra* note 48, at 222.

325. *Id.*

326. Eric Pace, *Dumas Malone, Expert on Jefferson, Is Dead at 94*, N.Y. TIMES, Dec. 28, 1986, at 28.

327. See ISAAC, *supra* note 75, at 247-48 (discussing the failure of the Burgesses to obtain the royal assent for a bill ending the slave trade into Virginia).

328. See generally ERIC WILLIAMS, CAPITALISM AND SLAVERY (1944); ROGER T. ANSTEY, THE ATLANTIC SLAVE TRADE AND BRITISH ABOLITION, 1760-1810 (1975); DAVIS, SLAVERY IN THE AGE OF REVOLUTION, *supra* note 91; Thomas L. Haskell,

that a concordance of interest and morality was necessary to the overthrow of the nefarious traffic. What scholars and the general public alike have lost sight of in the last four decades is Jefferson's typicality among reformers in this regard. Polemical as it may have been, Jefferson's attempt to enshrine the strictures against the trade in the Declaration attests to the centrality of slave trade abolition to his vision in 1776 and to the strength of his abhorrence of the practice. Moreover, when it came to slave trade abolition in 1776, Jefferson was actually in the vanguard of moral reform. In Britain, Clarkson and Wilberforce had not yet commenced their public careers, and legislation to outlaw the African trade was not yet a serious prospect.³²⁹ And Jefferson labeled the trade "piracy," something the United States Congress was not willing to do until 1820.³³⁰

The deleted passage, however, deals not just with the African trade, but with slavery itself, and here Jefferson's rhetorical situation was much more awkward. To delegitimize Lord Dunmore's proclamation urging slaves to enlist against the Continentals, Jefferson was forced to establish a hierarchy of values, placing white life above black liberty.³³¹ But the colonials were themselves taking up arms against the Loyalists, and they were doing so in the name of liberty. Given that the Declaration was premised on the triad of life, liberty, and happiness, these inconsistencies were better left unstated, and the document became more logical, more universal, and ultimately more promotive of liberty after the purge. Jefferson's invocation of universally applicable natural rights in a fundamental charter of national generation, rather than his endeavor to justify the contradictions particular to Virginia in 1776, rendered the Declaration immortal.

The Committee of the Whole made one more principal alteration before publishing the Declaration to the world. This involved the question of Scottishness. As Jefferson recalled in 1818:

[w]hen the Declaration of Independence was under the consideration of Congress, there were two or three unlucky

Capitalism and the Origins of the Humanitarian Sensibility (pts. 1 & 2), 90 AM. HIST. REV. 339, 339-61 (1985), 90 AM. HIST. REV. 547, 547-66 (1985).

329. DAVIS, *SLAVERY IN THE AGE OF REVOLUTION*, *supra* note 91, at 421-53 (tracing the Parliamentary struggle to abolish the trade from its beginnings in the 1780s to its fruition in 1807).

330. See An Act to Protect the Commerce of the United States, and Punish the Crime of Piracy, ch.77, 3 Stat. 600 (1820).

331. It is interesting to note that Jefferson adopted the reverse position in the context of the Haitian Revolution and Gabriel's Uprising, providing that slave rebellion was justified, while white self-defense was merely excusable on grounds of necessity. This point is developed in more detail in Merkel, *Jefferson and Gabriel's Uprising*, *supra* note 16, at 15-16.

expressions in it which gave offence to some members. The words "Scotch and other foreign auxiliaries" excited the ire of a gentleman or two of that country. . . . Although the offensive expressions were immediately yielded, these gentlemen continued their depredations on other parts of the instrument.³³²

As Boyd commented, there were no Scotsmen among the Committee, but several in Congress, the most prominent of whom were Wilson, Witherspoon, and McKean.³³³ This episode marks an early appearance of that quintessentially American penchant of ethnic minorities to resent any questioning of their Americanness in the political arena. In this sense, expunging calumnies against the Scotsmen rendered Jefferson's Declaration less parochial. It helped the document transcend British ethnic politics and erect a broader foundation for liberty than the one inherent in the rights of Englishmen. The birth rights that defined Englishmen, like the keen sense of liberty fostered by life in a slave society, were fundamental building blocks of Jefferson's natural rights philosophy. Eventually, that philosophy overcame its particular cultural context and embraced all humanity in its compass.³³⁴ It would not be until long after Jefferson's death that the natural rights enshrined in the Declaration were vouchsafed to African Americans.³³⁵ If Jefferson had not come around to insisting on those rights on behalf of Revolutionary America in universal terms by July 1776, it might have been very much longer still.

