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The Jeffersonian Moment: Feudalism and Reform in Virginia, 1774-1786

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ABSTRACT OF THESIS

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In his autobiography, Thomas Jefferson argued that his goal in the American Revolution had been to eliminate "feudal and unnatural distinctions" in colonial American society as part of the struggle for independence. This thesis focuses on Jefferson's years as a revolutionary legislator in the new state of Virginia, and argues that while he was correct in labelling Virginia a feudal society, his reforms were insufficient to the scale of social reformation that he identified. Material addressed includes Jefferson's synthesis of British feudal and mercantile history that he constructed during the early years of the revolution, his proposed constitution for the state of Virginia, and his legislative reforms to the judiciary, landownership, the established church, education, citizenship, and slavery.

Declaration of Own Work

I hereby certify that this thesis was researched and composed by myself, that the work is my own, and that it has not been submitted towards any other degree or qualification.

Daniel E. Clinkman
26 July 2013

For my parents and grandmother,

to whom I owe so much

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Abbreviations

Cappon	*The Adams-Jefferson Letters: The Complete Correspondence Between Thomas Jefferson and Abigail and John Adams.* Edited by Lester J. Cappon. 2 vols. Chapel Hill: University of North Carolina Press, 1959.
EP Papers	*The Letters and Papers of Edmund Pendleton, 1734-1803.* Edited by David John Mays. 2 vols. Charlottesville: University of Virginia Press, 1967.
GM Papers	*The Papers of George Mason 1725-1792.* Edited by Robert A. Rutland. 3 vols. Chapel Hill: University of North Carolina Press, 1970.
Hening	*The Statutes at Large: Being a Collection of All the Laws of Virginia, From the First Session of the Legislature, in the Year 1619: Published Pursuant to An Act of the General Assembly of Virginia, Passed on the Fifth Day of February One Thousand Eight Hundred and Eight.* Edited by W.W. Hening. 13 vols. Richmond: Printed by and for Samuel Pleasants, junior, printer to the commonwealth, 1823.
JM Papers	*The Papers of James Madison.* Edited by William T. Hutchinson and William M.E. Rachal. 17 vols. Chicago: University Press, 1962-.
LCB	*The Commonplace Book of Thomas Jefferson : A Repertory of His Ideas on Government.* Edited by Gilbert Chinard. Baltimore: Johns Hopkins Press, 1926.
TJ Papers	*The Papers of Thomas Jefferson.* Edited by Julian P. Boyd, et al. 36 vols. Princeton: University Press, 1950-.
TJ Ret. Papers	*Papers of Thomas Jefferson: Retirement Series.* Edited by J. Jefferson Looney and Barbara B Oberg et al. 8 vols. Princeton: University Press, 2004-.

Introduction

In February 1771, Thomas Jefferson, a young Virginian from Albemarle County, wrote to a London-bound friend to request a coat of arms. Jefferson believed himself to be a descendant of a member of the English gentry, and accordingly instructed his friend "to search the Herald's office for the arms of my family." Jefferson had done his own preliminary research, and while he was confident that arms would be found, he acknowledged that "it is possible that there may be none. If so I would with your assistance become a purchaser, having Sterne's word for it that a coat of arms may be purchased as cheap as any other coat."[1]

This letter is striking, both for what it says about Jefferson and what it says about Virginia's colonial society on the eve of the American Revolution. As a member of the Virginia gentry, Jefferson was concerned with demonstrating his family's genteel pedigree, although he was willing to cut corners if a legitimate genealogy was not available. The letter also shows that a Virginia gentleman in 1771 was very much concerned about taking on the proper accoutrements of a landed, albeit untitled, aristocrat, like those who comprised the gentry class of England. It shows that the long process of colonisation, begun under rustic conditions in the seventeenth century, had now yielded a society mature enough to openly emulate its English progenitor.

Although Jefferson retained a personal interest in his familial coat of arms for the rest of his life, the American Revolution forced him to rethink whether reconstituting English society in America was actually a good thing. By 1776, Jefferson was an outspoken opponent of Virginia's Anglicised social order, arguing that it amounted to a reconstruction of feudal society. His draft constitution of that year, followed by pieces of reform legislation, attempted to abolish the elaborate social hierarchy and institutions that generations of budding Virginia aristocrats had painstakingly built up by using an archaic, feudal legal code inherited from early Stuart England. Far from being a mere war of independence, Jefferson argued that a complete revolution must entail social as well as political change, for there was an intimate relationship between social hierarchy and political authority.

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[1] "To Thomas Adams", 20 February 1771, in TJ Papers, Vol. I, p. 62.

The argument Jefferson presented was two-fold. First, the colonial crisis was a result of the defects in the feudal law upon which the British Empire had been constructed. Second, while it was the relationships between the various constituent parts of the British Empire that alerted Jefferson to the feudal law's importance, upon further reflection it was a matter of domestic concern as well. Feudal law had corrupted the internal constitution of the Virginia colony itself, and 1776 was the time to correct defects that had been embedded in English law for the past seven centuries, and which had been passed on to Virginia. This moment, which I call the "Jeffersonian moment", was the point in time when Jefferson attempted to break with Virginia's feudal heritage through a comprehensive reform of the colonial legal code. Virginia in 1776 was an imitation of the reformed, late-stage feudal system of Tudor-Stuart England; if Jefferson succeeded, he would eliminate these "feudal and unnatural distinctions" and create a society "more wholly republican".[2]

Unlike J.G.A. Pocock's "Machiavellian moment", in which a newly established republic must confront the inevitability of its own future decline, the Jeffersonian moment was backward-looking, primarily concerned with breaking the connection to the historical system of feudalism. It was also located in a specific moment in time. By 1786, Jefferson knew that the moment for reform had passed, and that whatever had been accomplished by that point was all that could be done. "From the conclusion of this war we shall be going downhill," he declared to a French readership in 1785. "It will not be necessary [for the state] to resort every moment to the people for support. They will be forgotten, therefore, and their rights disregarded."[3] His hope was that what had been done by that point would be enough to have broken the feudal system, thereby freeing the people from transplanted Old World oppressions. The danger, as he wrote to his mentor George Wythe, was that, independence being achieved, the people would lapse into thinking that "kings, nobles and priests" were "conservators of the public

[2] Thomas Jefferson, *The Autobiography of Thomas Jefferson, 1743-1790 : Together with a Summary of the Chief Events in Jefferson's Life.* Edited by Paul Leicester Ford and Michael Zuckerman. Philadelphia: University of Pennsylvania Press, 2005. See pp. 57-78 for Jefferson's full description of the feudal order in Virginia and his attempts to reform it.

[3] Thomas Jefferson, *Notes on the State of Virginia*. Edited by William Peden. Chapel Hill: University of North Carolina Press, 1982, p. 161.

happiness" rather than "an abandoned confederacy against the happiness of the mass of people."[4]

This thesis is a study of the Jeffersonian moment that existed between 1774 and 1786, in the period between when Jefferson identified feudal law and society as the central issue of the colonial crisis and the point at which his effort to reform colonial society came to an end. Its purpose is to understand the ways in which the society of colonial Virginia was itself an outgrowth of late-stage English feudalism, and to understand why Jefferson thought that the break with Britain required more than a formal Declaration of Independence.[5] It tracks Jefferson's efforts at reform from his draft constitution of 1776 through his Revisal of the Laws of 1777-1786, and demonstrates that, while seemingly an unusual topic for an eighteenth-century politician to think about, Jefferson operated within a well-established tradition of Anglophone political thought while at the same time falling short of his goal of the complete overthrow of the feudal system in America.

I - Research Topic

The feudal system, or feudalism for short, is not a concept or category normally addressed by historians of the American Revolution. Aristocracy, patriarchy, monarchy, property inheritance, religious establishment, allegiance, slavery - all of them elements of a feudal society - have been handled by many historians, but no historian has brought together these disparate topics into a single study that focuses on feudalism as a system. Gordon S. Wood came closest to such a study in the first hundred pages of *The Radicalism of the American Revolution*, but even Wood stopped short by studying "monarchical" society, with its implied focus on the patriarchy of the monarchy, instead

[4] "To George Wythe", 13 August 1786, in TJ Papers, Vol. X, pp. 244-245.

[5] When I refer to the "late-stage feudalism" of early modern England, I am referring to the feudal order that post-dated "bastard feudalism" and the Wars of the Roses, but pre-dated the English Civil War and the abolition of most feudal tenures by the Restoration Parliament in 1660. This late-stage feudalism, characterised by the twin Tudor reforms of Crown centralisation and the rise of the gentry as a counterweight to the nobility, was the type of feudalism practised in England when the Virginia colony was planted in 1607. If Tudor feudalism, coming after Saxon, Norman, and bastard feudalism, was the fourth stage of English feudalism, then colonial feudalism was the fifth stage. It was characterised by the adaptation of secular and ecclesiastical institutions to the unique conditions of the colonial environment. In short, colonial feudalism was Tudor feudalism without the titled nobility but with slaves.

of feudal society.[6] Furthermore, by gesturing to a widely diverse American colonial culture at large, rather than a particular colony or individual, Wood did not delve into the specifics of Virginian society that might make the presence of a feudal system more apparent.

Feudalism itself is a tricky term with multiple meanings. One definition is that feudalism was a social system in Europe in the Middle Ages, characterised by the absence of organised government and the presence of violence, but also containing the basic premises of modern government's contractual relationship between ruler and ruled. Another is that feudalism was a more narrowly defined legal system dealing specifically with a tripartite relationship between political allegiance, military service, and property ownership, expressed in the local law of a feudal society - in this case, England's common law.[7] Furthermore, feudalism was a comparative enterprise - there were many different feudalisms. There was an English feudalism and a Scottish feudalism, an Irish feudalism, a Canadian feudalism, and a Virginian feudalism.[8] While various feudalisms have had various social outcomes, the basic law underpinning European feudalism was similar everywhere.

In this thesis, I define feudalism by three characteristics, as Jefferson did: that it was based on a version of the common law that had been altered after the Norman Conquest of England in 1066, that it was characterised by the presence of secular and ecclesiastical aristocracy established by this Normanised common law, and that it was heavily reliant on the royal prerogative in order to function. In essence, feudalism was

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[6] Gordon S. Wood, *The Radicalism of the American Revolution.* New York: Vintage, 1991.

[7] The legal definition of feudalism is best described in 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 .* Cambridge : University Press, 1987. Social feudalism is most comprehensively discussed in Marc Bloch, *Feudal Society.* 2 vols. Chicago: University Press, 1961. Elizabeth A.R. Brown disputes the use of feudalism as a term, arguing that its meaning has been stretched to the point of meaninglessness, in "The Tyranny of a Construct: Feudalism and Historians of Medieval Europe." *The American Historical Review* 79, no. 4 (1974): 1063-108. More recently, Susan Reynolds has argued that feudalism was entirely separate from a warrior code and was instead the product of property relationships in *Fiefs and Vassals.* Oxford: University Press, 1996.

[8] A comparative study of various European feudal regimes forms the core of Book III, Chapter II in Adam Smith's *Wealth of Nations*, a book contemporary to the American founding and cited by Jefferson as "the best book extant" on political economy. See "To Thomas Mann Randolph, Jr.", 30 May 1790, in TJ Papers, Vol. XVI, pp. 448-449.

the feudal law and the attendant local social order based on that law. This understanding of feudalism was informed by Jefferson's legal training, and his understanding of feudal law was in the tradition of Sir Henry Spelman, identified as the founder of Anglophone feudal studies by J.G.A. Pocock, and later criticised by Elizabeth A.R. Brown. In deference to Brown, I concede that this definition of feudalism is as artificial as any other; its virtue for the purposes of this study lies in being faithful to Jefferson's own definition.

The modern intellectual history of the American Revolution, following a generation of progressive scholarship rejecting the importance of ideas to politics, reached an early focal point with Louis Hartz's *The Liberal Tradition in American Politics*, in which Hartz posited that American politics exhibited an unconscious Lockean liberalism.[9] Hartz's goal was to understand why the United States had not developed a prominent socialist movement and instead had retained a Lockean liberal consensus into the twentieth century. He concluded that the reason for this was because, whereas socialist movements had developed in opposition to the shortcomings of both feudalism and market liberalism, feudalism had never existed in America, and hence there had been no need for America to move past liberalism into socialism. The historians of the "republican revisionist" school, led by Bernard Bailyn, Gordon Wood, and J.G.A. Pocock, disputed Hartz's conclusion that the American Revolution was a Lockean liberal event because, they countered, the revolution had actually been an episode in the ongoing history of civic republicanism, in which the rational individualism of Locke was a decidedly inferior concern to the classical republican principles of communitarianism, duty, and virtue.[10] This claim progressively grew stronger with Bailyn arguing for republicanism as an influence, Wood naming it the most important influence, and Pocock claiming it to be the only influence.

The republican revisionists' criticism bypassed the historiographical premise of Hartz's claim - that America did not have feudalism and that this was sufficient to explain its intellectual development - in favour of attacking his focus on liberalism. In

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[9] Louis Hartz, *The Liberal Tradition in America.* New York: Harcourt, Brace and Company, 1955.

[10] See Bernard Bailyn, *The Ideological Origins of the American Revolution.* Cambridge, MA: Belknap Press, 1967; Gordon S. Wood, *The Creation of the American Republic.* Chapel Hill: University of North Carolina Press, 1969; and J.G.A. Pocock, *The*

this, the republican revisionists overlooked an important part of what Hartz was saying: that America, uniquely of all the nations in the Western world, did not have a feudal past. Hartz, in turn, proceeded from too narrow a definition of feudalism. By focusing solely on an archetype of feudalism dating from Europe's Middle Ages, he did not appreciate the diversity of feudal society and completely missed the relevance of feudal law for understanding colonial America. Had Hartz taken this broader view, he would have seen that an adapted feudal system was alive and well in America, particularly in Virginia, which had closely replicated the institutions of rural England. With the common law came the common law's form of feudal social organisation - the law shaped the society. What this meant was that Virginia adopted feudal law, and a new, colonial form of feudal society was created.[11] In this respect, feudalism was like an organism that adapted itself to new surroundings, retaining its core attributes but developing situation-specific characteristics as well.

In Virginia, feudalism slowly and quietly gathered strength. While this strain was weaker and less developed than its English progenitor, its legal core was strong, and whereas England became less feudal over the seventeenth and eighteenth centuries, Virginia became more feudal.[12] One of Jefferson's greatest insights was his realisation that the Virginian gentry were exploiting the tools the feudal law put at their disposal and were working assiduously to raise themselves up into a full American aristocracy. Furthermore, given their attempts to gain control of westward expansion, this new Virginian aristocracy would have continental reach and would pose a threat to the other new republics struggling for their independence. Hence, Jefferson made it his priority to challenge and destroy this budding aristocracy through legal reform before it could mature.

I would be remiss if I did not, at this early juncture, clearly state the important differences between the English and Virginian feudal systems. In England, the

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Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition. 2nd edn. Princeton: University Press, 2003.

[11] This was given some attention by Charles M. Andrews in the 1960s, but has not been developed further. See Charles M. Andrews, *The Colonial Period in American History: The Settlements, Vol. I.* New Haven: Yale University Press, 1964.

[12] My interpretation is similar to that of John Murrin's Anglicisation thesis in "Anglicizing An American Colony: The Transformation of Provincial Massachusetts." PhD Dissertation, New Haven, CT: Yale University, 1966. I will discuss Murrin further in section three of this introduction, in regards to his hypothesised "feudal revival".

aristocracy consisted of the titled nobility, whereas in Virginia the aristocracy consisted of the most well-established gentry, themselves often descendants of English gentry families.[13] England had abolished unfree labour in the 1380 liberation of the serfs, but in Virginia unfree labour had expanded from indentured servitude to hereditary racial slavery. Finally, Virginia had much more widespread availability of land, although as I shall explain in chapter 3, monopolising control of westward expansion was an important aim of the aristocracy during the revolutionary period.

II - Why Feudalism?

Given that historians such as Wood and Hartz have consciously chosen not to use feudalism as an interpretive approach, it could reasonably be asked: why start now? More to the point, is there evidence that Jefferson perceived of a "feudal" issue as a substantive, as opposed to a rhetorical, problem? The occasions when he used the word suggest that he meant it as an analytical descriptor in the tradition of the ancient constitution school of English historical and legal thought. It also appears that, while by the end of his life he equated "feudal" with "aristocratic", at the time of the American Revolution itself he conceived of feudalism as a system rather than a particular social group.

Evolution of Usage

The earliest recorded use of the word "feudal" in Jefferson's hand comes in the Legal Commonplace Book that he started as a law student and maintained in earnest through the 1770s.[14] No less than forty-two entries in the book, dating from the early 1760s through 1776, reference his readings on feudal law. The readings concentrate on feudal property tenure, but some of the later entries expand in scope to include institutions such as the church, courts, and military. This indicates that Jefferson's earliest exposure to the concept of feudalism was as a holistic description of social and political organisation. His understanding was legal and analytical, not polemical or rhetorical.

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[13] For an illuminating account of the continuity between the English and Virginian gentry, see Peter Leslett, "The Gentry of Kent in 1640". *Cambridge Historical Journal*, 9 (1948): 148-174.

[14] Thomas Jefferson, *The Commonplace Book of Thomas Jefferson : A Repertory of His Ideas on Government.* Edited by Gilbert Chinard. Baltimore: Johns Hopkins Press, 1926.

The earliest usage of "feudal" as part of his own thinking appears to be in 1774, when, in the *Summary View of the Rights of British America*, Jefferson used the word "feudal" nine times in a single paragraph.[15] This paragraph contained a discussion of land tenures, comparing the supposedly free tenures of Saxon England with the feudal tenures instituted by the Normans. Here Jefferson used "feudal" to refer to the form of Continental feudalism practised in medieval Normandy, which included the legal tenure as well as the social obligations (typically military in nature) that the tenure created. By the end of this paragraph, Jefferson had introduced the concept of the royal prerogative. It was the prerogative, Jefferson argued, that provided the Crown with the authority for creating the feudal tenure in the first place. So it is clear that, by 1774, Jefferson had expanded his understanding of "feudal" to include not only tenures and institutions, but also social relationships and the constitutional construct of the prerogative.

Jefferson returned to the topic of feudalism in a correspondence with fellow Virginian Edmund Pendleton in August 1776, two months after Jefferson wrote his draft constitution for Virginia, which proposed to abolish feudal tenure and the royal prerogative, and two months before Jefferson took his seat in the Virginia Assembly, where he introduced legislation seeking to enact those provisions of his draft constitution that had not been adopted in the Virginia Convention's final version of the constitution.[16] The "feudal system", he wrote to Pendleton, had been enacted at the time of the Norman Conquest to institute a "military system of defence" which had "afterwards been made an engine of immense oppression". While feudalism's military formations were no longer in use, its "legal effects" upon society persisted. Therefore, Jefferson proposed that subsequent legislation should aim at "the restitution of the antient Saxon laws" that predated the Norman imposition of the feudal system. A return to "that wise and happy system of our [Saxon] ancestors" was the best foundation for the new Virginian republic.[17]

After concluding his service as a legislator in 1779, two terms as governor in 1781, and a term as a member of Congress in 1784, Jefferson went to Paris to serve as American minister to France. Living in France allowed Jefferson to observe a European feudal society first hand, and it hardened his opposition to the feudal system. His letters

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[15] "A Summary View of the Rights of British America", in TJ Papers, Vol. I, pp. 132-133.

[16] "The Virginia Constitution", in TJ Papers, Vol. I, pp. 329-386.

to correspondents in Virginia were laced with criticism of French feudalism, some of which was against the aristocracy of "kings, nobles, and priests", whom he denounced as "an abandoned confederacy against the happiness of the mass of people".[18] Yet other parts of Jefferson's criticism were against the feudal system itself, as when, in a letter to James Madison, he described an encounter with a peasant woman.[19] The woman, representative of France's large underclass, was poor because feudal tenures had locked up economic production in the hands of the landowning aristocracy. The tenure therefore had an impact on the entire system of social and economic relations, Jefferson maintained, and was not simply a problem of the aristocracy alone.

After returning from France and entering national politics, Jefferson continued to inveigh against "aristocracy" and "monarchy", while "feudal" dropped out of his nomenclature. He reintroduced the topic of feudalism in his retirement correspondence with John Adams. In a letter of October 1813, as part of a discussion of aristocracy, Jefferson made clear to Adams that he did not oppose aristocracy as a concept, but rather aristocracy in its feudal form. Jefferson accepted the Greek definition of aristocracy as rule by those of the greatest "virtue and talents", and even accepted that, at a time when "bodily powers" were the best mark of excellence, the feudal *noblesse d'epee* had been a natural aristocracy, but that since "the invention of gunpowder", physical strength was no longer a mark of virtue. The various forms of feudal aristocracy now formed an "artificial" social ordering, best replaced by a "natural aristocracy" of individuals with the "virtue and wisdom" necessary for civic leadership.[20] In his *Autobiography* of 1821, Jefferson referred back to his efforts of the 1770s as an attempt to "eradicate" the old, artificial aristocracy, in part by eliminating the "feudal and unnatural distinctions" in land tenure, by disestablishing the official church, and by creating an education system that would foster the natural aristocracy.[21]

Comparison to Extant Society

Much of this thesis is concerned, not just with Jefferson's thought, but also evaluating that thought within the context of society as it actually existed in Virginia in

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[17] "To Edmund Pendleton", 13 August 1776, in TJ Papers, Vol. I, pp. 491-494.
[18] "To George Wythe", 13 August 1786, in TJ Papers, Vol. X, p. 244.
[19] "To James Madison", 28 October 1785, in TJ Papers, Vol. VIII, pp. 681-683.
[20] "To John Adams", 28 October 1813, in TJ Ret. Papers, Vol. VI, pp. 562-567.
[21] Jefferson, *Autobiography*, pp. 57-78.

the 1770s. Without pre-empting the detailed analysis to come in subsequent chapters, I would like to pose a question and offer a preliminary answer: did Jefferson accurately identify some form of a "feudal system" within Virginia, informed by a system of land tenure that created "feudal and unnatural distinctions" in society at large? The answer to this appears to be a qualified yes.

In this respect, Jefferson's identification of the "legal effects" of the feudal system is important. He was not claiming that Virginia was a feudal society in the image of Norman England or the High Middle Ages in Europe. He openly acknowledged that the military aspects of feudalism no longer existed in England and never had in Virginia. Instead, he claimed that the land tenure of feudalism, and the non-military parts of the social organisation that resulted from it, had continued down the ages, undergoing reforms through statute, but never actually ceasing to exist. Claiming that England and Virginia were better societies for what had "hitherto [been] abolished of the feudal system", Jefferson now advocated for completing the process of feudal abolition.[22]

It is challenging to say precisely what Jefferson thought this feudal system was composed of in its entirety. The land tenure, the royal prerogative by which the tenure was granted, and the feudal law built up around both prerogative and tenure are the most obvious elements from the *Summary View*, and ones which he devoted substantial time and energy to reforming. It is clear that he included any secular aristocracy that was established by virtue of the land tenure. The Established Church, while not unique to a feudal society, also appears to have been included in this system, given its clerical aristocracy supported through a system of landed estates, the adoption of ecclesiastical law as part of the secular code, and the Virginian church's close relationship with the secular aristocracy, all of which Jefferson wrote of repeatedly in France and in his retirement. On the other hand, Jefferson did not seem to identify slavery as a form of unfree labour akin to serfdom or villeinage, nor plantations with the manorial political economy that characterised feudal England. While his opposition to slavery and his support for yeoman farming indicate that slavery and plantations may have been implicit parts of the feudal system, he did not label them as such.

[22] "To Edmund Pendleton", 13 August 1776, in TJ Papers, Vol. I, pp. 491-494.

Reception by Contemporaries

Jefferson's contemporaries were unconvinced by his views, differing with him not over the diagnosis of a feudal system but the prognosis of whether it was an issue urgently in need of attention. Edmund Pendleton was a member of Jefferson's committee for the Revisal of the Laws, as well as Speaker of the House, and it was in their August 1776 correspondence that Jefferson revealed his concern over feudalism. Pendleton's response to Jefferson's letter on feudal society may have been indicative of the views of other conservative members of the Virginia Assembly who resisted Jefferson's efforts. Even if not, it remains important, for Pendleton acted as Jefferson's chief opponent in the Assembly.

For Pendleton, the matter was one of degree. While accepting Jefferson's thesis that the legal aspects of feudalism remained in effect, he questioned whether this mattered without the concomitant military organisation, or even whether the feudal system might actually be put towards good use. It was "the slavish nature of the Feuds which made them oppressive to the tenant and inconsistent with freedom, and the establishment of a Military force independant [*sic*] of the legislature" that made feudalism in its original form so pernicious, Pendleton wrote. In contrast, "I am not able to discover disgrace to the tenant or injury to the Society from their holding of the commonwealth, upon the terms of paying a small certain annual sum disposeable [*sic*] for common benefit, by their own representatives: nor what this will retain of the old Feuds?"[23]

Pendleton's dissent was partly one over specifics - the socage tenure used in Virginia was non-military and still in use in England - but also one over perception of time. While Pendleton had high "esteem [for] the old Saxon Laws in General", he could not "suppose them wholly unalterable for the better after an experience of so many Centuries". It was better to update the feudal system rather than attempt to turn back the clock and reinstitute the Saxon system, as Jefferson proposed. Indeed, Pendleton saw in the feudal system the roots of Virginia's stability, writing to another correspondent that "the Feudal system had placed the legal title to the lands" within the royal prerogative, and that the territorial authority of the new Virginian government itself was therefore

[23] "From Edmund Pendleton", 26 August 1776, in TJ Papers, Vol. I, pp. 507-508.

derived from the prerogative powers that it had assumed from the Crown at independence.[24]

Rhetorical Usage

Given Jefferson's use of "feudal" as a legal term, and given its partial acceptance by Pendleton, it seems clear that Jefferson intended "feudal system" and "feudal and unnatural distinctions" to be substantive criticisms, not mere epithets for a form of social organisation that he did not like. Other factors become clear as well: his lifelong antipathy to prerogative and aristocracy were themselves aspects of his thought on the feudal system, rather than unconnected opinions. In addition, his pairing of "feudal" and "natural" as antithetical concepts had basis in legal theory. It would be unwise to mistake his use of either as only rhetorical.

As detailed thoroughly by Charles A. Miller, Jefferson used the word "natural" in an unsystematic but broadly consistent way, using it to refer to something as being "in contrast to socially determined tradition", in particular "the legacy of medieval science, the power of organized religion, and the feudal, class-based institutions of state and society."[25] Social formations could be evaluated according to their consistency with the tenets of natural law, an approach adopted contemporaneously by the writers of the Scottish Enlightenment whom Jefferson read as a student. Yet Jefferson was not as systematic as the Scottish literati, invoking nature, as Miller describes it, "always on behalf of a cause, never as part of a system, never in relation to other principles of natural law, and seldom in connection with any limits. He was far more a retailer or a consumer than a philosopher of nature."[26]

While the concepts of nature and natural law are essential companions to Jefferson's thinking on the feudal system, it appears that he used "feudal" much more consistently than Miller has portrayed his use of "natural". To begin with, Jefferson used it much less frequently, confining it to a few formative texts in the mid-1770s, although alluding to it by other words in many subsequent writings, as shown above. This greater consistency may partly be due to the absence of an exposition on natural law that is as clear and concise as Jefferson's discourse on the feudal system in the middle of the *Summary View*,

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[24] "To Joseph Jones", 10 February 1781, in EP Papers, Vol. I, pp. 328-338.

[25] Charles A. Miller, *Jefferson and Nature: An Interpretation*. Baltimore: Johns Hopkins University Press, 1988, p. 8.

or in his correspondence with Pendleton in 1776. Much of that correspondence has been lost, as Pendleton did not retain all of Jefferson's letters to him. What we do have indicates that while Jefferson was still not precise, he had a definite "feudal system" in mind, whereas he did not have a "natural system", holding nature instead as a vague ideal to work towards while the feudal system was a concrete arrangement of laws and institutions to be reformed.

Jefferson's purpose in his use of "feudal" thus seems clear, and he did not use the word loosely as an epithet or otherwise insincerely. At many points in the 1770s, Jefferson asserted that various aspects of the feudal system infringed natural law or natural right (the monarch's claim to the allegiance of émigrés was a violation of the natural right of expatriation, the established church a violation of the natural right of conscience, and so on). "Feudal" and "natural" were not used in a strictly binary sense, but the sense of Jefferson's writings is that he considered the Saxon system to have been one that was generally consistent with natural law, so that when the Saxon system was replaced by the Norman system, the resulting feudal society was unnatural. In this way, Jefferson's preferred "Whig versions of British history …. Served only to confirm, not to challenge, the lessons of nature."[27]

Aristocracy

Before closing this section, I should say a few words as to why I have chosen feudalism, as opposed to aristocracy, for my interpretation of Jefferson's legislation. This is especially important considering that aristocracy is the more familiar term in Jeffersonian scholarship.[28] For the purposes of this study, aristocracy is too limited a

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[26] Ibid., p. 183.

[27] Ibid., p. 5.

[28] It is noteworthy, however, that for all of its use in discussions of other topics, there is little focused discussion of aristocracy as its own topic. Shuffleton's *Bibliography* contains only a few references to aristocracy-focused entries in the Jefferson literature up until 1990; those references are almost exclusively regarding the sub-topic of "natural aristocracy". See Frank Shuffleton, *Thomas Jefferson: A Comprehensive, Annotated Bibliography of Writings About Him (1826-1980)*. New York & London: Garland Publishing, Inc., 1983; and *Thomas Jefferson, 1981-1990: An Annotated Bibliography*. New York & London: Garland Publishing, Inc., 1992. Subsequent scholarship, including the many recent survey volumes on Jefferson, do not contained dedicated, chapter-length discussions of Jefferson and aristocracy, nor does the term appears in the indices. The focused work on Jefferson and aristocracy appears to be limited to the works by Peter Onuf and others discussed below.

word, which, if used in a precise sense, refers to a very specific thing: a social group of upper-class people supported by favourable property arrangements, often but not always bearing titles of nobility. "Feudalism", on the other hand, is a more encompassing term that includes the royal prerogative and the constitutional system within which the aristocracy exists. Furthermore, "feudal system", a synonym for feudalism, was the term Jefferson himself used to describe Virginia during the 1770s. For this reason, "feudalism" is a better term than "aristocracy"; but since aristocracy is the word used by historians, the scholarship on Jefferson and aristocracy bears some examination.

While Jefferson made clear in his earliest writings that his concern was the "feudal system", by the 1790s and later he referred to "aristocracy", making "aristocrat" (along with "monocrat") his favourite epithet for political opponents. His use of the word softened later in life, though, after an exchange of letters with John Adams, in which he admitted that his opposition was really to the artificial aristocracies created by feudal land tenure and church establishment, not the "natural aristocracy" of the best and brightest whom he hoped would be promoted through the education system.[29] Jefferson's interest in aristocracy has attracted the notice of countless scholars who have mentioned aristocracy in passing. One historian in particular, Peter Onuf, has made it a centrepiece of his more recent work.

Onuf's work on aristocracy is most focused when discussing Jefferson's theory of generational sovereignty. After observing the feudal system in France, Jefferson wrote to James Madison that he believed feudal tenures, particularly entails, to be a violation of a natural order in which landowners had only a lifetime, "usufruct" right to their

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[29] See "To John Adams", 28 October 1812, in Cappon, Vol. II, pp. 387-392. Dumas Malone writes that Jefferson opposed "all the artificialities of aristocracy", and that "it did not take him long to discover that native ability and high character are the sole possession of no class". See Malone, *Jefferson the Virginian*. London: Eyre & Spottiswoode, 1948, p. xiv. More recently, Garrett Ward Sheldon has explained Jefferson's natural aristocracy in the form of a syllogism: "Man is naturally social, the social qualities are wisdom and virtue; hence, the most wise and good man is the best and most natural, or the natural aristocrat." See Sheldon, *The Political Philosophy of Thomas Jefferson*. Baltimore: Johns Hopkins University Press, 1994, pp. 79-80. A full analysis of the Jefferson-Adams debate on aristocracy may be found in Brian Steele, *Thomas Jefferson and American Nationhood*. Cambridge: University Press, 2012, pp. 141-157. Steele also discusses feudalism in the *Summary View* at pp. 29-31. My discussion of natural aristocracy may be found in the historiographic introduction to chapter 5, on pp. 215-217.

land.[30] This led Jefferson to a generational theory of politics in which different generations were as sovereign from each other in time as nations were in space.[31] According to Onuf, Jefferson believed that aristocracy blocked the natural transference of assets from generation to generation. "Under aristocracy," Onuf writes, "the rising generation [as a whole] could never hope to exercise its rightful authority as a generation, but individual children would at least come into their particular inheritances, unequal and unearned as they might be."[32]

Onuf's explanation of Jefferson's generational theory, that aristocracy allowed the "founders of great … families" to "attempt to rule from beyond the grave" is an attractive one, but was the generational theory actually about aristocracy?[33] At least one scholar, Herbert Sloan, has argued that it was about one entire generation, not just particular families, determining the general arrangements of another, putting emphasis on the discussion of national debt that formed the core of Jefferson's letter on the topic.[34] In light of these different emphases on aristocracy and indebtedness, a turn to the source material shows that an interpretation more expansive than any one issue is correct. Yes, Jefferson wrote that generational sovereignty concerned whether "the nation may change the descent of lands holden in tail", thereby establishing an aristocratic connection. But Jefferson went on to include "the church … hospitals, colleges, orders of chivalry, and otherwise … the charges and privileges attached on lands, including the *whole catalogue ecclesiastical and feudal* …. hereditary offices, authorities and jurisdictions … hereditary orders, distinctions and appellations … perpetual monopolies

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[30] "To James Madison", 6 Sept. 1789, in TJ Papers, Vol. XV, pp. 392-398.

[31] Onuf errs, though, by interpreting Jefferson as believing that the relation between two sovereign generations was that of the state of nature, and that therefore "the 'natural' relationship between the generations there was a state of war." Peter Onuf, *The Mind of Thomas Jefferson*. Charlottesville: University of Virginia Press, 2007, p. 215. The equation of the state of nature and the state of war is a Hobbesean interpretation, not a Lockean one. Onuf provides no evidence that Jefferson held a Hobbesean interpretation. Indeed, elsewhere Onuf discounts the idea, claiming that "Jefferson did not believe that a Hobbesian [sic] state of war was the natural, inevitable relation of distinct nations" in the state of nature. Peter Onuf, *Jefferson's Empire: The Language of American Nationhood*. Charlottesville: University of Virginia Press, 2000, p. 176.

[32] Onuf, *Mind of Jefferson*, p. 218.

[33] Ibid., p. 175.

[34] Herbert Sloan, "The Earth Belongs in Usufruct to the Living". In *Jeffersonian Legacies*. Edited by Peter Onuf. Charlottesville: University of Virginia Press, 1993, pp. 281-315. Sloan's chapter appears in a volume edited by Onuf, yet there is a curious lack of engagement with Sloan's ideas in Onuf's subsequent work.

in commerce, the arts and sciences; with a long train of et ceteras" [emphasis added]. It is possible to say that Jefferson was referring to aristocracy in this passage, but to do so is to simplify the richness of his description of what Sloan describes as "feudal privileges" and "feudal abuses".[35]

Aside from generational sovereignty, Onuf's other discussions of Jefferson and aristocracy focus more on aristocracy as a social than a legal institution. In *Jefferson's Empire*, Onuf argued that one of Jefferson's main concerns during the American Revolution was dismantling the Virginian aristocracy by ending feudal tenure in Virginia, particularly though his bills abolishing primogeniture and entail.[36] Onuf did not make feudal tenure the focus of his enquiry, however, choosing instead to emphasise how Jefferson thought American Indian men formed an "unnatural aristocracy" on the western frontier, as did the stockholders of land companies.[37] While there was some merit to the inclusion of the stockholders, the argument concerning the Indians involved redefining aristocracy to encompass Jefferson's description of American Indian warriors as "a standing army" living off of the labour of women.[38] In doing so, Onuf moved the focus from aristocracy as a social group grounded in land laws, as he had previously defined it in Virginia, to a wider definition that encompassed gender and labour relations that were not codified in law.

Returning to the topic of aristocracy in *The Mind of Jefferson*, Onuf again defined aristocracy as "the dominion of privileged families whose estates were preserved across

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[35] Ibid., pp. 286, 294. Likewise, Michael Grossberg, in his discussion of generational theory and Jefferson's reforms to inheritance law, refers to "artificial feudal hierarchy", not "aristocracy". Grossberg, "Citizens and Families: A Jeffersonian Vision of Domestic Relations and Generational Change". In *Thomas Jefferson and the Education of a Citizen*. Edited by James Gilreath. Washington, DC: Library of Congress, 1999, pp. 3-27, at p. 4.

[36] Onuf, *Jefferson's Empire*, p. 36.

[37] Ibid., pp. 23-33.

[38] Jefferson, quoted in Ibid., p. 32. Going through Onuf's footnotes, I am unable to verify that Jefferson actually referred to Indian men as aristocrats at any point; in all but one case, the references Onuf cites are to secondary works. Onuf does quote Jefferson referring to Indian warriors as a standing army, but that is a very different concept from an aristocracy. In republican thought, a standing army was a despotic alternative and threat to an aristocracy, which consisted of part-time landed warriors. See the discussion of standing armies and aristocracies in J.G.A. Pocock, "Machiavelli, Harrington and English Political Ideologies in the Eighteenth Century." *The William and Mary Quarterly* 22, no. 4 (1965): 549-583, at pp. 558-563. Without direct quotation of Jefferson referring to Indians as aristocrats, Onuf's interpretation is plausible but unproven.

the generations through the legal devices of primogeniture and entail".[39] Onuf quickly shifted from using "aristocracy" to refer to this specific group of landed Anglo-Virginians, however, and instead used it to refer to groups as diverse as populist politicians ("artful aristocrats") and American Indians ("frontier aristocrats").[40] Onuf's use of "aristocracy" was malleable, first using "aristocracy" in a legal, analytical sense and then later in a social, rhetorical sense, without clear boundaries between the two. While this shifting definition of aristocracy may perhaps reflect Jefferson's own evolving usage of the word over the course of his lifetime, it is less helpful for use in a study that focuses on legal reform in the moment of the 1770s.

Onuf is the most prominent investigator of Jefferson and aristocracy, but his work, while offering some promising leads, clearly considers aristocracy from a wide social, rather than narrow legal, approach. It also exaggerates the importance of aristocracy within Jefferson's theory of generational sovereignty and does not give proper treatment to feudal land tenure or the royal prerogative. Finally, as Merrill Peterson notes, the theory of generational sovereignty "grew out of the European situation, specifically the situation of France in 1789".[41] To impose Onuf's interpretation of generational sovereignty on Jefferson's work fifteen years earlier therefore risks anachronism, as Jefferson's thinking had not yet developed that far. The aim of this

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[39] Onuf, *Mind of Jefferson*, p. 169. In her important study of entails in Virginia, Holly Brewer makes her position unambiguous: "Entail and primogeniture were feudal institutions critical to the growth and perpetuation of aristocracy and slavery in the South." Holly Brewer, "Entailing Aristocracy in Colonial Virginia: 'Ancient Feudal Restraints' and Revolutionary Reform." *The William and Mary Quarterly* 54, no. 2 (1997): 307-346, at 311. I have two observations on this statement. First, Brewer treats entail and primogeniture as the foundations of aristocracy and slavery separately, but not necessarily of a larger system incorporating both. Second, she treats entail and primogeniture in a similarly compartmentalised fashion, at no point identifying them as part of a larger system of socage tenure.

[40] This is clearly inconsistent with the way in which Onuf formally defined "aristocracy" at the beginning of his chapter. Male American Indians assuredly did not benefit from a system of feudal land tenure. For "artful aristocrats" and "frontier aristocrats", see *Mind of Jefferson*, pp. 36, 220.

[41] Merrill Peterson, *Thomas Jefferson and the New Nation: A Biography*. Oxford: University Press, 1970, p. 383. Boyd et al., in their essay accompanying Jefferson's letter to Madison, also note that the generational theory was "irrelevant to the existing situation in America". While I agree with Onuf that actually it was relevant, Boyd et al. are correct in pointing out that it was an idea Jefferson conceived in response to the French condition, well after he wrote his Virginian reforms. Boyd et al., "The Earth Belongs in Usufruct to the Living", in TJ Papers, Vol. XV, p. 388.

thesis is to acknowledge Onuf's work on Jefferson and aristocracy, particularly the theory of generational sovereignty that Jefferson developed in France, while moving in a direction that places greater importance on law as a foundation for a feudal system that included, but was not limited to, aristocracy in Virginia in the 1770s.

III - Historiography

In this section I will define the terms feudalism, republicanism, and liberalism, while also providing some historiography on these ideas and on eighteenth-century Virginia and Jefferson's political and historical thought.

Feudalism: An Unexamined Legacy

As early as the publication of *The Liberal Tradition in America* in 1955, Louis Hartz identified "the feudal issue as one whose consideration in American history is long overdue."[42] Hartz defined feudalism narrowly, declaring that it "refers technically to the medieval era", and that "aspects of the decadent feudalism of the [late Middle Ages]", including "primogeniture, entail, and quitrents, were present in America even in the eighteenth century."[43] Having stated this, however, Hartz went on to minimise feudalism's actual importance to Americans, noting that colonists emigrating to British America had been motivated by a desire to escape the restrictions of feudalism and that feudalism had not actually been established in the New World. As a result, "the outstanding thing about the American effort of 1776 was bound to be, not the freedom to which it led, but the established feudal structure it did not have to destroy."[44]

The flaw in Hartz's thesis was his overly narrow definition of feudalism. While acknowledging that "wide variations take place" within European feudalism, Hartz dismissed the presence of feudalism in America by arguing that all that existed were "relics" such as primogeniture and entail, and that the absence was further proved because "the American 'aristocracy' could not, as Tocqueville pointed out, inspire either the 'love' or the 'hatred' that surrounded the ancient titled aristocracies of Europe."[45] By defining feudal institutions as "relics", Hartz assumed their insignificance without substantiating the claim, and led him to state tautologically that "it is the fact that feudal

[42] Hartz, *Liberal Tradition*, pp. 21-22.
[43] Ibid., p. 3.
[44] Ibid., p. 35.

relics such as primogeniture abolished by the American revolutionaries were indeed relics - which explains the nature of their abolition. And this fact ramifies outwards into every other phase of the revolutionary experience."[46] Of course, it was the abolition of primogeniture that made it a relic – it was an important part of Virginia property inheritance throughout the colonial period, and continued in private wills for a good time thereafter.[47]

The years following the publication of *The Liberal Tradition* saw the publication of two important works of feudalist scholarship. The first, J.G.A. Pocock's *The Ancient Constitution and the Feudal Law*, argued that feudalism was a deeply ingrained part of the English constitution and the common law, and that this was widely recognised by legal scholars during the seventeenth and eighteenth centuries.[48] Needless to say, this had attendant consequences for the colonial legal systems built on the English model. Had Hartz been able to take Pocock's findings into account, he might have reconsidered his blanket minimisation of feudalism's presence in the colonies. He would also have benefited from French historian Marc Bloch's definition of feudalism in his two-volume *Feudal Society*, translated from the French and published in the United States in 1961.[49] Bloch argued that feudalism was more comprehensive than a simple relationship between Crown and nobles characterised by land tenure in exchange for military service; instead, Bloch showed, feudalism involved all three estates of nobility, clergy, and commons, the relationships within and between each one affecting the others.

Pocock and Bloch, however, remained focused on Europe and did not address the feudal offshoots in the American colonies. Therefore, given the flaws in Hartz's approach, a truly focused interrogation of American feudalism was still unavailable and has remained so. Gordon Wood came very close to doing so in his comprehensive study of the transformation of American civil society in *The Radicalism of the American*

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[45] Ibid., p. 52.

[46] Ibid., p. 67.

[47] For a thorough study of property reform in Virginia, I have turned to Holly Brewer, "Entailing Aristocracy in Colonial Virginia: 'Ancient Feudal Restraints' and Revolutionary Reform"; and C. Ray Keim, "Primogeniture and Entail in Colonial Virginia." *The William and Mary Quarterly* 25, no. 4 (1968): 545-586. Brewer and Keim disagreed over the significance of feudal inheritance in Virginia but both accepted the reality of its widespread use.

[48] Pocock, *Ancient Constitution and the Feudal Law*, all.

[49] Bloch, *Feudal Society*, all.

Revolution.[50] The first hundred pages' of Wood's book were a study of colonial society, probing such issues as hierarchy, patriarchy, and patronage before the American Revolution. It could have been a major breakthrough in the study of feudalism in America, but it appears that Wood did not identify what he had found as "feudalism", choosing instead to fit his findings within the category of "monarchy".

It seems that the people of the eighteenth century were much more aware of their feudal surroundings than subsequent historians have been. The thinkers of the Scottish Enlightenment were often cited by Americans, particularly the jurist Henry Home, Lord Kames, and the philosopher Adam Smith. These writers devoted substantial parts of their treatises to feudalism - Kames to the development of feudal law and its shaping effect on social institutions and Smith to the development of the feudal system of agricultural production and its distorting effect on European economic development. In the American colonies as well, feudalism was recognised as a relevant issue in colonial society, prompting John Adams to pen *A Dissertation on the Canon and Feudal Law*, in which he characterised colonial disobedience as resistance to the introduction of feudalism into New England.[51] Adams did not think that feudalism already existed in Massachusetts, a colony founded by Puritans who were, amongst other things, eager to escape feudalism in England, but he identified the threat of feudalism as a prime mover of revolutionary sentiment and feared its spread from recently-conquered Quebec. James Wilson, an immigrant from Scotland, probed the complex web of feudal allegiance that bound the colonies to the mother island; and of course, Jefferson himself made "feudal and unnatural distinctions" in Virginia the centrepiece of his revolutionary reform programme.[52]

Jefferson's own definition of feudalism was quite broad and encompassed the whole of feudal society (much as did the later sociological analysis of Bloch), as well as certain powers of government. Legally, the common law had been corrupted by the Normans as well as by the late Saxon clergy. Socially, Jefferson saw feudalism as contained in the

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[50] Wood, *Radicalism*, all.

[51] Adams's treatise is comprehensively discussed in H. Trevor Colbourn, *The Lamp of Experience: Whig History and the Intellectual Origins of the American Revolution.* Liberty Fund Edition. Chapel Hill: University of North Carolina Press, 1965, pp. 100-128.

[52] Wilson is considered by Colbourn in *Lamp of Experience,* pp. 144-154. Colbourn discussed Jefferson in "Thomas Jefferson's Use of the Past" *The William and Mary Quarterly: Magazine of Early American History* (1958): 56-70. This was later reprinted in *Lamp of Experience*, pp. 193-225.

two aristocracies: the "artificial aristocracy" of the hereditary landed gentry and the "aristocracy of the clergy" of the Established Church, and in the subservient relationship of the great masses of the commons with this "Pseudo-aristocracy", or, as Jefferson pithily put it, the "Pseudalists".[53] It seems that, when Jefferson referred to aristocracy, he really meant the gentry, who held their lands by feudal tenure and monopolised control of civil and ecclesiastical offices; the role of the frocked clergy was a much more minor concern. In addition, this aristocracy was an "unnatural" social ordering by its commandeering of resources that ought properly to be held by the public or by private individuals for a duration limited to their natural lifespans.[54]

In addition to social aristocracy, Jefferson seems to have also identified feudalism as the corruption of governance through the use of prerogative powers by the executive and judicial branches. He singled out the English monarchy's assumption of properly legislative powers as examples of executive prerogative, and of judges' improper use of pardons and discretionary sentencing, such as the right of clergy, as judicial prerogative. Further complicating matters was the feudal system of allegiance and protection, still operative in 1776, and which bound common subjects to the Crown by birth rather than by oath or some other form of social contract. All of these facets of feudalism were subjects of Jefferson's historical criticism and legal reform in the 1770s.

Liberalism Phase I: Louis Hartz and Lockean Liberalism

The words "liberal" and "liberalism" are problematic ones to use in a discussion of the American Revolution, for while they can accurately be used to describe Jefferson's world view, liberalism as a political term did not become widespread in Anglophone usage until the nineteenth century. This does not mean that the words are useless in the context of 1770s America, however; for even if the term does not appear, it is essential. Jefferson's programme was predicated upon the concept of the rational individual as the atomistic element of political society - the hallmark of liberal political thought - and his legislative programme of individual political, civil, economic, and intellectual rights can

[53] "To John Adams", 28 October 1813, in TJ Ret. Papers, Vol. VI, pp. 562-567.

[54] During his years in France, Jefferson would develop a full theory of "usufruct" property rights and generational political realignment. For a fuller explanation by Boyd *et al*., see "The Earth Belongs in Usufruct to the Living", in TJ Papers, Vol. XV, pp. 384-391.

be collectively described only as "liberal" in a way that "republican", with its communitarianism, cannot.

Vaguer terms such as "liberty" and "freedom" are similarly inadequate for capturing the intellectual consistency of Jefferson's views - he was not committed to a loose conception of liberty, but had a highly developed liberal outlook that ensured consistency across his constitutional and legislative thought during this time period.[55] There is a philosophy of self underpinning Locke's liberalism, as in Jefferson's, that cannot be found in vaguer terms, nor in republican thought, with its focus on the community and things external to the individual such as property-holding and military service. Liberalism can be related to things external but is not defined by them - e.g., Locke's individual exists independently before his labour creates property, rather than property giving the individual his independent status.

Nor is it particularly useful to construct a new term when liberalism, so defined, will do nicely. When I use the words "liberal" and "liberalism" throughout this thesis, then, I do so in the strictly defined sense of liberal political theory as defined above. This liberal theory began with the social contractarians of the seventeenth century, Locke foremost among them, and was expanded and developed in other areas of human activity by thinkers of the Enlightenment in the eighteenth century, including English dissenters such as Joseph Priestley, Scottish literati such as Adam Smith, and Continental natural lawyers such as Jean Jacques Burlamaqui.