VI. CONCLUSION: THE NATURAL LAW FOUNDATIONS OF ANTISLAVERY

Jefferson's personal involvement with African American slavery constituted one of the central defining features of his life. As explored in this Article, antislavery also played an important—though not life-defining role—in Jefferson's early public career. As a practicing lawyer, Jefferson argued six freedom suits prior to closing his law office in 1774.³³⁶ The *Summary View* develops an argument

332. Anecdotes of Doctor Franklin (Dec. 4, 1818), in 8 THE WRITINGS OF THOMAS JEFFERSON 497, 500 (H.A. Washington ed. 1854) [hereinafter 8 JEFFERSON WRITINGS].

333. *Id.*

334. See DAVID ARMITAGE, THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY 139-44 (2007) (A "combination of appeals to natural rights and positive law" made the Declaration appeal to groups around the world.); GORDON S. WOOD: THE AMERICAN REVOLUTION: A HISTORY 57 (2002) ("The Declaration of Independence set forth a philosophy of human rights that could be applied not only to Americans, but also to peoples everywhere.").

335. See generally JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 522-61, 602-36 (8th ed. 2000) (chronicling the struggle of the Black community for equality in the United States); ERIC FONER, THE STORY OF AMERICAN FREEDOM 275-87 (1998) (describing the sea of change in political rights for Black Americans that took place during the 1960s).

336. See discussion *supra* Part III.

against political enslavement of British America,³³⁷ and at length, wrestles with the wrongfulness of African American slavery, a problem joined head on in Jefferson's drafts of the Declaration of Independence.³³⁸ This Article concludes its exposition by exploring Jefferson's role in ushering America to independence in 1776, but Jefferson made further antislavery efforts over the course of the revolutionary years. As a leading member of Virginia's Committee of Revision, Jefferson claims to have drafted a gradual emancipation bill for the Commonwealth, a claim buttressed by Jefferson's inclusion of a comprehensive gradual emancipation provision in his draft of the Virginia Constitution of 1783. A year later, the Confederation Congress failed by a single vote to include Jefferson's clause barring slavery from the entirety of the United States' western territories after 1800 in the Territorial Governance Act.³³⁹ In the decades after the Revolution, however, the first window of opportunity for the antislavery cause was closing rapidly.

Jefferson himself was acutely aware of what David Brion Davis calls the "[p]erishability of [r]evolutionary [t]ime," that is, of the urgency of implementing reform in the afterglow of independence, before popular disinclination to change and sacrifice had extinguished the nation's revolutionary virtue.³⁴⁰ During the 1790s, perceived excesses of the French Revolution chastened lingering radical impulses of northern Federalists, while extirpation of white planters in revolutionary Haiti spurred Southerners to seek an end to social reforms deemed destabilizing.³⁴¹ Gabriel's Plot of 1800, which prompted one of Jefferson's most principled (if clandestine) antislavery acts (his letter to Governor Monroe urging commutation of the rebels' sentences on the grounds that their uprising was justified), helped fuel the hostile backlash against the manumission movement—heretofore the Upper South's most tangible antislavery achievement.³⁴² Other than signing the Slave Trade Abolition Act into law in 1807 (the importance of which should not be underestimated),³⁴³ Jefferson did not make any direct attempts to counter the spread of slavery in the nineteenth century. In fact, it is entirely fair to say that he generally acquiesced, and to some degree

337. See discussion *supra* Part IV.

338. See discussion *supra* Part V.

339. Merkel, *Jefferson's Failed Antislavery Proviso*, *supra* note 87, at 559-60, 562, 572-77.

340. DAVIS, *SLAVERY IN THE AGE OF REVOLUTION*, *supra* note 91, at 306-26.

341. See generally Ashli L. White, *A Flood of Impure Lava: Saint Dominguan Refugees in the United States, 1791-1820* (2003) (doctoral dissertation, Columbia University) (detailing the effects of the Haitian revolution in Saint Domingue and the effects its exiles had on American society).

342. See Merkel, *Jefferson and Gabriel's Uprising*, *supra* note 16.

343. 2 Stat. 426 (1807).

collaborated, in its expansion. But the antislavery image that Jefferson established during the revolutionary period resurfaced after his death to become a powerful weapon in the antislavery movement of the antebellum years.