The existence of a long history of liberalism in American politics was the premise of Hartz's *The Liberal Tradition in America*. Responding in part to Progressive historians who denied the motivating role of ideas in American political history, Hartz countered that the United States had a political culture defined by liberalism. This "irrational Lockianism", as Hartz put it, was so deeply ingrained that Americans were not conscious of it, nor aware that without the countervailing influence of an equivalent to Sir Robert Filmer's absolute monarchism, the meaning of Lockean liberalism itself was changed, losing its original function as a rebuttal to the legacy of feudalism in early modern England.[56]

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[55] For a concise discussion of these differences, see Quentin Skinner, *Liberty Before Liberalism.* Cambridge: University Press, 1998. For a more cultural approach, see David Hackett Fischer, *Liberty and Freedom: A Visual History of America's Founding Ideas.* Oxford: University Press, 2005.

[56] Hartz, *Liberal Tradition*, p. 15.

Indeed, Hartz posited that while the southern slave-holding states formed the closest thing America had to European feudalism, it was not actually the same and therefore failed to exert the same "conservative", *ancien regime*-preserving influence as that of conservatism in Britain. "[The South] has been an alien child in a liberal family," Hartz wrote, "tortured and confused, driven to a fantasy life which, instead of disproving the power of Locke in America, portrays more poignantly than anything else the tyranny he has had."[57] In this, Hartz understated the case for the South's feudalism; as I shall show throughout this thesis, the legal structure of feudalism in Virginia was strong even if the social norms associated with feudalism were either dormant or adapted to the needs of the gentry, who despite their lack of noble titles were perfectly able and willing to assume the role of aristocrats.

Despite his claim for feudalism's irrelevance, Hartz's scholarship contained the seeds of a "feudal revival" in the study of the colonies. A decade after writing *The Liberal Tradition*, Hartz proposed that colonial societies were "fragments" of European feudal, liberal, and radical social archetypes, arguing that "when a part of a European nation is detached from the whole of it, and hurled outward onto new soil, it loses the stimulus towards change that the whole provides. It lapses into a kind of immobility."[58] These static societies, embodying the archetype of a nation in a particular point in time, were "unrecognizable in European terms". Therefore, a "feudal fragment" such as French Canada would have feudal traits without being subject to the same reformist impulses as the original feudal society in Europe, and a "liberal fragment", such as the future United States, would have a national identity confined within liberalism's intellectual boundaries. "A part detaches itself from the whole," Hartz explained, "the whole fails to renew itself, and the part develops without inhibition."[59]

So Hartz proposed that feudal societies could exist in colonial settings, but denied that any of the American colonies had been one of these feudal fragments. The proposed "feudal revival" came a few years later, in an essay by Rowland Berthoff and John Murrin. Murrin's interpretation reflected his "Anglicisation" thesis, which held that the colonies were becoming more similar to Old World society as they developed, while

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[57] Ibid., p. 8.

[58] Louis Hartz, *The Founding of New Societies: Studies in the History of the United States, Latin America, South Africa, Canada, and Australia*. New York: Harcourt, Brace& World, Inc., 1964, pp. 3-4.

[59] Ibid., p. 9.

Berthoff argued for a "conservative" reading of American history that emphasised low levels of social mobility during the colonial era, relative to mobility in subsequent centuries, although with greater individual equality than in Europe.[60] Rebutting Hartz's declaration of American liberalism, Berthoff and Murrin hypothesised that there was a "feudal revival" in British America between the granting of the proprietary colonies during the Stuart Restoration and the legislation of the colonial crisis.

Berthoff and Murrin specifically disagreed with what they characterised as Hartz's assessment that "feudalism was too anachronistic to survive in the free air of a new world." Instead, they argued that seventeenth-century America was "too primitive" to sustain feudal institutions, but by the late eighteenth century the colonies could sustain the "differentiation of function" required for a feudal society.[61] The maturation of the colonies in the eighteenth century made the feudal charters and land patents that established the colonies "incredibly lucrative", and feudal forms were revitalised for the "single-mindedly modern purposes" of turning a profit.[62] Berthoff and Murrin argued that to "reject the notion of feudalism in America on the grounds that no one seriously intended to resurrect the Middle Ages" was to "miss the point", for on "both sides of the Atlantic the revival stripped feudal relationships out of their original social context and seized what surviving obligations could be enforced for the income they might produce."[63] By the 1760s, many colonial proprietors enjoyed rent incomes equivalent to those of the English nobility. It differed from "mere land speculation" in its reliance upon feudal custom and the imposition of duties upon old settled areas as well as the frontier.[64]

Taken hand in hand, Hartz's fragment thesis and Berthoff's and Murrin's revival thesis lay the groundwork for further study of American feudalism, a study that will be conducted in the shadow of American liberalism. The fragment thesis shows that the exportation of a feudal system into a colonial environment was possible, and the revival

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[60] Murrin, *Anglicizing an American Colony*. Rowland Berthoff, "The American Social Order: A Conservative Hypothesis." *The American Historical Review* 65, no. 3 (1960): 495-514.

[61] Rowland Berthoff and John M. Murrin. "Feudalism, Communalism, and the Yeoman Freeholder: The American Revolution Considered As a Social Accident." In *Essays on the American Revolution.* Edited by Stephen G. Kurtz and James H. Hutson. Chapel Hill: University of North Carolina Press, 1973, pp. 264-265.

[62] Ibid., p. 266.

[63] Ibid., p. 267.

thesis shows how feudal forms could be adapted to capitalist ends without becoming liberal. This thesis will largely be a demonstration that Virginia was a feudal fragment, and that the adaptation of feudal forms to support the emergence of Virginia's gentry aristocracy can best be understood in the context of the wider feudal revival.

The Republican Revisionists

Beginning in the late 1950s, historians began to move towards what Robert Shalhope has termed a "republican synthesis" of liberalism and republicanism.[65] Around the same time as Hartz was deeming America Lockean, Caroline Robbins was completing her study *The Eighteenth-Century Commonwealthman*, in which she traced the evolution of a core set of republican political ideas from the Puritan Revolution through the American Revolution.[66] American revolutionaries, including Jefferson, participated in a single tradition with their English cousins, Robbins argued, and were connected to that tradition via the writings of late seventeenth- and early eighteenth-century English commonwealthmen such as Robert Molesworth, Thomas Gordon, and John Trenchard.

Following the direction in which Robbins had pointed, Bernard Bailyn expanded the study by focusing more closely on the American pamphlets written during the colonial crisis leading up to the revolution. His research culminated in his study *The Ideological Origins of the American Revolution*, in which he found that revolutionary politics, while complex and incorporating multiple influences, had a strong republican tradition bequeathed by the commonwealthmen.[67] Bailyn characterised the commonwealth discourse as being a debate over power and liberty - how much and what kinds of power the state could exercise without threatening the liberties of the governed.

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[64] Ibid., p. 272.

[65] Robert E. Shalhope, "Toward a Republican Synthesis: The Emergence of An Understanding of Republicanism in American Historiography." *The William and Mary Quarterly* 29, no. 1 (1972): 49-80; Shalhope, "Republicanism and Early American Historiography." *The William and Mary Quarterly* 39, no. 2 (1982): 334-356; and Shalhope, "In Search of the Elusive Republic." *Reviews in American History* 19, no. 4 (1991): 468-473.

[66] Caroline Robbins, *The Eighteenth-Century Commonwealthman.* Cambridge, MA: Harvard University Press, 1959.

[67] Bailyn, *The Ideological Origins of the American Revolution*, all.

A full republican revision was achieved by Gordon Wood in 1969 in his *The Creation of the American Republic*.[68] While Bailyn had characterised republicanism as a constitutional relationship between ruler and ruled, Wood expanded that analysis to include examining republicanism as an ethos. This ethos primarily embraced virtue as the organising principle of a citizen's life, one that the republic itself was expected to promote. The revolution was an attempt "to realize the traditional Commonwealth ideal of a corporate society, in which the common good would be the only objective of government."[69] This ideal was "refracted" through the writings of Renaissance and Commonwealth translators of classical texts, presenting a "highly selective" interpretation of republicanism in which the "history of antiquity thus became a kind of laboratory in which autopsies of the dead republics would lead to a science of social sickness and health matching the science of the natural world."[70]

Integrating the Italian Renaissance, English Commonwealth, and American Revolutionary interpretations into a single republican discourse was J.G.A. Pocock's goal several years later when he produced *The Machiavellian Moment*.[71] Pocock described a "Machiavellian moment" as the point in time at which a republic "was seen as confronting its old temporal finitude, as attempting to remain morally and politically stable" amidst change.[72] In many respects, *The Machiavellian Moment* was positioned after Wood's *The Creation*. It was published six years later, and whereas Wood had focused on the role of virtue at the moment of a republic's creation, Pocock focused on fortune and corruption as a republic aged and declined. Pocock placed emphasis on the role of James Harrington, who, he says, "brought about a synthesis of civic humanist thought with English social and political awareness", in particular by integrating "Machiavelli's theory of arms with a common-law understanding of the importance of freehold property."[73]

Strongly present in both Wood's and Pocock's accounts of republicanism was the strength of its communitarian, as opposed to libertarian, imperatives. Wood went so far as to declare that the "sacrifice of individual interests to the greater good of the whole

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[68] Wood, *The Creation of the American Republic*, all.
[69] Ibid., p. 54.
[70] Ibid., pp. 50-52.
[71] Pocock, *The Machiavellian Moment*, all.
[72] Ibid., p. viii.
[73] Ibid., p. viii.

formed the essence of republicanism and comprehended for Americans the idealistic goal of their Revolution."[74] Important concepts such as duty and obligation, also found in feudalism, were recast as part of republicanism. Liberty framed in a republican context, meanwhile, was not an aspect of the rational individualism characteristic of liberalism. It was framed specifically as an issue of constitutionalism, and often involved collective rights as well as individual ones. Accordingly, Shalhope characterises Bailyn's interpretation as "libertarian" rather than liberal, keeping the focus on constitutional process rather than a theory of individual rights.

Liberalism Phase II: Joyce Appleby and the Republican Synthesis

While many historians, including Bailyn, have been willing to accept the existence of Lockeanism in America, they have not been as eager to use "liberalism" as a synonym. After Hartz, historians avoided the word as such until Joyce Appleby reintroduced it to describe Jeffersonian republicanism in her 1976 article "Liberalism and the American Revolution".[75] Appleby criticised the republican revision for being "a passive complex of concepts unable to move men by itself …. Examining the content of the revolutionary mind does not relieve the historian of the responsibility for explaining what compelled belief, what triggered reactions, what stirred passions, and what persuaded the colonists of the truth of their interpretation of events." Appleby concluded that the only social tension within liberalism was "the explicit and unwarranted intrusion of authority upon individual freedom."[76] It was a series of such intrusions during the colonial crisis that accounted for the American Revolution.

These intrusions were primarily economic, at least to begin with, and Appleby's economic interpretation reads like an updated version of the property-centric Lockean ethic found in Hartz; and building upon Hartz, she articulated a theory of liberty in rebuttal to that of the republican revisionists. In *Capitalism and a New Social Order*, Appleby identified three modes of liberty, the first of which, group liberty, was a relic of feudal corporatism that was still embodied in modern struggles to protect communal

[74] Wood, *Creation*, p. 53.

[75] Joyce Appleby, "Liberalism and the American Revolution." *New England Quarterly* 49, no. 1 (1976): 3-26.

[76] Ibid., pp. 5-6.

liberties such as "the rights of Englishmen".[77] The second, republican liberty, "pertained to the public realm, not the private" and was part of citizenship. The third mode, personal liberty, was entirely private and was "bounded only by such limits as are necessary if others are to enjoy the same extensive personal freedom."[78]

While Appleby came to a liberal interpretation through her reading of economic history, the liberal thesis was broadened in the 1980s by John P. Diggins and Isaac Kramnick.[79] Diggins pointed out that the "social and economic implications of the liberal tradition have been examined almost to the exclusion of its moral content and even its psychological depth." Diggins' most important insight was in noticing that liberalism and Calvinism had tangled roots, and that the liberal ethic was, in part, a Calvinist ethic. "In studying American liberalism, most historians have focused almost solely on political ideas and have therefore slighted the religious convictions that often undergirded them," Diggins claimed, "especially the Calvinist convictions that Locke himself held: resistance to tyranny, original sin, and the corruptibility of man, labor and the 'calling' as the means to salvation, and the problem of man's infinite and insatiable desires, which compel him to be in 'constant pursuit' of happiness."[80]

Kramnick returned to the economic interpretation, arguing that while "republicanism is historically an ideology of leisure …. Liberalism, at its origin [in Locke], is an ideology of work."[81] This Protestant-liberal work ethic was the underpinning of a "social order of competitive individualism" in which "a society of achievement" accepted "social mobility [as the] rightful reward for ingenious people of talent and hard work."[82] Such a competitive society required equality of opportunity, or at least the appearance of equality of opportunity, to maintain its moral viability - but therein lay liberalism's and republicanism's fundamental incompatibility. "Equality of opportunity presumes a non-cooperative vision of society," Kramnick argued. "It

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[77] Joyce Appleby, *Capitalism and a New Social Order: The Republican Vision of the 1790s.* New York: University Press, 1984.

[78] Ibid., pp. 15-16.

[79] John P. Diggins, *The Lost Soul of American Politics: Virtue, Self-interest, and the Foundations of Liberalism.* University of Chicago Press, 1986; and Isaac Kramnick, *Republicanism and Bourgeois Radicalism: Political Ideology in Late Eighteenth-Century England and America.* Ithaca, NY: Cornell University Press, 1990.

[80] Diggins, *Lost Soul*, p. 7. Diggins refers to John Dunn, *The Political Thought of John Locke.* Cambridge: University Press, 1969, pp. 165-199.

[81] Kramnick, *Republicanism and Bourgeois Radicalism*, p. 1.

[82] Ibid., p. 3.

encompasses no ideal of community or quest for the common good. Individuals compete on an equal footing, and as in any race, some win, others lose."[83]

Like Diggins, Kramnick noted the importance of Protestantism in providing the assumptions behind liberalism, but declined to follow up further on Diggins' insights, although he did acknowledge Appleby, Diggins, and himself as a triumvirate of liberals, at least in the eyes of opposing republicans such as Wood, Pocock, and Bailyn.[84] He also noted that the liberal ideas that began with Locke had been developed by further generations of liberal thinkers such as Joseph Priestley and other Dissenting Protestants during the eighteenth century.[85] This suggests that there is not a big enough difference between Lockeanism and liberalism to justify the use of one term to the exclusion of the other.

The distinction between labels may break down even further. By emphasising Locke's Protestantism, Diggins and Kramnick achieved one intended and one unintended consequence. As was their intent, they introduced a moral component into liberalism. What was not their intent was that by linking Calvinism and liberalism, their interpretations have the potential to unite liberalism and republicanism at their origin point.[86] The original commonwealthmen of seventeenth-century England were Calvinist Protestants, and they too embraced ideas such as yeoman property ownership and liberty of conscience, which became hallmarks of liberalism. If eighteenth century liberalism and republicanism could find such common ground, were they in fact distinct ideologies, or were they interpretations of a single ideology coming out of Calvinist England in the mid-1600s?

Without following that line of reasoning exactly, subsequent scholarship has largely reconciled the liberal and republican viewpoints. In *The Spirit of Modern Republicanism*, Thomas L. Pangle argued that the entire liberal-republican divide was

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[83] Ibid., p. 15.

[84] Ibid., pp. 35-40.

[85] Ibid., pp. 11-13.

[86] This attracted the notice of Daniel T. Rodgers in his survey of the liberal-republican dispute, but thus far I am not aware of it having been taken further. See Daniel T. Rodgers, "Republicanism: The Career of a Concept". *The Journal of American History* 79, no. 1 (1992): 11-38, at p. 23. Rodgers is highly critical of the "republican paradigm" initiated by Bailyn, Wood, and Pocock, arguing that the fashionableness of the label led to it being stretched to meaninglessness in subsequent historiography.

the result of a misunderstanding by Pocock.[87] Pangle hit Pocock on several fronts, remarking that "one cannot avoid being struck by the ignorance" of Pocock and his historiographical followers towards the foundation texts of republicanism, and arguing that Pocock had privileged Aristotle's *Politics* over all other competing versions of classical republicanism. Pangle also accused Pocock of emphasising the close study of language over the larger messages of the texts in a manner that did not do justice to the introspective reading of the American Founders, who "read and studied with a passion, a need, and hence a seriousness, that is lacking in our contemporary scholars."[88]

Furthermore, Pangle argued, Machiavelli and Locke were not opposed thinkers in the way that Pocock needed them to be for his oppositional interpretation of republicanism and liberalism to work. Pangle noted that Machiavelli's *The Prince* ends, and the epigraph to Locke's *Second Treatise* begins, with the same passage from Livy on martial virtue. This indicates "kinship" between the two works, and that "Locke thus signals that the *Two Treatises* take up where Machiavelli's *The Prince* left off."[89] Pangle's illustration is tantalising, but an epigraph is not part of an argument, not did Pangle provide a citation for which edition of the *Second Treatise* the epigraph is from, which raises questions as to whether or not its inclusion was Locke's doing or someone else's.[90] What is clear, though, is that Pangle's larger point about the diversity of opinion within the "republican" tradition was well founded, and that this includes the existence of republican thought that can also be identified as "liberal".

While still respected, the hegemonic republican thesis of Pocock has largely been superseded since the counter-revolution of Appleby, Kramnick, Diggins, and Pangle in the 1980s, and a "republican synthesis", in which liberalism and republicanism are intertwined, is now accepted. The question now is what balances were struck between individualism and communalism in political thought and in legislation. Especially as regards Jefferson and the Virginians, this involves understanding their thought as a synthesis of various influences including liberalism and republicanism, not a binary system featuring Locke (or Machiavelli) against everything else.

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[87] Thomas L. Pangle, *The Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosophy of Locke.* Chicago: University Press, 1988.

[88] Ibid., p. 29.

[89] Ibid., p. 30.

[90] I have attempted to follow up on Pangle's claim by consulting early copies of Locke's *Treatise*, but without a citation I have been unable to verify it.

Virginia at the Revolution

This study of Virginia is largely made possible by the wealth of secondary literature that already exists on the topic. When the Virginia Company was taken over by the Crown in 1626, the new royal authorities in the colony set up governing institutions such as county courts, church parishes, and a privy council in imitation of their analogues in England. Likewise, the Virginia colony adopted England's common law and copied many of its statutes for colonial usage. The process of the assimilation of English governance into the colonial setting in the seventeenth century has been extensively documented and analyzed by Warren M. Billings, who goes so far as to label Virginia's assembly as a "little parliament".[91] Billings' work has been powerfully supplemented by James Horn's *Adapting to a New World*, a volume focused specifically on the Englishness of the adapted institutions.[92] These and similar findings have been further developed by Jack P. Greene, who has made the same institutions his focus, but in the eighteenth century, and found in the development of the southern colonial assemblies a political culture in which the assemblies actively contested royal governors for power in each colony, their members eventually going on to lead the resistance to British rule.[93]

With the development of Virginia's governing institutions came the development of a governing class, and the general consensus amongst decades of historians including Rhys Isaac, Robert and Katherine Brown, Charles Sydnor, Thomas Wertenbaker, and

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[91] See Warren M. Billings, "The Growth of Political Institutions in Virginia, 1634 to 1676." *The William and Mary Quarterly* 31, no. 2 (1974); Billings, *A Little Parliament: The Virginia General Assembly in the Seventeenth Century.* Richmond: Library of Virginia, 2004; and Billings, *The Old Dominion in the Seventeenth Century: A Documentary History of Virginia, 1606-1700.* Revised edition. Chapel Hill: University of North Carolina Press, 2007.

[92] James Horn, *Adapting to a New World: English Society in the Seventeenth-century Chesapeake.* Chapel Hill: University of North Carolina Press, 1996.

[93] Jack P. Greene, "Foundations of Political Power in the Virginia House of Burgesses, 1720-1776." *The William and Mary Quarterly* 16, no. 4 (1959): 485-506; Greene, "The Role of the Lower Houses of Assembly in Eighteenth-Century Politics." *The Journal of Southern History* 27, no. 4 (1961): 451-474; Greene, *The Quest for Power: The Lower Houses of Assembly in the Southern Royal Colonies, 1689-1776.* Chapel Hill: University of North Carolina Press, 1963; Greene, *Peripheries and Center: Constitutional Development in the Extended Polities of the British Empire and the United States, 1607-1788.* Athens: The University of Georgia Press, 1986; and Greene, *Pursuits of Happiness: The Social Development of Early Modern British Colonies and the Formation of American Culture.* Chapel Hill: University of North Carolina Press, 1988.

Louis B. Wright is that Virginia was at least a partially formed aristocratic society by the time of the American Revolution.[94] This budding aristocracy was kept in power via feudal tenure laws that preserved estates intact from generation to generation, allowing the formation of an hereditary ruling class.[95] In addition to their control of land, the aristocracy's vast holdings in black slaves put further resources at their disposal to maintain economic dominance.[96] In power, this ruling class exploited the coercive power of the state to shape society for its own benefit. As Gordon Wood showed in *The Radicalism of the American Revolution*, the entire social order in Virginia was built

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[94] Rhys Isaac, *The Transformation of Virginia.* Chapel Hill: University of North Carolina Press, 1982; Robert E. and Katherine Brown. *Virginia, 1705-1786: Democracy or Aristocracy?* Easting Lansing: Michigan State University Press, 1964; Charles S. Sydnor, *Gentlemen Freeholders: Political Practices in Washington's Virginia.* The University of North Carolina Press, 1952; Sydnor, "Virginia: A Semiaristocratic Political System." In *Politics and Society in Colonial America: Democracy or Deference?* Edited by Michael G. Kammen. USA: Holt, Rinehart and Winston, Inc., 1967; Thomas J. Wertenbaker, *Patrician and Plebeian in Virginia.* New York, 1959; and Louis B. Wright, *First Gentlemen of Virginia.* Charlottesville: University of Virginia Press, 1982.

[95] See Richard B. Morris, "Primogeniture and Entailed Estates in America." *Columbia Law Review* 27, no. 1 (1927); Keim, "Primogeniture and Entail in Colonial Virginia."; Stanley N. Katz, "Republicanism and the Law of Inheritance in the American Revolutionary Era." *Michigan Law Review* 76, no. 1 (1977): 1-29; Lee J. Alston and Morton Owen Schapiro, "Inheritance Laws Across Colonies: Causes and Consequences." *The Journal of Economic History* 44, no. 2 (1984): 277-287; Carole Shammas, "English Inheritance Law and Its Transfer to the Colonies." *The American Journal of Legal History* 31, no. 2 (1987): 145-163; John V. Orth, "After the Revolution: 'Reform' of the Law of Inheritance." *Law and History Review* 10, no. 1 (1992): 33-44; Holly Brewer, "Entailing Aristocracy in Colonial Virginia: "Ancient Feudal Restraints" and Revolutionary Reform."; J.F. Hart, "Less Proportion of Idle Proprietors: Madison, Property Rights, and the Abolition of Fee Tail." *Washington & Lee Law Review* 58 (2001): 167-194; and Claire Priest, "Creating An American Property Law: Alienability and Its Limits in American History." *Harvard Law Review* 120 (2006): 385-459.

[96] See Oscar and Mary F. Handlin. "Origins of the Southern Labor System." *The William and Mary Quarterly: A Magazine of Early American History* (1950): 199-222; Winthrop K. Jordan, *White Over Black: American Attitudes Toward the Negro, 1550-1812.* Chapel Hill: University of North Carolina Press, 1968; Robert E. Shalhope, "Race, Class, Slavery, and the Antebellum Southern Mind." *The Journal of Southern History* 37, no. 4 (1971): 557-574; Edmund S. Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia.* New York: W.W. Norton & Company, 1975; David Brion Davis, *The Problem of Slavery in the Age of Revolution, 1770-1823.* Ithaca: Cornell University Press, 1975; Philip J. Schwarz, *Slave Laws in Virginia.* Athens: University of Georgia Press, 1996; *Slavery & the Law.* Edited by Paul Finkelman. Madison, WI: Madison House, 1997; and Anthony S. Parent, *Foul Means: The Formation of a Slave Society in Virginia, 1660-1740.* Chapel Hill: University of North Carolina Press, 2003.

around a culture of patriarchy and deference. A threat to the aristocracy became a threat to the constitution of society as well.

This rigid ordering of society extended from civil government to ecclesiastic government as well. John K. Nelson's *A Blessed Company* emphasises the strong role of the church parish in Virginian life, including its complementary responsibilities and the identical membership rolls of the parish vestries and the county courts.[97] Like the county courts, the parishes had been largely copied from English models. Nelson wrote in response to other historians such as James Horn, W.M. Gewehr, and Rhys Isaac who have emphasised the challenge that Dissenters posed to the Established Church's control during and after the Great Awakening.[98] More recently, John Ragosta and J.L. Spangler have emphasised the agency of the Dissenters and tracked how their rise, and the successful Disestablishment of the Church of England, were accomplished amidst the aristocracy's need for support during the War of Independence.[99]

Jefferson as a Reformer

Jefferson's role as a reformer of Virginia's aristocratic society has attracted recurrent attention from biographers and historians, but interestingly this attention has been either cursory, in the case of his biographers, or episodic, in the case of historians, and sometimes it has been both. Generally, Jefferson's biographers have given his reforms, and in particular the Revisal of the Laws which Jefferson oversaw from 1777 to 1779, in a manner that mentions the key aspects of his reforms but go into little or no detail about the content of the reforms nor how they fit together as a coherent legislative program. Historians of Jefferson and of "Jeffersonianism" have given quite particular attention to the details of individual pieces of his reforms, especially the

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[97] John K. Nelson, *A Blessed Company: Parishes, Parsons, and Parishioners in Anglican Virginia, 1690-1776.* Chapel Hill: The University of North Carolina Press, 2001.

[98] Horn, *Adapting to a New World: English Society in the Seventeenth-century Chesapeake;* W.M. Gewehr, *The Great Awakening in Virginia, 1740-1790.* Duke University Press, 1930; Rhys Isaac, "Religion and Authority: Problems of the Anglican Establishment in Virginia in the Era of the Great Awakening and the Parsons' Cause." *The William and Mary Quarterly* 30, no. 1 (1973): 4-36; and Isaac, *The Transformation of Virginia.*

[99] John A. Ragosta, *Wellspring of Liberty: How Virginia's Religious Dissenters Helped Win the American Revolution & Secured Religious Liberty.* Oxford: University Press, 2010; and Jewel L. Spangler, *Virginians Reborn: Anglican Monopoly, Evangelical Dissent, and the*

property reforms and the Statute for Religious Freedom, but have been less concerned with contextualising them within the whole program. This is all the more perplexing given that Jefferson designed his statutes to complement one another, and provided a lengthy explanation of them in his *Autobiography*.

Given that Jefferson was one of the most out-spoken critics of feudalism in revolutionary America, and that he was perhaps alone in perceiving the depths to which it had permeated Virginian society in particular, it was inevitable that Louis Hartz would single Jefferson out in *The Liberal Tradition*, and that he would do so not only to level criticism but to express mockery. Attempting to identify Jefferson's reforms with the anti-feudalism of European revolutionaries "makes the remarkable success of the movement practically unintelligible", Hartz wrote, going on to label Jefferson's argument against primogeniture "absurd, and in other societies at other times … it would have generated considerable laughter".[100] Like so many of his other judgments, Hartz's assessment of Jefferson's legislation is highly questionable. Hartz argues that the fact that Jefferson's opponents "went under with scarcely a blow" proves the emptiness of the reforms.[101] On the contrary, given that Hartz gives the date of Jefferson's reforms as 1785 rather than 1776 or 1777, his analysis seems to overlook the decade of opposition Jefferson received to many of his proposals.

Jefferson's biographers have been less critical but not much more willing to probe deeply into the reforms. Jefferson's three-year turn as a revolutionary legislator garnered some attention from Gilbert Chinard, Dumas Malone and Merrill Peterson, but none made it their focus.[102] Chinard was aware of the various individual bills that were of importance to Jefferson, but did not connect them all in a meaningful way in the short amount of space he devoted to them.[103] Malone generally recounted the content of Jefferson's draft constitution and subsequent legislation in four short chapters, but his intent seems to simply have been to bridge the time between Jefferson's Congressional service and his governorship as quickly as possible, without going into the detail or

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Rise of the Baptists in the Late Eighteenth Century. Charlottesville: University of Virginia Press, 2008.

[100] Hartz, *Liberal Tradition*, pp. 68-72.

[101] Ibid., p. 68.

[102] Gilbert Chinard, *Thomas Jefferson: The Apostle of Americanism.* Boston: Little, Brown and Co., 1933; Dumas Malone, *Jefferson and His Time: Jefferson the Virginian*; and Merrill Peterson, *Thomas Jefferson & the New Nation: A Biography*.

[103] Chinard, *Apostle of Americanism*, p. 90, 93-107.

analysis he reserved for other major episodes in Jefferson's life.[104] Malone's assessment allowed that Jefferson "may have exaggerated the effects" of property reform, and that his reforms, while incomplete for the task at hand, "did remove legal vestiges of Old World aristocracy".[105] Peterson offered the best interpretation, correctly identifying Locke as an opponent of feudalism and the legislation as a corollary to Jefferson's draft constitution, but his schematic treatment of the legislation itself does not indicate that he fully comprehended why they were important or how they all fit together.[106]

Historians of Jefferson have fared better than Hartz or the biographers. Generally, historians who have studied a particular aspect of Jefferson's intellectual life - say, his political philosophy, or his ethics and moral philosophy - have discussed at least one of his signature reforms in the course of their studies.[107] The two best recent studies of relevance to understanding Jefferson's reforms are Garrett Ward Sheldon's *The Political Philosophy of Thomas Jefferson* and Luigi Marco Bassani's *Liberty, State, and Union: The Political Theory of Thomas Jefferson*.[108] The great value of both works is that they both properly contextualise Jefferson now that the liberal-republican dispute has been

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[104] Malone, *Jefferson the Virginian*, pp. 235-285.

[105] Ibid., p. 254.

[106] Peterson, *New Nation*, pp. 97-165.

[107] On political thought, see Henry Steele Commager, *Jefferson, Nationalism, and the Enlightenment.* New York: George Braziller, 1975; Robert E. Shalhope, "Thomas Jefferson's Republicanism and Antebellum Southern Thought." *The Journal of Southern History* 42, no. 4 (1976): 529-556; Douglas L. Wilson, "The American Agricola: Jefferson's Agrarianism and the Classical Tradition." *South Atlantic Quarterly* 80 (1981): 339-54; David W. Carrithers, "Montesquieu, Jefferson and the Fundamentals of Eighteenth-century Republican Theory." *French-American Review* 6, no. 2 (1982): 160-188; Joyce Appleby, "What Is Still American in the Political Philosophy of Thomas Jefferson?" *The William and Mary Quarterly* 39, no. 2 (1982): 287-309; Richard K. Matthews, *The Radical Politics of Thomas Jefferson: A Revisionist View.* Lawrence, KS: University of Kansas Press, 1984. On ethics and moral philosophy, see Adrienne Koch, *The Philosophy of Thomas Jefferson.* New York: Columbia University Press, 1943; Karl Lehmann, *Thomas Jefferson, American Humanist.* Chicago: University of Chicago Press, 1965; Gary Wills, *Inventing America: Jefferson's Declaration of Independence.* Doubleday Books, 1978; Ronald Hamowy, "Jefferson and the Scottish Enlightenment: A Critique of Garry Wills's Inventing America: Jefferson's Declaration of Independence." *The William and Mary Quarterly* 36, no. 4 (1979): 503-523; Jean M. Yarbrough, *American Virtues : Thomas Jefferson on the Character of a Free People.* Lawrence, Kan.: University Press of Kansas, 1998; and James L. Golden and Alan L. Golden. *Thomas Jefferson and the Rhetoric of Virtue.* New York: Rowman & Littlefield Publishers, Inc., 2002.

[108] Garrett Ward Sheldon, *The Political Philosophy of Thomas Jefferson*; and Luigi Marco Bassani, *Liberty, State, & Union: The Political Theory of Thomas Jefferson.* Macon, GA: Mercer University Press, 2010.

resolved in favour of the liberal-republican synthesis. In particular, Bassani's thesis, that "Jefferson was a classical liberal who believed that individuals were the best guardians of their own liberties and natural rights", is a pithy and accurate summation of the ethos behind Jefferson's legislation.[109] My own goal is to build upon Sheldon's and Bassani's focused assessments of Jefferson's thought by going more into the details of his legislation and of Virginian society.

Other historians have focused on particular issues with which Jefferson grappled rather than attempt comprehensive surveys of his mind. Studies of Jefferson and slavery are legion and generally revolve around Jefferson's early opposition to, and later accommodation with, slavery.[110] There are also numerous studies of Jefferson and the issues of religion and education, sometimes treated distinctly and sometimes jointly.[111]

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[109] Bassani, *Liberty, State, and Union*, p. 15.

[110] See W. Cohen, "Thomas Jefferson and the Problem of Slavery." *The Journal of American History* (1969): 503-526; John P. Diggins, "Slavery, Race, and Equality: Jefferson and the Pathos of the Enlightenment." *American Quarterly* 28, no. 2 (1976): 206-228; John Chester Miller, *The Wolf by the Ears: Thomas Jefferson and Slavery.* New York: Free Press, 1977; R. Dawidoff, "The Fox in the Henhouse: Jefferson and Slavery." *Reviews in American History* (1978): 503-511; Paul Finkelman, "Jefferson and Slavery: 'Treason Against the Hopes of the World'." In *Jeffersonian Legacies.* Edited by Peter Onuf. Charlottesville, VA: University of Virginia Press, 1993, pp. 181-221; Peter S. Onuf, "'To Declare Them a Free and Independant People': Race, Slavery, and National Identity in Jefferson's Thought." *Journal of the Early Republic* 18, no. 1 (1998): 1-46; Paul Finkelman, *Slavery and the Founders : Race and Liberty in the Age of Jefferson .* Armonk, N.Y.: M.E. Sharpe, 2001; and Ari Helo and Peter Onuf. "Jefferson, Morality, and the Problem of Slavery." *The William and Mary Quarterly* 60, no. 3 (2003): 583-614.

[111] On religion, see S. Gerald Sandler, "Lockean Ideas in Thomas Jefferson's Bill for Establishing Religious Freedom." *Journal of the History of Ideas* 21, no. 1 (1960): 110-116; Sanford Kessler, "Locke's Influence on Jefferson's" Bill for Establishing Religious Freedom"." *Journal of Church & State* 25, no. 2 (1983): 231-252; Merrill Peterson, *Thomas Jefferson: Religious Liberty and the American Tradition.* Fredericksburg, VA: Thomas Jefferson Institute for the Study of Religious Freedom, 1986; Eugene R. Sheridan, *Jefferson and Religion.* Chapel Hill: University of North Carolina Press, 1998. On education, see John P. Densford, "The Educational Philosophy of Thomas Jefferson." *Peabody Journal of Education* 38, no. 5 (1961): 265-275; Roy Honeywell, *The Educational Work of Thomas Jefferson.* Russell & Russell, 1964; R.M. Healey, *Jefferson on Religion in Public Education.* New Haven: Yale University Press, 1970; D.M. Post, "Jeffersonian Revisions of Locke: Education, Property-rights, and Liberty." *Journal of the History of Ideas* 47, no. 1 (1986): 147-157; S.G. Niles and G. Wallace. "Education in the Jeffersonian Tradition." *Education* 111, no. 2 (1990); Lorraine Smith Pangle and Thomas L. Pangle. *The Learning of Liberty: The Educational Ideas of the American Founders.* Lawrence, KS: University Press of Kansas, 1993; and Jennings L. Wagoner, *Jefferson and Education.* Monticello Monograph Series. Charlottesville: Thomas Jefferson Foundation, 2004.

While often very strong on aspects of Jefferson's internal thought process, these studies are less useful for relating Jefferson's thought to the reform of actual religious and educational institutions in Virginia. The Statute for Establishing Religious Freedom is often not contextualised, treated more as a philosophical problem than a political one, and Jefferson's educational initiatives of the 1770s are usually related to his retirement efforts to establish so-called "ward republics" and the University of Virginia, rather than addressed on their own merits.

Interestingly, the studies of most relevance to understanding Jefferson's legislation are not these secondary sources that directly link to proposed statutes, but ones which have studied a particular facet of his intellectual life. There are two-full length studies of Jefferson as a lawyer which provide good context for his legal education and outlook, but these studies by F.L. Dewey and Edward Dumbauld are both somewhat dated and confine themselves largely to Jefferson's thinking as a lawyer rather than as a legislator.[112] Because Jefferson thought historically, the line of research that began with H. Trevor Colbourn's *The Lamp of Experience*, and has most recently resulted in Hannah Spahn's *Thomas Jefferson, Time, and History*, is actually more profitable reading than the legal history of Dewey and Dumbauld.[113] Colbourn, Spahn and the others are essential for understanding Jefferson's understanding of the particular process of Anglo-American civilisation and of the development of societies generally; the work of Douglas Wilson is helpful, in conjunction with Colbourn's, for understanding how Jefferson

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[112] F.L. Dewey, *Thomas Jefferson, Lawyer.* Charlottesville: University of Virginia Press, 1986; Edward Dumbauld, *Thomas Jefferson and the Law.* Norman, OK: University of Oklahoma Press, 1978.

[113] See Colbourn, "Thomas Jefferson's Use of the Past."*;* Colbourn, *The Lamp of Experience;* Douglas L. Wilson, "Thomas Jefferson's Early Notebooks." *The William and Mary Quarterly* 42, no. 4 (1985): 434-452; Wilson, "Jefferson Vs. Hume." *The William and Mary Quarterly* 46, no. 1 (1989): 49-70; Wilson, *Jefferson's Books.* Monticello Monograph Series. Charlottesville: Thomas Jefferson Memorial Foundation, 1996; Francis Cogliano, *Thomas Jefferson: Reputation and Legacy.* Charlottesville: University of Virginia Press, 2006; Matthew Crow, "Jefferson, Pocock, and the Temporality of Law in a Republic." *Republics of Letters: A Journal for the Study of Knowledge, Politics, and the Arts* 2, no. 1 (2010): 55-81; and Hannah Spahn, *Thomas Jefferson, Time, and History.* Charlottesville: University of Virginia Press, 2011. There is also an unpublished thesis by Jessica Walker that updates Colbourn while probing Jefferson as a scholar of Anglo-Saxonism. See Jessica Lorraine Walker, "'Our Anglo-Saxon Ancestors': Thomas Jefferson and the Role of English History in the Building of the American Nation." PhD Thesis, University of Western Australia, 2007.

interacted with particular historians as well as the way in which he kept his commonplace book of historical and legal reading.

These studies are supplemented by some excellent work on Jefferson's constitutional thought. One of the limitations of the more subject-specific studies on "Jefferson and religion", "Jefferson and education", etc. is that Jefferson's thoughts on an issue are rarely connected to his larger constitutional theory; all of his keynote legislation began as points within his 1776 draft constitution, and so it should be interpreted as an outgrowth of that holistic approach. David N. Mayer's *The Constitutional Thought of Thomas Jefferson* is a fairly complete assessment, much improved over C.P. Patterson's *The Constitutional Principles of Thomas Jefferson*, although for the purposes of this thesis the shortcoming of both books is their lack of clear differentiation between Jefferson's state constitutionalism in the 1770s and 1780s and his federal constitutionalism in the 1790s and early 1800s.[114] On the other hand, Jeremy Bailey's *Thomas Jefferson and Executive Power* handles the issue of time clearly, devoting two chapters to the evolution of Jefferson's ideas during the revolutionary period, with a key emphasis on how his term as governor changed views that had until then been largely theoretical.[115] My goal is to build on all three of these works by connecting Jefferson's constitutionalism to his historical and social thought.

IV - Methodology

In this section I will explain the structure of the thesis, review my major primary sources, discuss how I used some of these sources, and outline my methodological approach.

Explanation of Structure

The process of Jefferson's effort to reform Virginia from a feudal monarchic to liberal republican society was a story that unfolded across twelve years, and like a story this thesis has a beginning, a middle, and an end. This structure corresponds not to time but rather to the thematic content of Jefferson's reforms. Thus the beginning recounts the

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[114] David N. Mayer, *The Constitutional Thought of Thomas Jefferson.* Charlottesville: University of Virginia Press, 1994; Caleb Perry Patterson, *The Constitutional Principles of Thomas Jefferson.* Austin: University of Texas Press, 1953.

[115] Jeremy D. Bailey, *Thomas Jefferson and Executive Power.* Cambridge: University Press, 2007.

genesis of Jefferson's ideas on feudalism, the middle recounts his efforts to tear down the old feudal system, and the ending explains his attempts to raise a new republican order in feudalism's place.

Chapter one is the beginning both chronologically and content-wise. It covers the years 1774-1776, from Jefferson's authorship of the *Summary View of the Rights of British America* in July 1774 through the opening of the Virginia Assembly in October 1776. It is concerned primarily with Jefferson's development of what I call his feudal-mercantile synthesis of British history, an interpretation that held that the American Revolution was a response to defects in the English constitution instituted at the time of the Norman Conquest, internalised within the common law, and spread to Virginia at the time of colonisation. At the same time, these Norman-imposed laws became the constitutional basis utilised by Parliament to justify English legal dominion over Ireland and provided the legal framework for the subsequent British empire in North America. Virginia's involvement in the colonial crisis, Jefferson claimed, stemmed from these defects in the English constitution that provided the legal basis for mercantilism and Parliament's attempt to legislate for the colonies under the mercantilist regime.

When Virginia became independent, Jefferson took the opportunity to extirpate feudalism from Virginia's laws by supervising a wholesale revision of its statute code. The middle chapters (two through four) assess his attempts to eliminate feudal holdovers in Virginia's governance, property laws, and religious Establishment. Chapter two visits the new republican constitution, both the draft constitution written by Jefferson and the significantly more conservative one actually adopted by the state Convention, and focuses on how Jefferson attempted to design state institutions that would be independent of the influence of local oligarchies that had formed in the colonial county courts.[116] Chapter three examines Jefferson's signature effort to undermine those local oligarchies' base of power by breaking up large estates, through the mechanism of abolishing feudal forms of land tenure. Chapter four continues with the local oligarchies by focusing on the parish vestry as the ecclesiastical equivalent of

[116] Throughout the thesis, I use both the words aristocracy and oligarchy. When speaking of the aristocracy, I refer to the colony-wide social group. When I refer to oligarchy, I am referring to the efforts of small groups of aristocrats to hold political power cooperatively, typically in the county courts, the parish vestries, or the Assembly. I have borrowed the term from Charles Sydnor, and use it as he did. See Sydnor, *Gentlemen Freeholders*, pp. 78-93.

the county court, and Jefferson's concern with the Establishment oligarchy's attendant efforts to impose uniformity of religious observance throughout Virginia as an adjunct of their own power.

The ending, chapter five, is concerned with Jefferson's attempt to construct a new social order based on what I have termed "natural citizenship". This new order would be based on the purged leftovers of the old, feudal system. While society would continue to be based on a hierarchy, the basis of that hierarchy would change from patriarchal, inherited wealth and preferment to a more meritocratic system based on personal improvement or refinement. Given that there was really no temporal narrative to Jefferson's reforms - the laws were considered in piecemeal fashion over a ten year period and were passed or rejected unsystematically - this is the logical ending to the study. In chapter one Jefferson identifies the principles behind the old regime, in chapters two, three, and four he attempts to tear that old regime down, and in chapter five he attempts to raise up a new regime in its place.

Overview of Primary Sources

Jefferson's life is one of the most exceptionally well-documented of any political figure in American history. The *Papers of Thomas Jefferson*, begun in the 1940s by an editorial team lead by Julian P. Boyd, has now produced thirty-six volumes containing Jefferson's papers from 1760 to 1802, which will continue through to the end of his presidency in 1809.[117] A second series, the *Papers of Thomas Jefferson: Retirement Series*, edited by a team led by J. Jefferson Looney, picks up from Jefferson's last day as President of the United States in March 1809 and will continue through to his death in 1826.[118] These two survey series are supplemented by a number of single-volume primary sources, including Jefferson's commonplace and memoranda books, his *Autobiography*, and his *Notes on the State of Virginia*, as well as out-of-date collections of Jefferson's papers published in the nineteenth- and early twentieth-centuries and numerous single-volume anthologies of his most noteworthy papers.[119]

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[117] *The Papers of Thomas Jefferson.* Edited by Julian P. Boyd, et al. 35 vols. Princeton: University Press, 1950-.

[118] *Papers of Thomas Jefferson: Retirement Series.* Edited by J. Jefferson Looney and Barbara B Oberg, et al. 8 vols. Princeton: University Press, 2004-.

[119] Jefferson, *The Commonplace Book of Thomas Jefferson*; Jefferson, *Notes on the State of Virginia;* and Jefferson, *The Autobiography of Thomas Jefferson, 1743-1790 :*

This thesis has relied on the slice of this major body of work that relates to Jefferson's activities in the 1770s and 1780s, most notably the first ten volumes of the Boyd series, the *Notes on Virginia*, the *Autobiography*, and Jefferson's legal commonplace book, edited by Gilbert Chinard in the 1920s and published under the title *The Commonplace Book of Thomas Jefferson: A Repertory of His Ideas on Government* in 1926. As such most primary citations carry a date no later than 1786, the year when James Madison piloted Jefferson's reform programme to partial passage in the Virginia Assembly, although letters from later years have been selected as appropriate, such as in cases when Jefferson reflected back on events of the Revolution during his retirement.

Jefferson's revolutionary writings are book-ended by his production of state papers for the Continental Congress in 1774-1776 and the *Notes on Virginia* in 1785. In 1774, Jefferson wrote a draft appeal to the Crown that was intended to be proposed by the Virginian delegation to the Continental Congress. The draft appeal was rejected by Virginia's governing Convention, but was printed by Jefferson's allies under the title *A Summary View of the Rights of British America*. The *Summary View* appears prominently throughout this thesis as the fundamental text explaining Jefferson's historical and legal interpretation of the causes of the Revolution, an interpretation to which he hewed closely in his other state papers, including the Declaration of Independence, and in the explanatory preambles to the legislation he wrote as a member of the Virginia Assembly from October 1776 to June 1779.

The *Notes on Virginia* were written at the tail end of the Revolution, during Jefferson's governorship in 1779-1781, in response to a query the French ambassador Francois Barbe-Marbois sent to each of the thirteen state governors asking for information on their territories. Jefferson responded to Marbois' requests with an account of Virginia's natural and human geography. In addition to containing detailed descriptions, the middle chapters of the *Notes* contain Jefferson's account of his reform programme and his rationale for it. It constitutes valuable supplementary material to the content of the laws themselves and to the earlier pamphlets. Published in France in 1785, in some respects it also represents the summation of Jefferson's intellectual

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Together with a Summary of the Chief Events in Jefferson's Life. Also see Thomas Jefferson, *Reports of Cases Determined in the General Court of Virginia. From 1730, to*

journey from a pamphleteer writing for a British audience in 1774 to an amateur scientist writing for a cosmopolitan European audience. In its content, however, it is remarkably consistent with the aims laid out in the early writings and, together with the laws themselves, comprises a coherent body of political thought.

A major source of supplementary evidence is the Legal Commonplace Book edited by Chinard. It is somewhat dated in its approach, and also very selectively edited - Chinard included only the entries that he deemed most relevant to understanding Jefferson's political views. This meant that while he included excerpts from works of history and philosophy, he provided citations but excluded complete excerpts from what he considered to be more prosaic works of law such as Coke's *Institutes* and Blackstone's *Commentaries on the Laws of England*. These defects will be ameliorated by a forthcoming edition of the Legal Commonplace Book released as part of the *Papers of Thomas Jefferson* series, which will reproduce the commonplace book in full; in the meantime, I have utilised Chinard's book as a guide to the digital manuscript edition of the commonplace book available from the Library of Congress, and for the illuminating notes Chinard appended to many of Jefferson's entries.[120] The commonplace book is often useful because it gives an indication of what kinds of issues were on Jefferson's mind in the 1760s and 1770s, when the vast majority of the entries were recorded, and some of the lengthier entries include Jefferson's own response to the authors, a valuable insight in and of itself.

One final primary source, that plays a minor but important role in the thesis, is William W. Hening's *Statutes at Large*, a collection of Virginia's colonial legal code assembled largely from Jefferson's own archives in the 1810s.[121] The *Statutes at Large* have a dual utility: they are useful for telling us what the content of Virginia's statutes were, and, since they were researched and published from Jefferson's library with his

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1740; And From 1768, to 1772. Reprint of 1829 edition. Buffalo, NY: Williams, Hein & Co., Inc., 1981.

[120] A stable URL for the digital Legal Commonplace Book can be found at: http://www.loc.gov/teachers/classroommaterials/connections/thomas-jefferson/langarts2.html. Accessed 3 October 2012.

[121] *The Statutes at Large: Being a Collection of All the Laws of Virginia, From the First Session of the Legislature, in the Year 1619: Published Pursuant to An Act of the General Assembly of Virginia, Passed on the Fifth Day of February One Thousand Eight Hundred and Eight.* Edited by W.W. Hening. 13 vols. Richmond: Printed by and for Samuel Pleasants, junior, printer to the commonwealth, 1823. For a discussion of Jefferson and Hening, see Cogliano, *Thomas Jefferson: Reputation and Legacy*, pp. 32-34.

active encouragement, they give us some indication of what Jefferson himself would have known about the development of Virginian law during the colonial period. Hening's collection can be cross-referenced with the list of "Histories, Memorials, and State Papers" in Query XXIII of the *Notes on Virginia* to gain further understanding of the archival resources available to Jefferson in the 1770s. I have cited from Hening when it offers some insight into the reform programme beyond what Jefferson himself had to say. This is particularly the case in the discussions of reforms to local government and property holding in chapters two and three.

Use of Primary Sources

In approaching Jefferson's correspondence, I have been particularly wary of quoting post-1789 letters out of context. While the volume of his correspondence provides ample source material for his views on government, after 1789 and through the end of his presidency in 1808 Jefferson commented almost exclusively on government at the national level. Jefferson's views on federalism and the federal government were frequently distinct from his views on local and state government, and were formulated two decades after the legal reforms studied in this thesis.[122] In light of the great gap in time and intent, I have largely refrained from citing these letters, even when on a relevant topic, because it would be anachronistic to treat them as having any meaning for state laws written twenty years or more earlier. After his presidency, however, Jefferson began to reminisce on the events of the 1770s themselves, and I have been much more willing to include these reflections as source material, though noting when their content seems to contradict statements made in the 1770s and 1780s. This includes his *Autobiography*, written in 1821 and comprising Jefferson's definitive statement of his intent during the Revolution.

I have been constantly aware of the difficulties of attributing causality or correlation to entries made into the Legal Commonplace Book (LCB). An excellent analysis of the LCB by Douglas L. Wilson, based on the evolution of Jefferson's handwriting, has

[122] For example, Jefferson's views on the use of common law at the federal and state levels are exactly opposite. The purity of the common law being a core focus of his as a state legislator, while as President he opposed any introduction of common law into federal jurisprudence. He was also a strict constructionist of the constitution at the federal level, opposing federal intervention in the economy, while as a state legislator he

allowed entries 1-731 of the LCB to be dated to Jefferson's time as a law student, and entries 732-879 to be dated to the revolutionary period (a handful of entries, 880-903, date from well after the revolution ended and are really footnotes to a notebook mainly composed in the 1760s and 1770s).[123] Therefore, I have treated entries into the LCB as real-time examples of Jefferson doing research into the relevant issues of the year in which Wilson has dated each entry. Entries 1-731 can be dated to the 1760s and provide contextual information for how Jefferson came to his essential views on legal history and philosophy under the tutelage of George Wythe, and entries 732-879 reflect specific issues upon which Jefferson conducted research during the revolution. I have tried to avoid expressly attributing influence to these entries, instead noting when Jefferson's own views were in sympathy or he engaged with a specific question posed by a writer. On the occasions when Jefferson expressed his agreement or disapproval of an author's ideas, I have used this as well.

A major limitation of this study is that Jefferson's interlocutors left far less of a paper trail than he did - only James Madison comes close - and that therefore it is often impossible to really know what was going on in the minds of people like Edmund Pendleton, George Mason, and George Wythe when they assisted or opposed Jefferson in his efforts. This thesis is, by and large, a study of Jefferson himself in context, not of a two-way conversation between him and his colleagues.

Methodological Approach

This thesis takes place within many genres of history - imperial, political, legal, religious, and social - but my primary approach is within the two disciplines of intellectual and constitutional history. In terms of intellectual history, I refer not to the history of high political thought, but the study of vernacular political ideas. I broadly conceive of constitutional history as not just the state but other major institutions that "constitute" society - in other words, the significance of social structures and institutions, such as entailed property or the parish vestry, within a context of political power relationships. It is not institutional history in the sense of a narrative of the

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authored legislation for internal improvements. This indicates that he saw federal and state constitutionalism as two very different realms.

[123] See Wilson, "Thomas Jefferson's Early Notebooks", all.

history of a particular institution, such as the Church of England in Virginia. I have provided such narratives only when necessary to establish context.

As an approach, I have used intellectual history both to understand the political ideas Jefferson was conversant with, as well as the legal ideas. There was a close relationship between law and political language in the eighteenth century, perhaps closer than there is today, when "rights" have replaced "law" in much of our own political discourse. Although Jefferson often spoke in the language of natural rights, he did so in the political context of liberalism and republicanism, and the legal context of the common law. The work of Pocock has been particularly helpful in deciphering the language of republicanism, in particular in placing Jefferson within the tradition of the seventeenth century English commonwealthmen who connected republicanism and anti-feudalism in a single political programme.

Where I have tried to improve on the approaches of other historians is to anchor the ideas Jefferson considered in the actual institutional context of Virginia. While Pocock and others have contextualised ideas by placing them alongside other ideas, with a focus on language, my goal here is to contextualise ideas by attaching them to things in society. A commitment to liberalism becomes more meaningful when property is entailed, or an Established Church actively persecutes its Dissenters, as opposed to simply comparing it to competing or cooperating discourses. The same goes for republicanism.

Labels

In general, I have avoided using personalised labels in favour of using generic labels. For example, I prefer to speak of a "liberal" outlook rather than a "Lockean" one, a "republican" mindset versus a "Harringtonian" or "Machiavellian" one. My reason for this is that, as Louis Hartz was criticised for, the moment one invokes a particular author's name, there is immediately the expectation that some sort of influence will be demonstrated. While the influence of Locke is apparent in Jefferson's thought, particularly in his direct engagement with Locke's *Letter on Toleration*, to label Jefferson "Lockean" would be to imply that Locke held some sort of pride of place in Jefferson's overall thinking. On the contrary, the Legal Commonplace Book shows that Jefferson's reading was rich and that it would be a mistake to identify him with any one author. Jefferson is a "Lockean", but so is he "Kamesean", "Montesquieuan", and a half-dozen

other labels. Instead, I have preferred to avoid the question of authorial influence and instead refer to the schools of thought - feudalist, liberal, and republican - within which Jefferson operated. The influence of authors is somewhat beside the point, and in any event readers can draw their own conclusions on that matter.

V - Argument

My argument throughout the thesis is that Jefferson was systematically attempting to eliminate feudalism in Virginia through his revolutionary legislation, and that this was a defensible assessment by Jefferson of Virginian society at the time, but his reforms were dogged by opposition and were insufficient remedies for the scale of the problem he identified. To support the argument, I have attempted to reconstruct Virginian society from secondary studies while concurrently reconstructing Jefferson's thought from his writings so as to create a detailed picture of what he was doing and why. I have also situated each chapter within the historiographical debate over liberalism and republicanism, and will show that while Jefferson used the language of both schools of thought, his republicanism was really an expression of his core liberalism, not the other way around. What this means is that Hartz was wrong. Rather than America having always been liberal, Virginia was feudal and Jefferson's liberalism was a response to that feudalism. The answer to Hartz's question, of why there was no socialism in America, cannot be explained by the absence of feudalism.

I will argue that Jefferson constructed a "feudal-mercantile synthesis" in his early public writings, and that this interpretation of history provided the intellectual context and motivation for his reforms. Empowered by a comprehensive historical world-view that allowed him to place the events of the colonial crisis within a compelling and urgent narrative, Jefferson then saw history repeating itself within Virginia, its gentry attempting to set up an aristocracy in the local and state governments that would spread itself through land speculation. Having established this worldview, in the subsequent chapters I will argue that Jefferson's draft constitution would have largely addressed this problem, but that its rejection meant he had to deal with the problems of feudalism piecemeal or not at all. Slavery, of course, was the major weakness of Jefferson's approach, and he did not seem to fully realise, or at least was not prepared to confront the reality, that slavery was as big a part of Virginian feudalism as land tenure or religious Establishment.

The points I wish to make in this thesis are three-fold. First, I will show that a feudal society did exist in Virginia at the time of the Revolution, that it had grown stronger in the decades leading to the revolution, and that Jefferson accurately perceived this. Second, I will argue that Jefferson's solution, while systematically laid out in his draft constitution, was diluted in his subsequent legislative proposals, and that both his proposed solutions, and the bills that actually passed, were inadequate to the challenge which he had identified. Importantly, Jefferson's liberalism, in part derived from interpretations of John Locke, was a response to feudalism, not something that was the product of its absence as Hartz suggests. Third, I will show that, as a result of these feudal findings, the current form of the liberal-republican synthesis is not adequate for understanding the American Revolution.

Chapter 1:
The Feudal-Mercantile Synthesis

In October 1769, a ship bound from London docked at the port in Norfolk, Virginia and unloaded its cargo. That spring, the royal governor had disbanded the colonial assembly for agreeing to resolves that criticised royal rule. In response, an extraordinary association had declared a boycott of manufactured goods coming from the mother country. Fortunately for one of the young participants in the association, books and other publications were not on the list of proscribed goods. The crate containing his order of books from the London publishing houses was sent upriver to his agent's premises at Williamsburg. Thomas Jefferson had placed his order earlier in the spring, when he had taken his seat in the House of Burgesses as the new delegate from Albemarle County. Although the governor had dissolved the assembly within days of its first meeting, the book order was already on its way to Britain. For the sum of £13 10s, Jefferson had purchased a shelf of books on politics that would aid him as the assembly sought to navigate the colonial crisis of the 1770s.[1]

Jefferson was both a reader and a writer. His own written contribution to the revolutionary effort would include a pamphlet, state papers, a draft constitution, and a revised legal code. These were no pieces of hack writing, nor were they mere compilations of the work of others. Although he modestly denied any great ingenuity on his own part, Jefferson possessed a worldview that was his own synthesis of legal, historical and philosophical thought. It was dominated by two key concepts: feudalism and natural law. Jefferson paired them in his mind, arguing repeatedly that feudal influences had corrupted the law and turned it away from the protection of natural rights.

In order to understand Jefferson's republicanism, one must understand his views on natural law and feudalism. The former has already been the subject of much scholarly enquiry, but the latter hardly at all, and what is extant has focused more on "Whig history" than on feudalism and the law. In this chapter, I will attempt to reconstruct Jefferson's worldview as it existed in the mid-1770s through his research and his writings, with an eye towards establishing the context necessary to understand his draft

[1] "From Perkins, Buchanan & Brown", 2 October 1769, in TJ Papers, Vol. I, pp. 33-34.

constitution and his legislation submitted to the Virginia Assembly between 1776 and 1779. I will argue that Jefferson constructed his own narrative of British history in which natural rights protected by the ancient constitution of the Saxons had been usurped by feudalism, in which feudalism provided the legal basis for mercantilism, and in which a republicanism premised on the eradication of feudalism was the only hope of bringing about a political order based on the law of nature, as Saxon England's had been.

This chapter is presented in four parts. First, I will examine Jefferson's main pre-independence writings as a single corpus of revolutionary thought in which he attempted to lay out a narrative of British imperial history from the Saxon emigration up to the colonial crisis, within a framework of natural rights. Turning from documents to themes, I will then explain how Jefferson conceived of the British empire as a feudal construction centred on the Crown in the sixteenth and mid-seventeenth centuries, and then how he understood feudalism as providing the constitutional basis for parliamentary mercantilism in the eighteenth century. Fourthly and finally, I will show how, having introduced the topic of feudalism through his criticism of British imperial governance, Jefferson went on to define his republicanism in opposition to feudalism in his draft constitution.

I - Revolutionary Writings

Over the period from July 1774 to July 1776, Jefferson produced drafts for four state papers of Congress.[2] The *Summary View of the Rights of British America* was intended as a plea for the king's protection from the advances of Parliament and was to be presented by the Virginian delegates to Congress; the "Declaration of the Causes and Necessity for Taking Up Arms" of July 1775 stated the grounds for armed rebellion to parliamentary rule; the "Refutation of the Argument that the Colonies Were Established at the Expense of the British Nation" of January 1776 developed the claim within the *Summary View* and the *Declaration of Causes* that the colonies were formed

[2] A fifth state paper, the "Resolutions of Congress on Lord North's Conciliatory Proposal" is also a major work but does not figure as importantly in the historico-legal model which Jefferson was constructing.

independently of state support; and the "Declaration of Independence" of July 1776 announced the abolition of the monarchy in the colonies.[3]

Despite being written at different times during a rapidly developing political crisis, these state papers were remarkably consistent in their content. In the *Summary View*, Jefferson invoked natural law as the first principle of legal analysis, and introduced the importance of feudalism and the role it played in the development of mercantilism. He also developed a list of grievances against Parliament that remained consistent between 1774 and 1776, even as he expanded the object of the grievances to include both Parliament and the Crown in the Declaration of Independence. When Jefferson later claimed that the Declaration of Independence was not an original work, but instead was a compilation of existing ideas, he was telling the truth, for it was the natural outcome of his own work. The content of these four state papers shall now be examined with the intent of demonstrating Jefferson's consistency and the usefulness of these four state papers as documentary evidence of Jefferson's construction of a feudal-mercantile model that he would later oppose with republicanism.

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[3] While the scholarship on the Declaration of Independence is practically limitless, scholarship devoted to the early development of Jefferson's thought is much more limited and generally is confined to analysis of either Jefferson's theory of emigration or the plan of union offered at the conclusion of the *Summary View*. No synthesis has yet been offered that relates the corpus of Jefferson's revolutionary writings on feudal law to his emergent republican constitutionalism, as opposed to his opposition political activities. See W.H. Bennett, "Early American Theories of Federalism." *The Journal of Politics* 4, no. 03 (1942): 383-395; B.A. Black, "The Constitution of Empire: The Case for the Colonists." *University of Pennsylvania Law Review* (1976): 1157-1211; H. Trevor Colbourn, "Thomas Jefferson's Use of the Past." *The William and Mary Quarterly: Magazine of Early American History* (1958): 56-70; Colbourn, *The Lamp of Experience: Whig History and the Intellectual Origins of the American Revolution.* Liberty Fund Edition. Chapel Hill: University of North Carolina Press, 1965, pp. 193-225; R.R. Johnson, "'Parliamentary Egotisms': The Clash of Legislatures in the Making of the American Revolution." *The Journal of American History* 74, no. 2 (1987): 338-362; Michael G. Kammen, "The Colonial Agents, English Politics and the American Revolution." *The William and Mary Quarterly: A Magazine of Early American History* 22, no. 2 (1965): 244-263; Kammen, "The Meaning of Colonization in American Revolutionary Thought." *Journal of the History of Ideas* 31, no. 3 (1970): 337-358; Anthony M. Lewis, "Jefferson's Summary View As a Chart of Political Union." *The William and Mary Quarterly* 5, no. 1

A Summary View of the Rights of British America

The *Summary View* was Jefferson's most important statement of political thought prior to the Declaration of Independence, and anticipated the latter in many of its key themes. The intent of the *Summary View* was to introduce the concept of a confederal empire of many realms tied together in the person of the king, and to appeal for the king to intervene on behalf of the colonies by exercising his veto power on parliamentary legislation that concerned the internal affairs of the colonies and the tenure of their assemblies. Once the king had intervened to stop the escalation of the crisis, Jefferson proposed that there then be negotiations for a treaty of union amongst all of the British realms that would establish a common market while guaranteeing the autonomy of local legislatures, in effect formalising the confederal arrangement which, he claimed, already existed.[4]

The argument of the *Summary View* was predicated upon the existence of two natural rights: the right of expatriation from one's homeland, and the right to trade freely upon the oceans.[5] By subjecting the colonies to the rule of the home-country

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(1948): 34-51; Garrett Ward Sheldon, *The Political Philosophy of Thomas Jefferson.* Baltimore: Johns Hopkins University Press, 1991, pp. 19-40.

[4] Hannah Spahn interprets the *Summary View* as an example of Jefferson engaging in philosophical history with the intent of using history to teach a moral lesson on kingship to King George III. She also argues that the *Summary View* is an example of Jefferson portraying history, specifically Anglo-Saxon England, as part of a "continuum" in which examples from the past can be timelessly transposed into the present for the purposes of moral instruction. See Hannah Spahn, *Thomas Jefferson, Time, and History*, Charlottesville: University of Virginia Press, 2011, pp. 117-121. While there is some merit to this overall analysis of Jefferson's use of history in the 1770s, I believe Spahn to be mistaken in this particular case. Instead, as John Phillip Reid has pointed out, the *Summary View* is an analysis of constitutional law in which examples may appear timeless because they are being used to illustrate a legal principle - which would be, by the standards of legal scholarship, timeless in its nature of "always" having been law. See John Phillip Reid, *Constitutional History of the American Revolution (Abridged).* Madison: University of Wisconsin Press, 1986, pp. ix-xx. In addition to Reid's point on the importance of constitutionalism as a distinct viewpoint from historicism, it's also important to point out that Jefferson does in fact periodise history in the *Summary View*, laying out an argument of comparative history between various conquests and colonisation efforts, as well as constructing a narrative of the growth of Parliamentary interference in colonial affairs. Spahn's characterisation of the *Summary View* is really limited in scope to its initial paragraphs, and even then she overlooks the point of Jefferson's constitutional argument.

[5] The natural right of expatriation shall be fully treated upon in Chapter 5. The natural right to free trade is not as important for an understanding of Virginia's internal revolutionary settlement and thus will be dealt with only cursorily in this study.

legislature, and by restricting their trade upon the seas, Parliament, through the mercantile system, was actively infringing upon both of these rights. While Jefferson was willing to grant Britain the right of first refusal upon American goods as compensation for the protection of the Royal Navy, he saw no justification for Parliament's declaration of sovereignty over the colonies in the Declaratory Act of 1766, nor for its mercantile regime of exclusive trade privileges and imposition of taxes and laws within sovereign colonial territory.

The structure of the *Summary View* was not straightforward and it is an easily misread piece. Loosely, it followed a plan of laying out first principles, followed by grievances against Parliament, followed by grievances against the king. Jefferson began the essay with a brief description of an empire of legislatively sovereign realms united in an imperial Crown acting as "chief magistrate of the British empire", embedding the Crown within a social contract and declaring that the king "is no more than the chief officer of the people, appointed by the laws, and circumscribed with definite powers, to assist in working the great machine of government erected for their use, and consequently subject to their superintendance [*sic*]."[6]

After summarising the imperial constitution, Jefferson then provided a brief history of the colonisation of North America. He declared a natural right "of departing from the country in which chance, not choice, has placed them, of going in quest of new habitations, and of there establishing new societies, under such laws and regulations as to them shall seem mostly likely to promote public happiness."[7] To establish the basis of this right within history, as well as philosophy, Jefferson invoked the example of the Saxon emigration to Britain, who "in like manner, left their native wilds and woods in the North of Europe, had possessed themselves of the island of Britain …. And had established there that system of law which has so long been the glory and the protection of that country."[8] To reiterate the similarity between the free Saxons and the English colonists of the seventeenth century, Jefferson noted that "America was conquered, and

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[6] "A Summary View of the Rights of British America", in TJ Papers, Vol. I, p. 121. Hereafter *SumView*.

[7] Ibid., p. 121.

[8] Ibid., pp. 121-122. This is one of only two references in the *Summary View* to the ancient constitution, and appears to be an innovation of Jefferson's own design, focusing as it does on the Saxon movement to Britain rather than on the internal balance of power of the estates in Parliament, which characterised the work of other ancient constitutionalists.

her settlements made and firmly established, at the expence of individuals, and not of the British public."[9]

Delving further into history, Jefferson further explained that the great expenditures of the British state for the defence of the colonies in the wars with France, particularly in the French and Indian War of 1754-1763, had come well after the colonies had been formed and established (Georgia, the last colony to be founded, was settled in 1732) and that therefore the laws and taxes of Parliament could not be justified as being due to Parliament's role in protecting the colonies when they were too immature to protect themselves. Jefferson noted that similar naval support had been rendered to Portugal and other allies in the wars, "yet these states never supposed that, by calling in her aid, they thereby submitted themselves to her sovereignty."[10]

Jefferson then switched from constitutional theory to exposition of some of the specific ways in which colonial rights had been infringed. He noted the policy of the Stuart kings in creating proprietary colonies out of the territories of the old Virginia Company.[11] The majority of his complaints pertained to the actions of Parliament itself, starting with the Navigation Acts and continuing through the beginning of Parliament's expansion into the internal affairs of the colonies with the establishment of an inter-colonial post office in 1711. From that time, Parliament had become more and more involved in colonial affairs and, by the 1770s, it was now moving to abolish or suspend the colonial legislatures themselves, beginning with New York and Massachusetts, while suspending trial by jury by expanding the jurisdiction of admiralty courts to inland affairs.[12]

But Jefferson's grievances were not with Parliament and the deposed Stuart kings alone. The final third of the *Summary View* was a preview of what was to come in the Declaration of Independence two years later. Here Jefferson put the king on notice of his own role in the colonial crisis, not only by what he had done, but by what he had not done. While the king had been more than willing to veto acts of internal legislation by the colonial assembles, no monarch had been willing to use the veto on Parliamentary

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[9] Ibid., p. 122.

[10] Ibid., p. 122.

[11] Ibid., p. 123. The colonies Jefferson lists are Maryland, Pennsylvania, the Carolinas, and New Jersey, which fell within the latitudinal limits granted to the Virginia Company in its exploratory charter of 1606.

[12] Ibid., pp. 123-129.

legislation since the reign of Queen Anne. At times, Jefferson wrote, the king had made outrageous demands as conditions of his royal assent - for example, vetoing "any law for the division of a county, unless the new county will consent to have no representative in the assembly."[13] In addition, the royal governors routinely dissolved colonial assemblies in the name of the king, often refusing to call new elections, while the last reigning monarch to dissolve Parliament had been King William III in 1701.[14] Jefferson also took this opportunity to call into question the king's right to grant lands to his colonial proprietors, which shall be investigated in greater depth later in this chapter.

The *Summary View* concluded with a reminder to the king of his responsibilities to serve the people of all of his realms, and a warning against allowing Parliament to use the military to enforce its rule in the colonies. In the final paragraph, Jefferson proposed that, after the king had de-escalated the crisis by vetoing any further acts of Parliament, there should be a treaty of union between the various realms of the British empire that would establish a common market while ensuring the sovereignty of each local legislature.[15] In effect, Jefferson was proposing to enshrine in law what he considered to already exist in fact: a British empire of many equal realms, united by one imperial crown. What the colonies would do if the king did not cooperate he left unstated, for the time being.

The Declaration of Causes and Necessity for Taking Up Arms

After the outbreak of armed hostilities at Lexington and Concord and the subsequent Battle of Bunker Hill, Congress incorporated the various militia units in the field at Boston into a Continental Army under General George Washington. Having officially made the cause of the New England colonies the cause of all thirteen, Congress resolved to issue a statement explaining why it had gone to war. Jefferson and the Pennsylvania delegate John Dickinson were assigned to draw up the *Declaration of Causes*. Jefferson's own draft declaration, written before his and Dickinson's ideas were reconciled in Congressional debate, shows how he continued to emphasise the themes of the

[13] Ibid., p. 130. Jefferson offered many conspiratorial explanations for this action - that the king wanted to strip his subjects of their political and civil rights - while ignoring the more apparent one: that this was a passive way of discouraging settlement across the Proclamation Line.

[14] Ibid., pp. 131-132. Jefferson erred on this count. A subsequent Parliament was also dissolved by Queen Anne in 1710.

Summary View even as the political situation had changed from passive resistance to open war.

Jefferson's first stroke was to emphasise that, contrary to his warning not to impose Parliament's rule by force, that the "*legislature of Great Britain*" [emphasis in original] was attempting "to effect by force of arms what by law or right they could never effect."[16] He then summarised his main points from the *Summary View*: that the colonies had been settled by the natural right of expatriation; that the conquest of America had been the act of private enterprise, not the British state; that the colonial charters formed a bond with the mother country through the Crown alone; and that any acquiescence to parliamentary statutes in the past should not be interpreted as having conceded the legal validity of Parliament's claims to supremacy.[17] Keeping with the theme of conquest, Jefferson also raised the danger that the colonies, although not conquered by the British state at their settlement, might soon be, "the new ministry finding all the foes of Britain subdued" having taken up "the unfortunate idea of subduing her friends also."[18]

Jefferson then did something that he had not done in the relatively detailed and verbose *Summary View*: he gave a succinct list of ten enumerated grievances that the colonies had taken up arms to protest. These grievances included Parliament's attempt to "give and grant our money without our consent", the military action that had "interdicted all commerce to one of our principle towns", and the restriction of trade so as to "cut off the commercial intercourse of whole colonies with foreign countries". The colonies were also fighting to preserve the rights of due process under English law. Parliament had "extended the jurisdiction of courts of admiralty beyond their antient [*sic*] limits, [thereby having deprived] us of the inestimable …. privilege of trial by a jury." Furthermore, persons accused of "certain offences" against Parliament could now be "transported beyond sea to be tried before the very persons against whose pretended sovereignty the offence is supposed to be committed." Finally, Parliament had "attempted fundamentally to alter the form of government in one of these colonies", in contravention of a charter secured "on the part of the crown and confirmed by acts of

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[15] Ibid., p. 135.

[16] "Declaration of the Causes and Necessity for Taking Up Arms", in TJ Papers, Vol. I, p. 199. Hereafter *Causes*.

[17] Ibid., p. 199.

[18] Ibid., p. 200.

it's [sic] own legislature", while also installing in Quebec "a tyranny dangerous to the very existence of all these colonies."[19]

"But why should we enumerate their injuries in the detail?" Jefferson mused. "By one act they have suspended the powers of one American legislature, & by another have declared they may legislate for us themselves in all cases whatsoever. These two acts alone form a basis broad enough whereupon to erect a despotism of unlimited extent."[20] From here, Jefferson recounted the course of the fighting since the raid on Concord, including General Gage's proscription of the rebels and proclamation of martial law in Massachusetts. He closed with an appeal to "the good offices of our fellow subjects beyond the Atlantic", and to God to "dispose" the King, his ministers and Parliament towards "reconciliation with us on reasonable terms & to deliver us from the evils of a civil war."[21]

Refutation of the Argument

The King's speech declaring the colonies out of royal protection in October 1775, prompted Jefferson to write a rebuttal, the "Refutation of the Argument that the Colonies Were Established at the Expense of the British Nation" in January 1776. The majority of the *Refutation* consists of a history of the unsuccessful English efforts at colonising the North American seaboard from Elizabeth I's granting of letters patent to Sir Humphrey Gilbert in 1578, through the efforts at implanting a colony in the Chesapeake region by Sir Walter Raleigh in the 1580s, to Raleigh's attainder and the reissuing of the letters patent to the Virginia Company by King James I in 1606. Jefferson's thesis, reiterated for each successive wave of attempted colonisation, was that the expedition's sponsor had "equipped at his own expense" the colonists.[22] He also noted that the condition of the patent granted to Gilbert, as well as the identical patent granted to Raleigh when Gilbert's expired, was that the colony would be held by "him and his heirs" as a proprietary colony, swearing allegiance to the Crown and paying to it

[19] Ibid., p. 200.

[20] Ibid., pp. 200-201.

[21] Ibid., p. 203. It is noteworthy that Jefferson labels the war a civil one, indicating that he viewed the British Empire as one community fighting amongst itself rather than separate and sovereign polities. This choice of words is somewhat at odds with the legal claim he is making.

[22] "Refutation of the Argument that the Colonies Were Established at the Expense of the British Nation", in TJ Papers, Vol. I, p. 278. Hereafter *Refutation*.

a feudal due of "the fifth part of all the ore of gold and silver which should be gotten there."[23]

The terms of these patents were important to Jefferson's narrative of colonial settlement. Significantly, the patent was issued in the name of the reigning monarch and the terms of allegiance and feudal dues were only to the Crown, not to Parliament. Likewise, it made clear that the only state support received by Gilbert and Raleigh was from the Crown, and that it consisted solely of an authorisation to explore and claim lands, while incurring a significant potential liability in the form of the quit-rent. Significantly, however, Jefferson acknowledged that the letters patent also stipulated that the colonies should be governed "as nearly as convenient agreeable to the form of the laws and policy of England, and were not against the Christian faith then professed in the church of England", thereby opening up the possibility of some basis of metropolitan control over both colonial civil and religious life.[24]

In the final paragraphs of the *Refutation*, Jefferson linked the history of these failed attempts at colonisation in the sixteenth century to the successful attempts in the seventeenth century, and explained why the connection mattered. Raleigh had been attainted and his patent forfeited and, in 1606, an association of investors petitioned King James I for new patents that would authorise them to form the Virginia Company. These investors dispatched the expedition that founded Jamestown, from which the rest of the Virginia colony grew, all of which was done through private enterprise. In 1624 James suspended the Company's charter, and in 1626 King Charles I seized the Company's title, for which it "had expended an hundred thousand pounds" by Jefferson's estimation, and turned it into a royal colony held directly by the king. "A Quo warranto indeed is said to have issued against the company, in order to draw over these arbitrary proceedings the veil of legal form," Jefferson noted. "But it is doubted whether any judgment was ever obtained."[25]

It is not clear what Jefferson sought to prove through this lengthy history, since the Virginia Company patent superseded the forfeited Raleigh patent. The history of the Virginia Company's colonisation effort, and the effective robbery by the Crown of the Company's private investment, would seem to be all the evidence Jefferson needed to at

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[23] Ibid., p. 277. Feudal dues, known as quit-rents, would be an important part of Jefferson's Agrarian Law. See Chapter 3, below.

[24] Ibid., p. 277.

least show Virginia's independence from Parliament. What does seem clear is that Jefferson saw benefit in associating the Virginia Company patent with the terms of the earlier patents, for he was attempting to defend the autonomy not only of Virginia but of "the other colonies within [Raleigh's patent's] limits".[26] In the *Summary View* he had claimed that the proprietary colonies to Virginia's north and south had been carved out of Virginia's own territory. Now in the *Refutation* he was reiterating that point by saying that not only were Virginia's neighbouring colonies entitled to self-rule by Virginia's charter, but they were also covered by the patent given to Raleigh, the jurisdiction of which had extended two hundred leagues north and south of the settlement at Roanoke, thereby including everything from Florida to New England within its boundaries.

The Declaration of Independence

It is worth emphasising what the Declaration of Independence was declaring independence from, and what it was not. In the context of Jefferson's earlier writings, it was declaring independence from the imperial Crown. It was not declaring independence from Parliament, which Jefferson considered to already be in effect and thence not to require declaring; at most, the Declaration of Independence is a reminder that the colonies had never accepted the Declaratory Act of 1766. Furthermore, it is helpful to understand that when Jefferson claimed that there was "nothing original" in the Declaration of Independence, he was referring to the ideas within the canon of the colonial pamphleteers, but he could just as easily have been referring to his own personal canon of the *Summary View*, *Declaration of Causes*, and the *Refutation*.[27] Jefferson's implication of the Crown within Parliament's wrongdoing dated from the *Summary View*, the listing of grievances had begun in the *Declaration of Causes*, and the imperial theory denying Parliament's right by conquest had been reiterated throughout, most recently in the *Refutation*. Therefore, it is appropriate to say that the Declaration of Independence, in addition to being a founding document of the new polity, was also just one more piece of many in his historical thought that placed his feudal-mercantile synthesis at the centre of American history.

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[25] Ibid., p. 283.
[26] Ibid., p. 283.
[27] Jefferson to Henry Lee, 8 May 1825. In Ford Edition, Volume X, p. 343.

The first three paragraphs of the Declaration of Independence form a charter for the new republican states in North America. The body of the *Declaration* is a standard accounting of natural rights philosophy and laid out a liberal vision of empowered individuals forming government through the social contract. It lists the natural rights that government is formed to protect, among others "life, & liberty, & the pursuit of happiness." It affirmed a right of resistance to tyranny while also disavowing rebellion as anything but a last resort, and called for the monarchy in each colony to be overthrown in favour of republics "most likely to effect their safety and happiness."[28] This was a fairly standard body of natural rights doctrine, although it is notable that, while Jefferson had invoked the natural rights of expatriation and free trade in the *Summary View*, the rights he was now advocating were different in intent and scope. While the natural rights of the *Summary View* had pertained to international movement and the law of nations, the natural rights of the *Declaration* pertained to stationary polities and their constitutions.

To demonstrate that the colonies were not declaring their independence from the Crown for "light & transient causes", Jefferson provided a list of eighteen grievances against the king. The first eleven concerned the independence of the legislative and judicial departments of the colonial governments, and the various attempts of the king, his Privy Council, and the royal governors to bring the colonies to heel. Strictly speaking, these abuses concerned incidents where the Crown was acting within its jurisdiction but had acted inappropriately, for example by dissolving legislatures without calling new elections, or by infringing upon the rights of due process. The twelfth item concerned actions where the king had allegedly colluded with Parliament, and its eight sub-items largely replicated the list of grievances found in the *Declaration of Causes*. Grievances thirteen through seventeen concerned what Jefferson considered to be war crimes committed by the British military since the start of the war, such as the sacking of cities and the incitement of Indian and slave uprisings. Finally, the eighteenth grievance was Jefferson's indictment of the slave trade, anachronistic in its claims of George III's personal responsibility for the slave trade, and swiftly cut out when the draft *Declaration* was edited by Congress.[29]

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[28] "Jefferson's 'Original Rough Draft' of the Declaration of Independence, 11 June – 4 July 1776", in TJ Papers, Vol. I, pp. 423-424. Hereafter *DecInd*.

[29] Ibid., pp. 424-426.

The final third of the *Declaration* recounted the attempts by Congress to resolve the colonial crisis peacefully. In it, Jefferson hearkened back to his own work, noting that "we have warned them from time to time of *attempts by their legislature to extend a jurisdiction over these our states*" (emphasis added). The *Declaration* "reminded" Britons of "the circumstances of our emigration & settlement here …. Effected at the expense of our own blood & treasure, unassisted by the wealth or the strength of Great Britain." Finally, Jefferson reiterated his federal theory of the imperial Crown, noting that "we had adopted one common king, thereby laying a foundation for perpetual league & amity" between all the English-speaking realms, "but that submission to [Parliament] was no part of our constitution".[30] These closing remarks firmly anchored the *Declaration* within his own canon of works, making it a bridge between feudal-mercantilism and republicanism, and showing his sense of how they were in opposition.

II - Feudalism

Jefferson's first goal as a writer during the colonial crisis was to assert, and if possible prove, the independence of colonial legislatures, in particular Virginia's own Assembly. This posed a problem because, as he had learned as a law student, English law considered Virginia to be a dependent realm, like Ireland, rather than an independent realm linked by the person of the king, as in the case of seventeenth-century Scotland. As a dependent realm, the Virginian legislature thus served at the pleasure of the English Crown, and did not have a constitutionally separate existence from its parent state.

The Crown made this claim by the right of conquest, a doctrine under the law of nations that stated that any realm conquered by the forces of another state became the legal ward of that state, which assumed the powers of governance over it. As Jefferson saw it, the history of the British empire was a history of conquests. Four conquests in particular defined this history: the Saxon conquest of Britain in the early Middle Ages, the Norman conquest of Saxon England in the eleventh century, the Anglo-Norman conquest of Gaelic Ireland during the twelfth century, and the English conquest of Virginia in the seventeenth century. Jefferson did not deny that Virginia had been conquered, but hoped to differentiate its conquest from both of the Norman conquests

[30] Ibid., pp. 426-427.

by showing that the conquerors of Virginia had not been agents of the Crown, nor had they possessed a valid feudal title to the conquered territories.

I shall begin first by describing Jefferson's understanding of the Norman Conquest of 1066, the subsequent reform in English land tenures, and why Jefferson thought that this cast doubt upon the validity of the colonial charters. Then, I shall examine Ireland, which Jefferson researched in the late 1760s as an example of a subdued and feudalised realm that was dependent upon England. Using these two case studies as precedents, I will then examine Jefferson's argument for why Parliament did not have a valid right of conquest over the American colonies, and why the Crown did not possess a valid feudal claim either. In light of this lack of a valid claim, Jefferson argued that the colonies were independent realms, linked to Britain solely through a voluntary allegiance to the imperial Crown.[31]

The Norman Conquest of England

Much like the old saying that the Glorious Revolution was not so very glorious, Jefferson might also have said that William the Conqueror was not so very much a conqueror. In the *Summary View*, Jefferson argued that the feudalisation of English land tenures after the Norman invasion of 1066 had been illegitimate because it had not been a conquest under the law, but rather a contest for the crown limited to King Harold of England, Duke William of Normandy, and the knights and men-at-arms who fought under their banners at Hastings. Consequently, the realm itself remained unchanged. In arguing that feudalisation was a piecemeal process, and that there had been no general

[31] The nature of this connection through the imperial Crown was the subject of a recent forum in the *William and Mary Quarterly*. The lead article by Eric Nelson argues that colonial writers during the years 1769-1775 adopted a stance of "patriot royalism" in which they self-consciously adopted elements of constitutional theory of the early Stuart kings James I and Charles I, accepting an enhanced royal prerogative in order to ward off Parliamentary encroachment. Although criticised by the respondents on the forum, I concur with Nelson's overall assessment and with his description of Jefferson as an "idiosyncratic" member of this school due to his rejection of the particular royal prerogative of granting lands. See Eric Nelson, "Patriot Royalism: The Stuart Monarchy in American Political Thought, 1769–75." *The William and Mary Quarterly* 68, no. 4 (2011): 533-572; Gordon S. Wood, "The Problem of Sovereignty." *The William and Mary Quarterly* 68, no. 4 (2011): 573-577; Pauline Maier, "Whigs Against Whigs Against Whigs." *The William and Mary Quarterly* 68, no. 4 (2011): 578-582; Daniel J. Hulsebosch, "The Plural Prerogative." *The William and Mary Quarterly* 68, no. 4 (2011): 583-587;

change to English tenures, Jefferson was consistent with the scholarship of his day, an interpretation that has continued to win support amongst more recent historiography.[32]

As befitting an ancient constitutionalist, Jefferson subscribed to a belief in the freedom of Saxon land tenures in addition to his belief in the antiquity of the House of Commons. "In the earlier ages of the Saxon settlement feudal holdings were certainly altogether unknown," he wrote in the *Summary View*, "and very few, if any, had been introduced at the time of the Norman conquest." Instead, the minor Saxon gentry held their property "in absolute dominion, disencumbered with any superior, answering nearly to the nature of those possessions which the Feudalists term Allodial."[33] By qualifying his claim with the words "very few", Jefferson acknowledged the possibility that the earls who held lands along the Welsh and Scottish borders had held military tenures; his point was that the vast majority of English landholders in southern England and the Midlands, the heart of the English realm, had been freeholders at the time of the Battle of Hastings.

It was Duke William of Normandy who "first introduced [feudalism] generally" into English landholding.[34] The principal nobles of southern England fought for King Harold at Hastings; many died, and those who continued to resist were attainted by William after he gained the crown. Still more died or were attainted in the subsequent rebellions that marred the first decade of William's reign. The lands of these Saxon nobles "formed a considerable proportion of the lands of the whole kingdom," Jefferson wrote. "But still

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and Eric Nelson, "Taking Them Seriously." *The William and Mary Quarterly* 68, no. 4 (2011): 588-596.

[32] A review of the historiography shows agreement on the gradual conversion of Saxon tenures into Norman ones through the process of escheat and attainder, followed by the wholesale collapse of the English gentry. Robin Fleming puts it thus: "Many English lords must have taken strong exception to the rush of minor landholders into the arms of Norman lords for protection. As their dues and retinues shrank, these men were propelled into rebellion. Thus, once the Conqueror and his followers began to restructure landholding without regard to kinship and commendation, little could stop the English aristocracy's terrible slide towards annihilation." See Robin Flemings, *Kings and Lords in Conquest England*. Cambridge: University Press, 1991: p. 144. See also Brian Golding, *Conquest and Colonisation: The Normans in Britain, 1066-1100*. London: St. Martin's Press, 1994: pp. 27-85; George W. Keeton, *The Norman Conquest and the Common Law*. London: Ernest Benn Ltd., 1966: pp. 9-48, 81-101; and Ann Williams, *The English and the Norman Conquest*. London: Boydell Press, 1995: pp. 24-71.

[33] *SumView*, p. 132.

[34] Ibid., p. 132.

much was left in the hands of his Saxon subjects, held of no superior, and not subject to feudal conditions."[35]

Here a digression must be made from Jefferson's text, in order to explain why, having won the Battle of Hastings, William was not legally the conqueror of the whole kingdom, as his sobriquet implied. As Jefferson was doubtless aware, the Duke of Normandy did not land his army on the southern English coast in 1066 out of happenstance or from a random outburst of territorial aggression. Earlier in the year, King Edward of England had died without a son, and Harold had inherited the crown as Edward's brother-in-law. William, who was a descendant of Edward's mother's sister, chose to contest Harold's claim. Thus, he chose to land his troops in the centre of the realm, at Hastings, in order to bring about a trial by battle for the kingship. William defeated Harold in that trial, official English resistance died out in the coming months, and William was legally proclaimed king when he arrived in London. Thus, while William had "conquered" in the military sense of the term, he had not in the legal sense, instead claiming the crown by the right of descent.[36]

Jefferson's argument thus has merit under this particular reading of the legal status of William's assumption of the kingship. Lands of the defeated nobles became William's to distribute as he pleased, while the lands of the uninvolved gentry who had not taken up arms against William at Hastings or in the rebellions continued to enjoy their original free tenures. It was not long, however, before these titles were usurped by the centralising Anglo-Norman state. The freeholds, "by express laws, enacted to render uniform the system of military defence … were made liable to the same military duties as if they had been feuds: and the Norman lawyers soon found means to saddle them also with all the other feudal burthens."[37] In Jefferson's telling, the true Norman Conquest was not effected by the swords of William's army but by the quills of his lawyers.

Since the Saxon gentry had not resisted William's rule, their lands "had not been surrendered to the king, they were not derived from his grant, and therefore they were

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[35] Ibid., p. 132.

[36] The subsequent rebellions by the remaining Saxon nobles took place well after William's coronation, and the seizing of their lands should thus be seen as lawful responses to treason rather than acts of conquest.

[37] *SumView*, p. 132.

not holden of him."[38] Nonetheless, the whole realm came to be considered to be under the feudal law, "but this was borrowed from those holdings which were truly feudal, and only applied to others for the purposes of illustration. Feudal holdings were therefore but exceptions out of the Saxon laws of possession, under which all lands were held in absolute right."[39] This had not prevented subsequent kings from claiming that all tenures were feudal, regardless of history. According to Jefferson's reasoning, the feudalisation of Saxon tenures based upon the legal fiction of attainted lands' conquest or surrender to the Crown had, in turn, become the basis of the king's claimed prerogative to grant lands. Jefferson argued that this prerogative had no basis in law or history, and that therefore was not binding in the present day. As shall be seen, this would become one arrow in his quiver as he went about undermining the legitimacy of royal rule in America.

The Anglo-Norman Conquest of Ireland

Although never mentioned by name in any of Jefferson's draft state papers in the period 1774-1776, Ireland is an ever-present spectre throughout his narrative as the prime example of a realm that was ruled by right of conquest and which was, in fact, dependent upon the Kingdom of England for its legal existence. The Declaratory Act of 1766 was modelled upon the Irish Declaratory Act of 1720, which affirmed the supremacy of the British parliament over its Irish counterpart. To understand the kind of dependency that Jefferson was arguing against in the case of the colonies, it is necessary to understand the kind of dependence that already existed in Ireland. It is in this respect that the Declaration of Independence is a separation both from the institution of the imperial Crown as well as a refutation of a pretended supremacy of the British parliament. The case of Ireland provided essential context for the claim made by Parliament in 1766.

Jefferson took an interest in Ireland's relationship with England from the very beginning of his involvement in the unfolding colonial crisis. As he took his seat as a newly-elected member of the House of Burgesses in 1769, Jefferson placed an order for books to be delivered from London which he felt would be helpful in his duties. Amongst these volumes were three histories of Ireland: Ferdinando Warner's *History of*

[38] Ibid., p. 132.
[39] Ibid., pp. 132-133.

Ireland (1763) and *History of the Rebellion and Civil-War in Ireland* (1768), and Sir William Petty's *Political Survey of Ireland* (1719).[40] Warner's first book concerned the ancient history of Ireland before the conquest by the Anglo-Normans in the twelfth century, while the *History of the Rebellion* and Petty's *Survey* concerned the subjugation of Ireland in the Wars of the Three Kingdoms and the subsequent annexation of its lands to the English aristocracy in the late seventeenth century. In combination, these histories helped Jefferson form an overall picture of how Ireland came to be a dependent realm of England.

The colonisation of Ireland was a slow process that began with an invasion by an Anglo-Norman army loyal to King Henry II in 1169, one century after William's invasion of England. The English forces, led by their king, subdued much of the eastern half of Ireland, establishing Crown lands around the administrative capital, Dublin, that became known as the Pale. The hinterlands surrounding the Pale were parcelled out to Henry's principal lieutenants, who received the lands under feudal tenure in exchange for keeping military control of their neighbourhoods in the realm. The eastern half of the island thus came under direct or indirect Crown control, while the western areas remained under the control of the Gaelic natives. The realm itself was ruled by a lord lieutenant and was considered to be a "lordship" rather than a proper kingdom.

The situation changed with the rise to power in England of the House of Tudor in 1485. Soon after the consolidation of Henry VII's rule in England, the Anglo-Irish feudal lords, descendants of the Anglo-Normans who had fought for Henry II, allowed enemies of the Tudors to take shelter in Ireland. In response, Henry VII dispatched a new lord lieutenant, Sir Edward Poynings, to bring the lordship in line.[41] Poynings secured passage by the Irish Parliament of what became known as Poynings' Law, a statute that, in the words of historian James Kelly, restricted "the capacity both of the king's deputy to call a parliament and the parliament's authority to make law."[42] Through passage of this law, the Irish Parliament alienated its authority to the king and Privy Councils at

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[40] "From Perkins, Buchanan & Brown", 2 October 1769, in TJ Papers, Vol. I, pp. 33-34.

[41] See A. Clarke, "The History of Poynings' Law, 1615-41." *Irish Historical Studies* 18, no. 70 (1972): 207-222; R.D. Edwards and T.W. Moody. "The History of Poynings' Law: Part I, 1494-1615." *Irish Historical Studies* 2, no. 8 (1941): 415-424; James Kelly, *Poynings' Law and the Making of Law in Ireland, 1660-1800.* Dublin: Four Courts Press, 2007; and D.B. Quinn, "The Early Interpretation of Poynings' Law, 1494-1534." *Irish Historical Studies* 2, no. 7 (1941): 241-254.

[42] Kelly, *Poynings' Law*, p. 9.

Dublin and Westminster, effectively abrogating Irish self-rule. Poynings' Law was the forefront of what has been termed a "constitutional revolution" in Irish affairs that resulted in the establishment of a full, but dependent, kingdom in 1542 and culminated in the final conquest of the remaining areas of the island in the late sixteenth century.[43]

A kingdom but not an independent one, Ireland was dragged into the series of wars that began with the Anglo-Scottish Bishops War of 1639 that became known as the Wars of the Three Kingdoms. Ireland's subjugation by the army of Oliver Cromwell and the re-division of its lands after the war were the subject of both Warner's and Petty's histories. From this point on, Ireland was ruled firmly as a dependency of the English King-in-Council, and of the King-in-Parliament after the Glorious Revolution. Poynings' Law remained in effect, and was bolstered by the British parliament's Declaratory Act of 1720, which stated that the Westminster parliament exercised sovereignty over its Dublin cousin.[44] The state of Ireland remained in this way until Poynings' Law was repealed after the American Revolution and Ireland was absorbed into the United Kingdom of Great Britain and Ireland by the Act of Union of 1800.

Jefferson's Argument

Feudalism was important to Jefferson in two ways. First, it provided the basis for the king's right to grant lands, and hence the colonial charters. Second, it provided the legal framework that kept Ireland subordinate to England by right of conquest - and as will be shown later in this chapter, Ireland was the model which Parliament came to choose for defining the colonies' constitutional status. In rebuttal to each, Jefferson argued that the charters were not binding land grants but instead were social compacts, and that the colonies were not conquered by the king's soldiers but by independent adventurers. If he could prove that feudal law did not apply to America, or that it was illegitimate, he

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[43] See Brendan Bradshaw, *The Irish Constitutional Revolution of the Sixteenth Century.* Cambridge: University Press, 1979; Nicholas P. Canny, *The Elizabethan Conquest of Ireland: A Pattern Established, 1565-76.* Hassocks: Harvester Press, 1976; Canny, *Kingdom and Colony: Ireland in the Atlantic World, 1560-1800.* Baltimore: Johns Hopkins University Press, 1988; and Colm Lennon, *Sixteenth-Century Ireland: The Incomplete Conquest.* Dublin: St. Martin's Press, 1995.

[44] See description in Kelly, *Poynings' Law*, pp. 193-197. Furthermore, the Irish Declaratory Act came after five decades of controversy over the English Parliament's authority to regulate Ireland's external trade through the Navigation Acts. No English Parliament had attempted internal taxation, however. See Canny, *Kingdom and Colony*, pp. 114-124.

could successfully argue for colonial autonomy under the imperial Crown. If he could not, then the colonies were no more independent than Ireland was and could be ruled accordingly.

The challenge facing Jefferson was that settled legal opinion considered Virginia to be, in fact, a conquered and dependent realm with the same constitutional status as Ireland.[45] While a law student, Jefferson recorded in his commonplace book a decision from William Salkeld's *Reports of the Cases in King's Bench*. Summarising the decision in *Holt. Smith* v. *Brown and Cooper*, Jefferson wrote that "The laws of England do not extend to Virginia, which being a conquered country, their law is what the king pleases."[46] His entire corpus of political writing from the *Summary View* to the Declaration of Independence was oriented around refuting that claim. Virginia was an independent polity, and the king had constitutionally limited powers.

Based upon his reading of the history of the Norman Conquest of England, Jefferson determined that feudal tenures did not apply in America. The original Saxon tenures, having never truly been superseded by the feudal law, "still form[ed] the basis of the groundwork of the Common law, to prevail wheresoever the exceptions have not taken place," Jefferson wrote in the *Summary View*. "America was not conquered by William the Norman, nor it's [*sic*] lands surrendered to him or any of his successors. Possessions there are undoubtedly of the allodial nature."[47] While the colonial charters established the colonies as land grants from the Crown, this was a fraud perpetrated by the Crown upon unsuspecting colonists who were "laborers, not lawyers" and did not know their land rights. "The fictitious principle that all lands belong originally to the king, they were early persuaded to beleive [*sic*] real, and accordingly took grants of their own lands from the crown."[48]

This misappropriation of colonial lands had not been limited to the original royal charters for Virginia and Massachusetts. It had extended to the allocation to English

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[45] Reid affirms that the "colonial original contract was an exact duplication of the Irish original contract. The reason is not because the Americans knew of the Irish and copied it, but because both were extensions or novations of England's original contract." This has a whiff of question-begging, as the matter of right of conquest was by no means settled law at the time, and the entire colonial crisis was an act of defiance in the face of Parliamentary claims of supremacy. See Reid, *Constitutional History*, pp. 54-60, quotation from p. 54.