Before the triumph of the ideology of economic liberalism in the nineteenth century, Americans who argued politics from first principles argued from the standpoint of natural rights. No one did so more eloquently than Jefferson. Eighteenth-century lawyers looked to natural law to discover the first principles of jurisprudence.³⁴⁴ But they also realized that natural law must generally give way to positive law wherever it conflicted with legitimate expressions of legislative will or accepted judicial determination. Natural law, encompassing also theories of natural right, would, it was to be hoped, generally be in harmony with positive law in a just society. Perhaps still more importantly, natural law, and argument from first principle, should and would be determinative wherever the legislature or the courts had not spoken. Natural law was, to use an idiom of our own day, the default rule of the legal culture and the preferred gap filler of legal lacunae.³⁴⁵ It was in this intellectual and professional environment that Jefferson sought freedom for Mr. Howell.³⁴⁶ What is most remarkable about his unsuccessful argument is the very wide swath he carved out for the authority of natural law and his most contentious suggestion that unjust law should give way to natural right in a case touching the core principles undergirding the legality of African slavery in Virginia.³⁴⁷

One reason the onus of proof respecting the defensibility of slavery was shifting to the slaveholding interest in the 1850s is that the natural rights vision of *Howell*³⁴⁸ found enduring expression in the universal language of the Declaration of Independence in 1776. While *Howell* addressed the overarching conflict of natural right and slavery, it did so in the particular and limited context of a mixed-race bound servant's quest for liberty after the death of his master. The Declaration spoke of liberty without contextual limits, transcending the arguments for liberty that the *Summary View* rooted in English political and constitutional history. The particular genius of the Declaration, as drafted by Jefferson and edited by the Committee

344. See COVER, *supra* note 109, at 8-30.

345. See KRAMER, *supra* note 4, at 10-11, 22, 36-37, 42-44 (discussing the relationship between natural law, positive law, and constitutionalism in late eighteenth- and early nineteenth-century American political thought).

346. See *supra* Part III.A.

347. See *id.*

348. *Howell v. Netherland*, 1 Jeff. 90 (Va. Gen Ct. 1770), reprinted in 1 JEFFERSON WRITINGS, *supra* note 54, at 373-81.

and by Congress, was that it avoided efforts to excuse slavery's presence in America and justified American independence on unabashedly universalist principles of liberty. The logical applicability of these principles to African Americans emerges from the plain meaning of the document; indeed, in the context of America's appeal to a candid, philosophical, and logical world, it is clear that, abstractly and in terms of principle, the right to liberty necessarily reached black people as well as white. No coherent universal philosophy could deny this and retain the general applicability that gave it scientific legitimacy. It is only in the context of the South's particular social and economic situation that African Americans would clearly be excluded from the Declaration's immediate appeal. But to Southerners, black exclusion did not require expression, and to the rest of the world, black exclusion from the Declaration went unstated. This left the world a manifesto for universal liberty from which African Americans were not excluded and from which there was no principled reason to exclude them.

In the period between Jefferson's death in 1826 and the coming of the Civil War, the Declaration acquired virtually oracular authority for Americans, particularly those increasingly committed to antislavery.³⁴⁹ As its authority augmented over the years, the Declaration retained no internal evidence for principled devotees without a stake in slavery to assume that it did anything other than delegitimize slavery or provide an irrefutable justification for its abolition. This is the spirit in which the antislavery Republicans of the 1850s received their Jefferson, and—to borrow Lincoln's idiom about Jefferson and the Declaration—"all honor" to them for applying Jefferson's theories to ultimate purposes Jefferson himself was politically, sociologically, and psychologically unable to achieve. At a Jefferson Day dinner organized by the Republican Party of Boston in 1859, Lincoln said that Jefferson was:

the man who, in the concrete pressure of a struggle for national independence by a single people, had the coolness, forecast, and capacity to introduce into a merely revolutionary document, an abstract truth, and so to embalm it there, that to-day, and in all coming days, it shall be a rebuke and a stumbling block to the very harbingers of re-appearing tyranny and oppression.³⁵⁰

Inspired by Jefferson's words, Lincoln's generation of Republicans took momentous steps down the road to putting Jefferson's ideals more completely into practice.

349. See PETERSON, *supra* note 7, at 164-209 (discussing Jefferson's approach to slavery and abolition).

350. Letter from Abraham Lincoln to H.L. Pierce and others (Apr. 6, 1859), reprinted in PETERSON, *supra* note 7, at 162.