[46] LCB Entry 231.

[47] *SumView*, p. 133.

noblemen of lands that were part of the Virginian charter (the same one that was illegitimate). The illegitimacy was compounded by carving out new colonies that were allocated to noblemen as proprietary manors, in which all landholders would be feudal tenants of the noblemen who held title to the colony. The Stuart kings, "by an assumed right of the crown alone" had "at several times parted out and distributed among the favourites and followers of their fortunes" Virginian lands into "the distinct and independent governments" of Pennsylvania, Maryland, and the Carolinas.[49] "From the nature and purpose of civil institutions," Jefferson contended, " all the lands within the limits which any particular society has circumscribed around itself, are assumed by that society, and subject to their allotment only."[50]

Jefferson was not above invoking charters when it served his purposes, such as to prove that the colonies had not been conquered by the British state. Here, the wording of Queen Elizabeth I's letters patent to Gilbert and Raleigh served his purposes, by showing that they had been acting as private explorers.[51] The same went for the Virginia Company's charter before it was seized by King Charles I.[52] While a charter could not bind Virginia to the home islands, "the expence of the British nation" in planting them could form the basis for some sort of political obligation, as was the case with the feudal plantations in Ireland. Jefferson did not dispute that "America was conquered", but that "her settlements [were] made and firmly established, at the expence of individuals and not of the British public", or its king. In contrast, Ireland had been subdued by a royal army under the king's personal command. The two conquests were not commensurable.[53]

Royal charters of any kind were unnecessary for forming a new society, Jefferson wrote, because the natural right of expatriation with which he began the *Summary View* not only allowed people to leave their homeland, but to set up "new societies, under such laws and regulations as to them shall seem most likely to promote public happiness."[54] Indeed, the Declaration of Independence was later issued because the

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[48] Ibid., p. 133.
[49] Ibid., p. 123.
[50] Ibid., p. 133.
[51] *Refutation*, pp. 277-278.
[52] Ibid., p. 283.
[53] Ibid., p. 283.
[54] *SumView*, p. 121.

Crown had interfered with the right to "the pursuit of happiness".[55] Charters did have usefulness as a way to maintain a political connection with England via the Crown. To that end, Jefferson was willing to acknowledge that the colonists had knowingly and with intent "continue[d] their union with [England] by submitting themselves to the same common sovereign", whilst at the same time denouncing those provisions of the charters that granted land.[56] Thus, Jefferson accepted an idealised version of charters, and for the purposes of argument substituted this ideal for the flawed, feudal documents that actually existed.

This idealisation also involved re-imagining the Crown. Rejecting the medieval legacy of divine right and the claims to absolute monarchy of the House of Stuart, Jefferson adopted a view of the king as a "chief magistrate" who was "appointed by the laws, and circumscribed with definite powers, to assist in working the great machine of government."[57] This was consistent with his view of England's ancient constitution, under which he thought the kingship had been an elective office chosen by a council of petty nobles and gentry. While it is unclear whether Jefferson thought that the ancient constitution itself extended to America - his comment that the Glorious Revolution restored the "British constitution" to its "free and antient principles" suggests that it did not apply in the colonies - it is clear that Jefferson thought the office of the king to be similarly limited under the colonial charters.[58]

This model of a king limited in powers, bound by a social compact, and with less authority than was claimed by the Stuart kings who had presided over colonisation, was analogous to but different from the King-in-Parliament within Britain. Unlike the British constitution, in which the king was one of three feudal estates represented in Parliament, Jefferson's colonial king was a simple magistrate with utilitarian duties as chief executive, no balancing role to play between nobility and commons, and a diplomatic function as the arbiter between the various kingdoms. This was a major departure from the British view of a constitution adapted to local needs and traditions, in which the king in England had different duties and privileges from the king in Ireland; instead, Jefferson envisioned a universal monarch, with the same duties and powers in every realm, overseeing their relations without regard to local political arrangements.

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[55] *DecInd*, p. 423.
[56] *SumView*, p. 122.
[57] Ibid., p. 121.

This universalisation of the form of government amongst political units of equal and uniform standing was a decisive turn away from the feudal conglomeration of palatinates, baronies and duchies, each with its own rights and governing arrangements, and became a hallmark of the American constitutional tradition.

III - Mercantilism

His assessment of feudalism provided Jefferson with the basic principles of his political thought. The colonies had been established by private enterprise, and therefore enjoyed the political independence of expatriated communities. The colonial charters had retained the Crown as a link between England and the new realms, but the Crown's authority in the colonies could not exceed that which it had within England, where it was limited by the ancient constitution of the Saxons. The ancient constitution did not give the king the right to grant lands, and hence the charters could only be voluntary documents with regard to the colonists, who had expatriated themselves privately and by choice, which explained the political independence the colonies enjoyed. Jefferson's historical and legal reasoning thus had a pleasing circularity, one point reinforcing the next in a continuous cycle.

This circularity was not a closed philosophical system, because Jefferson was arguing as a political writer, not a philosopher. Proving the rights of the colonies by denying the feudal law was a necessary but not sufficient condition of defending the colonial cause. Jefferson also had to link that deeper history to the more recent history since colonisation. That involved drawing a connection between feudalism and mercantilism in the constitutional law of British imperialism. His account of feudalism concluded chronologically with the division of Virginia's charter lands by the Stuarts after the Restoration. His account of mercantilism began with the passage of the Navigation Acts by the Stuarts' foes, the Commonwealth of England, and proceeded up to the year of the Declaration of Independence itself.[59] The importance of the mercantile

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[58] Ibid., p. 131.

[59] In using the term "mercantilism", I am referring in the most general sense to the constitutional and legal aspects of the trading regime between England's Parliament and its colonies. I am not attempting to define any particular aspect of the content of the trade policies adopted by Parliament, but instead to clarify the legal authority involved in making those policies in which the colonies on the periphery were oriented by law towards the imperial centre. The definition of mercantilism as trade policy remains hotly contested in its own right. See the recent article by Steve Pincus and the

legislation was not just in its content, but in that it showed that Parliament was arrogating authority that did not belong to it - authority that could only be justified by Parliament's appropriation of feudal authority previously reserved to the Crown.

In this section, I will trace the history of mercantilist imperialism as portrayed by Jefferson from the early 1650s to June 1776. First, we shall see how Jefferson saw the Navigation Acts and subsequent mercantilist legislation as a gradually expanding effort by Parliament to claim imperial authority over the colonies. This parliamentary legislation culminated in the Declaratory Act of 1766, in which Parliament formally declared that it enjoyed the same supremacy over the colonies as it did Ireland. Parliament's attempt to arrogate to itself by legislation what the law of nations gave the Crown by right of conquest - i.e., the final constitutional authority in colonial affairs - provides the crucial link between feudal land rights and mercantilist legislation in a single imperial constitution. It was also a major turning point in the colonial crisis, for until then Parliament had exercised authority on a case by case basis, rather than claiming final authority "in all cases whatsoever". In response, Jefferson conducted legal research that satisfied him that the colonies had the rights of palatinates under feudal law, but in public he held that in reserve, arguing instead that the colonies were independent realms that could only be joined with Britain by an act of union acceptable to all the realms concerned.

Acts of Parliament 1651-1765

By Jefferson's telling, the last acts of Crown feudalism with the creation of the proprietary colonies in the 1660s post-dated the beginning of Parliamentary

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accompanying response in the "Rethinking Mercantilism" forum in the *William and Mary Quarterly*: Steve Pincus, "Rethinking Mercantilism: Political Economy, the British Empire, and the Atlantic World in the Seventeenth and Eighteenth Centuries." *The William and Mary Quarterly* 69, no. 1 (2012): 3-34; Cathy Matson, "Imperial Political Economy: An Ideological Debate and Shifting Practices." *The William and Mary Quarterly* 69, no. 1 (2012): 35-40; Christian J. Koot, "Balancing Center and Periphery." *The William and Mary Quarterly* 69, no. 1 (2012): 41-46; Susan D. Amussen, "Political Economy and Imperial Practice." *The William and Mary Quarterly* 69, no. 1 (2012): 47-50; Trevor Burnard, "Making a Whig Empire Work: Transatlantic Politics and the Imperial Economy in Britain and British America." *The William and Mary Quarterly* 69, no. 1 (2012): 51-56; Margaret Ellen Newell, "Putting the "Political" Back in Political Economy (This Is Not Your Parents' Mercantilism)." *The William and Mary Quarterly* 69, no. 1 (2012): 57-62; and Pincus, "Reconfiguring the British Empire." *The William and Mary Quarterly* 69, no. 1 (2012): 63-70.

mercantilism in March 1651. After the death of King Charles I and the creation of the English Commonwealth, many of the English colonies continued to recognise the Stuarts. The "Parliament of the Common-wealth took the same in high offence," Jefferson wrote in the *Summary View*, "and assumed upon themselves the power of prohibiting their trade with other parts of the world except the island of Great Britain."[60] The Commonwealth initially attempted to impose "this arbitrary act", but later, "by solemn treaty" Virginia agreed to a modified version of this mercantilist regime, securing, as Jefferson quoted from the treaty, "free trade as the people of England do enjoy to all places and with all nations according to the laws of the Commonwealth."[61]

In the *Notes on Virginia*, Jefferson further explained the Anglo-Virginian treaty in terms of the Crown's feudal, prerogative rights. "[In] 1650 the parliament, considering itself as standing in the place of their deposed king, and as having succeeded to all his powers, without as well as within the realm, began to assume a right over the colonies, passing an act for inhibiting their trade with foreign nations," Jefferson wrote. "This succession to the exercise of the kingly authority gave the first colour for parliamentary interference with the colonies, and produced that fatal precedent which they continued to follow after they had retired, in other respects, within their proper functions" after the Restoration in 1660.[62] When the Stuarts regained the throne, the parliament of the restored monarchy passed the Navigation Acts, at which point the colonies' "rights of free commerce fell once more a victim to arbitrary power."[63] The "exercise of a free trade with all parts of the world" was a "natural right", Jefferson contended, "which no law of [the colonies' own] had taken away or abridged."[64] The acts of the Restoration Parliament to take away that right, "shew [*sic*] what hopes [colonies] might form from the justice of a British parliament were its uncontrouled [*sic*] power admitted over these states."[65]

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[60] *SumView*, p. 123.

[61] Ibid., pp. 123-124. Jefferson glosses over Virginia's capitulation to a squadron of the Commonwealth navy before this treaty was agreed to. Mentioning it would have undermined his claim that Virginia had never been conquered by the English state.

[62] Jefferson*, Notes on Virginia*, pp. 113-114.

[63] *SumView*, p. 124.

[64] Ibid., p. 123.

[65] Ibid., p. 124.

The beginnings of the exercise of that uncontrolled power began innocuously enough, with Parliament's creation of an intercolonial post office during the reign of Queen Anne. While the Navigation Acts had limited their jurisdiction to external trade upon the oceans, the post office act "intermeddled with the regulation of the internal affairs of the colonies."[66] This act "seems to have had little connection with British convenience, except that of accomodating [*sic*] his majesty's ministers and favorites with the sale of a lucrative and easy office."[67] It is interesting to note that, while Jefferson had asserted a natural right to trade freely, he was here denying Parliament's right to even stimulate trade through a public service such as a post office, on the grounds that it was an infringement upon each colony's territorial integrity and that post officers would be mere placemen of the Crown and its ministers.

The danger of Parliament regulating the internal affairs of the colonies, or even their economic relations with each other, came from the lack of "moderation [with which Parliament] are like to exercise power, where they themselves are to feel no part of it's [*sic*] weight."[68] For evidence of this, Jefferson pointed to the Restraining Acts that formed corollaries to the Navigation Acts. In particular, he pointed to the Hat Act and the Iron Act, which he claimed "prohibit us from manufacturing for our own use the articles we raise on our own lands with our own labor."[69] Jefferson concluded that the Hat Act, which forbade a colonist "to make a hat for himself of the fur which he has taken perhaps on his own soil" was "an instance of despotism to which no parallel can be produced in the most arbitrary ages of British history." The same went for the Iron Act, which forbade the smelting of iron into steel, and required that iron mined in the colonies be exported to Britain for use in its steel mills.

Jefferson's portrayal of the Restraining Acts is somewhat contorted, and suggests that he was stretching the meaning of the acts to suit his argument; it is also noteworthy that the acts did not directly concern Virginian commerce and were therefore out of his area of expertise. In *The Navigation Acts and the American Revolution*, Oliver M. Dickerson notes that the Hat Act was a response to over-production by New England hat

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[66] Ibid., p. 125.

[67] Ibid., p. 125. It is easy to see why Parliament would have viewed a post office as a legitimate means of assisting colonial economic development; Jefferson's hostility to such a simple measure foreshadows his strict constructionist view of the federal constitution two decades later.

[68] Ibid., p. 124.

manufacturers. The Act "prohibited the transportation of hats from one colony to another" and created production regulations "essentially the same as those practiced in England." In particular, "the act is specific in not interfering with that part of the industry that was local and essentially domestic in character, and the regulations concerning apprentices did not apply to members of a worker's own family."[70] Likewise, "the iron bill should be considered chiefly as a measure to encourage an infant steel industry in England rather than an attempt to destroy a colonial enterprise." Dickerson notes that "important steel manufacture" did not exist in America at the time of the colonial crisis, and would not for decades after independence.[71]

The third and final expansion of Parliamentary authority came in the form of the Stamp Act. While the post office sought to regulate and stimulate intercolonial trade, and the Restraining Acts sought to regulate economic activity within each colony, the Stamp Act attempted to tax within each colony. It was the extension of the taxation power that prompted the first stirrings of colonial revolt. Jefferson had comparatively little to say about the Stamp Act, other than that it, along with other pieces of mid-1760s legislation, "form a connected chain of parliamentary usurpation."[72] This is consistent with Jefferson's larger argument that mercantilism was illegitimate by its very nature. While other colonial writers might draw distinctions between Parliament's right to regulate trade and its right to tax, Jefferson saw it all as an integrated system of exploitation.

Declaratory Acts of 1720 & 1766

Immediately following the repeal of the Stamp Act in 1766, Parliament issued a Declaratory Act binding the colonies to the will of the British legislature. This act marks a turning point in Jefferson's history of mercantilism, as both he and Parliament agreed that the constitutionality of the Townshend and Coercive Acts hinged on this point. It was the Declaratory Act that marked the decisive shift from piecemeal mercantile regulation to a "connected chain of parliamentary usurpation".[73] In so doing, Parliament

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[69] Ibid., p. 124.

[70] Dickerson, Oliver M. *The Navigation Acts and the American Revolution*. Philadelphia: University of Pennsylvania Press. 1951. Citation p. 19.

[71] Ibid., p. 20.

[72] *SumView*, p. 126.

[73] Ibid., p. 126.

drew upon its authority over the conquered realm of Ireland to provide the precedent for its authority over the American colonies. It had not done this before, when the powers it exercised were ostensibly regulatory rather than legislative or involving revenue taxation.

The American Declaratory Act of 1766 closely followed the wording of the Irish Declaratory Act of 1720, and the operative clauses of the two acts are nearly identical.[74] The situation prompting each Declaratory Act differed slightly. The Irish Declaratory Act was a response to the Irish House of Lords assuming the authority of the final court of appeal over the Irish courts, while the American Declaratory Act was a response to the colonies asserting powers of legislation and taxation "derogatory to the Legislative Authority of Parliament." In response, the Irish Declaratory Act "for the better securing of the Dependency of *Ireland* upon the Crown of *Great Britain*", and the American Declaratory Act, in response to colonial actions "inconsistent with the Dependency of the said Colonies and Plantations upon the Crown of *Great Britain*", both declared that Ireland and America were "and of Right ought to be, subordinate unto, and dependent upon" Great Britain.[75]

There was a subtle difference in the two Declaratory Acts that retains their similarity but prevents their being identical. While the Irish Declaratory Act specified the dependency of Ireland upon "the Imperial Crown" of Great Britain, the American Declaratory Act assigned supremacy to "the Imperial Crown and Parliament". It is unclear whether the addition of Parliament to the American Declaratory Act was a constitutional statement regarding the status of colonies or merely reflected an updated way of speaking of the mixed constitution within Britain itself. In any event, both statutes assigned future executive and legislative powers to "the King's Majesty, by and with the Advice and Consent" of both houses of Parliament, with "full power and Authority to make Law and Statutes of sufficient Force and Validity to bind" Ireland and America to the Crown. These identical clauses would therefore make it seem that the

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[74] All subsequent quotations from these acts come from the reprints in Owen Ruffhead's *Statutes at Large*, 1786 edition. Irish Declaratory Act, Volume 5, p. 179 and American Declaratory Act, Volume 7, p. 571.

[75] The insertion of the words that the colonies "are, and of Right ought to be, Free and Independent States" into the final version of the Declaration of Independence suggests that Congress had the language of the Declaratory Acts in mind when editing that document.

above addition of Parliament to the American Declaratory Act was a matter of style, not substance, since Parliament's authority was implied in the earlier Irish Act.

Within a year of the passage of the American Declaratory Act, the authority Parliament granted to itself was exercised in the New York Restraining Act. This act suspended the operations of New York's colonial assembly until the colony complied with Parliament's requirements for quartering and supplying military forces based around New York City. Jefferson was appalled. "One free and independent legislature hereby takes upon itself to suspend the powers of another, free and independent as itself," he intoned in the *Summary View*, "thus exhibiting a phaenomenon, unknown in nature, the creator and creature of it's [*sic*] own power."[76]

The Palatinate Alternative

Jefferson's Legal Commonplace Book shows that he again became interested in the importance of Ireland sometime around 1774, as he was researching his pamphlet and Congressional state papers.[77] Entry 753 of the commonplace book is a detailed account of various court cases pertaining to Irish autonomy under the imperial Crown. In it, Jefferson recorded case law regarding Ireland's legislative independence, its land law, and the jurisdiction of its courts.[78] He also looked to the rights of Wales and counties palatine under customary law. Like the colonies, palatinates were not taxed by Parliament, unless they were given representation. This research provided a fallback position from the assertion that the colonies formed fully separate realms from England.[79]

As always, Jefferson's first priority was in ascertaining the nature of legislative power within a realm. The Irish realm was a conquered one, this could not be denied,

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[76] *SumView*, p. 126.

[77] Douglas L. Wilson has dated the relevant entry to the mid-1770s. It follows entries related to the court fee controversy of 1774 and to political confederations, and precedes entries on the Gothic constitution and feudal tenures that most likely date from when Jefferson wrote his draft constitution in 1776. See Douglas L. Wilson, "Thomas Jefferson's Early Notebooks." *The William and Mary Quarterly* 42, no. 4 (1985): 434-452.

[78] All quotes in this section come from LCB Entry 753.

[79] Reid is surprisingly dismissive of this line of reasoning, arguing that palatinate rights were only an analogy, which implies that the comparison was rhetorical rather than substantive. Jefferson's own research records indicate that he took this quite seriously, far more than a mere analogy. See Reid, *Constitutional History*, pp. 43-45.

but even so Ireland's dependence upon England was far from complete. "By the opinion of the chief justice the [statutes] of England shall bind those of Ireland, which was in a manner agreed by the other justices", Jefferson summarised, "and yet it was denied the last day before, tamen nota that Ireland is a realm of itself and has a [parliament[in itself." The discrepancy could be resolved by allowing Ireland limited sovereignty in which its internal laws were left to its own parliament but its external policies were settled by England.

"The [parliament] of England does not bind Ireland as to it's [*sic*] lands, for they have a parliament there", but mercantile regulations for "things transitory as to ship wool or merchandise to the intent to carry it to any other place beyond sea" could be decided by the superior Westminster parliament. Thus, "a ship with intent to carry to Holland beyond sea is a cause of forfeiture immediately." The underlying principle for this was that, since Irish lands were held of the king under feudal tenure, not of the English parliament, they had a separate jurisdiction under the Crown; "general statutes do not bind lands in antient demesne, nor counties palatine, nor the cinque ports, and the reason is that men of those places do not come to [parliament] as knights and burgesses." The same went in Wales, another conquered realm, the counties palatine of which "do not come to [parliament and] shall not be bound by the [parliament] of England", though a statute could extend to them "if particularly mentioned".[80]

This issue of jurisdiction extended to other areas of law, most notably the jurisdiction of courts. While Jefferson could not ascertain the true nature of the Irish courts, he did note that counties palatine were not considered areas where "the king's writ" ran, and therefore palatine courts were separate from crown court jurisdiction. He chose the Cinque Ports of southeastern England as an example. "The Cinque ports are not by the king's grant nor by prescription but by act in an antient [parliament]" he recorded, and therefore "the king's writ does not extend to the Cinque ports."[81] If such a

[80] Unrepresented palatinates were exempt from taxation by Parliament. See G.H. Guttridge, "Thomas Pownall's the Administration of the Colonies: The Six Editions." *The William and Mary Quarterly* 26, no. 1 (1969): 31-46, in particular pages 40 and 45. Reid identifies these passages as coming from another of William Petyt's studies of Ireland, the *Lex Parliamentaria*. See Reid, *Constitutional History*, pp. 74-75.

[81] This is consistent with the assertion that the king has no right to grant lands. Meanwhile, since the Cinque Ports are part of the island of Britain, the right to expatriation does not apply.

palatine right also existed in the colonies, then acts of Parliament such as the Administration of Justice Act (part of the Coercive Acts) were unconstitutional.

From these entries, it is easy to see how Jefferson came to disbelieve not only the parliamentary claim of the right to levy taxes, but of their right to impose any regulation at all. It is clear that Jefferson thought that it was at least possible that colonies were entitled to the legal status of unrepresented palatinates. A palatinate without representation in Parliament would retain allegiance to the Crown but would enjoy separate legislative and judicial jurisdiction.[82] This was a similar position to that held by Jefferson's colleagues in Virginia politics, whom he characterised in his autobiography as stopping "at the half-way house" of Pennsylvania delegate John Dickinson, Jefferson's collaborator on the *Declaration of Causes*, "who admitted that England had a right to regulate our commerce, and to lay duties on it for the purposes of regulation, but not of raising revenue".[83]

Jefferson's Plan of Union

Breaking with his colleagues, Jefferson had rejected this palatinate solution because "for this ground, there was no foundation in compact [or] in any acknowledged principles of colonization", and hence it was inadequate for use in the kind of political theory he had attempted in the *Summary View*. Furthermore, it failed to acknowledge that "expatriating [was] a natural right, and acted on as such, by all nations, in all ages."[84] Instead of palatinates, Jefferson thought that the colonies were entirely separate realms from England, arguing that the relationship between Britain and "these colonies was exactly the same as that of England & Scotland after the accession of James I until the Union" of 1707.[85] This model of empire was not a relic of a discarded Stuart-era constitution, for it was also the "same as [England's] present relations with Hanover, having the same Executive chief but no other necessary political connection." This entire analysis was predicated on his theoretical understanding of the rights of expatriation from one jurisdiction in order to create a new and separate one.

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[82] Wales and the palatinates were not fully incorporated into the English state and legal framework until their representation in the Tudor parliaments of the sixteenth century. See Elton, 'The body of the whole realm', p. 51.

[83] Jefferson, *Autobiography*, p. 7. See Nelson, "Patriot Royalism", pp. 538-539.

[84] Jefferson, *Autobiography*, p. 7.

[85] Ibid., p. 7.

Instead, the colonies were the subject of direct parliamentary rule after the Declaratory Act, which Jefferson considered to be an outright usurpation of colonial powers. The theme of parliamentary usurpation was one that he developed from the *Summary View* through the Declaration of Independence, and the list of grievances against Parliament featured in the Declaration of Independence was both a set of constitutional grievances as well as a critique of mercantilism as a trading regime. His solution to these twin problems was a plan of union, laid out in the most cursory of outlines at the end of the *Summary View*. When it became clear that a union other than that imposed by the British military could not become reality, he turned to independence as the solution to the problem.

As discussed in the first section of this chapter, the *Summary View* contained the basic ideas of Jefferson's grievances with Parliament. These grievances were then refined into a list of ten specific points in the *Declaration of Causes*, and were repeated in the Declaration of Independence. In 1774, Jefferson still held out hope for a reasonable solution if the Crown would exercise its veto to prevent Parliament from enacting new legislation and by, presumably, impeding the execution of the offensive legislation already passed into law. At as late a date as 1774, and arguably until the end of 1775, a strong monarch was at the centrepiece of Jefferson's plans. He was no republican, and no revolutionary, when he proposed his plan of union.

Jefferson's call for a "union on a generous plan" was intended to end mercantilism by acknowledging the sovereignty of the colonies under the imperial Crown. This would also have ended any sort of feudal link with England. In his proposal, Jefferson struck at the very heart of mercantilism by assailing the restrictions of the Navigation Acts. "Accept of every commercial preference it is in our power to give for such things as we can raise for their use, or they make for ours," he allowed, "but let them not think to exclude us from going to other markets, to dispose of those commodities which they cannot use, nor to supply those wants which they cannot supply." Asserting the rights of both independent realms and of unrepresented palatinates, he further stipulated "that our properties within our own territories shall be taxed or regulated by [no other] power on earth but our own."[86]

Jefferson's plan of union relied on an impartial monarch as an arbiter between the realms. It was the failure of the king to perform this function that led to Jefferson's

personal break with Britain. What the eighteen points of grievance in the Declaration of Independence were intended to show was that the British monarchy was no longer capable of performing that task via abuses of its prerogative powers as well as collusion with Parliament to usurp further powers. The dissolution of the monarchy within the colonial realms now presented a new question: how to form a new government for his own state of Virginia that would remedy the wrongs of feudalism and mercantilism.

IV - Republicanism

To an extent, independence caught Jefferson by surprise. With all of his energies put towards refuting British claims by constructing a narrative of American history that would secure the colonies their independence from Parliament and a contractual relationship with the king, Jefferson had little time for developing an idea of what kind of government would replace the monarchy. "In truth, the abuses of monarchy had so much filled all the space of political contemplation, that we imagined everything republican which was not monarchy," Jefferson recalled to his correspondent Samuel Kercheval in 1816.[87] The king's rejection of Congress's Olive Branch petition in December 1775 declared the colonies out of the Crown's protection, and within six months the Virginia delegation in Congress moved for a declaration of independence from the British Empire.

"We had not yet penetrated to the mother principle, that 'governments are republican only in proportion as they embody the will of their people, and execute it.' Hence, our first constitutions had really no leading principles in them," Jefferson continued to Kercheval. In the absence of a fully formulated republican theory of government, Jefferson fell back on what he knew. While the Virginia Convention, which had governed the colony in the absence of the royal authorities since 1775, was meeting in Williamsburg to draft a Declaration of Rights and a republican constitution, Jefferson rushed through three drafts of his own proposed constitution in Philadelphia, within which he emphasised reform of such aspects of the feudal law that were of domestic concern in Virginia. The last of these drafts was sent with his mentor and fellow Congressional delegate, George Wythe, to be presented to the Convention for

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[86] *SumView*, p. 135.

[87] TJ to Samuel Kercheval, 22 January 1816, in the Library of America edition of TJ's Writings, p. 1396. The Retirement Series does not appear to have reached this letter yet.

consideration; but Wythe arrived too late to influence the substance of the deliberations, and only Jefferson's preamble and a few scattered substantive clauses made it into the constitution the Convention formally adopted in late June 1776.

As this chapter comes to a close, I will briefly outline the chronology of events in 1776, from the time the Virginian Delegates moved for independence, through the Virginia Assembly session in autumn 1776. Then, I will address Jefferson's turn from monarchy to republicanism in his draft constitution, and attempt to understand why he made a break with monarchy after building his political theory around it in the *Summary View*. Turning from monarchy to feudalism, I will then examine the "list of rights public and private" in Jefferson's draft constitution and explain how it could have reformed feudalism in Virginia. Finally, I will outline the legislation that Jefferson proposed after the draft constitution was rejected, the contents of which will form the basis of the rest of this thesis.

Chronology

Jefferson and the Convention developed their respective constitutions concurrently during May and June 1776. Jefferson, assigned to Philadelphia as a Virginian delegate to the Continental Congress, developed his draft constitution while simultaneously writing the Declaration of Independence for Congress. Jefferson's intent was that his draft constitution would arrive in Virginia in time to influence the Convention's proceedings, but by the time it was received by the Convention a select committee under the leadership of George Mason had already formulated a constitution as well as a Declaration of Rights. Jefferson's constitutional preamble, itself nearly a copy of the grievances from the Declaration of Independence, was borrowed by the Convention, but other than that he failed to exert more than episodic influence on the main text of the document.

The reason for this was that Jefferson took too long to formulate his constitution, writing three drafts between mid-May and mid-June.[88] The ideas in each draft were similar - the people were the source of sovereignty, powers were to be clearly separated amongst the three branches of government, including a bicameral legislature, and a list

[88] The Virginia Constitution (13-29 June): "First Draft by Jefferson", in TJ Papers, Vol. I, pp. 337-347; "Second Draft by Jefferson", in TJ Papers, Vol. I, pp. 347-355; "Third Draft by Jefferson", in TJ Papers, Vol. I, pp. 356-365.

of rights was attached after the plan of government - and the minor modifications Jefferson made from draft to draft served to delay him without changing the substance of the document.[89] When he transmitted the constitution to Virginia via George Wythe, who had ridden south to participate, Wythe arrived after the Convention had decided on the essentials of the new government.

In contrast, the Convention moved with alacrity. Upon moving to consideration of a constitution, it immediately named George Mason as chairman of the committee assigned to drafting the document. First, Mason's committee developed a Declaration of Rights that were to serve as the new government's statement of principles.[90] While the Declaration of Rights also declared popular sovereignty and separation of powers as the principles of the new state, it used weaker language, and while Jefferson's list of rights would have necessitated comprehensive legal reform, the Declaration of Rights served primarily to re-confirm classic English civil liberties that were already protected by colonial law. The constitution itself was similar to Jefferson's in its outline, but its details served to confirm the existing county-centric form of government, making only such changes that were necessary to fill the void left by the absence of royal authority, and placing those new offices under control of the county oligarchies.[91]

Abandonment of Monarchy

The question of how Jefferson became a republican is one that is difficult to provide a simple answer for. In all of his pre-independence writings, there is not once a hostility to constitutional monarchy as such. Indeed, Jefferson's entire plan of imperial governance required a de-politicised monarch in order to function. His hostility was rather directed towards *perversions* of constitutional monarchy, such as the Crown abusing its prerogative, and its inactivity in allowing Parliament to exceed that body's authority by asserting feudal jurisdiction over the colonies through its mercantile regulation. The grievances laid out from the *Summary View* through the Declaration of Independence concern specific problems of feudalism and mercantilism, not the institution of the Crown itself. Jefferson's turn to republicanism thus at least initially

[89] Henceforward, I have generally cited from Jefferson's third and final draft, as my goal is to compare his views to the Convention's, not track minute changes.

[90] "Virginia Declaration of Rights", in GM Papers, Vol. I, pp. 274-291.

[91] "The Constitution as Adopted by the Convention", in TJ Papers, Vol. I, pp. 377-386. The specifics of the Virginia government will be fully explored in chapter 2.

seems to stem from the most banal of explanations: the conflation of the sins of the office holder with the office itself. As a result, Jefferson's republicanism defies easy categorisation, instead seeming to be a product of the immediate issues of the time rather than a coherent system of political thought in the vein of Harrington, Sidney, or Machiavelli.

Any study of Jefferson's draft constitution must begin with the Declaration of Independence. The two documents were composed simultaneously, and part of the Declaration, consisting of the grievances against the Crown and Parliament, was included nearly verbatim as the preamble to Jefferson's constitution. It is here that the transition from constitutional monarchy to republicanism took place, in a manner so unremarkable that a student of Jefferson's later, astringent republicanism might be taken aback by the seeming lack of thought that went in to it. The adoption of republicanism, perhaps the biggest decision of Jefferson's political life along with the decision to support independence, bears no indication of the careful thought that went into Jefferson's views on history, law, and philosophy.

Jefferson's contention with the king was over his conduct in office. George III, "heretofore entrusted with the exercise of the kingly office in this government hath endeavored to pervert the same into a detestable and insupportable tyranny", Jefferson wrote at the beginning of the draft constitution, then offering the grievances from the Declaration of Independence by way of explanation. As a result, George had "forfeited the kingly office and has rendered it necessary for the preservation of the people that he should be immediately deposed from the same, and divested of all its privileges, powers, & prerogatives." But Jefferson did not stop there. The institution of the Crown was "an office which all experience hath shewn to be inveterately inimical" to "public liberty". The constitution of Virginia would therefore need to be re-established upon "such ancient principles as are friendly to the rights of the people".[92]

It is somewhat of a giant leap to go from criticising the actions of one king to abolishing the Crown; it is the equivalent of impeaching a corrupt public official and then abolishing his office for good measure. Jefferson offered no real explanation for this conflation.[93] His writings betray no similar antipathy to the earlier Hanoverian

[92] Jefferson's Third Draft Constitution, TJ Papers, Vol. I, pp. 356-357.

[93] Jeremy Bailey also considers Jefferson to be confused in this regard. "If George III had perverted his office such that it was insupportable, why not simply fill the kingly

kings, and while he acknowledged the crimes of the Stuarts in the seventeenth century as well as the usurpation of William the Conqueror, he had made no complaint against the institution of monarchy in general. Indeed, in the *Summary View* Jefferson seems quite satisfied with the settlement to the Glorious Revolution, and his draft constitution included an executive "Administrator" that retained many of the powers of the royal governor while eliminating the Crown's royal prerogative. The most probable explanation is that Jefferson decided that the repeated abuses of monarchy by William I, the Stuarts, and George III were proof that monarchy, specifically its attendant prerogative that placed it outside of popular control, was inimical to "the will of [the] people, and [to executing] it."[94]

If this is the case, then it shows the extent to which popular sovereignty underpinned all of Jefferson's thought. His opposition to feudalism, with its prerogatives and aristocracies, can be explained in this light as well as in light of his opposition to feudal tenure in the *Summary View* and feudal law's corruption of England's ancient constitutional monarchy through medieval feudalism and modern mercantilism. This is, of course, largely speculative, for Jefferson did not clearly explain his reasoning, and he could have kept monarchy, since a constitutional monarchy was perfectly in line with his previous thinking. The switch to republicanism suggests that he was going after something wider - the feudal society itself, including both the Crown's prerogative as well as the secular and clerical aristocracies' legal privileges.

Proposed Reforms

In contrast to his abrupt denunciation of monarchy, the list of "rights public and private" which Jefferson included as the fifth and final section of his draft constitution are entirely in keeping with the character of his earlier work and form an obvious response to the grievances against feudal and mercantilist wrongdoing. The problem of mercantilism was theoretically solved simply by virtue of independence and confederation with the other rebelling colonies, but feudalism was a domestic problem

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office with someone who would not exhibit George III's tyranny?" Bailey argues that Jefferson shifted from a direct criticism of King George III to a criticism of monarchy as a system of government without really explaining why. Jeremy D. Bailey, *Thomas Jefferson and Executive Power*. Cambridge: University Press. 2007, p. 30.

[94] TJ to Samuel Kercheval, 22 January 1816, in the Library of America edition of TJ's Writings, p. 1396.

and would require greater action to uproot. Jefferson's bill of rights targeted the entire variety of "feudal and unnatural distinctions" within Virginian society, not just the feudal land tenures he discussed in the *Summary View*.[95] His proposed land laws would have abolished feudal tenures and redistributed Virginian lands via equal inheritance, while formally ceding the lands carved out of Virginia's original charter territories and given to the proprietary colonies by the Stuarts, and forbidding any future division of Virginia's lands into proprietorships. The natural right of expatriation would be enshrined within the constitution, and the slave trade restricted. The church, with its clerical class and ties to metropolitan England, would be disestablished. Military force would be vested in a citizen's militia, and the kind of peacetime standing army that propped up the autocracies of Europe would be banned. Printing presses were to be free from regulation. Finally, the royal prerogative regarding forfeitures was transferred to the state, and the prerogative concerning wrecks, strays and wildlife was abolished.[96]

While Jefferson's list of rights was wide-ranging and not all of its contents are easily classifiable, four broad categories do emerge: the basing of the three branches of state upon the principles of popular sovereignty and separation of powers; the inclusion of an agrarian law that would ensure a broad distribution of land and power; liberty of conscience and expression; and a social order based on natural, as opposed to feudal, distinctions in ranks. While the draft constitution was not seriously considered by the Virginia Convention, Jefferson would go on to push for many of these rights to be enacted through ordinary legislation. This effort came in two rounds, the first being the lightning round of activity at the first session of the new General Assembly in October 1776, and the second being the marathon effort of the Revisal of the Laws, which Jefferson worked on from the winter of 1777 to the summer of 1779.

In the autumn 1776 session, Jefferson proposed bills establishing a superior court system, abolishing the use of the feudal entail in property inheritance, exempting Dissenters from compulsory taxation in support of the Established Church, and naturalising foreigners as citizens.[97] These bills corresponded to the four respective

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[95] Jefferson, *Autobiography*, p. 77.

[96] Jefferson's Third Draft Constitution, TJ Papers, Vol. I, pp. 362-364.

[97] See TJ Papers, Vol. I, for "Drafts of Bills Establishing Courts of Justice", pp. 605-652; "Bill to Enable Tenants in Fee Tail to Convey Their Lands in Fee Simple", pp. 560-562; "Draft of Bill for Exempting Dissenters from Contributing to the Support of the Church", pp. 532-535; "Bill for the Naturalization of Foreigners", pp. 558-559.

categories listed above. While the bills establishing courts came as a package of bills, the others were individual pieces of legislation. All of them attempted to reconcile the commonwealth as enacted by the Convention with Jefferson's preferences laid out in the draft constitution, but sought to enact reform piecemeal rather than sweepingly.

Also during this session, Jefferson filed a bill creating a committee for the revisal of Virginia's legal code. Jefferson seized this opportunity to enact a second wave of reforms, authoring bills enhancing the role of the jury in criminal trials, abolishing primogeniture in intestate inheritances, disestablishing the Church of England, and establishing a system of public schooling to encourage the rise of a "natural aristocracy" distinguished by its members abilities rather than their inherited wealth.[98] These bills formed counterparts to his bills proposed in the autumn session, but unlike those bills the Revisal of the Laws languished for years, with its proposed statutes not being voted on until 1786, and some not at all.

The result was that Jefferson achieved an incomplete victory in his struggle against feudalism, one that was not sufficient to prevent the rise of the powerful slave aristocracy of the nineteenth century (in which Jefferson was nonetheless an active participant). Whether it be by forestalling the consolidation of existing aristocracies of landowners and clergymen, preventing abuses of prerogative in the form of an omnipotent executive or an unchecked judiciary, or by encouraging the formation of a new order based on natural social distinctions, Jefferson's major pieces of legislation during this time period are all consistent with the concerns regarding feudalism that he had raised as early as 1774.

Conclusion

In this chapter I have sought to answer the question of why Jefferson thought that feudalism was relevant to questions of eighteenth-century mercantilism. We have seen how Jefferson, informed by his education as a lawyer, was aware of the feudal origins of the laws upon which mercantilism found its legal justification, a view that was reinforced through subsequent research in the 1760s and 1770s. This synthesis of the

[98] Revisal of the Laws: No. 20, "A Bill Directing the Course of Descents", in TJ Papers, Vol. II, pp. 391-393; No. 64, "A Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital", in TJ Papers, Vol. II, pp. 492-507; No. 79, "A Bill for the More General Diffusion of Knowledge", in TJ Papers, Vol. II, pp. 526-535; and No. 82, "A Bill for Establishing Religious Freedom", in TJ Papers, Vol. II, pp. 545-553.

histories of feudalism and mercantilism became the subject matter of his major revolutionary writings, and provides the motivation for his statements that the unravelling of "feudal and unnatural distinctions" and their replacement with a government "more wholly republican" was "the whole object" of the American Revolution.[99] Having demonstrated why feudalism was important, the rest of this dissertation will be concerned with what Jefferson proposed to do about it. Each chapter will follow one of the four categories identified from his draft constitution: popular sovereignty, the agrarian law, liberty of conscience, and natural aristocracy.

[99] Jefferson, *Autobiography*, pp. 77-78. "To Thomas Nelson", 16 May 1776, in TJ Papers, Vol. I, p. 292.

Chapter 2:
State Government

In the first chapter, we saw why Jefferson deemed feudalism important and how he defined his republicanism against it. In this chapter, we will see how he put these anti-feudal, republican principles into practice in the three branches of government of his draft constitution, with which he proposed to "new-model" the Virginian state in the late spring of 1776.[1] Jefferson viewed all three branches of Virginian governance - executive, legislative and judicial - as corrupted by feudal practices under the colonial constitution. He proposed to completely tear down the old apparatus and construct a new one based on very different principles. This placed him well beyond the ambitions of most Virginia gentry in attendance at the Virginia Convention, who proposed instead to reform the existing government without challenging most of its key assumptions or institutions.[2]

This chapter will proceed in four parts. First, I will reconstruct the Virginian colonial constitution. I will argue that colonial government was characterised by a constant struggle between centralist and localist influences, and that, when Virginia engaged wholeheartedly in rebellion, the balance between these two influences was one of the casualties. I will then proceed through three sections devoted to the executive, legislative, and judicial branches of government. Throughout these sections, I will

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[1] "Jefferson's Third Draft Constitution", in TJ Papers Vol. I, p. 356.

[2] There are two major studies of Jefferson's constitutionalism that I have relied on in this chapter: Caleb Perry Patterson's *The Constitutional Principles of Thomas Jefferson.* (Austin: University of Texas Press, 1953) and David N. Mayer's *The Constitutional Thought of Thomas Jefferson* (Charlottesville: University of Virginia Press, 1994). Of the two, I have found Mayer's more recent scholarship to also be more reliable, as Patterson does not adequately account for differences between Jefferson's state-level constitutionalism in the 1770s-1780s and his federal constitutionalism in the 1790s and 1800s. I have supplemented these two sources with Jeremy D. Bailey's even more recent *Thomas Jefferson and Executive Power* (Cambridge: University Press, 2007), which does a very good job of clearly delineating the growth in Jefferson's thought on executive power through the different stages of his political career. Finally, Willi Paul Adams' *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* (Translated by Rita Kimber and Robert Kimber. Chapel Hill: University of North Carolina Press, 1980) has been indispensable for comparing the constitution designed by the Virginia Convention to other state constitutions developed in the 1770s.

maintain that while Jefferson sought to proceed from a clean slate and make each branch accountable to popular sovereignty while also eliminating feudal prerogatives, the Virginia Convention had a much looser adherence to popular sovereignty and shared little of Jefferson's interest in feudalism as a relevant part of the revolution.

Part I - The Colonial Constitution

Under the colonial constitution, Virginia's government consisted of county courts responsible for local administration, a House of Burgesses elected by the gentry of each county and responsible for proposing legislation and raising taxes, and a Council of State that acted as an executive council, appellate court, and upper legislative house, which was appointed by the royal governor. The county courts, House of Burgesses, Council of State, and royal governor were all based upon English analogues, and operated on the same principles. In practice, Virginia politics were characterised by tension between the county courts and the governor's court at Williamsburg. These localist and centralist interests remained in balance throughout most of the colonial period, but revolution broke down that balance. Jefferson identified feudal elements of the colonial government as priority cases for reform in his draft constitution, but the Virginia Convention left them unaddressed, in the process preserving the power of the gentry in the county courts.

Centralism vs. Localism

In assessing Virginian governance, including within this category both administration and politics, the colonial period was distinguished by tension between centralism and localism. In this assessment, I am building upon that of Jack P. Greene, who in his studies of eighteenth-century colonial legislatures has found that "the lower houses engaged in a successful quest for power as they set about to restrict the authority of the executive, undermine the system of colonial administration laid down by imperial and proprietary authorities, and make themselves paramount in the affairs of their respective colonies."[3] Centralism may be thought of as those people,

[3] Jack P. Greene, "The Role of the Lower Houses of Assembly in Eighteenth-Century Politics", *The Journal of Southern History* 27, no. 4 (1961): 451-474, quote from p. 451. See also Greene, "Foundations of Political Power in the Virginia House of Burgesses, 1720-1776." *The William and Mary Quarterly 16, no. 4* (Oct. 1959): 485-506; Greene, "Political Mimesis: A Consideration of the Historical and Cultural Roots of Legislative

institutions, and mores that supported the central government of the Crown colony in the person of the royal governor and his retainers. Localism may be thought of as the set of opposing factors that supported the local elites centered around the county courts (and the courts' ecclesiastical analogues, the parish vestries); it should not be confused with Jefferson's democratic republicanism, which emphasised individual participation in politics, often at the local level, but as part of national life, without the provincialism or oligarchism of the gentry localists.[4]

Centralist and localist interests in Virginia were defined by proximity to institutions.[5] County courts, proliferating throughout the land, and monopolising political, judicial, and administrative authority within their territories, were bastions of local elites and formed centres of power which balanced that of the central authorities.[6]

Behavior in the British Colonies in the Eighteenth Century." *The American Historical Review* 75, no. 2 (1969): 337-360; and Greene, *Pursuits of Happiness: The Social Development of Early Modern British Colonies and the Formation of American Culture.* Chapel Hill: University of North Carolina Press, 1988.

[4] Jefferson's definition of the nation shifted over the course of his life. While as a politician in the federal government he adopted an increasingly American national identity, at this point in his life he was still a firmly Virginian nationalist. This outlook was established early, with the *Summary View* envisioning multiple independent kingdoms, not a Kingdom of Great Britain and a single Kingdom of America. It continued through the publication of the *Notes on Virginia*, throughout which he referred to Virginia, not America, as "my country".

[5] This centralist-localist tension (never properly a complete division) was similar, although not identical, to the "Court vs. Country" divide within Britain and which historians such as Stanley Elkins and Eric McKitrick maintain was adopted by Americans during the early republican period. Elkins and McKitrick define the British Court-Country mentality as a "viewpoint with its vocal center in the landed gentry, leveled against the Court establishment of an entrenched executive ministry." (Stanley Elkins & Eric McKitrick, *The Age of Federalism*. Oxford: University Press, 1993, p. 14) As they note, this mentality in Britain, as in America, stemmed from controversy over a national bank, which serviced a national debt. While this was an organising principle during the 1790s, it can not be said that Court vs. Country, as defined by Elkins and McKitrick, was an organising principle in colonial Virginia. This is a crucial distinguishing factor between Court-Country and Centralist-Localist.

[6] Bernard Bailyn notes that a localist interest (although he does not label it as such) formed in the mid-seventeenth century at the time that royal authority was interrupted by the English Commonwealth. "By 1658 …. effective interference from outside had disappeared and the supreme authority had been assumed by an Assembly which was in effect a league of local magnates secure in their control of county institutions." After the Restoration, local elites retained this power within their counties. See Bernard Bailyn, "Politics and Social Structure in Virginia." In *Seventeenth-Century America: Essays in Colonial History.* Edited by James Morton Smith. Chapel Hill: University of North Carolina Press, 1959, p. 98.

The royal governor, heading his court at Williamsburg, made that centre of ceremonial, administrative, and judicial authority his base of support.[7] Both localists and centralists used their authority to maximise their influence setting colonial policy. In effect, this meant utilising their respective powers of patronage.

The powers of patronage available to both the governor and the county courts were formidable. The local elites who controlled county courts were able to appoint justices of the peace, county clerks, and parish clergymen, amongst others; they were also able to decisively influence the choice of delegates to the House of Burgesses.[8] The governor did not lack for patronage either - while the positions at his disposal were few in number, they carried great prestige and responsibility in colonial affairs. This patronage consisted of appointment of the members of the Council of State, which played a part in all three branches of governance, and, in feudal fashion, the authority to distribute land grants to supporters. The governor also possessed the authority to appoint a number of other petty officers who participated in colony-wide governance.[9]

The balance between localism and centralism was finally upended amidst the colonial crisis of the late 1760s. Jefferson's grievances in the Declaration of Independence, which were appended to the front of the constitution adopted by the Virginia Convention, often reference activities that cumulatively undermined the balance between local and central authority: the royal demand that newly formed counties give up their rights to representation, the dissolution of constituent assemblies without recall, and the subordination of local judiciaries to royal control. The patronage power itself was also an issue, for the British government had "erected a multitude of new offices by a self-assumed power, & sent hither swarms of officers to harass our people & eat out their substance."[10]

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[7] Warren M. Billings has written a biography of one of Virginia's most preeminent colonial governors, William Berkeley, which illustrates the extent to which the royal governor truly functioned as a proxy monarch with a considerably developed court. See Warren M. Billings, *Sir William Berkeley and the Forging of Colonial Virginia.* Baton Rouge: Louisiana State University Press, 2010.

[8] Warren W. Billings, *The Old Dominion in the Seventeenth Century: A Documentary History of Virginia, 1606-1700.* Revised ed. Chapel Hill: University of North Carolina Press, 2007, pp. 87-89.

[9] Ibid., *The Old Dominion*, p. 49.

[10] "Jefferson's 'Original Rough Draft' of the Declaration of Independence, 11 June – 4 July 1776", in TJ Papers, Vol. I, pp. 424-425. Hereafter *DecInd*.

The Problem of State Unification

Independence, following the dissolution of Crown control, posed a problem for Virginia's leaders as they debated a new constitution: How to unify and govern the state without royal authority? While Jefferson saw the absence of monarchy as an opportunity to construct a brand-new state-level entity that would stand on its own, unencumbered by existing local elites and their structures of power, the Convention produced a constitution that extended the localists' already formidable power.[11] Now left unchecked by the Crown, the localists simply absorbed state-level offices into their zone of control, using the county courts to influence election to the state Assembly (as they had before), and then using the Assembly to control the rest of the state government (a new development impossible when the rest of the central government had been located in the Council of State and the royal governor, and had answered to the Crown).

Both Jefferson and the Convention moved decisively to dissolve the vestiges of Crown authority by dismantling the colonial Council of State and controlling the executive. Under the colonial constitution, the Council of State had been a unifying nexus both for reconciling localist to centralist interests as well as for the different branches of governance. Membership on the council had been the governor's instrument to co-opt local elites into the service of the central authorities, but it had also been a way for those elites to influence the administration of the colony. As an institution, the council had assisted the governor in his administrative duties, but also served as the colony's sole appellate court of justice, and functioned as the upper house of the colonial assembly.[12] Next to the abolition of monarchy, the dissolution of the Council of State was the most important development in the proposed constitutions and required a fundamental rethinking of how the state government would operate.

Both the Convention and Jefferson envisioned a bottom-up approach to government, but differed as to whether the bottom should be located at the county level or in the people themselves. The Convention's constitution empowered localism by retaining the

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[11] By way of analogy, consider how Rousseau's "general will" was supposed to be something that was more than the aggregate of individual wills. Jefferson envisioned a state government that would represent the whole people, not just individual interests or factions. Unlike Burke's notion of "virtual representation", however, Jefferson still intended that all citizens should be directly represented in electoral districts.

[12] See Billings' description of the Council in *The Old Dominion*, pp. 53-54.

county as the basic unit of social and political organisation. Representation in both houses of the state assembly would be organised by county, and elections conducted under the colonial suffrage, which ensured that local elites would continue to control the election of state assemblymen. The assembly would, in turn, select the state's executive officers as well as its appellate judiciary. This would ensure seamless control and provide localists with decisive victory in their struggle against centralist authority. To punctuate this emphasis, the Convention, composed of the very elites who would be empowered by the constitution, adopted the constitution in its own session.[13]

Jefferson argued that this was a usurpation, for the Convention had been chosen by electors "not thinking of independance and a permanent republic", and that the Convention had illegitimately "[passed] an act transcendant to the powers of other legislatures".[14] The dissolution of the royal government necessitated that a new social contract be agreed to through a representative assembly specifically tasked with developing a new fundamental law.[15] He dismissed the idea that the "necessities" of the war were a just reason for the Convention to subvert popular control of constitution-making, arguing that they "do not convey its authority to an oligarchy" but rather that "they throw back, into the hands of the people, the powers they had delegated, and leave them as individuals to shift for themselves."[16]

Jefferson's alternative plan of government differed fundamentally from the Convention's. The Convention used the language of popular sovereignty while using the power structure of aristocracy. Jefferson sought to make this language a genuine reality by making the people, not the counties, the building blocks of his government. Jefferson proposed that legislative districts be determined by population, that the executive be

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[13] See "The Constitution as Adopted by the Convention", in TJ Papers, Vol. I, pp. 377-386.

[14] Jefferson, *Notes on Virginia*, p. 122.

[15] Ibid., pp. 121-125. Much of Jefferson's criticism hinges on the formality that the Convention was elected in April 1776 under a continuing ordinance passed the previous year, when independence was not yet under consideration, and therefore the voters could not have known that they were electing a body that would decide a new government. This seems flimsy - it assumes that electors to the Convention had no inkling that independence was coming, even though armed hostilities had been underway for a year and the Crown had declared the colonies out of its protection in December. Such ignorance on part of the voters seems unlikely, but Jefferson's strict adherence to forms and procedures underscores the importance he placed on a clearly written constitution that could not be amended by act of the legislature alone.

[16] Ibid., p. 127.

appointed by this more representative legislature but that it be independent once appointed, and that the state judiciary, while also appointed, be limited in its powers by the balancing authority of juries.[17] Jefferson was not a pure democrat - the upper house of the legislature, the executive, and the judiciary all remained appointed - but he clearly took his popular sovereignty much more seriously than did the local elites, who he saw as attempting to monopolise power and whose constitution he criticised as extra-legal because of its circumvention of a popular ratification process.[18]

Hallmarks of Feudal Governance

What did governmental reform have to do with feudalism? For Jefferson, quite a bit, for he was aware of the extent to which Virginian government had been modelled on its feudal, English progenitor. Reform of state governance, especially with regards to who held power and who was empowered under the new constitution, was just as important as the property, ecclesiastical and educational reforms proposed in the draft constitution's list of fundamental rights. Jefferson targeted three specifically feudal elements of government: the royal prerogative, corporate representation in the legislature, and the coincidence of judicial office and aristocratic privilege. These concepts will now be introduced and later expanded upon in the sections on the relevant branches of government.

Jefferson defined "prerogative" quite expansively in his draft constitution, listing twelve royal prerogatives that were to be assumed by the legislature. In the *Notes on Virginia*, he clarified that prerogative referred to "the exercise of all powers undefined by the laws" and hence inimical to "a republican organization."[19] These twelve

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[17] See "Third Draft by Jefferson", in TJ Papers Vol. I, pp. 356-365.

[18] Edmund S. Morgan writes on the tension between elite localism and popular sovereignty. "In this transformation, government remained, as it must, something other, something external to the local community, but that something was no longer a king. It was now the representative body itself, or at least the representatives of other localities, acting rather than acted upon, exercising an authority derived from a people who could not exercise it themselves." Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America*. New York: Norton, 1988, p. 53.

[19] Jefferson, *Notes on Virginia*, p. 127. Jeremy D. Bailey asserts that Jefferson got his definition of prerogative from Locke's Second Treatise, Section 160, "Of Prerogative". Jefferson may have found his definition here, but he cites the Second Treatise, Chapter 11 in his Legal Commonplace Book. This chapter consists of Sections 134-142 and is titled "Of the Extent of the Legislative Power". See Jeremy D. Bailey, *Thomas Jefferson and Eecutive Power*, Cambridge: University Press, 2007, p. 16 and Jefferson's LCB Entry

prerogatives match a list of grievances against the king found in the constitution's preamble, which was similar to that found in the Declaration of Independence.[20] From this usage it is clear that when Jefferson spoke of prerogative, he was using it nearly as a synonym with "power", but with the twist in meaning that these were powers being exercised without oversight and susceptible to arbitrary usage. When exercised by the executive they were "prerogatives", but when exercised by the legislature Jefferson modified his word choice to "powers", indicating that he saw a difference in their legitimacy depending on who was exercising them.[21]

Since the legitimacy of the exercise of powers depended on who possessed them, strongly grounding the entire government in popular sovereignty was essential, and Jefferson stated the all government was "enacted by the authority of the people" in his draft constitution.[22] Even after the original foundation of government, continued citizen involvement was essential. "We think in America that it is necessary to introduce the people into every department of government as far as they are capable of exercising it," he wrote to the Abbé Arnoux in 1789, "and that this is the only way to ensure a long-continued and honest administration of it's [*sic*] powers."[23] Jefferson proposed that Virginia's colonial method of representation, in which corporations such as the College of William and Mary and the City of Norfolk held seats alongside counties, each of which enjoyed equal representation, should be abolished and replaced by a system of direct representation of the people. Jefferson conceded that counties and boroughs formed the most viable electoral districts, but specified that representation amongst counties should be proportional to their populations. This moved the representation system further away from institutions and towards being based on persons - a key ingredient for avoiding the corruption of the legislature seen in Britain in "rotten boroughs".

Finally, Jefferson was concerned with the independence of the judiciary, and the potential for future abuse that institutional autonomy posed. There were two problems. First, the county courts were the centres of localist influence and posed a threat to the viability of the state government as an independent institution responsive to the people

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754. In either event, he probably got the definition from Locke but the LCB provides a more precise origin.

[20] For analysis of the development of this list of grievances, see chapter 1.

[21] "Third Draft by Jefferson", in TJ Papers, Vol. I, p. 360.

[22] "Third Draft by Jefferson", in TJ Papers, Vol. I, p. 357.

[23] "To Abbé Arnoux," 19 July 1789, in TJ Papers, Vol. XV, p. 282.

at large. Thwarting localist ambitions through the creation of an independent superior court system, however, risked elevating the superior court judges into a position where they could form their own oligarchy and exercise their own prerogatives. The only way to keep the judiciary from becoming an oligarchy was to, in turn, limit their authority through statute while empowering juries. Jefferson was ambivalent about juries too, well aware of their ability to be manipulated by rhetoricians such as Patrick Henry, but found in them the popular element necessary to allow the judiciary to do its job while keeping it under control.

Part II - Legislative Branch

The legislative branch was the first branch of government in the minds of Jefferson and of the Convention. While the colonial House of Burgesses had existed as an indulgence from the Crown, the new proposed constitutions all designated the legislature as the first branch of government.[24] Doing so involved a major redefinition of the location of sovereignty, as well as addressing whether the new sovereignty required a new form of representation, and whether the legislature should have its own internal checks through bicameralism. While both Jefferson and the Convention favoured eliminating the Council of State in favour of a Senate, they differed on questions of representation and the extent to which the legislature would be bicameral. While the Convention was satisfied with a solution in which power remained with the county oligarchies, Jefferson considered the Convention's new legislative setup to be a recipe for the extension of oligarchic rule to the state at large.

Sovereignty

The constitution-making period of 1776 was a period of major change in the way Virginians thought about sovereignty.[25] At the time of colonisation, popular sovereignty

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[24] See "The Beginnings of Representative Government: The Virginia Company Creates a General Assembly", in Billings, *The Old Dominion*, pp. 45-47.

[25] The best single account of changing perceptions of sovereignty in seventeenth- and eighteenth-century Anglophone political thought is Edmund S. Morgan's *Inventing the People*. For a comprehensive account of how the idea of popular sovereignty was implied in the three "commonwealth" states of Massachusetts, Pennsylvania, and Virginia, see J.R. Pole, *Political Representation and the Origins of the American Republic.* London: Macmillan Press, 1966, especially his discussions of Virginia on pp. 125-165, 281-338.

was not yet the accepted way of framing constitutional questions. Instead, sovereignty was thought of in medieval terms - the king ruled by divine right - and representation was thought of in feudal terms of estates. People were not represented in Parliament, but estates were. In Britain, this meant that Parliament consisted of the estates of society: the Lords Temporal and Spiritual, and representatives of the Commons, and it existed to bind the estates to the king, not to express the popular will.[26] While Virginia did not have resident nobility, the royal governor was the representative of the Crown estate and the House of Burgesses represented the Commons.[27] The Commons of Virginia, like those in Britain, were split between counties and royal boroughs, each of which consisted of a different internal polity.

As shown by Edmund S. Morgan, attitudes towards the sovereignty of things instead of people began to change after the English Civil War. The English commonwealth tradition of political thought began to develop the idea that it was the people, not their institutions, that were represented in Parliament, an idea that was taken further and made normative by theorists such as John Locke. Parliamentary sovereignty, the idea that the legislature itself is sovereign on behalf of the people, became a middle-way compromise between the reality of non-popular representation in Parliament and the popular ideal.[28] While British governance did not fully adopt the

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[26] Morgan, *Inventing the People*, p. 39. The organisation of Parliament was consolidated in 1340, with the estates sorted into their respective Houses, according to G.R. Elton in *Studies in Tudor and Stuart Politics & Government*. Cambridge: University Press, 1974, p. 23 of vol. 2. However, Elton is sceptical that the estates of England were ever organised as coherently as their analogues on the Continent, Ibid., p. 38.

[27] While there was no resident nobility, approximately one-third of Virginia's land east of the Blue Ridge was owned by an absentee landowner, the Lord Fairfax. Fairfax was the successor to a consortium of joint owners drawn from the English nobility in the seventeenth century. The Fairfax Proprietary, as it was known, enjoyed many feudal privileges under the Crown Colony and will be discussed as part of the land reforms in Chapter 3.

[28] Morgan, *Inventing the People*, pp. 55-60, 82-85. There is a rich literature on the topic of the evolution of parliamentary sovereignty. The "Problem of Sovereignty" is the title of a very recent essay by Gordon Wood in *The William and Mary Quarterly* 68, no. 4 (2011): 573-577, as part of the "Patriot Royalism" forum referenced in chapter 1. Also see H.T. Dickinson, *Liberty and Property: Political Ideology in Eighteenth-Century Britain.* London: Methuen, 1977, and "The Eighteenth--Century Debate on the Sovereignty of Parliament." *Transactions of the Royal Historical Society* 26 (1976): 189-210. For parliamentary sovereignty before the modern era, see R.W.K. Hinton, "English Constitutional Doctrines From the Fifteenth Century to the Seventeenth: I. English Constitutional Theories From Sir John Fortescue to Sir John Eliot." *The English Historical*

principle of popular sovereignty until the nineteenth century, the colonial audience was much more receptive to this reasoning and incorporated it into their protest movement in the 1770s, but official attitudes changed slowly.

The five Virginia Conventions that met from 1774 to 1776 continued to use the old language and considered themselves the "Delegates from the counties and corporations of the colony of *Virginia*."[29] The title the Convention chose for the constitution continued that language, reading that the Convention, consisting of "the Delegates and Representatives of the several Counties and Corporations of Virginia", was now transferring power to the government contained in the constitution. The transition to popular sovereignty came just a few paragraphs later, in the main body of the constitution, where the conventioneers restyled themselves "the Delegates and Representatives of the good People of Virginia."[30] This shift from "counties and corporations" to "people" marked a period of transition from the Conventional government, a body based on the sovereignty of things, to the Constitutional government, a body based on the sovereignty of persons. This was further emphasised by the accompanying Declaration of Rights, in which the Convention firmly stated that the people, in whom "all power is vested in, and consequently derived from", were sovereign.[31]

Representation

During the Middle Ages in Britain, two different franchises developed and reflected a split between incorporated and non-incorporated constituencies. As G.R.

Review 75, no. 296 (1960): 410-425, and Conrad Russell, "Thomas Cromwell's Doctrine of Parliamentary Sovereignty." *Transactions of the Royal Historical Society* 7 (1997): 235-246. For the adoption of Parliamentary norms in Virginia, see Warren M. Billings, *A Little Parliament: The Virginia General Assembly in the Seventeenth Century.* Richmond: Library of Virginia, 2004, and Jack P. Greene, *Peripheries and Center: Constitutional Development in the Extended Polities of the British Empire and the United States, 1607-1788.* Athens: The University of Georgia Press, 1986. See also R.R. Johnson, ""Parliamentary Egotisms": The Clash of Legislatures in the Making of the American Revolution." *The Journal of American History* 74, no. 2 (1987): 338-362. For a glimpse of how one of Jefferson's intellectual colleagues understood the issue, see J.V. Jezierski, "Parliament or People: James Wilson and Blackstone on the Nature and Location of Sovereignty." *Journal of the History of Ideas* 32, no. 1 (1971): 95-106.

[29] *The Proceedings of the Convention of Delegates, held at the Capitol, in the City of Williamsburg, in the Colony of Virginia, on Monday the 6th of May, 1776*, p. 5.

[30] "The Constitution as Adopted by the Convention", in TJ Papers, Vol. I, p. 379.

Elton notes, in the medieval period constituencies tended to represent communities that were defined by their territory rather than by their people, and unincorporated constituencies tended to be counties while incorporated constituencies tended to be royal boroughs.[32] In incorporated polities, only members of an electorate defined for that particular constituency could vote for the corporation's representative to Parliament. When a royal borough was chartered by the Crown, its membership was often stipulated as part of its incorporation, and each had its own suffrage requirements.[33]

Therefore, to take an example, only the members of the corporation of the borough of Nottingham could vote for its Member of Parliament. The franchise did not automatically extend to all freemen within the borough, nor to all freeholders.[34] As Edmund S. Morgan notes, "in some [suffrage] extended to virtually all free male inhabitants, in others it was confined to the governing corporation of the borough."[35] Nor were cities the only corporations capable of being represented. The Universities of Oxford and Cambridge were represented in Parliament, with their faculty and fellows comprising the electorate voting for the representatives.[36]

The county polities were classified differently. As unincorporated entities, counties did not have membership rolls. Therefore, the electorate in the counties was determined by property ownership, with suffrage limited to freeholders with estates worth forty shillings.[37] In both the cases of county and corporate representation, suffrage was determined by one's place in society as a property holder or some other privileged membership. Thus, the House of Commons was in no sense founded upon a notion of popular sovereignty in which all freemen enjoyed equal representation.

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[31] "Final Draft of the Virginia Declaration of Rights", in GM Papers, Vol. I, p. 287.

[32] Elton, *Studies*, pp. 40-41. For an older account of the medieval borough constituencies, see May McKisack, *The Parliamentary Representation of the English Boroughs in the Middle Ages*. Oxford: University Press, 1932.

[33] See Derek Hirst, *Representatives of the People?: Voters and Voting in England Under the Early Stuarts.* Cambridge: University Press, 1975, pp. 90-105.

[34] Ibid., pp. 91-92.

[35] Morgan, *Inventing the People*, p. 42.

[36] See H.T. Dickinson, *Liberty and Property*, pp. 149-150, and Mark A. Kishlansky, *Parliamentary Selection: Social and Political Choice in Early Modern England.* Cambridge: University Press, 1986, pp. 136-162.

[37] See Hirst, *Representatives of the People*, pp. 29-43.

The Virginian House of Burgesses was modelled upon the English House of Commons and used the same system of organising its electorate; Warren M. Billings has characterised the House of Burgesses as a "mirror that reflected local interests."[38] The landowners of each county elected two delegates to each session of the House, and corporations, including the College of William and Mary and the boroughs of Williamsburg and Norfolk elected one each. Despite the relocation of sovereignty to the people, old ways died hard. Representation under the new constitution continued in the borough-county mould used under the colony. While Jefferson agreed with the Convention on the location of sovereignty in the people, he was very critical of the Convention's choice to retain the antiquated system of uniform corporate and county representation.[39]

The House of Burgesses was replaced under the new constitution by a reformed lower house called the House of Delegates, which preserved the colonial House's representation of corporations and counties. This arrangement was slightly modified to take into account the new popular sovereignty. Delegates from the counties remained, as before, elected by each county's wealthiest landowners. Corporations, in contrast, were significantly reduced. With the royal charters now defunct, the Convention took it upon itself to define which corporations would be recognised under the new constitution. Only the boroughs of Williamsburg and Norfolk, large and prosperous towns in their own right, were considered to be populous enough to warrant seats in the House of Delegates.[40] Any further corporate constituencies, including the College,

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[38] Billings, *The Old Dominion*, p. 56. Billings continues: "Unwittingly, the General Assembly had adopted a theory of representation akin to one that had flourished in medieval England. On that groundwork Virginia politicians, like their colleagues elsewhere in English North America, continued to construct a novel system of direct representation. But a early as the fifteenth century the English had begun to abandon that medieval conception for one that held that members of Parliament represented the whole realm as well as the particular electors who had chosen them…. Only when the constitutional crisis that led to revolution arose in the eighteenth century did the diverging views of representation become palpable." The Virginians did not undergo this same transformation before the revolution, and encouraging it was the crux of Jefferson's reforms.

[39] See Jefferson, *Notes on Virginia*, pp. 118-120.

[40] The under-representation of urban and semi-urban communities is one of the most startling aspects of the Virginia constitution. While the Convention limited the initial number of borough constituencies to two, the English Parliament had 112 borough constituencies as early as the reign of Henry VIII. Even taking into account Virginia's smaller size, the town-country imbalance is extreme. See Elton, *Studies*, p. 41.

would need to apply for admission to the House of Delegates, whose membership was overwhelmingly composed of county gentry, concentrated in the eastern counties. These gentry, averse to diluting their power by dividing the most populous western counties, which were outside of their control, into smaller constituencies, thereby increasing western representation in the House, were presumably also averse to empowering boroughs that would further dilute their already tenuous power.[41]

All settled areas of the state were part of a county, and therefore any landholder within a county was represented by his two delegates to the House, plus a Senator representing a district of several counties composited together. However, it is easy to give more credit to the reformed House than is due. While the Convention had taken some measures towards eliminating the worst abuses of the system inherited from England, many shortcomings remained. The counties often had dramatic inequalities in population, especially the further west one went. As Jefferson noted, "the county of Warwick, with only one hundred fighting men, has an equal representation with the county of Loudoun, which has 1746. So that every man in Warwick has as much influence in the government as 17 men in Loudon."[42] The electorate remained confined to a small group of propertied gentry who ensured their continued hegemony through feudal inheritance laws.[43] And a borough whose population fell below half that of a neighbouring county could be reabsorbed into that county and thereby lose its seat in

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For a perspective on why there were so few towns, see John C. Rainbolt, "The Absence of Towns in Seventeenth-Century Virginia." *The Journal of Southern History* 35, no. 3 (1969): 343-360.

[41] Jefferson provides an illuminating table on the discrepancy between population and representation in *Notes on Virginia*, p. 119. The Tidewater counties in the east, the oligarchies' heartland, had 40% of the state's white adult male population (as registered on the militia rolls) while controlling half of the Senators and just under half (71 of 149) of the Delegates. From first hand experience, Jefferson further attested that the difficulty of western representatives in reaching the Assembly at Williamsburg meant that the eastern gentry, voting as a group, "give law" to the sixty per cent of the population residing elsewhere in the state.

[42] Ibid., p. 118.

[43] Suffrage was conditional on owning a freehold in a county or a house in a borough. English property requirements had been set at 40s by Act of Parliament in 1430. See Hirst, *Representatives of the People*, pp. 29-33, and Elton, *Studies*, pp. 41-42 for further explanation on the origins of the property requirement. For the adaptation of these requirements into the Virginian colonial setting, see John Gilman Kolp, *Gentlemen and Freeholders: Electoral Politics in Colonial Virginia.* Baltimore: Johns Hopkins University Press, 1998, pp. 38-44.

the House. No such provision existed for counties whose population dropped beneath the same threshold.

Bicameralism and Separation of Powers

Having decided that the Assembly would represent counties and corporations, and that the franchise would extend to a very small propertied electorate, the Convention also decided to vest supreme power in an Assembly that, while consisting of an upper and lower house, was functionally unicameral. In addition, the executive branch was nominated by the Assembly and enjoyed no independence from the legislative branch; Jefferson favoured a much stricter separation of powers.[44] As a change from monarchy, this was a highly radical step that deserves to be ranked with Pennsylvania's unicameral popular legislature as one of the most radical innovations of the state-level revolutions, representing a direct affront to the Convention's stated goal of the separation of powers.[45]

The Virginia Constitution and the Declaration of Rights both emphasised that the "legislative, executive, and judiciary departments, be separate and distinct", and that "the legislature shall be formed of two distinct branches".[46] Yet, the two houses were unequal, with the constitution vesting virtually all power in the General Assembly, of which the lower house, the House of Delegates, enjoyed the preponderance of power versus the upper house, the Senate. The House of Delegates had the power of originating all legislation and money bills; the Senate could only amend legislation and submit money bills to an up-or-down vote. Meanwhile, the colonial upper house's authority over nominations to higher office had been removed to the new executive Council of State, and the right to judge in impeachments was removed to the judicial General Court. Effectively, the Senate could act only as a negative in the legislative process. Additionally, the gubernatorial veto had been entirely removed and the

[44] Jefferson also came to believe that executive legitimacy required a popular mandate, independent of legislative appointment. See Bailey, *Thomas Jefferson and Executive Power*, pp. 1-27.

[45] In this judgment, I am at odds with Willi Paul Adams, who, in his comparative study of the revolutionary constitutions, credits the Virginia Convention with writing the first American constitution that truly respected separation of powers in form as well as rhetoric, with an independent upper house and independent judiciary. See Adams, *The First American Constitutions,* pp. 267-268.

governor exercised no control in the legislative process. The governor's legislative powerlessness further tilted the balance towards the House.[47]

The position of the Senate was even weaker when it came to exercising control over the executive branch (consisting of the Council of State and the Governor), of the independent Secretary of State and Attorney General, of the judiciary, and of the state delegates for Congress. The constitution called for all these positions to be elected by joint ballot of the two houses, the mode of which would be that each vote would "be taken in each House respectively, deposited in the conference room, the boxes examined jointly by a committee of each House, and the numbers severally reported to them."[48] By combining the votes of both houses into a single joint ballot, the Senate could not exercise a check upon the House's greater numbers. Effectively, the Assembly functioned as a unicameral body when it selected the state's highest officers, with members of the House of Delegates casting the vast majority of votes in the joint ballot.

All told, the House of Delegates possessed six exclusive enumerated powers, and exercised a seventh enumerated power, nominations, in joint ballot with the Senate, where it thus controlled a majority. The exclusive powers were origination of legislation, origination of money bills, prosecution, pardon, ex post facto impeachment of executive officers, and impeachment of serving judicial officers.[49] It also had an eighth enumerated power, the authority to order the Senate into session if it had adjourned, a power it shared with the Governor. As Jefferson described it, the Assembly consisted of "the Senate as well as lower (or shall I speak truth and call it upper)" House of Delegates.[50] In sum, the Convention had granted the House of Delegates a preponderance of power within Virginia government, unbalancing the constitution and rendering the separation of powers superficial.

Jefferson's Criticism

Both Jefferson and his colleagues recognised the Senate for what it was – an ineffectual body of little real constitutional significance, overshadowed by the House of

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[46] "Final Draft of the Virginia Constitution of 1776", in GM Papers, Vol. I, pp. 304-305, and "Final Draft of the Virginia Declaration of Rights", in GM papers, Vol. I, p. 287.

[47] "The Constitution as Adopted by the Convention", in TJ Papers, Vol. I, pp. 379-380.

[48] Ibid., p. 380.

[49] Ibid., pp. 380-381.

[50] "To Edmund Pendleton", 26 August 1776, in TJ Papers, Vol. I, p. 504.

Delegates. "I agree our Senate is not on the independant [*sic*] footing I wished, tho' perhaps we should differ as to the proper change," Edmund Pendleton, who had been at the Convention, wrote to Jefferson in August 1776. "My principal fear now is that the Delegates will have too much influence in the Senate Elections, as I wish them to be totally independant [*sic*] of each other and to say the truth of the people too," going on to explain how he had favoured an independent Senate with life tenure.[51] In contrast, Jefferson had proposed selecting the Senate directly from the House of Delegates, but then rendering it independent of the lower house through long, staggered terms of rotation in office.

Responding to Pendleton, Jefferson explained how, under his plan, the long, nine-year terms of office for Senators, selected in different classes every three years, would have rendered them independent of the annually elected House of Delegates; he had only selected them from the House in order to remove them from popular pressure, similar in spirit to the electoral colleges that George Mason's original outline to the Convention had proposed.[52] Greater longevity than the annually-elected House would gradually remove each class of Senators from its influence. Lamenting the adopted constitution, with its virtually powerless Senate elected from the same constituency and at the same time as the House, Jefferson sighed "so much for the wisdom of the Senate."[53] In the *Notes on Virginia*, Jefferson explained further that the "senate is, by its constitution, too homogeneous with the house of delegates. Being chosen by the same electors, at the same time, and out of the same subjects, the choice falls of course on men of the same description. The purpose of establishing different houses of legislation is to introduce the influence of different interests or different principles."[54] Neither Pendleton nor Jefferson were under any illusions about the balance of power chosen by the Convention, and Pendleton himself was convinced that the Senate would be ancillary to the House rather than an independent body.

Jefferson accused the Convention of abusing its power, of having been elected to manage the crisis with Britain and instead using that power to perpetuate itself in office under the auspices of the House of Delegates. "[The Convention] received in their

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[51] "To Thomas Jefferson", 10 August 1776, in TJ Papers, Vol. I, p. 489.

[52] "The Plan of Government as Originally Drawn by George Mason", in TJ Papers, Vol. I, pp. 366-369.

[53] "To Edmund Pendleton", 26 August 1776, in TJ Papers, Vol. I, p. 504.

[54] Jefferson, *Notes on Virginia*, p. 119.

creation no powers but what were given to every legislature before and since. They could not therefore pass an act transcendant [*sic*] to the powers of other legislatures."[55] In so doing, the Convention had exceeded its mandate, and had imposed a constitution upon the state that entrenched control of the Convention's own gentry membership through a malleable legislative supremacy vested in the House of Delegates.

Jefferson warned that the Convention had designed the Assembly so as to allow for the rise of an oligarchy. The Assembly "exercises a power of determining the Quorum of their own body which may legislate for us," Jefferson wrote in the *Notes*. "The house of delegates therefore have lately voted that, during the present dangerous invasion, forty members shall be a house to proceed to business." Forty was less than half of the one hundred and thirty-odd delegates seated; it was also the quorum of the British House of Commons.[56] "But this danger could not authorize them to call that a house which was none: and if they may fix it at one number, they may at another, till it loses its fundamental character of being a representative body… From forty it may be reduced to four, and from four to one: from a house to a committee, from a committee to a chairman or speaker, and thus an oligarchy or monarchy be substituted under forms supposed to be regular."[57] By way of example, Jefferson pointed to Venice, a republic that had fallen into oligarchy by allowing an aristocracy to rise up through a rump legislative branch.

A further concern was that lack of separation of powers meant that the legislature, even if not a rump, could interfere in the activities of the other branches, or even direct them outright. There was "no barrier" between the three branches of government, Jefferson claimed, because "the judiciary and executive members were left dependant on the legislative" for salaries and in some cases their very "continuance" in office. As a result, "all the powers of government, legislative, executive, and judiciary, result to the legislative body."[58] In short, the ability of the legislature to control the other branches of government, and in the process to override the constitution itself, was to "exercise power undefined by the laws", just as Jefferson had defined prerogative.[59]

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[55] Jefferson, *Notes on Virginia*, p. 122.

[56] See David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain.* Cambridge: University Press, 2002, p. 21.

[57] Jefferson, *Notes on Virginia*, p. 126.

[58] Ibid., p. 120, 129.

[59] Jefferson*, Notes on Virginia*, p. 127.

Lack of separation of powers was, in fact, prerogative power, and the Convention had written it into their constitution.

Part III - Executive Branch

Jefferson's revolutionary writings show that he had a very clear idea of a republican executive as early as the summer of 1774. In the *Summary View*, Jefferson wrote of an idealised monarchy which would rule the various realms of the British empire. Notably, this idealised monarchy was a reformed monarchy which would be stripped of its prerogative powers while retaining its full executive powers. In his draft constitution, Jefferson used this concept as a model for his own state-level executive, the Administrator. The Virginia Convention, however, went even further by creating a plural executive in which the governor was supervised by a veto-wielding Council of State. This shows important differences between Jefferson's vision of a strong executive and the Convention's vision of a weak one.

The Convention's Governor-in-Council

In reconstructing the office of the governor, the Virginia Convention took pains to make the governor of the commonwealth the opposite of his royal predecessor in all but title. Rather than serving at the king's pleasure, which in effect often meant a lengthy term that could stretch for a governor's entire life, the Convention limited the governor to a year-long term, limited him to three consecutive terms in office, and made him appointable by a joint ballot of the legislature. The governor was secure in his tenure while in office, but given that his term lasted for only twelve months, it meant he was effectively subject to a confidence vote each time the legislature nominated him for a new term. Historian C.B. Patterson refers to this and similar arrangements as "a weak form of cabinet government, resembling that of France in the Third Republic, in which the executive, lacking the power of dissolution, was subject to the complete control of the legislative body."[60]

Likewise, executive powers were restrained, and many of the prerogative powers of the royal governor were vested by law in the House of Delegates. The pardon power was removed to the legislature and the legislative veto was removed, as was the right to dissolve or prorogue the legislature; the governor's one remaining legislative

prerogative was to call back the legislature from a recess. The governor was what Patterson has described as the "Whig type of executive, only the administrative agent of the legislature, which enjoyed complete supremacy. He had no discretionary powers."[61]

In addition to being fenced in by the legislature, the governor was not free to act on his own. A privy council, also appointed by the legislature, was endowed with advise-and-consent power on all executive decisions. This privy council was not like the Privy Council of Britain, which was appointed by the king and served at his pleasure. Instead, the privy council was a co-equal part of the executive branch, referred to as the Council of State in the constitution. The eight members of the council had complete oversight over all executive activities, no matter how mundane. Colonial governors had routinely withheld their royal instructions from the Council of State; now the Governor could not do anything without the Council's acquiescence, including sending official correspondence in the post.[62]

In contrast to American constitutional tradition before and since, with its emphasis on presidential government and the "unitary executive", the Virginia Convention created a plural executive where no one person was responsible for administration.[63] This approach was not novel - plural executives had been in use throughout the colonial crisis in the forms of Committees of Safety and Committees of Correspondence. The Virginia Convention itself was a plural executive body as well as a legislature. Many of the other new state governments in North America had governor's councils in their constitutions, but Virginia's compared only to Pennsylvania's plural executive in the extent to which it reduced the governor to near-powerlessness.

In the Massachusetts Constitution of 1780, designed by John Adams, the office of Governor was a powerful one with a legislative veto, appointment power, pardon

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[60] Patterson, *Constitutional Principles,* p. 91.

[61] Ibid., p. 83.

[62] Billings, *The Old Dominion in the Seventeenth Century: A Documentary History of Virginia*, p. 49. For an example of the governor's lack of independent powers, see the letter by Gov. Patrick Henry in JM Papers, Vol. I, pp. 219-221.

[63] This type of executive was also used in Pennsylvania's radically democratic constitution; curiously, this radical element of the Virginia constitution has escaped equal notoriety. For the federal tradition of the unitary executive, see Stephen G. Calabresi and Christopher S. Yoo, *The Unitary Executive: Presidential Power From Washington to Bush.* New Haven & London: Yale University Press, 2008, especially pp. 64-76 for Jefferson's invocation of the unitary executive as President of the United States.

power, and military power as commander-in-chief. Most strikingly, the fear in Massachusetts was not that the governor should corrupt the legislature, but that the legislature should corrupt the governor, and to that end the constitution specified that the governor should receive a guaranteed salary during his tenure. While the governor did have to work with the Council, it met only when he convened it, and its enumerated powers were limited to "advice" on executive business. The Councilors were appointed by joint ballot of the legislature, out of the membership of the Senate, and resigned their legislative duties in order to take their seats in the Council. The proceedings of the Council were also available for review by the legislature, and minority reports were included in the proceedings. But that was the extent to which the Council acted as a check on the Governor. The Council operated more as a traditionally subservient Privy Council than as an equal partner in governance.[64]

The Virginian Governor-in-Council bore superficial resemblance to the Pennsylvanian "president and council" empowered by that states' commonwealth constitution of the same year, but the similarities ended there. The president and council were directly elected by the state's freeholders for short, fixed terms, and here the executive had more power than in Virginia. The president and council had appointment power, executive power, appellate jurisdiction, power of reprieve (but not pardon), and military power with the president serving as commander-in-chief. Thus, while the executive branch was circumscribed, the President and Council had a great deal more power than the Governor-in-Council in Virginia.[65]

Jefferson's Administrator

As we saw in chapter one, Jefferson's views on constitutionalism were heavily influenced by the Saxon myth of the ancient constitution. His commonplace entries show that by 1776 he was again researching the history of kingship, not only in Britain but in the Germanic kingdoms of northern Europe. In this, he followed in the footsteps of English commonwealthmen such as Robert Molesworth, a contemporary of Algernon Sidney and John Locke, whom Jefferson commonplaced extensively at the same time as he was drawing up the outlines of his constitution.

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[64] *Roots of the Republic: American Founding Documents Interpreted.* Stephen L. Schechter, ed. Madison, WI: Madison House, 1990, pp. 194-226.

According to Molesworth, constitutional monarchies were defined, in part, by incorporating some element of elective monarchy into their constitution. From Molesworth's *Account of Denmark*, a classic of the commonwealth genre, Jefferson recorded that "Denmark was, till 1660, governed by a king chosen by the people of all sorts"; the estates of the realm would meet in an electoral college to choose the most meritorious member of the deceased king's family to be his successor. Molesworth noted that the Danes retained the right to depose their king if he misbehaved, "either formally by making him answer before the representative body of the people", or "if by ill practices, such as making of parties, levying of soldiers, contracting of alliances to support himself in opposition to the people's rights, he was grown too powerful to be legally contended with, they dispatched him, without any more ceremony, the best way they could" and went on to elect a new king.[66] The echoes of the list of grievances in Jefferson's own Declaration of Independence could not be clearer.

Jefferson was not done there, for he went on in the same commonplace entry to cite Locke on the authority of the legislature to makes laws binding the executive, and gave a lengthy list of English kings to show that elective monarchy had been the original state of the English crown under the Saxons before being usurped shortly after the Norman Conquest. This suggests that Jefferson was thinking of an idealised elective monarch while drawing up his design of a republican executive in the spring of 1776. Further corroboration can be found in his unusual choice of the title "Administrator" for his chief executive, rather than the "Governor" used by the Convention and the other colonies. What was an Administrator, and where did Jefferson get the idea?

After discussing the line of English kings in his commonplace book, Jefferson turned to another history of the northern kingdoms, that of Sweden in Thomas Salmon's *Modern History* of Europe. Salmon wrote of the war between Sweden and Denmark when Sweden withdrew from their combined monarchy in 1439. The Swedish king, Charles Canutson, successfully led the Swedes to independence, but "after his death in 1469 they discontinued the kingly office and chose a person whom they called an Administrator who in fact possessed equal power with the king." The Administrator,

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[65] J. Paul Selsam, *The Pennsylvania Constitution of 1776: A Study in Revolutionary Democracy.* Philadelphia: University of Pennsylvania Press, 1936, pp. 194-196.

[66] LCB Entry 754.

acting on behalf of the feudal estates of Sweden, continued the wars.[67] The Administrators maintained Sweden's independence until 1523, when Denmark renounced its claim and the incumbent Administrator, Gustavus Ericson, was named king. Ericson proceeded to reduce the Swedish estates through use of his royal prerogative, including increasing feudal land dues, and died only after making the monarchy absolute and hereditary to his son.[68]

The Swedish estates later reclaimed their privileges from Gustavus Ericson's weak successors, but why would Jefferson choose to name his chief executive after a defunct Swedish office that culminated in autocracy? It is likely that Jefferson saw moral value in naming his chief executive after the leaders who had won Sweden its own war of independence against the forces of a combined monarchy. But, most important, the Administrator was an example of a relatively recent leader of a landed polity in which executive power was wielded responsibly through an elective office. Unlike the instability of the English commonwealth and its eventual dominance by Cromwell, the example of the Administrators was one of fifty-five years of governmental stability that ended only when the Swedish estates voluntarily (and unnecessarily) re-established the monarchy.[69]

An elective monarch was not enough, for the executive office would also have to be purged of its prerogative powers. As stated earlier in this chapter, Jefferson identified twelve prerogatives of the royal governor that should be stripped away and placed under legislative control.[70] These powers would not be eliminated from government

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[67] These estates were dominated by the clergy, who controlled half a dozen bishoprics that allowed them to amass substantial secular power and riches. Clerical aristocracy will be further discussed in chapter 4.

[68] LCB Entry 755.

[69] On the other hand, Jefferson may simply have chosen the title as a way of indicating that the executive was a mere administrator, or "first magistrate" as he said in the *Summary View*. This is possible, but I do not believe that Jefferson was trying to minimise the importance of his executive. Clearly defining authority so as to eliminate prerogative is not the same thing as weakening the executive, which was what the Convention did with the Governor-in-Council. In contrast, the commonplace entry offers a more ready-made explanation rich in republican context, a sort of inside reference that Jefferson was telling himself similar to the ornate Anglo-Saxon notations he made to his manuscript copy of the Bill for Proportioning Crimes and Punishments.

[70] Jeremy Bailey questions why, after denouncing monarchy in the Declaration of Independence and the preamble to the draft constitution, Jefferson would then base the office of Administrator upon it. Bailey notes that the Virginia Convention accepted language Jefferson used to denounce George III while rejecting his denunciations of

purview, but they would be returned to the legislature for inclusion in legislation, where they properly belonged under Jefferson's definition of prerogatives as authority "undefined" under the law. Ergo, legislative action would make them into law, which the executive could then execute. Jefferson was not making an argument for a weak executive or limited government, but he was making an argument for responsibilities to be vested in their proper places.[71] Once prerogatives had been removed, the executive was free to carry out its genuinely executive responsibilities without hindrance - a major difference from the Convention's Governor-in-Council.[72]

Taking all of this into account, Jefferson's Administrator ended up looking like the preferred executive in the *Summary View*, when Jefferson referred to the king as only the "chief officer of the people, appointed by the laws, and circumscribed with definite powers."[73] At the time, it had been a fictitious misrepresentation of the king's actual status under British law, but Jefferson now had the chance to act on that vision when creating his own executive. The Administrator, while seemingly named after an obscure

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monarchy as a form of government, and his basing the executive power on monarchy, thereby avoiding the contradiction in their own document. Bailey ascribes Jefferson's willingness to copy the basic model of kingship as born out of fear that the people would seek a restoration of the Crown if executive authority were found to be ineffectual. See Bailey, *Thomas Jefferson and Executive Power*, pp. 31-33.

[71] Working from a less precise definition of prerogative, Jeremy Bailey argues that Jefferson later relaxed his views on prerogative as president. "Democratic energy requires a new understanding of executive prerogative …. Jefferson understood that it was the executive's duty to meet occasions dealt by necessity - even if it required acting in the absence of legal authority or, in some cases, departing from the law." Bailey gives the Louisiana Purchase as an example of a case where Jefferson used a form of prerogative. Ibid., pp. 15-16.

[72] In later years Jefferson would make his proposed executive even stronger. His 1783 draft constitution lengthened the executive's term to five years to give him better independence from legislative interference. "Jefferson's Draft of a Constitution for Virginia", in TJ Papers, Vol. VI, pp. 298-299.

[73] "A Summary View of the Rights of British America", in TJ Papers, Vol. I, p. 121. Julian H. Franklin notes that "in a limited monarchy the king, although circumscribed by law, has a legal monopoly of all constitutional initiatives; in a mixed monarchy constitutional initiative is shared by the king and the Estates. In either form the king is vested with a large sphere of independent power which the representative body must be forbidden to assume." Jefferson's Administrator bears great resemblance to a mixed monarch. Julian H. Franklin, *John Locke and the Theory of Sovereignty: Mixed Monarchy and the Right of Resistance in the Political Thought of the English Revolution.* Cambridge: University Press, 1978, p. 3.

office in Swedish history, was very much the product of several years' worth of Jefferson's thinking on comparative government within the British world as well.[74]

Comparison

It can be seen that Jefferson and the Convention had very different ideas about executive power. Jefferson clearly perceived a difference between royal prerogative and legitimate executive power. He acted to end one while leaving the other unhindered, and did so with the example of responsible elective monarchs and executives in mind. In contrast, the Convention acted out of apprehension to executive power, apparently not perceiving the same difference between prerogative and executive authority. They continued Virginia's experiment in a plural executive and thereby created one of the weakest executive branches in the new nation.

While both Jefferson and the Convention can be fitted into the intellectual tradition variously designated as "Whig", "commonwealth" or "neo-Harringtonian", their differing approaches to executive power reveal an important conceptual difference in how they understood constitution-making.[75] While the Convention sought to preserve the localist influence under the guise of a textbook republicanism, emphasising the power of the legislature and fragmenting executive authority, Jefferson displayed far more interest in adapting constitutional monarchy to a republican setting. Contrary to some historians'

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[74] Keeping in mind Patterson's description of the "Whig type of executive" as "only the administrative agent of the legislature" (se Patterson, *Constitutional Principles*, p. 83), it could be reckoned that Jefferson was using the title "Administrator" in that sense only, as a way of de-emphasising the authority of the executive. I disagree with this alternative interpretation because Jefferson was not trying to weaken the executive's legitimate powers of execution and interpretation of the laws, he was only trying to eliminate prerogative. Rather, as Jeremy Bailey shows, when Jefferson attempted to minimise the authority of the executive he did so by hiding behind the Privy Council, not by minimising the office of the chief executive itself. See Bailey, *Jefferson and Executive Power*, pp. 35-37.

[75] A historiographical survey of this intellectual tradition must include J.G.A. Pocock's *The Machiavellian Moment : Florentine Political Thought and the Atlantic Republican Tradition.* Princeton, NJ: Princeton University Press, 2003; *The Ancient Constitution and the Feudal Law : A Study of English Historical Thought in the Seventeenth Century: A Reissue with a Retrospect.* Cambridge : University Press, 1987; as well as his article "Machiavelli, Harrington and English Political Ideologies in the Eighteenth Century." *The William and Mary Quarterly* 22, no. 4 (1965): 549-583; in addition to Caroline Robbins' *The Eighteenth-Century Commonwealthman.* Cambridge, MA: Harvard University Press, 1959.

interpretations, Jefferson did not fear executive authority but was only opposed to the executive making its own laws, which he termed prerogative.[76]

Having pointed out the major differences in Jefferson's unitary and the Convention's plural approach to executive power, it should be pointed out that there were many similarities. The offices of attorney general, treasurer, and delegates to Congress all were appointed by the Assembly, and the executive itself was appointed by the Assembly on short, one-year terms. This shows that while Jefferson believed in unity for most executive duties, he was open to inferior or specialised positions being appointed separately by the legislature. While he allowed his Administrator did have the authority to take unitary action on most matters, a privy council would still sit to advise him, though its consent was not required. Finally, both proposed constitutions ended the royal prerogative. Therefore, it seems that the one crucial difference between Jefferson and his colleagues, on the matter of executive authority, was whether prerogative and executive authority were intrinsically linked or could be separated. Jefferson believed that they could, the Convention believed that they could not, and this explained all the other structural differences.

Part IV - Judicial Branch

While the provisions for the judiciary make for the shortest part of Jefferson's draft constitution, and while his proposed reforms have not won the same historical notoriety as his work on property, religion, and education, the legislation relating to Virginia's court system comprised a large amount of Jefferson's total workload as a legislator in the years 1776-1779. Jefferson proposed to make an entirely new judiciary in his draft constitution, from the lowest county courts all the way through a Court of Appeals exercising final jurisdiction in all legal matters, and divided into two distinct

[76] Patterson is a notable example in his misreading of Jefferson's views on the executive. Patterson focuses on Jefferson's views held after 1789, when his outlook on executive power had changed considerably. Bailey persuasively argues that the ongoing shifts in Jefferson's views on executive power had to do with his changing understanding of the nature of executive accountability to the people without the intermediary influence of the legislature. David N. Mayer draws attention to the principle of rotation in office present in all of TJ's executive plans, in contrast to the lack of rotation for the federal president. See Mayer, *Constitutional Thought of Thomas Jefferson,* p. 225.

branches of common law and of equity. When his draft constitution was rejected, he made repeated attempts to enact reform through legislation.

Jefferson was motivated by a desire to ensure the judiciary's independence while also holding it accountable to the sovereign people, and to ensure that separation of powers were not violated by judge-made law usurping the role of the legislative branch. In contrast to the legislative and executive branches, the basic forms and procedures of which were set in stone by the Convention's constitution, Jefferson identified the judiciary as an area much more open to reform given the relative vagueness of its enumerated provisions in the constitution. This section examines Jefferson's attempt to reform the county courts so as to break up the hold of the local county oligarchies, then moves on to his efforts to prevent similar oligarchies from forming in the state's superior court system. Finally, it examines the judiciary's use of prerogative power and Jefferson's attempts to constrain judicial discretion so as to enhance the justness of judicial decisions.

Inferior Courts

County courts had been the cornerstone of both English justice and governance since the Middle Ages. The courts, staffed by justices of the peace, formed a patronage network that allowed the Crown, through appointments of the justices, to maintain control throughout the kingdom without the use of a standing bureaucracy.[77] By an act of the General Assembly in 1634, the English "shire" system was replicated in Virginia.[78] Over time, the county courts were ceded increasing power from the colonial government, eventually including the right to appoint their own members.[79] Warren M. Billings notes that the county courts were never exact replicas of their English

[77] For histories of the development of the English judicial system, see Robert C. Palmer, *The County Courts of Medieval England, 1150-1350.* Princeton: University Press, 1982; Anthony Musson and W.M. Ormrod. *The Evolution of English Justice: Law, Politics and Society in the Fourteenth Century.* London: Macmillan, 1999; Ogilvie, Charles. *The King's Government and the Common Law, 1471-1641.* Oxford: Basil Blackwell, 1958; and George W. Keeton, *The Norman Conquest and the Common Law.* London: Ernest Benn Ltd., 1966.

[78] Billings, *Old Dominion*, p. 83. Original citation found in Hening/I/224.

[79] In their study of eighteenth-century Virginia county politics, Robert and Katherine Brown dispute the notion that the county courts were aristocratic but do concede that some county offices were unofficially hereditary. Robert E. Brown & Katherine Brown,

counterparts, for "they lacked the power to take life and limb, whereas their authority united administrative, admiralty, criminal, civil and ecclesiastical jurisdictions that in England belonged to a variety of different courts."[80]

By the time of the American Revolution, these county courts had become the loci of power for oligarchies within each county.[81] In an 1816 letter reflecting on the deficiencies of the Virginia constitution of 1776, Jefferson remarked that "the justices of the inferior courts are self-chosen, are for life, and perpetuate their own body in succession forever, so that a faction once possessing themselves of the bench of a county, can never be broken up, but hold their county in chains, forever indissoluble."[82] This was a major source of corruption, as the lack of separation of powers allowed the justices of the peace to control nominations to other branches of county government as well; furthermore, local justices of the peace were the only officials at the state level granted an exemption from separation of powers and were allowed to hold local office while also sitting in the Assembly.[83] While the Convention's constitution granted the power of nominating justices of the peace to the Governor-in-Council, it conditioned that appointments were "to be made upon the recommendation of the respective County Courts", thereby leaving nominating authority within local control, and leaving the staffing of all other positions to the courts themselves.[84]

The county courts exercised legislative, executive, and judicial functions, an exception to the separation of powers that was explicitly guaranteed in the second enumerating paragraph of the Convention's constitution.[85] "Yet these justices are the real executive as well as judiciary, in all our minor and most ordinary concerns," Jefferson continued. "They tax us at will; fill the office of sheriff, the most important of all the executive officers of the county; name nearly all our military leaders, which

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Virginia, 1705-1786: Democracy or Aristocracy? Easting Lansing: Michigan State University Press, 1964, p. 217.

[80] Billings, *Old Dominion*, p. 87.

[81] For a thorough analysis of the character and responsibilities of the county courts at the time of the revolution, see George M. Curtis III, *The Virginia Courts During the Revolution*, PhD Thesis, University of Wisconsin, 1970, pp. 1-96.

[82] TJ to Samuel Kercheval, 22 January 1816. The letter has not yet been included in the Retirement Series of Jefferson's papers, but may be found in the Library of America anthology of his papers, pp. 1395-1403, with this particular quotation found on p. 1397.

[83] "The Constitution as Adopted by the Convention", in TJ Papers, Vol. I, p. 379.

[84] Ibid., p. 382.

[85] Ibid., p. 379.

leaders, once named, are removable but by themselves. The juries, our judges of all fact, and of law when they choose it, are not selected by the people, nor amenable to them. They are chosen by an officer named by the court and executive. Chosen, did I say? Picked up by the sheriff from the loungings [*sic*] of the court yard, after everything respectable has retired from it."[86]

The impact of oligarchy was not limited to the counties themselves, for the Convention's retention of county representation from the House of Burgesses meant that the local oligarchs also were able to decisively influence the selection of delegates and senators to the Virginia Assembly. By restricting the suffrage to those eligible under the colonial government, the constitution guaranteed continued control to those oligarchs who had gained their position under the *ancien regime*.[87] Jefferson was fully justified in lamenting that the Convention had frozen the colonial hierarchy in place through these arrangements.

Upon taking his seat in the House of Delegates in the autumn of 1776, court reform was one of Jefferson's top priorities, and his slate of judicial reforms included a bill for procedural reform within the county courts.[88] Jefferson's bill failed, but the topic of reforming the county courts remained an active one throughout the 1780s. While minister to France, Jefferson was kept informed of the debate over county court reform by James Madison, who was busy shepherding Jefferson's other reform bills through the legislature. Madison informed Jefferson that, county court reform being dead, another bill establishing courts of assizes was working its way through the House of Delegates in 1785. These assize courts, based on their English namesakes, would supervise the county courts and provide a buffer between the counties and the constitutionally-mandated superior courts.[89]

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[86] TJ to Samuel Kercheval, 22 January 1816, Library of America Edition of TJ Papers, p. 1397.

[87] "The Constitution as Adopted by the Convention", in TJ Papers, Vol. I, p. 380.

[88] "Bill for Better Regulating the Proceedings in the County Courts", in TJ Papers, Vol. I, pp. 650-652.

[89] Madison stated that the reform bill was based on one proposed by Edmund Pendleton, Jefferson's colleague on the Revisal of the Laws, in the autumn session of 1776. It is unknown whether Jefferson viewed Pendleton's bill as complementary or competing with his county reforms. See "From James Madison", 9 January 1785, in TJ Papers, Vol. VII, pp. 588-599.

In August 1785, the bill was still pending before the House, and Madison expressed his concern that supposed allies of the bill were secretly planning to sabotage it.[90] Indeed, a competing county reform bill was proposed in the autumn session, which, as Madison noted to James Monroe, "is meant as a substitute for the Assize system, to all the objections against which it is liable, without possessing its advantages."[91] By the end of the year, Madison was conceding defeat on reforming Virginia's inferior court system, confessing to Monroe that "The Reform of the County Courts has dwindled into directions for going thro' the docket quarterly, under the same penalties as now oblige them to do their business monthly. The experiment has demonstrated the impracticability of rendering these Courts fit instruments of Justice; and if it had preceded the Assize Question would I think have ensured its success."[92]

As Jefferson had feared, the county courts proved to be the Gordian knot of the Virginia constitution, without reform of which the entire government remained rigged in favour of local oligarchy. Madison reported back to Jefferson in January 1786, noting that while the county court and assize bills had both passed, the county bill "amounts to nothing, and is cheifly [*sic*] the result of efforts to render Courts of Assize unnecessary."[93] The assizes bill, meanwhile, was crippled by the need for supplementary legislation, which Madison considered to be a ploy to prevent these district courts from ever coming into being. "The various interests opposed to it, will never be conquered without considerable difficulty," Madison lamented.

Superior Courts

Like the inferior courts, Virginia's superior court system was vaguely defined by the Convention constitution. While a Court of Appeals, a General Court, courts of chancery, and courts of admiralty were all mentioned as part of the legislature's appointment power, the constitution itself did not establish those courts, leaving the matter to subsequent legislation.[94] That task was left to the legislature, and in the autumn of 1776 Jefferson seized upon the opportunity to take a shaping role in the state's judiciary.

[90] "From James Madison", 20 August 1785, in TJ Papers, Vol. VIII, p. 415
[91] "To James Monroe", 24 December 1785, in JM Papers, Vol. VIII, pp. 455 - 457.
[92] "To James Monroe", 30 December 1785, in JM Papers, Vol. VIII, pp. 465-467.
[93] "From James Madison", 22 January 1786, in TJ papers, Vol. IX, p. 197.

Jefferson's own constitution had quite clearly established a system of superior courts overseeing the counties, and the county court reform bill was part of a much larger slate of five bills establishing Virginia's entire judiciary.[95]

Unlike the legislature, which was modelled on the House of Burgesses, and the executive, which was modelled on the royal governor, a system of superior courts was completely foreign to the Virginian experience before 1776. Under the colony, the Council of State had exercised all appellate functions along with its legislative and executive duties. The governor himself convened the Council, which he had appointed, when sitting in its judicial capacity, thereby ensuring that all justice dispensed by the Council bore a royal imprimatur. Both Jefferson and the Convention were agreed on breaking up the Council's authority in judicial proceedings and eliminating executive influence over judicial proceedings; Jefferson took an additional step by eliminating the pardon prerogative from the constitution while the Convention relocated it in the legislature.

Jefferson's own research into the history of England's superior courts showed that their authority flowed from the Crown. As a law student, Jefferson had dutifully recorded chapter-by-chapter excerpts from the *Historical Law-Tracts* by Henry Home, Lord Kames.[96] In the *Law-Tracts*, Kames traced the history of England's crown courts from their origin in the *curia regis* of the post-Conquest period, and found that "the chieftain or king was originally sole judge in matters of importance. But in the progress of society, being involved in the greater affairs of government, he instituted courts, and distributed among them the several branches of civil, criminal, and ecclesiastical jurisdiction. But jealous of his authority he bestowed on them no other power but that of jurisdiction in its strictest sense, viz. a power to declare what was law, reserving to himself all magisterial authority."[97]

Kames' account was corroborated by that of William Dalrymple in his *History of Feudal Property*. As Jefferson recorded, Dalrymple held that "the princes who gave beginning to the feudal system in Great Britain, were at once generals and judges. --

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[94] It was uncertain whether courts established by law enjoyed the same independence compared to those established by the constitution. When defending the repeal of the Judiciary Act of 1801 as President, Jefferson would claim that they did not.

[95] "Drafts of Bills Establishing Courts of Justice", in TJ Papers, Vol. I, pp. 603-652.

[96] LCB Entries 557-568.

[97] LCB Entry 563.

When the conquests were settled, their officers shared with them in a regular jurisdiction. -- In the end the power of judges was taken from those who formerly enjoyed it, is at present entrusted entirely to judges. The gradation from the third to the last step of this progress, constitutes the history of feudal jurisdictions in Britain."[98] In other words, at the time of the Conquest the feudal nobility and the judiciary were one, but this system had been gradually reformed and the judiciary moved under Crown control.

The feudal, later Crown, courts existed concurrently, and in some tension, with the county courts. As Jefferson recorded from Dalrymple, "upon the Norman conquest all the allodial were converted into feudal lands; and consequently the lords acquired a jurisdiction in these new feuds also. Yet the sheriff's court was still retained, it was made co-ordinate with the lords' courts in most cases, and superior to them in many. William the conqueror [*sic*] established a continuous court in the hall of his palace, called Aula regis, for all matters, of crimes, and of finances".[99]

Establishing a new superior court system that was independent, and not a mere extension of the executive branch, was therefore a major problem for Jefferson to overcome in his own design, and which he referenced in the Declaration of Independence with his grievances against the Crown's manipulation of the colonial justice system.[100] The danger was that, in making the judiciary independent of the executive by giving judges life tenure, they would become independent of the people they were supposed to serve, and that the judiciary would return itself to its aristocratic origins. "In England, where judges were named and removable at the will of an hereditary executive ... it was a great point gained, by fixing them for life, to make them independent of that executive," Jefferson noted to Samuel Kercheval in 1816. "But in a government founded on the public will, this principle operates in an opposite direction, and against that will … we have made them independent of the nation itself. They are irremovable, but by their own body, for any depravities of conduct, and even by their own body for the imbecilities of dotage."[101]

Jefferson grappled with this dilemma as best he could, both within his draft constitution and within the legislation he sponsored in the Assembly. In his draft

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[98] LCB Entry 584.
[99] LCB Entry 584. The "aula regis" appears to be Dalrymple's term for the curia regis.
[100] *DecInd*, in TJ Papers, Vol. I, pp. 424-425.

constitution, he clearly laid out the number of judges on each superior court, their responsibilities, and the required qualification that they all be members in good standing of the state bar.[102] In his legislation, he replicated these courts in detail, adding a court of admiralty to handle the admiralty cases previously adjudicated by the county courts.[103] His reforms were only partially successful, and he attempted a third round of reforms as part of the Revisal of the Laws that he oversaw from 1777-1779.[104] Once more, the reforms fell short of success, for not only did they threaten the localist oligarchy's control of Virginia politics, but in doing so challenged important parts of judicial prerogative.

Judicial Prerogative

The executive was not the only branch of government capable of assuming prerogative powers for itself. Jefferson had great anxiety about the capacity for judges to overstep their authority as adjudicators and to begin to exercise executive and legislative powers.[105] In particular, he was concerned about the potential for injustice by the law being inconsistently applied through a judge's exercising of excessive discretion. In a related vein, he was also opposed to judicial discretion leading to judge-made law, in which the judiciary legislated from the bench on issues for which the legislature had failed to anticipate or had ceded authority. Finally, Jefferson had an uneasy view of the pardon power, and attempted to get rid of it altogether. His solution to all of these problems was to dramatically increase the authority of the jury, while more carefully writing legislation to close loopholes and deny judges the opportunity to exercise discretion.

Jefferson's attempts to reform the judiciary were complicated by the nature of law and judgeship at the time. Unlike the present day, in which there is a single legal system,

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[101] TJ to Samuel Kercheval, 22 January 1816, LoA edition, p. 1397.

[102] "Jefferson's Third Draft Constitution", in TJ Papers Vol. I, pp. 361-362.

[103] "Bill Establishing a Court of Admiralty", in TJ Papers, Vol. I, pp. 645-649.

[104] Bills Nos. 90-94 established superior courts, Bills Nos. 95-99 regulated court personnel, and Bills Nos. 100-119 regulated court proceedings. Many of these bills were restatements of existing law that was due to expire, but all told they form a significant body of court-related legislation. The texts of all the bills can be found in TJ Papers, Vol. II, pp. 566-638.

[105] Later in his career as a national politician, Jefferson would develop a third fear: that the judiciary would assert a prerogative of judicial review over the Constitution itself.

in eighteenth-century Anglo-America there were two parallel systems of law and equity. Law courts heard cases relating to statute and common law, and could look to precedents to decide cases. Equity cases, heard in courts of chancery, were different, for they operated on principles of natural law and verdicts were issued on a case-by-case basis depending on the chancery judge's understanding of the unique factors in each case.[106] Despite Jefferson's wishes to remove judicial discretion, while the law could plausibly be reduced to a written code to be applied without variation, discretion and individual judgment were an intrinsic part of equity as a field of jurisprudence. While both his and the Convention's versions of the constitution created a separate Court of Chancery to hear equity appeals, equity and law jurisdiction remained combined in the county courts at the local level.

In law, at least, something could be done. "Let mercy be the character of the law-giver, but let the judge be a mere machine," Jefferson wrote to Edmund Pendleton in August 1776. "The mercies of the laws will be dispensed equally and impartially to every description of men; those of the judge, or of the executive power, will be the eccentric impulses of whimsical, capricious designing man."[107] To that end, Jefferson attempted to rewrite elements of Virginia's statutory code, such as his Bill for Proportioning Crimes and Punishments, in order to completely remove the judge's discretion in sentencing.[108] Jefferson considered judges' excessive use of discretion in sentencing to stem from an aversion to the death penalty, which remained applicable to so many non-violent felonies. "It is only the sanguinary hue of our penal laws which I meant to object to. Punishments I know are necessary, and I would provide them, strict and inflexible, but proportioned to the crime."[109]

As a body of law, common law is noteworthy for the high degree of discretion given to judges who need to apply archaic common law precedents to modern problems and, in the process, create entirely new legal precedents unforeseen to the medieval framers of the common law. Providing common lawyers with the guidance necessary to navigate this flexible system was the rationale both for Sir Edward Coke's *Institutes of the Lawes*

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[106] See Jefferson's letter to Philip Mazzei, which goes into great detail on the characteristics and differences between law and equity. "To Philip Mazzei", November 1785, in TJ Papers, Vol. IX, pp. 67-72.

[107] "To Edmund Pendleton", 26 August 1776, in TJ Papers, Vol. I, p. 505.

[108] "A Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital", in TJ Papers, Vol. II, pp. 492-507.

of England and Sir William Blackstone's *Commentaries on the Laws of England*. Jefferson was not concerned by this. "Antiently indeed, before the improvement or perhaps the existence of the court of Chancery, [common law judges] allowed themselves greater latitude, extending the provisions of every law not only to the cases within it's [*sic*] letter, but to those also which came within the spirit and reason of it," Jefferson explained to his friend Philip Mazzei. "This was called the equity of the law. But it is now very long since certainty in the law has become so highly valued by the nation that the judges have ceased to extend the operation of laws beyond those cases which are clearly within the intention of the legislators."[110]

Jefferson's concern was that, where equity and common law jurisdictions were combined, as in the county courts, there was danger that a judge's equity-deciding authority as a judge in chancery would evolve into law-making powers as a judge of law. Such courts would adopt "at once all the rules of the Chancery, with the consent of the legislature, or, if that is witheld [*sic*], these courts will be led, by the desire of doing justice, to extend the text of the law according to it's [*sic*] equity as was done in England before the Chancery took a regular form," Jefferson predicted. "This will be worse than running on Scylla to avoid Charybdis. For at present nine tenths of our legal contestations are perfectly remedied by the Common law, and can be carried before that judicature only. This proportion then of our rights is placed on sure ground. Relieve the judges from the rigour of text law, and permit them, with pretorian discretion, to wander into it's equity, and the whole legal system becomes incertain [*sic*]."[111] Chancery jurisdictions, if not properly quarantined through separation of powers between law and equity, had the further potential to undermine separation of powers between the judiciary and legislature.[112]

Aside from the mixing of equity and law, which he largely considered to be one of disorganisation of the judiciary, Jefferson was implacably opposed to pardons, which he

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[109] "To Edmund Pendleton", 26 August 1776, in TJ Papers, Vol. I, p. 505.

[110] "To Philip Mazzei", November 1785, in TJ Papers, Vol. IX, p. 68.

[111] Ibid., pp. 70-71.

[112] Jefferson accused Lord Mansfield, the Chief Justice in England, of intentionally seeking to bring about this very outcome through his combination of equity and law jurisdiction on the Court of King's Bench. Ibid., p. 71.

explicitly identified as a prerogative.[113] Jefferson criticised pardons on two grounds. First, pardons undermined justice by making the execution of sentences a matter of whim, not law.[114] Second, pardons were a violation of separation of powers by allowing the pardoner, be it in the executive or legislature, to overrule the outcome of a trial conducted by the judicial branch.[115]

Pardons would not be necessary if punishments were not excessive and if trials were conducted according to exacting standards of fairness. To this end, Jefferson sought to minimise the potential role of individual caprice in a trial by making juries, not judges, the determiners of fact in all cases in both law and chancery.[116] His attempt to extend jury trial to equity trials was the fourth pillar of his anti-feudal reform programme as delineated in his *Autobiography*.[117] In addition, juries, not judges, were to be responsible for sentencing.[118] This last part was a major change that, with the other rollbacks in judicial discretion, reduced judges to little more than the presiding officer of a court room. Not surprisingly, these reforms went nowhere, Jefferson's colleagues viewing them as a loss of their authority.[119]

The radical nature of these reforms is all the more surprising given Jefferson's own ambivalent attitude towards juries. In his study of Jefferson and juries, Daniel D. Blinka notes that Jefferson found juries to be unreliable and easily manipulated by lawyers at the bar.[120] It is also worth keeping in mind that Jefferson himself denigrated juries under the colonial system, retained as part of the Convention constitution, as "the

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[113] On a related note, Jefferson was also opposed to "benefit of clergy", which allowed a convict to escape punishment for their first felony offence by successfully reading aloud from the Bible.

[114] In the Bill for Proportioning Crimes and Punishments, Jefferson explicitly stated that the adjustment of penalties was a job for the legislature, not the judiciary. "A Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital", in TJ Papers, Vol. II, pp. 492.

[115] In his draft constitution, Jefferson eliminated pardon as an executive prerogative and put it under the control of the legislature. He subsequently removed it altogether. "Jefferson's Third Draft Constitution", in TJ Papers Vol. I, p. 360. See Boyd *et al.*'s explanation in fn 4, p. 365.

[116] "Jefferson's Third Draft Constitution", in TJ Papers Vol. I, p. 362.

[117] Jefferson, *Autobiography*, pp.77-78.

[118] "Jefferson's Third Draft Constitution", in TJ Papers Vol. I, p. 362.

[119] Jefferson, *Autobiography*, pp. 59-60.

[120] Daniel D. Blinka, "Jefferson and Juries: The Problem of Law, Reason, and Politics in the New Republic." *The American Journal of Legal History* 47, no. 1 (2005): 35-103.

loungings of the courtyard."[121] While it is understandable that Jefferson wished to retain popular accountability as an element in his proposed judicial system, it would seem that he did so fully aware that the reliability of jury verdicts was uncertain, even as he took away the pardon prerogative capable of rectifying jury injustice.

Conclusion

At the beginning of this chapter, I built upon the work of Jack P. Greene and Bernard Bailyn to offer, as an interpretive framework, the existence of a centralist-localist dichotomy in Virginia politics in the colonial period. External factors stemming from the colonial crisis of 1763-1775 were responsible for the breakdown in balance between centralists organised around the royal governor's court at Williamsburg and localists organised around the various county courts, but a breakdown did occur as seen in the rapid deterioration in Virginian governance from 1774-1776. While localism was not a motivating ideology for the Virginia gentry on their march to rebellion, the collapse of royal authority within the colony did leave the forces of localism with unchallenged control.[122]

While localism cannot be identified as the motivation for independence, the Convention's lukewarm reforms in the new constitution adopted following independence can be attributed to the ongoing salience of the centralist-localist dichotomy. While Jefferson largely alienated himself from self-identification with the gentry class that controlled Virginian politics, preferring instead to view himself as an enlightened and impartial reformer, his peers continued to view themselves within the framework of colonial politics. This complacent acceptance of the *status quo antebellum*, with its attendant material and immaterial benefits, most readily explains the Convention's aversion to an Administrator or other strong centralising authority that could threaten the hegemony of localist influence working through the new constitutional channels, in which all power flowed up from the oligarchies on the county courts.

Not being bound by this parochial world view, Jefferson was much more thorough and sincere in his effort to establish meaningful separation of powers, seeing in the

[121] TJ to Samuel Kercheval, 22 January 1816, Library of America edition of TJ Papers, p. 1397.

county oligarchies the hereditary aristocracy that he believed corrupted British society. While the Convention had declared the separation of powers at the beginning of its constitution, it inserted so many exceptions and exemptions into the actual machinery of government as to render the separation meaningless, with an executive dependent on the county-appointed legislature and a judiciary that was not even constitutionally independent. Jefferson hewed much more closely to the spirit of separation of powers with his powerful and autonomous Administrator, his independent judiciary, and the break-up of county court oligarchy. In order to maintain the accountability of each separate branch, he enumerated strong popular controls on their activities through regular elections and juries.

Jefferson's anti-feudal programme was not limited to being anti-aristocratic. He was keenly aware also that an unsupervised executive could quickly begin to exercise prerogative powers unbounded by the law. He abolished all of the royal prerogatives in his draft constitution, and specifically stated that the Administrator, while enjoying nearly unchecked executive authority, was limited in that authority to exercising it within areas which were decreed by law.[123] An Administrator who over-stepped his boundaries would simply not be returned for another year-long term in office. Jefferson's draft constitution was very carefully calibrated so as to limit each branch's activities while still retaining their operational independence.

The rejection of most of the ideas in his draft constitution meant that, aside from court reform, there was very little that Jefferson could do as a legislator to change the new state's core setup. The next chapter will examine how Jefferson shifted his target from feudalism within the government to feudalism's base of logistical support in the large, heritable estates guaranteed by Virginia's property laws.

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[122] Allowing, of course, that the War of Independence continued for another seven years.

[123] The exceptions being in cases where the legislature granted the authority to another, independent member of the executive branch, such as the Attorney General or Secretary of State.

Chapter 3:
Land

The formal institutions of state, in the familiar three branches of executive, legislative, and judicial government, were not the sole emphasis of Jefferson's reforms. One of Jefferson's strengths as a legislator was his comprehensive understanding of political sociology, and his recognition that a republic's politics was directly related to institutions other than those of formal government. In light of this, his draft constitution included a lengthy list of "rights public and private" that would shape the character of Virginian society. The backbone of these rights was his policy towards landed property, which would have completely revolutionised the way in which land was held and the relationship that landowners would have to each other and to the commonwealth.

Land in colonial Virginia was held under socage tenure, one of four feudal tenures in use in England when Virginia was colonised in the seventeenth century.[1] Socage, a non-military tenure associated with farmers and husbandmen, contributed to the defence of the realm via the levying of quit-rent fees on the value of the land, which was a central feature of the manorial political economy that characterised feudal England. Ownership of Virginian lands was highly concentrated in the hands of the gentry aristocracy; generally speaking, landholding was most concentrated in the east, where Lord Fairfax and neighbouring landowners held large estates let out to tenants, and least concentrated in the west, where settlers were setting up small claims in the Shenandoah Valley and the Appalachian mountains.[2] The progress of westward settlement, however,

[1] See LCB 570.

[2] In his recent study of the Northern Neck, Albert H. Tillson, Jr. estimates that less than half of white males in the Northern Neck held land, and of those who did the vast majority were small-hold tenants, compared to the fewer number of gentry, who held two to eight times as much land as the typical small-holder. See Albert H. Tillson, Jr., *Accommodating Revolutions: Virginia's Northern Neck in An Era of Transformations, 1760-1810.* University of Virginia Press, 2009, pp. 14-17. The disparity was even greater, for Tillson does not account for the fact that many of those small-holds were in fact held on leases from the gentry, who held from Lord Fairfax himself, the proprietor of the Northern Neck. Thomas J. Humphrey estimates that one-third of the landholders in the Northern Neck were tenants of the gentry, and held insecure short leases. Similar practices extended across Virginia, with local variations. See Thomas J. Humphrey, "Conflicting Independence: Land Tenancy and the American Revolution." *Journal of the Early Republic* 28, no. 2 (2008), 159-182, in particular pp. 164-166. In short, the

was increasingly dominated by the eastern gentry, who used their favourable positions in the colonial assembly to secure large grants of western territory, held by Virginia as part of its charter Crown lands, to speculative companies in which they held joint stock. These large blocks of land were then sublet to settlers in the same fashion as the eastern manors.

The collective thrust of Jefferson's land reforms was to undermine the concentration of property that the budding localist oligarchies, whose political activities were discussed in chapter two, used in order to support their consolidation of local control. In advocating for his legislation, Jefferson could not be as direct in his criticism of the aristocrats as he was later in life, when writing his *Autobiography*. His reforms came in the midst of ongoing war and he could not treat his neighbours as adversaries, especially when he needed their votes to pass the reforms. When initial entreaties for land reform on republican principles fell on deaf ears, Jefferson updated his arguments to include reasons of economic liberalism, which found a more receptive audience in the Virginia Assembly. This obscured his main intent of undermining aristocracy, and convinced those very same aristocrats that at least some reform was in their own best interests. In turn, the aristocrats gave as good as they got, and managed to turn some of Jefferson's reforms to their own advantage and against his intent of spreading landed wealth and breaking up the largest estates.

This chapter is divided into five parts. First, I will examine the two major discourses of liberalism and republicanism in eighteenth-century thought as regards to property-holding. Then, I will review Jefferson's six-point plan for land reform contained in his draft constitution, and contextualise it within the two discourses. Third, I will look at the specific theme of land tenures and royal prerogative. Fourth, I will compare Jefferson's

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problem of feudal tenures, with their accompanying disparity in political and economic security between the gentry and the tenantry, was a widespread and pressing problem. This disparity in land was further exacerbated by the use of entails to preserve aristocratic estates without fragmentation in the male line. See Holly Brewer, "Entailing Aristocracy in Colonial Virginia: 'Ancient Feudal Restraints' and Revolutionary Reform." *The William and Mary Quarterly* (1997): 307-346. Brewer disproved the existing historiographical consensus on the unimportance of entail, and by extension feudal tenure, by demonstrating that the prevalence of entail in Virginia had been grossly undercounted. Based on her revised estimates, Brewer thinks that between fifty and seventy-five per cent of settled Virginian land was entailed prior to Jefferson's statute abolishing the entail in 1776. Brewer, "Entailing Aristocracy", p. 311. In conjunction

two major reforms of inheritance law: the abolition of entail and of primogeniture. Fifth, I will address the issue of western expansion, where Jefferson's constitutional reforms were adopted but still fell short of preventing the spread of feudal society. Throughout, I will argue that Jefferson's views on property reform were a synthesis of liberal and republican ideas, and that while Jefferson can be understood in the context of the neo-Harringtonian tradition of Anglophone republicanism, he also owed a significant intellectual debt to economic liberalism.

I - Two Discourses on Property

In England during the early modern period, feudalism as a way of organising society was challenged by both republicanism and liberalism. In the seventeenth century, republicans such as James Harrington argued that, with the rise of the commons in England, the feudal system of Crown and Estates should be replaced with a gentry commonwealth. In the eighteenth century, English and Scottish liberals challenged feudal landholding on economic grounds. Jefferson accessed and synthesised both of these discourses in order to construct and advocate for his own land reforms.

Liberal Discourse

The liberal discourse on landed property proceeded in fits and starts from its origins in seventeenth-century England. As Joyce Appleby has argued, the origins of economic liberalism - i.e., an economic ideology that focused on the individual as a rational economic actor - originated in the pamphlet discourse of Restoration England, in opposition to the prevailing mercantilist economic ideology of the time.[3] According to

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with Tillson's and Humphrey's findings, this indicates a massive oligopolisation of Virginian land by the aristocracy over the course of the eighteenth century.

[3] Joyce Appleby, "Ideology and Theory: The Tension Between Political and Economic Liberalism in Seventeenth-Century England." *The American Historical Review* 81, no. 3 (1976): 499-515. Appleby later developed her work on liberalism to include the American Revolution and early republican period, eventually collecting her articles into a single volume, *Liberalism and Republicanism in the Historical Imagination.* Cambridge, MA: Harvard University Press, 1992. In particular, her articles "Liberalism and the American Revolution." *(New England Quarterly* 49, no. 1 (1976): 3-26) and "What Is Still American in the Political Philosophy of Thomas Jefferson?" *(The William and Mary Quarterly* 39, no. 2 (1982): 287-309) are useful for understanding the contextual role of economic liberalism and Jefferson's participation in that tradition. Appleby's dispute with the republican revisionist school is ongoing, and much of her work contends that

Appleby, mercantilism (a label that she uses interchangeably with capitalism) was a system based on production with the goal of the accumulation of specie as capital. Liberal pamphleteers challenged the mercantilist consensus that dominated the Restoration period, arguing instead that production should be undertaken so that producers could consume things, that material self-improvement was the goal of human activity, and that this self-improvement was best pursued through a marketplace in which capital and labour were equally free.

Appleby argues that the division between mercantilism and liberalism was a disagreement over whether production or consumption was the proper goal of economic activity, with an attendant disagreement over whether economic activity should be state-planned, through the use of monopolistic trading companies such as the East India Company, or trusted to individual activity in the marketplace. The rational individualism of the liberal option posed a threat to social order as Britain made the difficult transition away from a feudal society, and she attributes the rejection of liberal economic thought for most of the eighteenth century due to the better ability of mercantilism to command workers, and thus impose social control.[4]

More recently, Steve Pincus has pursued a similar research angle to Appleby, coming up with complementary yet significantly different conclusions.[5] For Pincus, the liberal writers were at their greatest strength following the Glorious Revolution, rather than during the Restoration, although he agrees that their influence had declined by the reign of Queen Anne. Furthermore, he dates the sunset of liberal theory to the 1710s precisely because he has determined that, by this point, economic policy had become a party issue, with Tories preferring mercantilism and Whigs preferring liberalism. Unlike Appleby, who holds that liberalism died out as an economic theory until it was revived by Adam Smith, Pincus argues that economic policy's absorption into party struggle meant that liberalism never really went away, but also never returned to its earlier dominance.[6]

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republican ideology was unimportant to the practice of American economics during this period, including property ownership.

[4] Appleby, "Ideology and Theory", pp. 513-515.

[5] Steve Pincus, "Rethinking Mercantilism: Political Economy, the British Empire, and the Atlantic World in the Seventeenth and Eighteenth Centuries." *The William and Mary Quarterly* 69, no. 1 (2012): 3-34.

[6] Pincus' analysis is hotly contested by other scholars who continue to find Appleby's account more persuasive and who believe that Pincus has overstated the case for

Pincus' greatest difference with Appleby is in his assessment over what mercantilists were hoping to achieve and what their theory of value was. While Appleby treats mercantilists as capitalists, with their focus being on specie and other liquid capital, Pincus argues that the economic debate was one between mercantilists' land theory of value versus liberals' labour theory of value.[7] To an extent, the difference is an artificial one, because Pincus allows that mercantilists were concerned with "the raw materials derived from" land as well as the land itself, but this in turn blurs the difference between mercantilists who derive value from things underground and the liberals who derive value from the things farmed on top of it. Pincus' mercantilists often look more like feudal landlords seeking to extract rents from their tenants, rather than merchants and financiers seeking to accumulate specie from trade.

What is important, regardless of the specifics and whether it was dormant or merely intermittent, is that there was already a tradition of economic liberalism when Adam Smith's *Wealth of Nations*, generally considered the first major work of classical economic liberalism, was published in 1776. Smith's theory of the natural progress of opulence addressed feudalism and mercantilism in a way similar to Jefferson's feudal-

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partisan economic policies in eighteenth-century Britain. See Cathy Matson, "Imperial Political Economy: An Ideological Debate and Shifting Practices." *The William and Mary Quarterly* 69, no. 1 (2012): 35-40; Christian J. Koot, "Balancing Center and Periphery." *The William and Mary Quarterly* 69, no. 1 (2012): 41-46; and Susan D. Amussen, "Political Economy and Imperial Practice." *The William and Mary Quarterly* 69, no. 1 (2012): 47-50.

[7] Both Pincus and Appleby tend to ignore John Locke, who they treat as a product of his time rather than as a uniquely important economic thinker. Despite his reputation as the father of liberalism, Locke does not easily fit into either the mercantilist or liberal mode. With his labour theory of value and his emphasis on rational individualism, Locke appears to be one of Appleby's liberals; but his focus on specie and his apology for hoarding in the *Second Treatise on Government* bear the mark of a mercantilist. At the very least, it would see that Locke had harmonised the labour theory of value with the reality of a specie-based economy. This synthesis forms a significant part of the work of C.B. Macpherson in *The Political Theory of Possessive Individualism* (Oxford: Clarendon Press, 1964). While Macpherson's analysis is now dated, it influenced all subsequent scholarship on the subject of economic liberalism in the seventeenth and eighteenth centuries, including Appleby and Pincus. However, Macpherson's Marxist account of a "bourgeois" Locke has been disputed by John Diggins and Steven M. Dworetz, amongst others, as a selective misreading of Locke's holistic philosophy that excludes the theological content of Locke's philosophy. See John P. Diggins, *The Lost Soul of American Politics: Virtue, Self-interest, and the Foundations of Liberalism.* University of Chicago Press, 1986; and Steven M. Dworetz, *The Unvarnished Doctrine: Locke, Liberalism, and the American Revolution.* Durham & London: Duke University Press, 1994.

mercantile synthesis, although concerned with political economy rather than constitutionalism. Smith held that feudalism had perverted the progress of European agriculture, and that the market in luxury items had driven the feudal aristocracy to liberate its tenants as a way of raising funds for consumption. These markets for overseas goods had in turn been corrupted by mercantilism, which confused specie for wealth. The wealth of a nation, Smith argued, was found in the value of its total economic production, and, like Appleby's liberals, Smith thought economic behaviour was motivated by personal desires and consumption.

Jefferson was likely ignorant of Smith's ideas on political economy when formulating his own thought in the mid-1770s, as the publication of the *Wealth of Nations* coincided with the Declaration of Independence and post-dated Jefferson's interpretation of the feudal history of property in the *Summary View* by two years, although by 1790 he was aware of *Wealth of Nations* and pronounced it "the best book extant" on political economy.[8] Despite this late date, it is important to remember that Smith's book was the culmination of a half-century's work on political economy by the historians and jurists of the Scottish Enlightenment, many of whose books lined Jefferson's shelves and were cited in his correspondence and commonplace books.

It is often impossible to say for certain just what Jefferson read and what emphasis he placed upon it, but if the Legal Commonplace Book is any indication, Henry Home, Lord Kames' writings played a major role in the development of Jefferson's views towards property. From the time of his being raised to the bench in 1752 until his retirement in 1782, Kames wrote tirelessly on the subject of legal history and philosophy. Throughout, he formed an interpretation of the law that blended economic liberalism with natural law and moral sense theory. Most important, Kames' *Historical Law-Tracts* and *Sketches of the History of Man* were economic histories both of the institutions of property-holding and the ways in which property was used in economic exchange. In this way, Kames built upon the work of both the economic liberals and historians of feudal law.

Jefferson closely read Kames as a law student, devoting thirteen lengthy entries in the Legal Commonplace Book to Kames' *Historical Law-Tracts* and a substantial portion

[8] "To Thomas Mann Randolph", 30 May 1790, in TJ Papers, Vol. XVI, p. 449. My own guess is that Jefferson first read Smith in 1784, during his first year in Paris.

of his Equity Commonplace Book to Kames' *Principles of Equity*.[9] Kames was vociferously anti-feudal, decrying feudalism as a "violent and unnatural" system and singling out the entail as an institution in particular need of reform.[10] Anticipating Smith's argument that feudalism perverted the development of agriculture away from productive ends, and accepting the liberal axiom that material self-improvement could best be pursued through markets, Kames argued throughout his writings that feudal landholding was an obstacle to national improvement and that it distorted trade. It is likely that Jefferson's own views on feudalism, particularly the entail, were substantially shaped by his reading of Kames, as he employed Kames' language and drew up an entail reform bill remarkably similar to the one for Scotland that Kames had presented to Parliament in 1759.[11]

Republican Discourse

In his *Autobiography*, Jefferson singled out of all of his land laws his bill to abolish intestate primogeniture, claiming that "equal partition of inheritances removed the feudal and unnatural distinctions" of primogeniture, and that "equal partition" was "the best of all Agrarian laws."[12] Jefferson's choice of the phrase "agrarian law" was no accident, for it was an easily recognisable part of classical republican discourse. This choice increases in significance when one considers that the writer who introduced the phrase to Anglophone republicanism, James Harrington, proposed his model republic in the *Commonwealth of Oceana* as a solution to the breakdown of feudalism in England during the Civil Wars, and that his ideas were further developed by a cadre of "neo-Harringtonian" writers during the late seventeenth century.[13] This classical republican

[9] The *Principles of Equity* is an especially interesting case, because Kames argued for precisely the sort of judge-made law that Jefferson sought to quarantine in his plans for an independent judiciary. See chapter two.

[10] See David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain.* Cambridge: University Press, 2002, pp. 156-158; William C. Lehmann, *Henry Home, Lord Kames, and the Scottish Enlightenment: A Study in National Character and the History of Ideas.* The Hague: Martinus Nijhoff, 1971, pp. 126-128, 327-332; and Ian Simpson Ross, *Lord Kames and the Scotland of His Day.* Oxford: Clarendon Press, 1972, pp. 202-221, in particular pp. 210-212.

[11] See the copy of Kames' bill in Lehmann, *Kames & Enlightenment*, pp. 327-332.

[12] Jefferson, *Autobiography*, p. 77.

[13] J.G.A. Pocock lists the Earl of Shaftesbury, Henry Nevile, Andrew Fletcher of Saltoun, Walter Moyle, John Toland, John Trenchard, Thomas Gordon, and Viscount Bolingbroke as the most prominent neo-Harringtonians. See J.G.A. Pocock, "Machiavelli,

discourse existed alongside the liberal discourse and competed with it during the American Revolution.

The fictitious country-island of Oceana was based on England of the seventeenth century, and the dialogues within the book were concerned with how to construct a stable government after the fall of an hereditary landed aristocracy. J.G.A. Pocock describes *The Commonwealth of Oceana* as "both a civil history of the sword and a civil history of property" which describes "a transformation in the social manner in which men bear arms, itself based upon a transformation in the manner in which they hold property. In other words, to the Machiavellian hypothesis that arms are the foundation of citizenship, Harrington adds the hypothesis that land is the foundation of arms."[14]

In this respect, Harrington was responding to a specific historical problem, that of the expansion of the English gentry brought about by the Tudor monarchs' alienation of Crown lands to non-nobles during the sixteenth century. The Tudors' goal had been to weaken the primacy of the nobility and the system of "bastard feudalism" in which the nobility had become more powerful than the Crown in the fifteenth century, providing the political and economic context for the military conflict of the Wars of the Roses.[15] The alienation of lands to this new body of gentry, holding their land directly of the Crown in exchange for an annual fee rather than military service, both challenged the nobility's monopoly of the landed resources necessary to field their proprietary armies, and provided the Crown with independent revenues for maintaining its own "household" military forces independently of the nobility and the House of Commons.

The new gentry, however, were not content to remain unarmed alongside the nobility and the Crown, and in the early seventeenth century pressed for the right to form their own militia. The civil wars of the 1640s were the outcome of a resulting instability within English society, Harrington claimed, for the creation of this independent class of landowners and its attendant demands for political and military

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Harrington and English Political Ideologies in the Eighteenth Century." *The William and Mary Quarterly* 22, no. 4 (1965): 549-583, especially p. 573.

[14] J.G.A. Pocock, "'Oceana': its argument and character", in *The Political Works of James Harrington*. Cambridge: University Press, 1977, p. 43.

[15] K.B. McFarlane "Parliament and 'Bastard Feudalism'." *Transactions of the Royal Historical Society* 26 (1944): 53-79. For more recent work on this issue, see P.R. Coss, "Bastard Feudalism Revised." *Past & Present* , no. 125 (1989): 27-64; and David Crouch and D.A. Carpenter. "Bastard Feudalism Revised." *Past & Present* , no. 131 (1991): 165-189.

power had undermined the balance of economic and military resources between the nobility and the king. As J.G.A. Pocock summarises it, this convinced Harrington that feudalism, even when modified to include the gentry, was "inherently unstable" and that "the Tudor kings had brought about a redistribution of land [to the commons] to undermine their nobility, and in doing so had undermined themselves."[16]

Harrington argued that a new constitution must reflect the new balance of landholding within society by granting the preponderance of political power to the gentry, uniting political and military authority in the hands of the same class that controlled the majority of society's landed resources. Harrington's proposed constitution for Oceana rested on an Agrarian Law, which was designed to ensure that the hereditary landed nobility could not threaten the primacy of the gentry in the future. The Agrarian Law of Oceana capped the value of estates at £2,000 annual income by limiting the size of inheritances.[17] By Harrington's estimation, such a cap would guarantee that Oceana would have a minimum of five thousand independent landowners on which to base the franchise for participation in government. While the titled nobility would continue to exist, the Agrarian Law would break up their estates, leaving them with titles but no greater wealth than any other gentry, and hence unable to marshal the resources necessary to command proprietary armies.[18]

This rebalancing would affect the Crown as well as the nobility, because gentry who were independently landed, and hence independently wealthy, could not be dominated by the Crown alone. Without the nobility to assist it, the Crown's household forces were

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[16] Pocock, "Machiavelli, Harrington and English Political Ideologies in the Eighteenth Century", p. 561.

[17] Pocock argues that it was not a redistributionist measure such as was advocated by the Levellers, because the Agrarian Law operated by limiting inheritance and was essentially passive. Pocock, "'Oceana': its argument and character", in *Works of Harrington*, p. 47. Charles Blitzer has observed that the real effect of the Agrarian Law would be to prevent large estates from getting any larger. Charles Blitzer, *An Immortal Commonwealth: The Political Thought of James Harrington.* New Haven: Yale University Press, 1960, p. 232. In any event, all estates would be leveled to the £2,000 cap within a generation, thus making the Leveller debate somewhat irrelevant to the overall purpose of the law.

[18] Pocock, "Machiavelli, Harrington and English Political Ideologies in the Eighteenth Century", p. 553. While five thousand may still seem like a small number, it was a twenty-five-fold increase from the existing number of approximately two hundred titled nobility. Dividing landed property amongst thousands of gentry would ensure that returning to the bastard feudalism of the 15th century would be an impossibility for future kings and nobles.

seriously outmatched by the gentry's militia, a fact which exposed the reality that the rise of the gentry made monarchy as equally untenable as aristocracy. The real purpose of Harrington's argument, and his true justification for a commonwealth, was to demonstrate that monarchy could survive only with the support of a hereditary aristocracy, based on feudal inheritance and commanding armies of dependent tenants, but that this system contained the seeds of its own destruction, and that, once a society of freeholders had developed, a republic was the only stable form of government.

Pocock analyzes Harrington's interpretation of history as making three points. First, he understood feudalism as an unstable system in which the nobility and monarchy were in tension but needed each other to survive, and that the monarch had miscalculated by liberating the gentry as a hedge against the nobility. Second, the feudal relationship is fundamentally one of lord and tenant. Third, that after the expansion of the gentry, and the reduction in importance of the lord-tenant relationship, the monarchy became untenable, as there is a fundamental incompatibility between feudalism and republicanism.[19]

The monarchy's lack of viability after the alienation of the Crown lands and the rise of the gentry, was the result of what Harrington saw as the nature of military power. The feudal lords' proprietary armies had been composed of tenant farmers. By creating an expanded class of independent landholder, the monarch undermined the power of the aristocracy, but given that the freeholders now held their lands outside of military tenure, the king could not command them either. The gentry and other freeholders risked overpowering the king, and the monarch could only maintain control through a standing army composed of household troops. The result, Harrington thought, was England's civil war. The rise of the New Model Army, and the subsequent purge of Parliament, only reinforced Harrington's view that for a commonwealth to survive it must rely on a citizen's militia composed of independent landowners.[20]

That is Harrington's system, but what of his influence? Pocock describes Harrington as the "central figure" of the English commonwealth tradition, and identifies the 1st Earl of Shaftesbury as the first of the neo-Harringtonians.[21] Shaftesbury, and the pseudonymous author of the "Letter from a Person of Quality" (who is widely believed

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[19] Pocock, "'Oceana': its argument and character", in *Works of Harrington*, p. 46.

[20] Pocock, "Machiavelli, Harrington and English Political Ideologies in the Eighteenth Century.", p. 561.

to be him), attempted to reconcile Harrington's views with the doctrine of the mixed government of Crown, Lords, and Commons that was the core of ancient constitutionalism. "In short," Pocock concludes, "Harrington did not believe in the ancient constitution, but Shaftesbury and the Person of Quality, twenty years later, did. They chose, however, to present their ideas in Harringtonian form, and the essence of neo-Harringtonianism lies in the drastic revision of Harrington's historical doctrine which this necessitated."[22] This tradition of political thought lasted for half a century and culminated in the writings of Bolingbroke.[23]

Neo-Harringtonianism came to be defined by a combination of ancient constitutionalism with opposition to a standing army and support for a freeholder militia. The "central idea of Harringtonian balance", Pocock writes, "is that power must not be distributed so that it encroaches on the independence of property." The neo-Harringtonians changed it to read that the ancient constitution was calibrated to protect the balance of property, but that the Crown sought to disturb the balance through corruption and a standing army.[24] This neo-Harringtonian argument was made by those aligned with the Country in English politics, who favoured a strict separation of powers. The Court, in contrast, favoured maintaining constitutional balance through interdependence.[25]

As opposed to liberalism, in which landholding was part of a productive process, Harrington held that republican landholding was part of a civil process of politics and military support. But this was not the only aspect. Landholding was also about affording the leisure for civic participation. Gregory S. Alexander, in a study of American property holding, describes the republican ideal type as holding that "property is the material foundation for creating and maintaining the proper social order, the private basis for the public good".[26] Isaac Kramnick, in his study of republicanism and the bourgeois ethic of late eighteenth-century Britain, argued that "republicanism is historically an

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[21] Ibid., p. 552.
[22] Ibid., pp. 558-562.
[23] Ibid., p. 572.
[24] Ibid., p. 570.
[25] Ibid., p. 571.
[26] Gregory S. Alexander, *Commodity & Propriety: Competing Visions of Property in American Legal Thought, 1776-1970.* University of Chicago Press, 1997 p. 1. This book builds on Alexander's earlier work in "Time and Property in the American Republican Legal Culture." *New York University Law Review* 66, no. 2 (1991): 273-352.

ideology of leisure", in contrast to liberalism, "an ideology of work."[27] Pocock, in a subsequent study from his initial work on Harrington, has argued that republican virtue was considered specifically antithetical to liberal "commerce" during the eighteenth century.[28]

What Alexander's, Kramnick's, and Pocock's (by way of Harrington's) civic emphases have in common is that republican land-holding was not about economic production. In this sense, republicanism has some similarity with the feudal system it was intended to replace, in which an estate's annual worth (a "£200 per year" estate, for example) referred to the value of rents brought in from tenants, not the market value of the farmed produce. Pocock notes that Harrington did not relate England's instability to any change in the means of production, but simply in the transfer of landed wealth to persons not under the king's control, and that this fact undermines C.B. MacPherson's thesis of "possessive individualism" as part of Harrington's thought.[29]

II - Jefferson's Draft Constitution

As discussed in the previous chapter, Jefferson's draft constitution consisted of three sections setting up the commonwealth's legislative, executive, and judicial branches; but there was also a fourth section, devoted to "rights public and private" that would be protected as part of Virginia's fundamental law.[30] These rights began with a list of six provisions relating to land: the reassignment of the royal prerogative to grant lands to the Administrator-and-Council, the authority to grant fifty-acre freeholds to new settlers, the reform of feudal tenure, the regulation of land purchases from Native American tribes, the cession of disputed charter lands, and the reform of inheritance. Together, these six provisions would form a complete reform of Virginian land law.

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[27] Isaac Kramnick, *Republicanism and Bourgeois Radicalism: Political Ideology in Late Eighteenth-Century England and America*. Ithaca, NY: Cornell University Press, 1990, p. 1.

[28] J.G.A. Pocock, *Virtue, Commerce, and History: Essays on Political Thought and History, Chiefly in the Eighteenth Century.* Cambridge: University Press, 1985.

[29] Pocock, "Machiavelli, Harrington and English Political Ideologies in the Eighteenth Century", p. 557.

[30] In an earlier draft, Jefferson titled this section "lands" only. "Jefferson's Second Draft", TJ Papers, Vol. I, p. 352.

The Draft Constitution

In the *Summary View of the Rights of British America*, Jefferson argued that the feudalisation of English land tenures had been the result of King William I's usurpation of land rights after the Norman Conquest. Righting this original defect was Jefferson's first priority in his land law, proposing that "unappropriated or Forfeited lands shall be appropriated by the Administrator with the consent of the Privy Council."[31] This ensured that while the chief magistrate would still have the power to distribute lands, he would be accountable for his decisions to another public body and could not grant lands freely, or in exchange for personal service, as a king or feudal lord using his prerogative power would.

Furthermore, the lands at the Administrator's disposal were public lands, and should be disposed of in a manner that was equitable to the public. Jefferson stipulated that "[e]very person of full age neither owning nor having owned [50] acres of land, shall be entitled to an appropriation of [50] acres or to so much as shall make up what he owns or has owned [50] acres in full and absolute dominion, and no other person shall be capable of taking an appropriation."[32] These grants would provide the recipients with the freeholds necessary to qualify as voters, while preventing the concentration of landed wealth in the hands of a few magnates who could then parcel the lands out to tenants.

Under common law, all lands were held under some form of feudal obligation to the crown. By the eighteenth century, English military tenures had been abolished by statute, but lands were still held as estates under socage tenure, which required the deed holder to pay a feudal due, known as a quit-rent, to the Crown.[33] Jefferson proposed to convert all estates held under feudal tenure into allodial estates. This legal distinction would have converted all estates that were held of a feudal superior, in exchange for the payment of quit-rent fees, into estates held "in full and absolute dominion, of no superior whatsoever."[34] The conversion of socage to allodial tenures

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[31] "Jefferson's Third Draft", in TJ Papers, Vol. I, p. 362.

[32] Ibid., p. 362.

[33] Socage is defined as "a type of tenure in which a tenant held lands in exchange for providing the lord husbandry-related (rather than military) service." *Black's Law Dictionary,* 7th edition. These technical definitions will be more fully explained further on in the chapter.

[34] "Jefferson's Third Draft", in TJ Papers, Vol. I, p. 362. A quit-rent has been defined by Beverley Bond as "a feudal due, originating from the commutation into a fixed money

was intended to restore landholders to the independent status Jefferson believed they had enjoyed prior to the Norman Conquest. It would also mean that the recipients of the fifty-acre freeholds would have no reciprocal obligation to the state in exchange for their land.

While the Administrator was empowered to dispose of lands that were under state control, there were still large tracts of land within Virginia's borders that were owned by native tribes. Land companies, owned by consortiums of eastern gentry, were busily buying up these lands to lease to tenants. The activities of these land companies complemented Jefferson's feudal-mercantile synthesis, whereby the advantages the gentry enjoyed under feudal tenure were enabling them to extend their influence via mercantile corporations. As a way of arresting the development of a new feudal-mercantile aristocracy, Jefferson stipulated that all land deals with native tribes were to be concluded by the public authorities, acting under the authority of a General Assembly statute "to be passed for every purchase specially."[35] The lands purchased would thus become public and would be parceled out like other public lands, bypassing the land companies.

In the *Summary View*, Jefferson had written that one of the last acts of feudal despotism by the Stuarts had been the dismemberment of Virginia's charter lands in order to create proprietary colonies to the north and south.[36] These colonies had been formed using the royal prerogative to grant lands. While Jefferson hoped to formally abolish that prerogative, he recognised that it was useless to try to change history. Therefore, he proposed that Virginia formally recognise its neighbours' right to exist and cede the disputed lands to them. Virginia would retain its claim to "the Western and Northern extent of this country" (indicating Kentucky and Ohio), but with the condition that "by act of the Legislature one or more territories shall be laid off Westward of the Alleghaney mountains for new colonies, which colonies shall be established on the same

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equivalent of the food and labor payments exacted by the lord of the manor. The very name is significant, for by the payment of the quit-rent the tenant was quit, i.e. free, from all other annual feudal charges…. It should be noted, however, that even with the payment of quit-rents the lord still retained the feudal right to exact alienation or descent fines." Beverley W. Bond, *The Quit-Rent System in the American Colonies.* Gloucester, MA: Peter Smith, 1965, pp. 25, 29 fn 3.

[35] "Jefferson's Third Draft", in TJ Papers, Vol. I, p. 362.

[36] "A Summary View of the Rights of British America", in TJ Papers, Vol. I, p. 123.

fundamental laws contained in this instrument, and shall be free and independant [*sic*] of this colony and of all the world."[37]

Finally, as well as converting tenures, Jefferson proposed to abolish the feudal inheritance practice of primogeniture and replace it with gavelkind, a form of inheritance associated with both allodial and socage holding. Gavelkind divided estates equally amongst male children, in contrast to primogeniture, which directed descent exclusively to the eldest surviving male heir.[38] In an innovation upon gavelkind, Jefferson further stipulated that "females shall have equal rights with males."[39] Notably, Jefferson did not restrict this provision to intestate property, in which a landholder died without a testated will, but made it the basis of all inheritance, a point which will be elaborated on later in this chapter.

Comparative Constitutionalism

While Jefferson agreed with Harrington that republicanism should be framed in opposition to feudalism, they came to that conclusion through different ways of viewing the past. Harrington analyzed society in terms of balance (or lack thereof) between estates co-existing within a feudal constitution. Jefferson analyzed society in terms of a unitary sovereignty, the people, and viewed the constitution of feudal England as a corruption of the natural political and social order. Therefore, while they both proposed land reform, which consisted of nearly identical provisions, they did so proceeding from different viewpoints and by different methods. It leaves us with the likelihood that Jefferson used the phrase "agrarian law" not to align himself functionally with Harrington, but to position himself rhetorically within the English republican tradition that Harrington had founded.[40]

Jefferson's draft constitution had many things in common with Harrington's *Oceana*. The breakdown of feudal tenure, the breakup of large estates through inheritance law, and the equitable distribution of new territories - these are the three essential tenets of

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[37] "Jefferson's Third Draft", in TJ Papers, Vol. I, p. 362-363.

[38] Gavelkind is defined as "a species of socage tenure arising in land that has descended equally to the decedent's sons." *Black's Law Dictionary*, 7th edition.

[39] "Jefferson's Third Draft", in TJ Papers, Vol. I, p. 363.

[40] Jefferson was not the only one to call his proposals an agrarian law. Landon Carter, one of Jefferson's most vociferous critics in the Virginia Assembly, used agrarian law as an epithet when recording his reaction to Jefferson's ideas in his diary. See Landon Carter, *The Diary of Landon Carter of Sabine Hall, 1752-1778.* Edited by Jack P Greene. 2 vols. Charlottesville: University of Virginia Press, 1965, p. 1068.

Harrington's agrarian law, as they are of Jefferson's own fundamental law.[41] Jefferson also specified that the commonwealth would rely on a citizen's militia for defence and that a standing army would be banned in peacetime.[42] While this coincidence, along with Jefferson's acceptance of feudal tenure as an important factor in politics, is intriguing and embeds Jefferson in the republican discourse, some caution must be exercised due to Jefferson's divergent view on the ancient constitution of the Saxons. While Harrington disregarded the ancient constitution as just an earlier manifestation of feudalism, Jefferson's interpretation of feudalism as a corruption complicated his political designs. This places him more in the company of the neo-Harringtonians than of Harrington himself.[43]

As we saw in chapter one, Jefferson came to be concerned about feudalism because he thought that feudalism had corrupted the ancient constitution of the Saxons; and, as seen in chapter two, while separation of powers was an issue of major importance for Jefferson, mixed constitutionalism was not. A single power, the people, was to find representation in each branch of government; Jefferson's proposed Senate did not represent property or some other interest, but was merely a different manifestation of the same popular will that elected the lower house. Indeed, Jefferson rejected the notion that any group within society could lay legitimate claim to a proprietary share of the constitution.

Jefferson's adoption of popular sovereignty in his draft constitution and the Declaration of Independence should not be seen as a rejection of neo-Harringtonianism, but rather as his own personal development of it. While Jefferson based his political thought as a British subject on the ancient constitution, he freely let it go once he had chosen independence; the Declaration of Independence was the moment that Jefferson turned his back on neo-Harringtonianism and was liberated to try new ideas. By replacing the role of the gentry with the people at large, Jefferson returned to

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[41] The crucial difference between the Agrarian Law of Oceana and Jefferson's proposals was that, while Oceana would have limited even properly testated estates to a £2,000 maximum value, at no point did Jefferson include such a cap in either the draft constitution or the Bill for Directing the Course of Descents.

[42] "Jefferson's Third Draft", in TJ Papers, Vol. I, p. 357.

[43] It should also be noted that Jefferson's own definition of the ancient constitution is flexible. Within the *Summary View* itself, Jefferson variously claims that the Saxons were a nation of freeholders and that the House of Lords, a body of feudal nobles, is part of the ancient constitution.

Harrington's idea of government of the many, rather than the few or the one. This was not so much a rejection of the balance of property as it was making it irrelevant through land grants. Jefferson's adoption of popular sovereignty within Harringtonian parameters for an agrarian law should be seen as a development in this school of thought akin to Shaftesbury's adoption of ancient constitutionalism. While Shaftesbury created neo-Harringtonianism, it may be helpful to think of Jefferson's land reforms as a New Harringtonianism.

Next, we shall see how, the Convention having rejected the draft constitution, Jefferson was forced to pursue his land policies through regular legislation, just as he did with his judicial bills. The remainder of this chapter will deal with these bills according to the categories Jefferson created in his draft constitution. First, I shall examine his efforts to reform the land prerogative and feudal tenures. Then, I will explore how Jefferson wished to reform the feudal inheritance practices of entail and primogeniture. In the final section, the focus shall move to westward expansion. In the conclusion, I will seek to further contextualise Jefferson's views within the eighteenth-century discourse on property and civic participation.

III - Tenures

With the rejection of his draft constitution, Jefferson had another chance to implement aspects of his fundamental law, through ordinary legislation. Even before taking his seat in the House of Delegates, Jefferson was raising the issue of tenures with the presumptive Speaker of the House, Edmund Pendleton. Pendleton, however, was sceptical of the necessity for reform and thought that Jefferson was being over-enthusiastic in his zeal for entirely reforming Virginia's land law, favouring a more restrained approach by reforming the worst aspects of feudal tenure without completely changing the underlying system. An examination of Jefferson's legal commonplace book shows that he came to an opinion on tenures as the result of substantial historical research. Despite his absorbing interest, tenure reform was not part of his legislation, although limited reform took place through other members'

legislation in the House of Delegates; by the time Jefferson recounted his efforts in his *Autobiography* he no longer considered tenures to be a salient detail of his reforms.[44]

Research into Tenures

Jefferson's understanding of the nature of the history of feudal tenure, and its origins in warfare, came from a number of legal authorities recorded in his Legal Commonplace Book: Henry Home, Lord Kames' *Historical Law-Tracts*, Sir Henry Spelman's *De Terminis Juridicis*, William Somner's *A Treatise of Gavelkind*, Sir John Dalrymple's *An Essay towards a General History of Feudal Property in Great Britain*, Francis Stoughton Sullivan's *An Historical Treatise on the Feudal Law and the Constitution and Laws of England*, and Sir William Blackstone's *Commentaries on the Laws of England*.[45] Jefferson's interest in these works was to discover the origins of feudal military tenure, its development, and eventual replacement by non-military tenures.

The first method was to use language to determine whether feudal tenures were of Saxon or Norman origin. Referencing Spelman, Jefferson came to an indeterminate conclusion, finding that both "feodum" and "allodium" were of Saxon origin. "Spelman sais [*sic*] that the invention of feudal holdings has been ascribed by some to the Franks, by others to the Longbards, others to the Germans, and that some traces of it have been thought to be found in the laws of the Anglo-Saxons," Jefferson wrote, but continued, "[a]s all these nations therefore drew their origin from the Germans, it may be supposed that the resembling parts of their laws and customs were derived from the common source." Basic forms of feudal tenure were brought by the Germanic tribes when they moved into the Roman province of Gaul, and the Frankish kingdoms "enlarged and polished" the system, which was subsequently exported by William the Conqueror, who

[44] The quit-rent, the prerogative tax extracted from fee simple estates, was abolished by statute in May 1779. See 1779 c. XIII, Hening X, pp. 64-65.

[45] In his edited version of Jefferson's Legal Commonplace Book, Gilbert Chinard gives the editions of these works as follows: Sir John Dalrymple, *An Essay towards a General History of Feudal property in Great Britain. With a History of the Introduction of the Feudal System in Great Britain*. London, 1757; Henry Home, Lord Kames, *Historical Law-Tracts*. Edinburgh, 1758; William Somner, *A Treatise of Gavelkind, both name and thing*. London 1660, 2nd edition 1726; Sir Henry Spelman, *De Terminis Juridicis*, 1684, etc.; Francis Stoughton Sullivan, *An Historical Treatise on the Feudal Laws and the Constitution and Laws of England... In a course of lectures read in the University of Dublin*. London, 1772. The edition of Blackstone's *Commentaries* is not provided. See *The*

"divided *all England* among his souldiers [*sic*]. After this all things resounded with the feudal *oppressions* which in the time of the Saxons had never been heard of."[46]

Spelman's effort still left the origins of feudal tenure vague, and offered the possibility that the Saxons themselves had used an early version of the tenures when still in Germany, which would mean that feudal tenures predated the Saxon emigration and were therefore part of the original common law. Turning to Somner for information that would relieve him of this unpalatable conclusion, Jefferson found that "Somner concurs with those who think feudal tenures were introduced by the Conqueror …. If the feudal regulations prevailed at all among our Northern ancestors, before their irruption into the Southern countries, it must have been in a very infantine [*sic*] state."[47] In the same commonplace entry, Jefferson noted that passages from Caesar's *Commentaries* and Tacitus' *Germania* supported Somner's claim, with Caesar reporting that the German tribes with which he fought in Gaul "had no fixed property in lands" and therefore Saxons emigrating at that stage of social development could not have had feudal tenure in a recognisable, Norman form.[48]

Jefferson also turned to Blackstone for information. Jefferson and Blackstone had very different interpretations of the supposed timelessness of the common law. While Jefferson envisioned the common law as having had a pristine beginning in the Saxon wilderness, which was only later corrupted by the influence of the Normans, Blackstone's legal theory assumed that the common law as it existed in the eighteenth century was as it had always been, feudal tenures included. Blackstone thought that the "constitution of feuds had it's [*sic*] original among the military policy of the Northern nations, and was carried by them into their several colonies as the most likely means to secure their new acquisitions." When a territory was captured by a German tribe, the chieftain doled out lands to his chief subordinates, who doled out their allotments to lieutenants, and henceforth down the social hierarchy. What came next was exactly

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Commonplace Book of Thomas Jefferson : A Repertory of His Ideas on Government. Edited by Gilbert Chinard. Baltimore: Johns Hopkins Press, 1926.

[46] LCB Entry 736.

[47] LCB Entry 740.

[48] Jefferson and Somner seem to have overlooked the fact that both Caesar's and Tacitus' account of Germanic tribesman during the age of the late Roman republic and early empire predated the Saxon emigration to England by several hundred years. Feudal customs could well have been picked up after the Romans wrote their accounts but before the Saxon emigration.

what Jefferson hoped for. “These allotments were called ‘feoda’ fiefs, fees, or rewards. The condition annexed was a service of some kind to him by whom they were given, but this feodal polity seems not to have been received in England, at least not universally and as a part of the national constitution, till the reign of William the Norman.”[49]

While Spelman, Somner and Blackstone all held subtle yet important differences in opinion on the Saxon or Norman origin of the feudal law, what they all agreed upon was that, in its original form, it was a system in which land was held of a superior lord in exchange for military service. This service specifically pertained to the provision of knights for the king’s armies, and often included the provision of retainers and foot levies from a lord’s tenants as well. By the sixteenth century, the Tudors were working to phase this system out by requiring that the holders of the newly alienated Crown lands pay quit-rent fees towards the support of standing household military forces rather than provide knight-service or some similar military obligation. It was the form of tenure that the Tudors used for this alienation - socage, itself well-established in feudal use - that interested Jefferson.

As a Crown colony, Virginia was a distinct jurisdiction like a palatinate, but its lands were part of the realm of the King of England and did not constitute a fully separate jurisdiction on the order Scotland and Ireland.[50] By Virginia’s original charter from King James I, the lands within Virginia were held “as of the manor of East Greenwich”, in the county of Kent in England.[51] This meant that the colony was part of the Crown lands. As imperial historian Charles M. Andrews has observed, “though the new colonies might be outside the realm - as far as the payment of customs dues went and representation in parliament was concerned - they were within the realm in all that pertained to their legal and tenurial rights.”[52] Therefore, the form of tenure prevailing in Kent - socage -

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[49] LCB Entry 740.

[50] Of course, as seen in chapter one, this was a highly disputed fact at the time, and Jefferson certainly did not agree with it. Whatever the law ought to have been, however, this was the law according to Virginia’s charter.

[51] “Letters Patent to Sir Thomas Gates, Sir George Somers, and others”, 10 April 1606, in Hening I, pp. 65-66.

[52] Charles M. Andrews, *The Colonial Period in American History: The Settlements, Vol. I.* New Haven: Yale University Press, 1964, p. 86. Andrews stresses in a footnote that Virginia was not actually part of East Greenwich Manor, but rather that “of the manor of East Greenwich” was a commonly used legal phrase meant to signify that an overseas possession was legally within the realm.

was the form of tenure in use in Virginia, and Jefferson needed to understand the nature of socage tenure in order to determine a Virginian landholder's feudal obligations.

Jefferson found an answer in Dalrymple's *Essay towards a General History of Feudal Property in Great Britain*. "As the principles of the feudal system were founded in conquest, and all it's [*sic*] relations tended to preserve and defend that conquest, most fiefs were originally held by military services, insomuch that if no service was reserved in the grant, the law presumed the tenure of knight's service to have been intended. A part of the lands were given to Sokmen, or husbandmen who paid in return corn, cattle, and cloaths, a part also was laboured by the Villains, or slaves, for the behoof of their masters," Dalrymple recounted.[53] Over time, the villeins were liberated and consolidated with the Sokmen, who paid their annual feudal fees in the form of a share of their crops, or in money if it was available.[54] Meanwhile, artificers who resided within towns were granted their own form of non-military tenure, *burgage*, which exempted them from military duties. In addition, clergy were exempted from their military obligations via a tenure known as *frankalmoigne*. "Thus the several orders that were of value in the state, the soldiers, husbandmen, artizans and clergy gave rise to the four simple tenures of Knights-service, socage, burgage, and frankalmoigne, into which all others may be resolved."[55]

Of the four, only socage had widespread use in Virginia. The non-military dues by landholders took the forms of quit-rents, assessments made upon land that functioned as a tax levied by prerogative, rather than legislative, authority. Dalrymple described England before the Magna Charta as a country in which the Anglo-Norman kings ruled without taxation, and instead were "supported by the rents of the demesne lands, and incidents of the feudal tenures. Hence when the kings levied taxes, they pretended to receive them as voluntary contributions. Things could not stand long on this footing: thro' the decline of the feudal system, the feudal emoluments were become less, and a land tax was necessary."[56] Within a century after the issuing of the Magna Charta by

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[53] LCB Entry 570.

[54] See Paul R. Hyams *Kings, Lords and Peasants in Medieval England: The Common Law of Villeinage in the Twelfth and Thirteenth Centuries.* Oxford: Clarendon Press, 1980.

[55] LCB Entry 570.

[56] LCB Entry 571. Interestingly, Dalrymple seems to be dating the decline of feudalism to the time period immediately preceding the Magna Charta in 1215, which means he identifies feudalism not as the bastard feudalism of a later era but with the strong kingship and noble service to the king characteristic of the Anglo-Normans.

King John, "it was provided [during the reign of Edward I], that the king should not lay new aids without consent of parliament."

This empowerment of the nobles led to the advent of bastard feudalism, and then the alienation of the Crown lands, solving one problem of the Crown's by creating another. "The rise of the great families on the power of the crown first stripped the king of the power of laying on a land tax; the rise of the commons on both, stripped both of this power, and now in Britain the laying taxes from a [custom] much stronger than any statute, belongs not so properly to the parliament, as to the house of commons."[57] Here Dalrymple linked the issue of quit-rents, a form of revenue derived from the royal prerogative to grant lands, to the issue of taxation with representation, one of the early issues of discord between the colonies and Parliament. A move for reform of the quit-rent system, therefore, was consistent with the generally stated aims of the American independence movement. Jefferson's preferred manner of reforming quit-rents was to replace the entire system of feudal tenure with the allodial freeholds he thought had existed before the Norman Conquest.

Controversy with Pendleton

The issue of tenures was one in which Jefferson was unsuccessful in converting his constitutional provisions into legislation. While ten of the bills in the Revisal of the Laws concerned inheritance, as did his bill abolishing entails, which was considered apart from the Revisal, no tenure reform was included in the Committee of Revisors' report in June 1779. The explanation as to why Jefferson did not include tenure reform, which he considered so important for a commonwealth, lay with his relationship to Edmund Pendleton, the Speaker of the House of Delegates, and Pendleton's views on the same issue.

After the Declaration of Independence was adopted by Congress, and a new constitution adopted by the Virginia Convention, Pendleton wrote to Jefferson attempting to convince him to take a seat in the newly established state judiciary.[58] Jefferson informed Pendleton that his intention was to resume his old seat in the House representing Albemarle County. This led to a discussion of which bills Jefferson would propose in the upcoming legislative session of October 1776, and from there the two

[57] LCB Entry 571.
[58] "From Edmund Pendleton", 22 July 1776, in TJ Vol. I, pp. 469-470.

men quickly moved to Jefferson's land reforms. Pendleton did not see the need to convert socage estates into allodial ones, nor was he concerned by the issue of quit-rents or the distribution of western lands. While Jefferson was a reformer, Pendleton sought to affect Virginia's transition into an independent polity with as little internal disruption as possible. The final result of Jefferson's efforts must, therefore, be seen as a compromise between Jefferson and Pendleton, not Jefferson's preferred outcome.

For Pendleton, the issue of socage tenure and the quit-rents paid as feudal dues were not problems he considered to be important to the revolution. Writing to Jefferson on 3 August 1776, Pendleton dismissed Jefferson's idea for allodial land grants by treating socage tenure, and the quit-rents paid under them, as a single unsolvable issue, remarking that "I would not have the New settlers in a worse condition than the old, It will be the source of murmuring and Injustice, to place them in a better, as they must be, unless you release the old from the payment of Quitrents they have been long accustomed to, against which I think there are Objections of great weight."[59]

Here Pendleton was rather evading the issue, constructing a false disparity between Jefferson's plans for western settlement and for existing estates in eastern Virginia. Jefferson had called for converting all estates into allodial; here Pendleton was claiming that Jefferson had only wanted to do so in the west. This mischaracterisation allowed him to put himself in the strange position of being the settlers' ally in his regard for their threatened reputations. Pendleton continued that "[t]o hold of the common wealth by the Payment of a certain sum, cannot interfere with the dignity of Freemen …. It upon the whole therefore appears to me best to continue the old mode, transferring rights, former and future quitrents and Escheats to the Common Wealth from the Crown, only confining the grants to small quantities to give the Poor a chance with the Rich of getting some Lands."[60]

Jefferson was not so sanguine. "Is it consistent with good policy or free government to establish a perpetual revenue? Is it not against the practice of our wise British ancestors? Have not instances in which we have departed from this in Virginia been constantly condemned by the universal voice of our country? Is it safe to make the governing power when once seated in office, independant [*sic*] in it's revenue?"[61]

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[59] "From Edmund Pendleton", 3 August 1776, in TJ Papers Vol. I, pp. 484-485.
[60] Ibid., pp. 484-485.
[61] "To Edmund Pendleton", 13 August 1776, in TJ Papers, Vol. I, pp. 491-494.

Parrying the thrust, Pendleton responded that "as to a Perpetual revenue, I do not discover the danger of establishing a Revenue of that sort, provided the quantum be certainly below the unavoidable expence of Government, and the disposition left to the Representatives of the people annually chosen." The danger from quit-rents under the colonial government had been in entrusting the revenue to a royalist Governor and Council "without Account, a body who from their Constitution were encouraged … to thwart rather than promote the Interest of this people, in the disposal of the Fund."[62]

The value of quit-rents paid to the colonial government averaged £3,500-£4,000 per year.[63] An equal amount was collected for Lord Fairfax in the Northern Neck proprietary.[64] In 1775, the last year in which the quit-rents were collected on behalf of the Crown from Virginia's non-proprietary lands, the sum was £7,420, all of the proceeds of which were sent to London; had they remained in the colony, they would have provided a significant maintenance to the governor's court, being equivalent to the annual income of a major nobleman in England.[65] So Pendleton was not entirely correct in minimising the value of the quit-rents. Clearly, they were an impressive sum within the colony, and would at least pay the governor's salary, as Jefferson indicated;[66] but

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[62] "From Edmund Pendleton", 26 August 1776, in TJ Papers, Vol. I, pp. 507-508

[63] Bond, *The Quit-Rent System*, p. 248. This did not include quit-rents from inside the Fairfax proprietary, which were paid directly to the proprietor himself. The borders of the Proprietary were disputed until they were settled in arbitration between the Proprietary and the Colony in the 1730s. Fairfax did not assume full personal control of these lands until 1747. See Douglas Southall Freeman, *George Washington: A Biography*. London: Eyre & Spottiswoode, 1951, pp. 502-510.

[64] Rowland Berthoff and John M. Murrin, "Feudalism, Communalism, and the Yeoman Freeholder: The American Revolution Considered As a Social Accident." In *Essays on the American Revolution.* Edited by Stephen G. Kurtz and James H. Hutson. Chapel Hill: University of North Carolina Press, 1973, p. 269.

[65] Bond, *The Quit-Rent System*, pp. 248-249. The all-time high for quit-rent collection was £15,000 in 1754. Clearly, quit-rent collection was sporadic under the royal governors, but the potential was always there for income that, in the colonial context, amounted to a very significant sum if spent within the colony. Berthoff and Murrin estimate that only four hundred English families had rents of more than £4,000, meaning that non-proprietary Virginia generated income equal to that of a nobleman's estate. See Berthoff and Murrin, "Feudalism, Communalism, and the Yeomen Freeholder", n. 27, pp. 267-268.

[66] The combined salary of the governor and lieutenant governor was £3,000, so Virginia's quit-rents, if properly collected, would be sufficient to maintain the governor and his court without legislative interference. See Jack. P. Greene, *The Quest for Power: The Lower Houses of Assembly in the Southern Royal Colonies, 1689-1776*. Chapel Hill: University of North Carolina Press, 1963, pp. 130-132.

perhaps Pendleton was correct in the sense that the finances of a monarchy and a republic worked somewhat differently. A republic, especially one with a weak executive like Virginia's, did not have the risk of a king or royal governor using land grants as patronage, nor seeking to rule without a representative assembly by getting his money from sources other than legislatively-levied taxation. Thus, in somewhat of a contradiction, it seems that Jefferson had not yet changed his thinking about finance from a feudal one to a republican one.

The specific issue of quit-rents did not solve the issue of allodialism itself, and here Jefferson stuck to the principles he had laid out in the *Summary View*. On 13 August 1776, Jefferson wrote to Pendleton that "[t]he opinion that our lands were allodial possessions is one which I have very long held ... As to [tenures] was not the separation of the property from the perpetual use of lands a mere fiction?"[67] Here Jefferson was referring to the feudal law's separation of the use of land by the tenant from its actual ownership by the lord or king. "Is not it's [*sic*] history well known, and the purposes for which it was introduced, to wit, the establishment of a military system of defence ... Are we not the better for what we have hitherto abolished of the feudal system? Has not every restitution of the antient Saxon laws had happy effects? Is it not better now that we return at once into that happy system of our ancestors, the wisest and most perfect ever yet devised by the wit of man, as it stood before the 8th century?"[68]

Pendleton responded on two tracks. "As to the Tenure, It was the slavish nature of the Feuds which made them oppressive to the tenant and inconsistent with Freedom, and the establishment of a Military force independant [*sic*] of the Legislature, which proved injurious to the Community, but I confess I am not able to discover disgrace to the tenant or injury to the Society from their holding of the commonwealth, upon the terms of paying a small certain annual sum disposeable [*sic*] for common benefit, by

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[67] Jefferson was hostile to legal fictions, preferring that decisions of law should rest upon empiricism, since this would improve their accuracy and hence their justness. See David Thomas Konig, "Legal Fictions and the Rule of Law: The Jeffersonian Critique of Common-Law Adjudication." In *The Many Legalities of Early America.* Edited by Christopher L Tomlins and Bruce H Mann. Chapel Hill: University of North Carolina Press, 2001.

[68] "To Edmund Pendleton", 13 August 1776, in TJ Vol. I, pp. 491-494. Hannah Spahn argues that this is evidence of Jefferson's tendency to think that history was a continuum on which actions of moral value from one period could be repeated in another to the same salutary effects. See Spahn, *Jefferson, Time, and History*. Charlottesville: University of Virginia Press, 2011, pp. 121-128.

their own representatives: nor what this will retain of the old Feuds?" This was reasonable enough, but Pendleton seemed to miss Jefferson's point that land held of the commonwealth was land on which the commonwealth could put conditions and threaten to take away, as English kings had done throughout history to coerce their nobles into compliance.[69]

Furthermore, Jefferson's defence of allodialism had turned into a bit of a rant, ending on the rather outlandish note that the ancient constitution could be reconstructed in Virginia. Pendleton pounced. "I highly esteem the old Saxon Laws in General, but cannot Suppose them wholly unalterable for the better after an experience of so many Centuries. Perhaps they may be better calculated for a few Hardy, virtuous men, than for a great Countrey [*sic*] made Opulent by commerce, and therefore in the growth of such a Countrey, it may be wisdom not to draw the Chords too close or refine too much, but to relax in some matters in order to secure those of greater moment."[70]

For this moment at least, Pendleton claimed the last written word for himself, inviting Jefferson to resume the conversation in person when he arrived in Williamsburg for the assembly session in October. There is no record of what transpired in conversation between the two men at the assembly, but this correspondence is insightful in that it offers an explanation as to why tenure reform was not included in Jefferson's legislation. Jefferson viewed tenures as an important part of a republican constitution. Pendleton viewed it as an irrelevant question. He considered the revenues from quit-rents to be too small to be significant, and as far as he was concerned the theory and history behind socage tenure was irrelevant so long as the current practice was harmless.

As Speaker of the House, and a member of Jefferson's Committee of Revisors, Pendleton was in a position to block the inclusion of tenure reform from the committee's final report. It also appears that Jefferson himself may have eventually come round to Pendleton's viewpoint. By 1785, Jefferson informed James Madison that

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[69] As Dalrymple put it, "The connection between lord and vassal was the basis of the feudal system; the declension of that connection involved the ruin of the system." LCB Entry 572. That declension formed the basis of Harrington's entire political history. In contrast, Pendleton was denying that such a declension had taken place, treating feudalism as of continued viability if lightly modified. That the relationship of vassal and lord was one of dependence, and that he was in effect proposing to make the citizen dependent on the state, does not seem to have occurred to him.

[70] "From Edmund Pendleton", 26 August 1776, in TJ Papers, Vol. I, pp. 507-508

"a moderate rent" was permissible for freeholders to pay to the government, and in his *Autobiography*, Jefferson did not mention tenures as an important element in his republican programme. Instead, he placed emphasis on inheritance law, which is the subject of the next section of this chapter.[71]

IV - Inheritance

Following on his draft constitution, Jefferson's legislative efforts to reform Virginia's system of inheritance law came in two parts. The first was his successful effort to abolish entails, which was proposed as a stand-alone bill in the House of Delegates on 14 October 1776. The second was a slate of ten bills regulating inheritance which he proposed as part of his Revisal of the Laws in June 1779, the most prominent of which, the Bill Regulating the Course of Descents, abolished intestate primogeniture in favor of gavelkind. In the entail bill's preamble, Jefferson justified reform to inheritance law in terms of its impact on the economy and its influence on manners. More important, though, as he explained in his *Autobiography*, was the bill's utility in breaking up the hereditary aristocracy that had taken root through large estates.[72] This section will compare his liberal and republican arguments for abolishing entail, before proceeding to examine the shortcomings of his bill abolishing primogeniture and instituting gavelkind.[73] It will also show how, although he did not incorporate natural rights

[71] "To James Madison", 28 October 1785, in TJ Papers, Vol. VIII, pp. 681-683.

[72] The importance of entail in making aristocracy hereditary has been disputed. C. Ray Keim has argued that the small number of entails as a percentage of total wills shows that it was a relatively minor element of inheritance law. C. Ray Keim, "Primogeniture and Entail in Colonial Virginia." *The William and Mary Quarterly* 25, no. 4 (1968): 545-586). Holly Brewer rebuts Keim by pointing out that unlike most wills, which govern a single case of inheritance, entails were binding on all generations. Thus a single entail should be counted multiple times under Keim's method. Brewer's argument is more convincing than Keim's due to her more accurate portrayal of how an entail works. See Holly Brewer, "Entailing Aristocracy in Colonial Virginia: 'Ancient Feudal Restraints' and Revolutionary Reform", pp. 307-346.

[73] There is a rich literature examining reform of feudal inheritance during the revolution and assessing its importance. See Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era.* Translated by Rita Kimber and Robert Kimber. Chapel Hill: University of North Carolina Press, 1980, pp. 194-196; Lee J. Alston and Morton Owen Schapiro, "Inheritance Laws Across Colonies: Causes and Consequences." *The Journal of Economic History* 44, no. 2 (1984): 277-287; J.F. Hart, "A Less Proportion of Idle Proprietors: Madison, Property Rights, and the Abolition of Fee Tail." *Washington & Lee Law Review* 58 (2001): 167; Stanley N. Katz, "Republicanism and the Law of Inheritance

language into his property bills as he would in his bills on religion and emigration, Jefferson toyed with the idea of a natural right to property and considered his inheritance reforms to be an "expansion" of the same.[74]

Definitions of Terms

An entail was a provision within a will to bind the ownership of real estate within the bloodline of the testator, according to the descent of primogeniture, which stated that the inheritance of a real estate was unitary and went to the eldest surviving son. The entail was widely used in Virginia and was the subject of repeated pieces of legislation, both of public bills of Assembly regulating the nature of entail in general, and private bills of Assembly introduced to "dock", or annul, the entails on particular estates. Major pieces of public legislation included a 1705 act converting slaves from chattel into real property, thus binding them to the land of an estate in a similar manner to that of serfs, and a 1734 act annulling the entails of all estates worth less than £200.[75] Private legislation included over a hundred docking bills, including one Jefferson himself introduced to dock the entail on his wife's dowry in 1774.[76] The bill to abolish entails proposed in October 1776 should be seen not just as a forward-looking piece of legislation, but as a universal docking bill on all entails then in place in Virginia.

The standard form of inheritance under socage tenure was called "gavelkind", and it was of great interest to Jefferson, forming one of the land provisions of the draft constitution and the subject of considerable research in the Legal Commonplace Book. Jefferson's first interest in gavelkind was in its relationship to the Saxon constitution

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in the American Revolutionary Era." *Michigan Law Review* 76, no. 1 (1977): 1-29; Richard B. Morris, "Primogeniture and Entailed Estates in America." *Columbia Law Review* 27, no. 1 (1927): 24-51; John V. Orth, "After the Revolution: "Reform" of the Law of Inheritance." *Law and History Review* 10, no. 1 (1992): 33-44; Claire Priest, "Creating An American Property Law: Alienability and Its Limits in American History." *Harvard Law Review* 120 (2006): 385-459; and Carole Shammas, "English Inheritance Law and Its Transfer to the Colonies." *The American Journal of Legal History* 31, no. 2 (1987): 145-163.

[74] Jefferson, *Autobiography*, pp. 58-59.

[75] 4 Anne c. XXIII, in Hening III, pp. 333-335. For £200 docking see 8 George II c. VI, in Hening IV, p. 400. The latter act is unclear as to whether the £200 refers to an assessed market value or the value of annual rents. If market value, then these would be very small yeoman estates. If rent value, then the estates could be mid-sized gentry estates with a small number of tenants. In either case, it in no way affected entails on the large, rent-producing estates of the top gentry.

and the original form of the common law. In the Legal Commonplace Book, he traced its etymology, concluding with some dissatisfaction that he could not tell whether it was of Celtic or Saxon origin, but resting assured that it was not part of the tenures established at the Norman Conquest.[77] Gavelkind had five principles, as explained by Somner, they being "dower of the moiety, loss of dower by marriage, descent to all the sons, not forfeitable for felony, power of alienation at 15 years of age."[78]

Primogeniture, in turn, could be conclusively identified as a Norman import, and thus formed the basis for knight's-service tenure. Dalrymple wrote of the "incompatibility of the feudal services being performed by many, and the succession was restrained to one son to be chosen by the grantor. This choice was necessary to prevent the danger of the fief's falling to one who might be incapable of doing the duties."[79] This custom had been introduced at an early point in Anglo-Norman history, before the testating of wills became standard practice as the legal system evolved, and thus the inheritance of an intestate estate down the eldest male line was essential for preserving unitary estates in such a rudimentary legal system.[80] Over time, this customary practice was established by statute during the reigns of Henry I and Henry II, and became the practice as well under socage tenure.[81] This was further explained in a Legal Commonplace Book passage by Hale containing a detailed outline of how the proper course of descents always maintained a male capable of military service.[82]

Fee Tail (Entail)

When presenting the entail bill to his peers in the House of Delegates, Jefferson eschewed the language of agrarian republicanism in favour of economic liberalism. The common theme of his first two concerns was that the entail put economic constraints upon the person who was in ownership of the land. Entails were "contrary to good

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[76] "Notes on the Progress of Certain Bills", in TJ Papers, Vol. I, p. 104.

[77] LCB Entries 848, 870, and 874.

[78] LCB Entry 739. Notably, entail altered this fifth provision in the same way in which primogeniture altered the third. In addition, both primogeniture and entail are designed for the demands of knight-service tenure, which provides a single heir of military age, not socage tenure, the husbandry of which may be executed by a person(s) of any age or gender.

[79] LCB Entry 577.

[80] i.e., this dates from a time when England's law truly was "unwritten".

[81] LCB Entry 577.

[82] LCB Entry 587.

policy" because an entail "tends to deceive fair traders" when placing a value on lands, and "discourages the holder thereof from taking care of and improving the same." In addition to the economic downsides, Jefferson gave as a third objection that entails were also destructive of morals. Child heirs "sometimes" became "independent of, and disobedient to, their parents" when they knew that they could not be disinherited.[83]

The first objection, that of deceiving traders, shows that Jefferson had some idea of land as a commodity that could be bought and sold through market interactions, not only conveyed through inheritance. Joyce Appleby points out that Jefferson joined "political democracy to economic freedom" in that he did not view land ownership as a static possession.[84] This was in contrast to the agrarian republican concept that the utility of property was that it bound its owner to the community.[85] As Jefferson quoted Dalrymple in his commonplace book, "[t]he right of excluding all others from a particular spot of ground is one step in the progress of the idea of property; but the right of transferring it to another, is a second and wider."[86] If ownership in land guaranteed the independence necessary to participate in both political and economic life, then constraints on that land, especially the inability to sell or otherwise alienate it, undermined the owner's independence. But here, Jefferson was saying that land was just another form of moveable property.[87] By muddying the distinction between real and personal estate, Jefferson eroded the rationale for entail, but in so doing moved in opposition to republican thought.

In Jefferson's mind, these issues of economic liberalism were directly relevant to entail's structural role in support of feudal hierarchy. According to a citation from Dalrymple in the Legal Commonplace Book, the abolition of entails in England had been one of the major episodes in the history of landholding. The original institution of

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[83] "Bill to Enable Tenants in Fee Tail to Convey Their Lands in Fee Simple", in TJ Papers, Vol. I, pp. 560-562.

[84] Joyce Appleby, "Commercial Farming and The 'Agrarian Myth' in the Early Republic." *The Journal of American History* 68, no. 4 (1982): 833-849. Citation p. 846.

[85] It is similar to, though less expansive than, C.B. MacPherson's thesis of "possessive individualism". See C.B. MacPherson, *The Political Theory of Possessive Individualism.*

[86] LCB Entry 573.

[87] This is true also of how he handles primogeniture. It indicates that he had a much more expansive concept of property and its uses than others in the Virginia Assembly. Indeed, it is the gentry's limited understanding of the political economy of land that may have accounted for their unproductive farming techniques, and with their conspicuous

entails, in the reign of Edward I, had come about because the "nobles saw that the allowing land to come so much into commerce, should weaken them and shift it into the hands of people who had been formerly little better than slaves."[88] The entail was a major factor in the development of bastard feudalism, for "in process of time, the property of the great families continually increasing, and never diminishing, their power grew to such a height, as enabled them totally to enslave the people, and sometimes to overshadow the crown."

Dalrymple further explained that "a commercial disposition required [*sic*] an unbounded commerce of lands, the landed men, the monied men, were equally hurt by entails; the lawyers in their writings had long been inveighing agt. Them," and this put the landed aristocracy using the entail in conflict with the rising merchant class in the towns. This tension eventually contributed to the outbreak of the English Civil Wars, for "these various ranks of men did not foresee the consequences of the dissolution of entails. It is obvious that the dissipation of church lands by [King Henry VIII] and the alienation of a great part of the crown lands added to the dissolution of entails produced that transition of property from the lords to the commons, which so soon after made the commons too powerful for the nobility and the king, so insolent as to vote the nobles no necessary part of the constitution, and by a publick [*sic*] trial and execution to put their sovereign to death."[89]

Jefferson's second objection, that of discouraging improvement of the land, was also liberal but returned to the view of land as something immoveable. Even if a landowner did not wish to sell part or all of his real estate, he would still wish to improve the land. Appleby contends that "Agriculture did not figure in [Jefferson's] plans as a venerable form of production giving shelter to a traditional way of life; rather, he was responsive to every possible change in cultivation, processing, and marketing that would enhance its profitability. It was exactly the promise of progressive agricultural development that fueled his hopes that ordinary men might escape the tyranny of their social superiors both as employers and magistrates … [Jefferson] recognized that hierarchy rested on economic relations and a deference to the past as well as formal privilege and social

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household consumption, increasing indebtedness to British moneylenders before the war.

[88] LCB Entry 576.

[89] LCB Entry 576.

custom."[90] Without an economic incentive to improve the land, the owner would be more likely to lease out his land to tenants on short leases with frequently increased rents, thus perpetuating the client-based system of tenures that Jefferson had sought to reform in his draft constitution.

It did not necessarily follow that an owner bound to his land would do nothing to improve it; indeed, the inescapability of an entailed property might provide just the incentive needed to improve an unproductive piece of land, since the owner could not recoup his losses by selling it off. As writers such as Lord Kames pointed out, however, a landowner of an entailed estate was unable to offer collateral in order to raise funds for improvement projects.[91] Quit-rents provided only a fixed income for a proprietor, which discouraged industrious use of the land. Jefferson seemed to hold a similar opinion, that entails induced an economic malaise on the part of the landowner. Furthermore, land that was unimproved must be made available to someone willing to use it; otherwise, as Jefferson explained to Madison in the case of seigneurial feudalism in France, the proprietor had "so far extended" his claim to the land "as to violate [the] natural right" of others to labour and own property from "the common stock" of the Earth.[92] A fee tail estate was thus the worst of all possible worlds: the "owner" of the land was not able to improve and commodify it, nor was he able to get rid of it through sale.

This theme of malaise was continued in Jefferson's third observation that entails were destructive of the morals of the designated heirs. Landowners were expected to be

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[90] Appleby, "Commercial Farming", p. 844.

[91] While I am not aware of Jefferson specifically quoting Kames on this issue, the inadequacies of the entail are a recurring topic throughout Kames' writings and Jefferson seems to have absorbed them from Kames or a similar source. See Henry Home, (Lord Kames), *Sketches of the History of Man: Book III, Progress of Sciences.* Natural Law and Enlightenment Classics. Indianapolis: Liberty Fund, 2007, pp. 907-914.

[92] "To James Madison", 28 October 1785, in TJ Papers, Vol. VIII, pp. 681-683. It is not quite clear just what Jefferson meant by this natural right. He does not emphasise a natural right to property in his other revolutionary writings, and actually removed it from the trinity of rights in the Declaration of Independence. In this letter, he also is specifically linking the availability of land to mass unemployment, which was not an issue in Virginia, although he also says a system of land grants then would forestall such an unemployment crisis in the future. It is probably too much to say that he viewed the Virginian aristocracy as violating natural right at the time he wrote, but he could envision a future in which it would. Further complicating the matter, in his *Autobiography* Jefferson stated that the abolition of entail was an "enlargement" of the natural right to dispose of one's property, though not necessarily to have it in the first place. See Jefferson, *Autobiography*, pp. 58-59.

virtuous participants in civic life. If they had acquired bad moral habits as children, then their civic participation might be vicious instead of virtuous. Again, Kames is relevant here, for he noted that "children of great families, accustomed to affluence and luxury, are too proud for business" or for labouring in their own fields.[93] Such children grew up to be unproductive members of society. If entail discouraged an owner from improving his estate, it could also be said that the entail discouraged the heir from improving himself. Entitlement in property bred decay in morals.

These objections being said, there were important differences between the use, if not the law, of entail in English and Virginian landholding. First, the entail's origins lay in ensuring a steady succession of militarily capable men to serve the crown as part of knight's-service, not socage, tenure.[94] Second, its use to monopolise land, and thus the instability that followed from the entail's dissolution, was specific to England, which had a finite amount of land. The same calculations did not necessarily apply to Virginia's abundance of unclaimed western land.[95] This made it all the more important to achieve an equitable distribution of Virginia's remaining western lands before they could be entailed by large proprietors or corporations.

Jefferson considered the entail to be one of the most important factors in the rise of the Virginian aristocracy. "In the earlier times of the colony, when lands were to be obtained for little or nothing, some provident individuals procured large grants, and, desirous of founding great families for themselves, settled them on their descendants in fee-tail. The transmission of this property from generation to generation in the same name raised up a distinct set of families who, being privileged by law in the perpetuation of their wealth were thus formed into a Patrician order, distinguished by the splendor and luxury of their establishments," Jefferson described in his *Autobiography*. "From this order too the king habitually selected his Counsellors [*sic*] of State, the hope of which distinction devoted the whole corps to the interests & will of the crown. To annul this privilege, and instead of an aristocracy of wealth, of more harm and danger, than benefit, to society, to make an opening for the aristocracy of virtue and

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[93] Kames, *Sketches*, p. 912.

[94] Military tenures had been converted to socage in England by Act of Parliament in 1660.

[95] This point is argued by Bernard Bailyn in "Politics and Social Structure in Virginia." *Seventeenth-Century America: Essays in Colonial History.* Edited by James Morton Smith. Chapel Hill: University of North Carolina Press, 1959, pp. 108-111.

talent, which nature has wisely provided for the direction of the interests of society, & scattered with equal hand through all it's conditions, was deemed essential to a well-ordered republic."[96]

This antipathy to a propertied power base for the state's senior leadership was not shared by that senior leadership, Edmund Pendleton among them. While Jefferson's draft bill broke all entails then in force, Pendleton introduced an amendment to soften the bill by only giving each fee tail holder the option of conversion to fee simple.[97] In this, Pendleton was calling Jefferson's bluff. If the purpose of the bill was to liberalise the state's property holding, as Jefferson claimed in the preamble, then what could be more liberal than giving the owner the free choice of conversion to fee simple or remaining in fee tail? Jefferson correctly saw this as an attack on the unstated anti-aristocratic motivation for the bill, for if some landowners converted to fee simple then the aristocrats remaining in fee tail would become even stronger. While there are no records of the floor debate, we do know that Jefferson succeeded in defeating Pendleton's amendment and the bill passed into law intact.

Primogeniture & Gavelkind

Along with his bill to abolish entail, in the *Autobiography* Jefferson also named the bill abolishing primogeniture, officially the Bill Directing the Course of Descents, as the chief bill in his reforms. The Bill Directing the Course of Descents is credited with abolishing the practice of primogeniture in Virginia, and Jefferson classified it as an indispensable attack on hereditary aristocracy. In truth, it was neither, and was in fact just the first of ten laws concerning private property that made only minor changes to Virginia's colonial code, or none at all.[98]

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[96] Jefferson, *Autobiography*, p. 58.

[97] Editor's note to "Bill to Enable Tenants in Fee Tail to Convey Their Lands in Fee Simple", in TJ Papers, Vol. I, p. 561.

[98] This claim has been most uncritically repeated by Jefferson's major biographers. Dumas Malone notes that Jefferson "may have exaggerated the effects" of the bill, but fails to mention gavelkind and the wider legal context of what Jefferson was doing Dumas Malone, *Jefferson the Virginian*. London: Eyre & Spottiswoode, 1948, p. 254. Merrill Peterson argues that the bill was one of many that "decisively settled the question of whether feudal or freehold tenure would prevail". This is true, but fails to recognise that the bill was an incremental reform of customary law that did not affect the probate wills used by the gentry, as well as the fact that primogeniture is not a tenure in its own right. Merrill Peterson, *Thomas Jefferson & The New Nation*. Oxford:

Chapter XXXIII of the Acts of Assembly of 1705, "An act for the distribution of intestates [*sic*] estates, declaring widows rights to their deceased husbands estates; and for securing orphans [*sic*] estates", had stipulated that one-third of intestate personal estate was to proceed to the widow for life, while the remaining two-thirds was to be distributed equally amongst the intestate's sons.[99] This act had been preserved in the revisal of 1748, "An Act for the distribution of Intestates estates."[100] Thus not once, but twice, prior Assemblies had seen fit to enact provision that intestate estates, i.e., ones in which the owner died without leaving a will, would have their personal estate distributed according to gavelkind and their real estate distributed according to primogeniture.

While Jefferson was correct to identify primogeniture as a major way of preserving large estates, the bill as written did not solve the problem as he identified it. The bill applied only to intestate estates. Estates for which the testator had provided a legally binding will were not affected.[101] Thus, the outcome of Jefferson's bill in practice was rather the opposite of what he intended in his draft constitution. Large estates owned by wealthy landowners with the services of trained attorneys would not be affected, but small estates owned by poor and legally ignorant yeomen farmers would be broken up. The result would be that the rich would maintain their hold on property, albeit without the help of the entail, while the poorer sort would fragment amongst different small-holds. This was a possibility he had been alert to when negotiating with Pendleton for passage of his bill on entails, fully aware that landowners with attorneys would keep their hereditary estates unified, but when it came to primogeniture Jefferson seems to have dropped the issue.

This was one of the greatest oversights in Jefferson's land programme, and the failure of his bills to stem "antient and future aristocracy" may be partly attributed to

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University Press, 1970, p. 113). This misconception has also formed an important assumption behind the work in Brewer, "Entailing Aristocracy in Colonial Virginia"; Katz, "Republicanism and the Law of Inheritance in the American Revolutionary Era", p. 12; Keim, "Primogeniture and Entail in Colonial Virginia", p. 551; Orth, "After the Revolution: 'Reform' of the Law of Inheritance", p. 36; Shammas, "English Inheritance Law and Its Transfer to the Colonies", p. 162; and Alston and Schapiro. "Inheritance Laws Across Colonies: Causes and Consequences", p. 279.

[99] 4 Anne c. XXXIII, in Hening III, pp. 371-376

[100] 22 George II c. III, in Hening V, pp. 444-448

[101] This important distinction is emphasised in Orth, "After the Revolution: 'Reform' of the Law of Inheritance", p. 35.

this key error in legislative draftsmanship.[102] As written, the bill largely reiterated the statutes of 1705 and 1748, which had been the law while Virginia's budding hereditary aristocracy was being formed, and simply treated real estate in the same way as personal estate. The other crucial changes concerned the status of women. First, Jefferson expanded upon gavelkind by including the provision from his draft constitution that daughters would inherit equally with sons. Second, in his zeal to protect daughters, Jefferson left out language protecting the widow's one-third share. The effect of his law was to cast widows out, reliant on the charity of their children, while investing daughters with land that they could not make practical use of other than as a dowry.

It is unclear why Jefferson attributed such misplaced grandiosity to this bill. The boast in his *Autobiography* that he had been the one to abolish primogeniture could be attributed to the mistaken recollection of an old man, were it not for the fact that a very similar statement exists in the *Notes on Virginia*.[103] We are thus confronted with Jefferson making a highly exaggerated claim about his reforms within five years of his having submitted it to the Assembly. Presumably this is too soon for such an error of memory, but it can be partly explained by Jefferson's own recollection of the debate within the Committee of Revisors. While the proposed bill established gavelkind, Jefferson wrote in the *Autobiography* that Pendleton had advocated in committee for retaining primogeniture. Jefferson and Wythe objected, at which point Pendleton proposed that the eldest son receive a double portion. In a moment of wit, Jefferson "observed that if the eldest son could eat twice as much, or do double work, it might be a natural evidence of his right to a double portion", but as this was not the case, gavelkind should stand. Pendleton relented to Jefferson and Wythe's united front.[104]

While Jefferson could not truly claim to have abolished primogeniture in its entirety, he could claim that he had successfully chipped away at it, though not where it really counted with large testated estates. It is possible that, as early as 1784, when the *Notes on Virginia* was completed, he became confused amidst the tumults and worries of his wartime duties as a governor and a diplomat, and that he based the recollection in his *Autobiography* upon the erroneous passage in the *Notes*. Indeed, the very real prospect

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[102] Jefferson, *Autobiography*, p. 77.
[103] Jefferson, *Notes on Virginia*, p. 137
[104] Jefferson, *Autobiography*, pp. 68-69

that this false claim was the product of confusion, not deceit, can also explain why he thought the bill carried such society-altering importance when it was actually limited to the estates of the intestate. The original proposal for instituting gavelkind, found in his draft constitution, would have made gavelkind part of the fundamental law of Virginia, rather than a mere statute, and there was no language limiting it to intestature. It can reasonably be inferred that Jefferson's intent was that this piece of fundamental law would have been binding upon all estates. If that is the case, then the gavelkind provision of the draft constitution truly was revolutionary, and his private knowledge of his intent may have swayed his memory of the practical importance of his statute.[105]

V - Public Lands

While most of Jefferson's ideas on land reform were passed over by the Virginia Convention, all of his proposals for the disposal of western lands were included in the Convention's final constitution.[106] The Convention agreed to cede lands claimed by Pennsylvania, Maryland, and the Carolinas; to fix Virginia's borders according to the charter of 1609 and the 1763 treaty ending the French and Indian War; to restrict all purchases of Indian lands to agents of the commonwealth; and to allow Virginia's westernmost counties to form a new state.

This still left the areas of present day Kentucky and West Virginia to be disposed of through legislation; furthermore, Virginia's back country was turning into a chaotic mixture of land companies staking expansive claims and squatters grabbing what they could hold on to. Jefferson proposed a number of bills for administering the backcountry. In particular, he proposed bills dividing Fincastle County, which encompassed all Virginian land west of the Appalachians, into smaller districts while also establishing a Land Office to sort through claims and issue new deeds.

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[105] There was one loophole by which a testated estate could still become subject to the Bill for Directing the Course of Descents. The following bill in the Revisal, No. 21 "Bill concerning Wills; the Distribution of Intestate's Estates; and the Duty of Executors and Administrators" stipulated that if a testator should leave a child unprovided for in his will, the entire will would be voided and the estate treated as intestate. Thus, a testator was obliged to make an at least basic provision for each of his children to avoid the full force of the Bill Directing the Course of Descents. This was an incremental improvement in making gavelkind binding within wills. See TJ Papers, Vol. I, p. 394.

[106] "The Constitution as Adopted by the Convention", in TJ Papers, Vol. I, p. 383.

There is a significance to Jefferson's western reforms that goes beyond mere administration, however. This final section of the chapter will show how the rush for western lands threatened to extend aristocracy's reach from the eastern Tidewater into the as-yet unsettled territories. In the east, rich gentry whose power and wealth were held through feudal estates were pooling their resources to capitalise land companies. These land companies, in turn, were attempting to set up manors in the west in which settlers would be tenants, not owners. Jefferson's legislation must be seen in this context.

The Northern Neck Proprietary

Jefferson's concerns over feudal law were not solely theoretical, nor based only on the history of England as chronicled by Blackstone or fictionalised by Harrington. Jefferson had very good reason to view the continued influence of feudal law with trepidation. The Northern Neck, that part of Virginia lying between the Potomac and Rappahannock rivers, comprised nearly a third of the state's territory east of the Blue Ridge. All lands within this territory were part of the Northern Neck proprietary domain, and the proprietor, Lord Fairfax, was a member of the British aristocracy. All landholders in the Northern Neck were in fact tenants and sub-tenants of Lord Fairfax. If the presence of feudal tenures meant the absence of the independence necessary for a landowner (or really, landholder) to participate in politics, then the Northern Neck was a cancerous growth within Virginia that needed to be neutralised before it corrupted the republic at large.

Jefferson's writings rarely mention the Northern Neck. In the *Notes on Virginia*, he comments that the northern parts of the Virginia Company's original claims were granted away to Lords Baltimore and Fairfax, but that only Lord Baltimore's claim, the future proprietary colony of Maryland, was given "the rights of separate jurisdiction and government."[107] Despite this passing over of the Northern Neck, research by Douglas Southall Freeman shows that the Proprietary did indeed have a separate jurisdiction while remaining part of the Crown colony, which is further borne out by the contents of

[107] Jefferson, *Notes on Virginia*, p. 113. Sullivan describes the feudal dues Lord Baltimore paid to the King as "five Indian arrows and a fifth of all gold and silver found in the province" in LCB Entry 766. In 1784, Jefferson became aware of an inchoate scheme to annex the Proprietary to Maryland, but this came to nothing. "To James Madison", 20 February 1784, in TJ Papers, Vol. VII, p. 546.

Hening's *Statutes at Large*, and one of Jefferson's own bills exempting the Proprietary from an Act of Assembly.[108] Considering that Hening's volumes were compiled from Jefferson's archives, and that Jefferson's list of "Histories, Memorials and State Papers" in the *Notes* contains numerous references to the history of the Proprietary, it is safe to assume that he knew more of its history than he let on to the readers of the *Notes*.[109] Indeed, his knowledge of the Proprietary, combined with his antipathy to feudal tenures, make it inconceivable that he did not have the Proprietary in mind when composing his laws, even though he did not specifically mention it at the time.

The history of the Proprietary was one of some of the leading families of England exporting their ambitions into the Virginia colony via the acquisition, and leasing, of land. With time, the joint ownership of the Proprietary was consolidated under one man, Lord Fairfax, and his descendants. The Proprietary's very existence disproves the misconception that colonial America had no hereditary aristocracy. Indeed, it did, and in addition to the Northern Neck, the colonies of Maryland and Pennsylvania were proprietaries operating under feudal law in which the proprietor, as chief tenant, held of the king and in turn was entitled to expect allegiance from his tenants as prescribed by socage tenure. The titles of the American aristocracy were from locations in England, and the lands which they lorded over operated under the same system of laws as their manors in England.

The lands controlled by the Northern Neck proprietor made him the lord of thousands of tenant farmers. Northumberland County had an average of five hundred and fifty tenants in the 1770s; there were over nine hundred tenants in Fairfax County in the early 1780s.[110] While most tenants farmed small holdings averaging one hundred acres, others possessed vast tracts which were sublet to sub-tenants. Many of these sub-

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[108] Douglas Southall Freeman, *George Washington*. Vol. I. London: Eyre & Spottswoode, 1951, pp. 447-525. Also see W.W. Hening, *The Statutes at Large: A Collection of All the Statutes of Virginia, from the First Session of the Legislature in 1619*. (R&W&G Bartow: New York) 1823. For example, even when quit-rents were abolished throughout the rest of the state, the Proprietor continued to collect his dues in the Northern Neck. Hening IX, p. 359. For Jefferson's Act of Assembly, see Revisal Bill No. 126, "A Bill for Repealing Certain Acts of Parliament and of General Assembly", in TJ Papers, Vol. II, pp. 656-657. Furthermore, a letter from James Madison in early 1786 informs Jefferson of difficulties pertaining to several bills for the Northern Neck, which had to be legislated for as a separate jurisdiction from the rest of the state. "From James Madison", 22 January 1786, in TJ Papers, Vol. IX, pp. 194-199.

[109] Jefferson, *Notes on Virginia*, pp. 177-196.

leases were insecure; few exceeded a duration of twenty-one years.[111] Indicative of this group of large tenants was Robert "King" Carter, the notorious Virginia aristocrat, who leased over 54,000 acres from Lord Fairfax and sublet it to 113 of his own tenants.[112] The result was a hierarchy running from the most humble sub-tenant at the bottom to Lord Fairfax himself at the top.

This hierarchy also provided the Lord with potential dominance within the state itself. Under Virginia's constitution, representation of citizens was by county, and the delegations from the Northern Neck counties were elected by potentially pliable constituents. These eight counties formed a significant group in the House of Delegates seated in October 1776, although a decade later their influence had shrunk as Virginia's western counties were divided into smaller districts, thus driving up the total membership of the House. In addition, the quit-rents which would normally have gone into the public treasury were instead collected by the proprietor himself, depriving the state of revenue.[113] From the perspective of a legislator in the 1770s, the Proprietary loomed as a significant force in Virginia politics. While Lord Fairfax himself no longer exercised direct control, many of his most notable tenants, such as George Washington, did, and used it aggressively.

Jefferson's Reforms

Washington was a leader in the effort to expand proprietary-style manors into other parts of the state. The Proprietary itself extended deep into present-day West Virginia, but the lands along the southern bank of the Ohio River remained unorganised. Washington, and other Northern Neck tenants, were stockholders of land companies which sought to buy up vast tracts of western land and lease them on the proprietary model. Washington himself intended to settle three hundred tenants on his western lands.[114] The result would be to concentrate wealth and political power in the hands of a very small number of the Proprietor's tenants, who in turn would become proprietors of their own western domains. The entire apparatus was supported by the system of socage tenure that upheld manorial feudalism in England.

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[110] Humphrey, "Conflicting Independence", p. 164.
[111] Ibid., p. 168.
[112] Ibid., p. 164.
[113] Bond, *The Quit-Rent System*, p. 62.
[114] Humphrey, "Conflicting Independence", p. 164.

As stated before, the land reforms within Jefferson's draft constitution followed three themes: the reform of feudal tenures into freeholds, the breakup of large estates through inheritance law, and the equitable distribution of new territories. Thus far, we have seen how Pendleton dismissed Jefferson's attempt to reform tenures, and how Jefferson abolished entail by operating outside of the Revisal of the Laws while scoring only a symbolic victory on gavelkind within it. For the third element, Jefferson once again moved from the Committee of Revisors to the floor of the House of Delegates, exchanging an obstructionist in Pendleton for a willing ally in George Mason.

Mason was an improbable ally for Jefferson on the issue of the fair distribution of western lands. Mason's plantation, Gunston Hall, bordered Washington's Mount Vernon on the Northern Neck, and thus Mason moved at the highest level within the very circle that was Virginia's living monument to feudalism. Like his neighbour, Mason was deeply involved in the activities of land companies seeking to divide up Virginia's western lands and lease them at profit to tenants. Yet, once independence was declared, Mason largely reversed himself, and introduced a bill that would have strengthened the claims of western squatters against the corporate speculators seeking to uproot them. In addition, Mason also assisted Jefferson in the debate over the latter's Bill for Establishing a Land Office.

Before establishing the Land Office, Jefferson took immediate action to neutralise the threat posed by one of the land companies in particular. Throughout 1775, the Transylvania Company, a group of Virginian and North Carolinian investors styling themselves the "true and absolute Proprietors of the Colony of Transylvania" had attempted to stake a claim to Virginia's western-most county of Fincastle, in present-day Kentucky.[115] From Jefferson's perspective, this would be worse than another semi-autonomous proprietary manor based on the Northern Neck. Instead, it would be the partition of Virginian territory and the creation of a fifth proprietary colony - in addition to Pennsylvania, Maryland, and the Carolinas - out of Virginia's sovereign charter lands.

Jefferson responded to the challenge of the Transylvania Company by moving quickly to recognise the land claims of western squatters, thereby enfranchising them

[115] Quoted in Boyd, "Editorial Note", in TJ Papers, Vol. I, p. 565. For further information, see "Notes and Documents relating to the Transylvania and Other Claims for Lands under Purchases from the Indians", in TJ Papers, Vol. II, pp. 64-66; and "Depositions concerning Claims to Lands under Purchases from the Indians" in TJ Papers, Vol. II, pp. 68-111.

under the law and allowing them to vote for members of the House of Delegates. To improve western administration and increase their representation, Jefferson also moved to split Fincastle into Kentucky and Washington counties.[116] When this bill was defeated by the eastern aristocrats, Jefferson tried again, hijacking, while still in committee, a bill that would legitimise the Transylvanian holdings, and replacing its language with his own before sending it on to the whole House, where it was approved by the House and Senate.[117] The new bill went further than the old one, dividing Fincastle in to three counties, thereby tripling western representation, filling out the House of Delegates back benches with members inclined to support Jefferson's other land reforms. It also barred persons who had "taken any oath of Office to the pretended Government" of the Transylvanian Company from taking public office, unless that person made a public renunciation of the prior affiliation.[118]

As Julian Boyd observes in his editorial note on the Bill for Establishing a Land Office, Jefferson's objective was "to lay down the foundations of a broad and permanent policy" for republican landholding in the west.[119] The Land Office bill proceeded from the same principles laid out in his draft constitution as did the Fincastle bills: that the appropriation of western lands should fall to the public authorities, not private interests, and that free land should be made available to any freeman lacking the required estate to qualify for the suffrage. A central tenet of the bill was a system of land grants that exceeded even the one within his draft constitution. Grants of seventy-five acres were to be made to all un-landed free men and women upon their wedding days, the effect of which would be to create 150-acre freeholds supporting entire families which, according to the Bill on Descents, would then be divided equally amongst the children upon their parents' deaths, combining and dividing along new lines with each new marriage and death.[120] Theoretically, this could create a stable system of freeholding that would last into the foreseeable future.

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[116] "Bill for Dividing the County of Fincastle into Two Distinct Counties", in TJ Papers, Vol. I, pp. 569-571.

[117] The legislative maneuvering is explained in Boyd, "Editorial Note", in TJ Papers, Vol. I, p. 568.

[118] "Bill for Dividing the County of Fincastle into Three Distinct Counties", in TJ Papers, Vol. I, pp. 571-576.

[119] Boyd et al., "Editorial Note" in TJ Papers, Vol. II, p. 138

[120] "Bill Establishing a Land Office", in TJ papers, Vol. I, pp. 139-140.

The Land Office was intended to offer yeomen the opportunity to purchase lands of their own instead of leasing from a land company. It was legislation without which the other elements of western land policy contained in the constitution could not be implemented, and, in particular, extended from Jefferson's desire to have land grants emanate from an accountable body in the executive branch. Upon Jefferson's elevation to the position of governor, however, the landed interest in the Virginia Assembly seized control of the bill and, in like fashion to what Jefferson had done with the Fincastle bill, replaced Jefferson's language with their own. As enacted, the Land Office became an institution of protection for the land companies and their extensive holdings. Manorial feudalism would live on in Virginia.[121]

Conclusion

Jefferson's land reforms were a partial success. On tenures, he made little headway, although quit-rents were eventually abolished. On inheritance, he successfully abolished entail but his partial abolition of primogeniture fell short of the sweeping gavelkind reform he proposed in his draft constitution. On western lands, the provisions of the draft constitution were adopted in full, but the subsequent legislation necessary to implement the reforms was subverted by the landed interest in the Assembly to allow the land companies to continue their domination of westward expansion into Kentucky. Jefferson's goal was to ensure that the balance of landed property was in the hands of a majority of the citizens. In that, he failed, winning tactical victories against the great landed interests in the Virginia Assembly, but in the end leaving them with the feudal legal protections that would allow them to maintain power for many more decades.

This meant that he was unable to prevent the gentry from using feudal law to extend their influence throughout the state. While rich gentry with legal resources could evade the full thrust of Jefferson's reforms, the poorer yeomen could not, thereby ensuring that, contrary to his intent, large estates would remain intact while smaller ones

[121] For a summary history of the fate of the land office bill, see "Editorial Note", in TJ Papers, Vol. II, pp. 133-138. It is also worth noting that, while in Congress in 1784, Jefferson sponsored legislation ceding Virginia's western claims north of the Ohio River and organising the territories into new states. While not part of his state legislation, it is worth pointing out as it offers some insight into his vision for the West. See "The Virginia Cession of Territory North of the Ohio", 1 March 1784, in TJ Papers, Vol. VI, pp. 571-580; and the "Plan of Government for the Western Territory", 3 February - 23 April 1784, in TJ Papers, Vo. VI, pp. 581-617.

fragmented. Wealth continued to be held by a small number of aristocratic Tidewater gentry who used feudal law to maintain their landed property while expanding their commercial ventures in land speculation. Virginian landholding in 1785 was not substantially different from how it had been in 1775.

Jefferson's thinking on land policy seems to have broadened as he pursued the reforms from 1776 through 1779. His draft constitution was similar to Harrington's agrarian law, with clear republican overtones since the ownership of land was firmly linked to civic participation in the commonwealth. Yet, by the time Jefferson proposed his entail bill a few months later, he emphasised economically liberal reasons for reform, and, by the mid-1780s and in his *Autobiography*, he was asserting a vaguely defined natural right to property. Just what prompted this expansion of Jefferson's thinking is unclear. A possible explanation is that he did so in order to adapt to Pendleton's objections presented during their August correspondence. Another is that he recognised that the members of the Assembly would not look favourably on his reforms if he was open about his intent to fracture the aristocracy's hold on political life.

This does not mean that the liberal side of Jefferson's argument was insincere or purely tactical. Instead, Jefferson seems to have created a comfortable liberal-republican synthesis, holding both viewpoints simultaneously and extracting the elements of liberalism and republicanism that most complemented each other. It was entirely consistent to believe that a republican farmer should own his own land, and that his land should be agriculturally productive. It was also reasonable to use market potential as a way of reducing the appeal of holding land simply to collect rents. And, by eliminating quit-rents as a sponge for tenant farmers' profits as well as giving them full ownership through allodial titles, he could encourage those farmers to save and make improvements to their land. Jefferson's full vision went unfulfilled, but the manner in which he synthesised liberalism and republicanism for land reform would serve him in good stead again when he turned his attention to reform of the Established Church and ecclesiastical aristocracy.

Chapter 4:
Religion

Feudalism was a broad system, and while land reform was a necessary part of any modernisation programme, it was not sufficient. As early as the 1650s, many English republicans, such as John Milton and the Levellers, had understood that a revolution in secular affairs must be accompanied by a revolution in ecclesiastical affairs as well. There were two complementary reasons for this position. First, English republicanism was an outgrowth of Reform Protestantism, which emphasised the individual's capacity and responsibility for a personal relationship with God.[1] A commonwealth founded on that principle quite naturally abjured dictating matters of conscience to its citizens. Second, the established Church of England, with its episcopal hierarchy, was identified by High Churchmen and Dissenters alike as the ecclesiastical equivalent of secular aristocracy, and a crucial instrument of monarchical authority. Elimination of the episcopacy was favoured by English republicans, although they differed as to whether the episcopacy should be replaced by a presbyterian or congregational form of church government.

Jefferson's views on religion were complex. He was a lifelong member of the Anglican Church (rechartered as the Protestant Episcopal Church after independence), but denied the Holy Trinity. He saw a prominent role for religion in public and private

[1] Caroline Robbins and J.G.A. Pocock devote little attention to the particularly Protestant aspect of English republicanism, preferring instead to focus on the Harringtonian tradition in their accounts. However, a belief in spiritual autonomy and personal responsibility was quite compatible with republicanism and, later, liberalism. Michael P. Winship has made the link between Protestantism and republicanism the explicit theme of his recent research, particularly in regards to Puritans who left England for America; see "Godly Republicanism and the Origins of the Massachusetts Polity." *William and Mary Quarterly* 63, no. 3 (2006): 427-462. Other writings linking English republicanism and Christianity in its various forms include Jonathan Scott's study of republicanism and Christian humanism, *Commonwealth Principles: Republican Writing on the English Revolution*. Cambridge: University Press, 2004. The subsequent link between Protestant individualism and philosophical liberalism can be found in focused studies on John Locke, such as in Andrew R. Murphy, "The Uneasy Relationship Between Social Contract Theory and Religious Toleration." *The Journal of Politics* 59, no. 2 (1997): pp. 368-392; and J. Judd Owen, "Locke's Case for Religious Toleration: Its Neglected Foundation in the Essay Concerning Human Understanding." *The Journal of Politics* 69, no. 1 (2007): pp. 156-168.

life, yet advocated for disestablishment of any state church. He embraced liberty of conscience as a fundamental principle of politics, but did so on the grounds of Lockean liberalism rather than Protestant republicanism. Like his views on land reform, his views on the reform of public religion were similar in outcome to those of the seventeenth-century English republicans but differed in two important respects. First, whereas the English republicans found liberty of conscience through a Protestant understanding of divine law, Jefferson found it in the rational individualist psychology of John Locke. Second, while the English republicans saw the episcopacy as an unreformed royalist institution blocking their own liturgical and other reforms, Jefferson constructed a much more complex criticism of the Established Church that added to that assessment by also critiquing the role of the royal prerogative in church patronage and the meddling of clergymen in the development of the common law.

The established Church of England in Virginia in 1776 was significantly different from the parent church. The hierarchy of the Church of England in Virginia was much flatter than its parent church, consisting of local parish clergymen overseen by local parish vestry committees. While the Virginian clergy looked to the Bishop of London on matters of ceremony, in practice there were no bishops in America to constitute the upper echelons of a church hierarchy; the only other influence of the episcopate was as a bogeyman that could potentially be imposed on the colonies by Parliament. But just as the absence of a titled nobility did not prevent the landed gentry from assuming the role of a secular aristocracy, the absence of episcopacy did not prevent some measure of ecclesiastical aristocracy. Indeed, it was the very same gentry who dominated the county courts who also dominated the vestry committees. To this extent, the secular aristocracy and the ecclesiastical aristocracy were one group of men, unlike in England where they were at least nominally separate. In addition, the parish clergy were settled on their own glebe estates, supported at public expense with life tenure.

It was in order to break up this fused aristocracy, and to remove state support for the landed clergy, that Jefferson proposed his Statute for Establishing Religious Freedom. This statute was presented as part of the Revisal of the Laws in June 1779 and was passed under the direction of James Madison in 1786, but its origins lie earlier in a single line from Jefferson's draft constitution in June 1776, later expanded into full legislation in the October 1776 session of the Assembly. This chapter will be presented as an explanation of how Jefferson thought about Disestablishment. First, I will give a

full description of what Establishment meant in colonial Virginia, especially as to how it was similar to and different from the parent church in England. Second, I will examine Jefferson's argument in 1776 for the disestablishment of the Church of England, which rejected state support for religion on the grounds of liberty of conscience. Third, I will explain how Jefferson responded to the claim that Establishment was necessary for public morality, and how he relied on alternative moral sources for the encouragement of virtue in the new republic.

I - Historiography

Jefferson's thought on religion has attracted as much, if not the most, attention as any of his areas of interest. Jefferson sought to place himself at the vanguard of a revolution in the public role of religion in Western society, authoring Virginia's Statute for Establishing Religious Freedom, advocating religious pluralism to the French readers of the *Notes on the State of Virginia*, seeking to remove religious instruction from public schools, and including his authorship of the Statute for Religious Freedom on his gravestone. Historical attention has been correspondingly profuse. There are four major areas of enquiry by historians: what Jefferson's personal theological views were, what influence John Locke had upon his opinion of religion's proper place in society, what Jefferson thought the public role of religion should be, and how he thought public morality should be encouraged in the absence of a state-sponsored church.

The matter of Jefferson's personal theology is one upon which there is partial consensus. Like most of the Virginia gentry, Jefferson was a member of the Church of England in Virginia during the colonial period, and retained his membership when the church was given a corporate charter as the Protestant Episcopal Church of Virginia after the revolution. Despite this life-long affiliation, Jefferson's personal religious views evolved considerably, eventually culminating in a rationalistic Unitarianism under the influence of his friend, the exiled English pastor Joseph Priestley. In a "religious biography" of Jefferson, Edwin S. Gaustad characterises Jefferson as an "idiosyncratic Anglican", while Charles B. Sanford, in an earlier treatment of Jefferson's religious life, identifies him as a fairly conventional Unitarian.[2] The difference in the two accounts

[2] Edwin S. Gaustad, *Sworn on the Altar of God: A Religious Biography of Thomas Jefferson*. Grand Rapids, MI: W.B. Eerdman's, 1996, and Charles B. Sanford, *The Religious Life of Thomas Jefferson*. Charlottesville: Virginia University Press, 1984.

appears to be the importance placed upon institutional affiliation versus the content of belief.

On the other hand, Eugene R. Sheridan, a contributor to the *Papers of Thomas Jefferson*'s edition of Jefferson's "Extracts from the Gospels", argues in his *Jefferson and Religion* that Jefferson was a Deist, not a Protestant of Anglican or Unitarian persuasion.[3] Sheridan rather overstates Jefferson's non-denominationalism. Jefferson identified himself as an Anglican or a Unitarian, depending on the context, but the label of "Deist" seems to be one imposed by Sheridan. This label rejects the importance of the message of Jesus for Jefferson, despite Sheridan's involvement in the publication of the "Extracts". Given the care and attention that Jefferson gave to Jesus' message, to portray Jefferson as not a Christian seems to be to accept a narrowly Trinitarian definition of Christianity that Unitarians then and now would reject wholeheartedly. At the end of the day, Jefferson thought of himself as a Christian, even if some Trinitarians don't agree.[4]

While Jefferson's personal theology is contested, its essential rationalism is a common element of the various interpretations, as is the influence of the writer who reconciled rational Christianity with political liberalism. In multiple studies, the primacy of John Locke in shaping Jefferson's views on public religion, as distinct from his views on theology, is undisputed, based on strong primary evidence reprinted within the *Papers of Thomas Jefferson* as "Notes on Locke and Shaftesbury".[5] The differences of

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[3] Eugene R. Sheridan, *Jefferson and Religion.* Chapel Hill: University of North Carolina Press, 1998. Reprinted from the introduction to *Jefferson's Extracts from the Gospels: "The Philosophy of Jesus" and "The Life and Morals of Jesus"*. Dickinson W. Adams and Ruth W. Lester, eds. Princeton: University Press, 1983.

[4] In his recent contribution to the *Blackwell Companion to Thomas Jefferson*, Johann N. Neem argues that Jefferson sought to spark a reformation in American Christianity. Disestablishment of the church would force innovation in religion, thereby encouraging the growth of rational Christianity culminating in widespread Unitarianism. Given that Unitarianism remains a distinctly minority interpretation of Christianity, and that Unitarian congregations were almost exclusively located in New England, this important intention of Jefferson's is easy to overlook. See Johann N. Neem, "A Republican Reformation: Thomas Jefferson's Civil Religion and the Separation of Church from State". In *The Blackwell Companion to Thomas Jefferson*. Francis D. Cogliano, ed. Oxford: Blackwell Publishing, Ltd., 2012, pp. 91-109.

[5] "Notes on Locke and Shaftesbury", in TJ Papers, Vol. I, pp. 544-551. Gerald Sandler argued that the Statute for Religious Freedom contained "a discernable paraphrasing" from Locke's "Letter Concerning Toleration", an assessment corroborated by the primary evidence from the "Notes on Locke and Shaftesbury". Sanford Kessler argued

opinion amongst scholars seem to be over whether Jefferson was influenced by Locke's "Letter Concerning Toleration" or whether Jefferson was also influenced by other of Locke's works, as well as the relative importance of other sources for which there is not as much direct textual evidence in Jefferson's hand.[6] While direct textual evidence within Jefferson's "Notes on Locke and Shaftesbury" corroborates the importance of the "Letter", the argument in support of the influence of "Reasonableness" involves broader similarities between Jefferson's and Locke's religious ethic. An important distinction separates Jefferson from Locke, however: while Locke advocated religious toleration with important limitations for Catholics and atheists, this chapter argues that Jefferson advocated full religious freedom based on his own development of the core Lockean philosophy. Based on this distinction, Jefferson was Lockean, but was not a slavish adherent to Locke's every view.

While there is general consensus that Jefferson was a rationalist and that Locke provided the core material for Jefferson's views on public religion, the consensus breaks down when historians discuss what Jefferson's definition of disestablishment actually was. One point of view is that Jefferson intended a strict separation of church and state that banished religion from the political sphere.[7] The weakness of this interpretation is

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that Jefferson was also influenced by Locke's essay on "The Reasonableness of Christianity", which provided the rationalist outlook discussed by Gaustad, Sanford, and Sheridan. David M. Post, in a wide-ranging discussion of Locke's influence on various aspects of Jefferson's thought, argued that Jefferson hewed much more closely to Locke on religion than on property. The consensus amongst these specific studies is that Locke provided the principles that guided Jefferson's thinking on toleration and church-state relations. See, S. Gerald Sandler, "Lockean Ideas in Thomas Jefferson's Bill for Establishing Religious Freedom." *Journal of the History of Ideas* 21, no. 1 (1960): 110-116.; Sanford Kessler, "Locke's Influence on Jefferson's 'Bill for Establishing Religious Freedom'." *Journal of Church & State* 25, no. 2 (1983): 231-252; David M. Post, "Jeffersonian Revisions of Locke: Education, Property-rights, and Liberty." *Journal of the History of Ideas* 47, no. 1 (1986): 147-157.

[6] Gilbert Chinard, for instance, argued that Jefferson was highly influenced by Lord Kames on religion. While Kames is often a presence in much of Jefferson's thought, the same direct textual evidence does not exist as does for Locke, Shaftesbury, and, in a much smaller role, John Milton. See Gilbert, Chinard, *Thomas Jefferson: The Apostle of Americanism.* Boston: Little, Brown and Co., 1933, and the discussion of Chinard in Mott, "Sources of Jefferson's Ecclesiastical Views", p. 271. For Milton, see George F. Sensabaugh, "Jefferson's Use of Milton in the Ecclesiastical Controversies of 1776." *American Literature* 26, no. 4 (1955): 552-559.

[7] For variations on this view, see Isaac Kramnick and R. Laurence Moore, "The Baptists, the Bureau, and the Case of the Missing Lines." *The William and Mary Quarterly* 56, no. 4 (1999): 817-822; and Merrill D. Peterson, *Thomas Jefferson: Religious Liberty*

that many of the historians who hold it have based their views on the so-called Letter to the Danbury Baptists, in which Jefferson called for a "wall of separation" between church and state. The relative permeability of that wall has fascinated historians, and jurists too, but a letter written in 1802 about New England Congregationalists and the first amendment to the federal constitution should not be taken as necessarily indicative of Jefferson's opinion about Virginian Anglicanism and the state constitution in 1776.[8]

Daniel L. Dreisbach disagrees with the strict separation interpretation, pointing out that many of the bills which accompanied the Statute for Religious Freedom allowed for continued public religion, notably in the declaring of fast days, in public offering of thanksgiving, and in the protection of Sabbath worshippers from harassment.[9] Dreisbach's point is well taken, and could even be extended to include draft legislation against usury and gambling that also accompanied the Statute within the Revisal of the Laws. Dreisbach's argument contains important flaws, though. He does not adequately address the fact that Jefferson did not pen every bill within the Revisal, and thus that the highlighted legislation may have been the work of Edmund Pendleton, who frequently

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and the American Tradition. Fredericksburg, VA: Thomas Jefferson Institute for the Study of Religious Freedom, 1986.

[8] For analysis of the Danbury letter itself, see the forum in the October 1999 *William and Mary Quarterly*, particularly James H. Hutson and Thomas Jefferson, "Thomas Jefferson's Letter t the Danbury Baptists: A Controversy Rejoined." *The William and Mary Quarterly* 56, no. 4 (1999): 775-790; Thomas E. Buckley, "Reflections on a Wall." *The William and Mary Quarterly* 56, no. 4 (1999): 795-800; and Edwin S. Gaustad, "Thomas Jefferson, Danbury Baptists, And" Eternal Hostility"." *The William and Mary Quarterly* 56, no. 4 (1999): 801-804. This forum was organised in response to a 1998 Library of Congress exhibit, curated by Hutson, that cast doubt on whether Jefferson intended his letter as a statement of general principles or, as Hutson thought based on newly uncovered evidence, that it was an attack on the New England Congregationalist clergy and therefore not a reliable guide to his beliefs. See also Johann N. Neem, "Beyond the Wall: Reinterpreting Jefferson's Danbury Address." *Journal of the Early Republic* 27, no. 1 (2007): 139-154.

[9] Daniel L. Dreisbach, "Thomas Jefferson and Bills Number 82-86 of the Revision of the Laws of Virginia 1776-1786: New Light on the Jeffersonian Model of Church-State Relations." *North Carolina Law Review* 69 (1990): 159-212; Dreisbach, "New Perspective on Jefferson's Views on Church-State Relations: The Virginia Statute for Establishing Religious Freedom in Its Legislative Context, A." *American Journal of Legal History* 35 (1991): 172-204; and Dreisbach, "Religion and Legal Reforms in Revolutionary Virginia: A Reexamination of Jefferson's Views on Religious Freedom and Church-State Separation." In *Religion and Political Culture in Jefferson's Virginia.* Edited

clashed with Jefferson on religious legislation, or, less likely, that of George Wythe. Another flaw is that Dreisbach does not seem to consider that Jefferson could have supported the existence of public morality, including the free exercise of religion for those who chose to do so, without agreeing that a state sponsorship was the way to achieve that public morality.

The question of what would replace the state church as the promoter of public morality has not attracted quite the same attention as the rest of the Jefferson and religion question, but remains the subject of several important enquiries. Garry Wills, in his *Inventing America*, argued that Jefferson was guided by Scottish moral sense philosophy, and that he therefore thought that natural benevolence formed the basis of the Declaration of Independence and presumably would provide a sufficient basis for public morality.[10] This interpretation was hotly contested by several historians, who argued that Wills seriously misinterpreted the draft of the Declaration of Independence that forms the basis of Wills' entire book.[11] More recently, in her *American Virtues*, Jean Yarbrough has revived the moral sense interpretation of Jefferson's views on public morality, arguing (more persuasively than Wills) from Jefferson's correspondence that

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by Garrett Ward Sheldon and Daniel L. Dreisbach. Oxford: Rowman & Littlefield, 2000, pp. 189-218.

[10] Garry Wills, *Inventing America*. New York: Doubleday, 1978.

[11] The first major response was a thorough debunking by Ronald Hamowy, who argued for the primacy of Locke in "Jefferson and the Scottish Enlightenment: A Critique of Garry Wills's *Inventing America*: *Jefferson's Declaration of Independence*." *The William and Mary Quarterly* 36, no. 4 (1979): 503-523. It is worth pointing out, though, that both Hamowy and Wills were referring to Locke's political, not religious, philosophy. Subsequent critical responses include John P. Diggins, *The Lost Soul of American Politics*. Chicago: University Press, 1986, pp. 32-47. Diggins also disagrees that Jefferson was a Scottish moralist, arguing that Scottish moral philosophy was based on science and Jefferson's was based on nature. Diggins does not adequately differentiate between the moral sense philosophy of Hutcheson, which was scientific, and that of, say, Adam Smith, who thought benevolence was naturally occurring. Garret Ward Sheldon likewise dismisses the importance of Scottish moral sense theory, arguing that most references to the moral sense come much later in jefferson's life. This is true, but a few letters from the 1770s and 1780s do support the position that moral sense was a factor in Jefferson's thinking, so while he may have given it greater emphasis later, it was there all along. See Garret Ward Sheldon, *The Political Philosophy of Thomas Jefferson*. Baltimore: Johns Hopkins University Press, 1991, p. 155.

he fully endorsed natural benevolence and considered it consonant with Christian morality.[12]

In sum, historians agree that Jefferson's religious views were defined by rationalism in the Lockean tradition, but they struggle to find a common agreeable label with which to describe his personal belief, as well as whether he considered natural benevolence a suitable substitute for the established church's coercive role in promoting public morality. While historians do generally agree that the "wall of separation" between church and state was significant, Dreisbach's dissent is an important reminder that Jefferson was not hostile to organised religion once separated from state entanglement, and that there may have been some areas where Jefferson was comfortable with limited expressions of public religion. This chapter will show how, far from being a mere attack on the "aristocracy of the clergy", Jefferson sought to change the role of the institution of the church within Virginian society, by stripping away the role of the royal prerogative in church patronage, ending legalised coercion, and establishing liberty of conscience, predicated on the philosophy of John Locke with assistance from the Scottish moral sense philosophers.

II - The Parish System of Establishment

Like the counties, the Anglican parishes in Virginia started from rudimentary beginnings but, by the mid-eighteenth century, had become mature institutions. Historian James Horn argues that the Church of England in Virginia in the seventeenth century was characterised by "weakness" both institutionally and in the commitment of its laity to religious life.[13] Looking instead at the eighteenth century, John K. Nelson argues that the parishes at that point were both institutionally strong and popular with the population, and that Dissenters should not be credited as being more fervent than the adherents of Establishment.[14] Nelson's argument rests upon the heavy rate of parish taxation, which vastly exceeded the analogous local tax levied by the counties. The widespread acceptance of such levies, Nelson argues, indicates that the Established

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[12] Jean M. Yarbrough, *American Virtues : Thomas Jefferson on the Character of a Free People .* Lawrence, KS: University Press of Kansas, 1998.

[13] James Horn, *Adapting to a New World: English Society in the Seventeenth-century Chesapeake.* Chapel Hill: University of North Carolina Press, 1996.

[14] John K. Nelson, *A Blessed Company: Parishes, Parsons, and Parishioners in Anglican Virginia, 1690-1776.* Chapel Hill: The University of North Carolina Press, 2001.

Church was both popular and well-resourced, and carried out a wide range of social responsibilities while managing "elaborate welfare systems".[15]

While Virginia's Establishment was part of the Church of England, it was organised and functioned very differently from the parent church. Nelson argues that the Virginian church differed from the one in England in its multi-congregationalism and lay control, and Horn agrees that "while the ruling elite wished to create a robust religious presence in the colony, they had no intention of erecting a church sufficiently strong to challenge their own power."[16] In the absence of an American episcopate, secular authorities moved to fill the gap in authority, and the Established Church in Virginia was regulated by the General Assembly and the General Court. At the same time, the local elites whom Jefferson mistrusted in the county courts, and whose hereditary estates he sought to break up through property reform, had also populated the vestry committees that administered each parish, creating a powerful union of church and state controlled by the local oligarchies and used to crush both religious and political dissent.

Parish Organisation

The Virginia Assembly divided the colony into parishes in the mid-seventeenth century. Similar to the counties in size and structure, parishes were responsible for ecclesiastical administration as well as some aspects of civil administration. Nelson describes Virginian local governance as a "parish-county" hybrid in which civil courts heard ecclesiastical cases while parish personnel assisted in civil matters such as property conveyances and boundary disputes.[17] Furthermore, there was significant overlap between the personnel of a county court and those of a parish. A typical parish contained one or more congregations, staffed by an ordained parson and an executive committee known as a vestry. When Jefferson spoke of the "aristocracy of the clergy", his criticism was not limited to the landed minor clergy, but also to the landed aristocrats on the vestry who formed the other wing of the "pseudo-aristocracy".[18]

Many parishes were "commensurate with the counties", Jefferson recorded in the *Notes on Virginia*, "but sometimes a county comprehends more than one parish, and

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[15] Ibid., p. 70.

[16] Ibid.,, pp. 17-32, and Horn, *Adapting to a New World*, p. 386.

[17] Nelson, *A Blessed Company*, pp. 11-16.

[18] "To John Adams", 28 October 1813, in TJ-Adams Correspondence, Vol. II, pp. 387-390.

sometimes a parish more than one county."[19] In order to facilitate Sunday meetings, parishes often divided into multiple congregations, each with its own church or chapel, unlike in England where each parish, centered on a village or manor, had a single congregation. By Nelson's count, Virginia had two hundred and forty-nine congregations by 1776, spread across its hundred-odd parishes.[20] The parson would rotate amongst the congregations, leaving the others in the hands of a churchwarden. This further emphasised lay control - in addition to the prominence of the vestries, the laity were in charge of their own services at least every other week, though closely circumscribed by the Book of Common Prayer and a liturgy decided upon by the Archbishop of Canterbury, as well as a church design that, with a few exceptions, placed emphasis upon High Church forms and architecture.[21]

The parish parson was compensated with a salary and an estate. The salary was paid in tobacco, and was set by statute of the General Assembly at sixteen thousand pounds of tobacco per year, which could then be sold at market rates.[22] In addition to his salary, a parson was also compensated by being settled on a landed estate known as a glebe. Mimicking medieval practice, these glebes were defined by colonial statute as a working farm of at least two hundred acres.[23] Jefferson was critical of this arrangement, noting that many of the clergy, "secure for life in their glebes and salaries, adding to these generally the emoluments of a classical school, found employment enough, in their farms and schoolrooms for the rest of the week, and devoted Sunday only to the

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[19] Jefferson, *Notes on Virginia*, p. 108. Nelson ascribes this to the cultivation of tobacco and the "resultant radical dispersal of population" due to "the virtual absence of villages or towns." Nelson, *A Blessed Company*, pp. 17-18.

[20] Ibid., p. 29.

[21] Ibid., pp. 28, 63-65. For more on the structure of the church layout, see Dell Upton, *Holy Things and Profane: Anglican Parish Churches in Colonial Virginia.* New Haven & London: Yale University Press, 1997.

[22] Nelson, *A Blessed Company*, pp. 48-50. This compensation remained the same throughout the first half of the eighteenth century. When the price of tobacco climbed during the Seven Years War, the General Assembly passed a statute known as the Two-Penny Act that would have set the price at which the parson could sell tobacco at two pence per pound. This Act was vetoed by the King-in-Council, and the parsons sued for back pay. The resulting "Parsons' Cause" courtroom drama, in which Patrick Henry convinced a jury to award a single cent in damages, significantly poisoned relations between the clergy and the laity, including the vestrymen who sat in the Assembly.

[23] c. XXXIV, 22 George II, "An Act for the Support of the Clergy, and for the regular collecting and paying of the Parish Levies" in Hening Vol. VI, p. 89. Nelson, *A Blessed Company*, p. 55.

edification of their flock."[24] Nelson notes that, while glebes were sometimes objects of secular jealousy and resentment, throughout much of the eighteenth century the glebes "were a source of pride, substantial expense, and recurring headaches" for the vestrymen who oversaw them.[25] The average size of a glebe, Nelson explains, was 380 acres, vastly exceeding the minimum statutory requirements, and the "care with which vestries drew up specifications for houses and outbuildings suggests something more at work than a grudging tight-fisted satisfaction" of legal requirements.[26]

Named after the vestry room of the church, where they typically held their meetings, the vestries were executive boards of the parishes, with authority established by Acts of Assembly. Without an American bishop, this arrangement of local control has been characterised by one historian as "a nearly congregational church within the episcopal framework", although, unlike in a congregational or presbyterian church, the vestrymen were unelected and appointed their own membership.[27] But a vestry was not the same as in an Anglican Church, either. In England, membership of the vestry was often open to all ratepayers of the parish's local tax, whereas in Virginia it was always limited to twelve parishioners who selected their own replacements upon resignation or death. Nelson attributes the innovation of the "select vestry" to two causes. First, geography was again a factor, as assembling the entire body of adult male parishioners was impractical. Second, the Virginia parishes lacked a patron, such as a local nobleman or bishop, who could take leadership of parish administration.[28] Therefore, a smaller vestry acting as an executive board was required.

Nelson and Horn both acknowledge the tight relationship between the vestries and the county courts, noting that the same families dominated both bodies, that "vestryman and [justice of the peace], in fact, were often one and the same person", and that the institutions supported one another in their administrative duties, ranging from enforcement of public morals to assisting in the conveyancing of estates and setting boundary lines between private lands.[29] Nelson assesses the vestries as being effective at these tasks, arguing that they "shouldered major responsibilities which they

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[24] Jefferson, *Autobiography*, pp. 61-62.

[25] Nelson, *A Blessed Company*, p. 51.

[26] Ibid., pp. 51-52.

[27] Joan Rezner Gunderson, *The Anglican Ministry in Virginia, 1723-1776: A Study of a Social Class*. PhD Dissertation. University of Notre Dame, 1972, p. 2.

[28] Nelson, *A Blessed Company*, p. 34.

discharged faithfully", and noting that, as an unelected body, "acceptance of their authority depended ultimately on their sensitivity to the interests and needs of the community."[30] Even Jefferson described the vestrymen favourably as well, calling them "the most discreet farmers …. well acquainted with the details and economy of private life, and [finding] sufficient inducements to execute their charge well."[31]

Parish Duties and Services

According to Horn, there were five core administrative duties for the vestry.[32] The first responsibility was to secure and provide compensation for a parson. Second was oversight of the construction and maintenance of sufficient churches and chapels to house the parish's congregations. Vestries were also responsible for enforcing public morality, administering poor relief, and assessing parishioners for the parish levy. The public nature of these responsibilities, and the necessity of interacting with the county courts, further underscores Nelson's description of the parish as an essential and equal partner with the county in Virginian life.

All Virginians, even Dissenters, were officially entered onto the parish roll as parishioners, and were required by law to attend services on a monthly basis.[33] Parish authorities could and did enlist the support of county authorities to enforce attendance at the Established Church and to put down competing gatherings of Dissenters.[34] The capacity and willingness to use the combined resources of church and state to enforce religious observance could also be used to enforce more general tenets of public morality. While Virginia lacked a dedicated ecclesiastical court system as existed in

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[29] Ibid., pp. 15, 36; and Horn, *Adapting to a New World*, pp. 196-197.

[30] Nelson, *A Blessed Company*, pp. 41, 61.

[31] Jefferson, *Notes on Virginia*, p. 133.

[32] Horn, *Adapting to a New World*, p. 196.

[33] According to Nelson, there was a brief period during the early 1700s when the Assembly authorised separate parishes for Dissenters to encourage foreign immigration, mainly from Germany, but these parishes were later reabsorbed by the time of the Great Awakening and the example was not repeated. Nelson, *A Blessed Company*, pp. 282-284.

[34] As John Ragosta has shown, preaching without a license from the Established Church could result in time served at the county jail, amongst other punitive actions that sometimes included carefully organised state violence against congregants. John A. Ragosta, *Wellspring of Liberty: How Virginia's Religious Dissenters Helped Win the American Revolution & Secured Religious Liberty.* Oxford: University Press, 2010, pp. 15-42.

England, the county courts took on this role in the decades following the initial colonisation. County grand juries heard presentments on charges of swearing, drunkenness, gambling, sexual offences, and Sabbath-breaking.[35] Nelson notes that prosecutions of moral offences were particularly frequent in the Northern Neck, the area of Virginia where, as we have seen in the last chapter, feudal institutions were strongest.[36]

The role of the parish was not simply coercive, for they were also responsible for administering what Nelson characterises as "elaborate welfare systems" for the indigent and infirm.[37] Such welfare services including placing elderly widows in the homes of families and providing a subsidy for their maintenance, binding out orphaned or indigent children to learn a trade, and maintaining a parish alms house to employ the idle.[38] This entire parish apparatus was supported by dedicated taxation levied by the vestry. On this point, Nelson argues, "Virginians taxed themselves substantially more heavily for the support of the parish than for any other public purpose."[39] Parish taxation was typically levied at a ratio of five-to-two compared to the county tax, and outspent them two-to-one on an annual basis. This indicates that the "parishes handled more extensive and costly responsibilities which in turn reflected the relative values Virginians ascribed to these activities."[40]

In light of the extensive social apparatus supported by the Established Church, in particular the role of the parish as a coequal part of daily life with the county, it becomes easier to understand why Dissenters were viewed by the Establishment not as followers of conscience but as threats to social order. As Rhys Isaac puts it in *The*

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[35] Lay officials of the parish often provided depositions for these presentments and, as stated above, the actions of courts were closely coordinated with the parish by the double-role of many vestrymen as justices of the peace. Nelson, *A Blessed Company*, pp. 273-281.

[36] Ibid., p. 280.

[37] Ibid., p. 70.

[38] The latter took place in the context of a strong eighteenth-century attitude that idleness, unless part of a propertied man's "leisure", was immoral. As such, the welfare parish was an important adjunct to the county courts' efforts to criminalise immoral behaviour. Nelson, *A Blessed Company*, pp. 75-84. Also see c. VI, 28 George II, "An Act for employing and better maintaining the Poor", in Hening VI, pp. 475-478.

[39] Nelson, *A Blessed Company*, p. 43.

[40] Nelson emphasises the extent to which the parish levies funded mandates passed down via statute from the General Assembly, and argues that the wilful decision of

Transformation of Virginia, "the parish community at the base of the barely consolidated traditional order was beginning to fracture. The rise of dissent represented a serious threat to the system of authority."[41] Furthermore, since Dissenting preachers, particularly Baptists, were "itinerants" who moved from parish to parish, the winning of converts undermined communal solidarity in addition to elite authority.[42] Nelson shrewdly notes that the Establishment had good reason to oppose the breakdown of communal order. The more radical, evangelical, or "New Light" Dissenters often harassed adherents to the Establishment, proselytising and accosting in such a way that "whenever and wherever evangelicals appeared, it seemed, Anglican faith and practice came under attack."[43]

Internal Control: The General Assembly and General Court

J.R. Gunderson identifies the General Assembly, not the vestries nor the clergy and bishop, as the centre of Establishment authority. "The General Assembly was the most cohesive force of the Anglican church in the colony," Gunderson writes. "Its laws imposed a certain uniformity upon the church there in temporal matters. Besides setting salaries, regulating the size and condition of glebes and requiring ministers to keep records of births, deaths, and baptisms, the assembly set parish boundaries and created new parishes."[44] The Assembly's unchallengeable authority provided a secure foundation for Establishment. "The security of the clergy tenure and the functioning of the vestry were the two most stable features of the church."[45]

The relationship between the church and the colonial state was sometimes also tested through court cases, the most infamous of which was the Parsons' Cause. In 1758, the Assembly passed the Two-Penny Act, which set parsons' compensation, hitherto paid in barrels of tobacco which could be sold at market rate, at two pence per barrel. The law was vetoed by the King-in-Council, and the parsons sued for several years worth of lost pay. While the court found for the plaintiffs, the defence attorney, Patrick

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Virginians to erect and maintain such a large parish social infrastructure outweighs any institutional tradition passed down from the English parishes. Ibid., 44-45.

[41] Isaac, Rhys. *The Transformation of Virginia.* Chapel Hill: University of North Carolina Press, 1982, pp. 147-148.

[42] Ibid., pp. 149-150.

[43] Nelson, *A Blessed Company*, p. 289.

[44] Gunderson, *The Anglican Ministry in Virginia, 1723-1776*, p. 10.

[45] Ibid., p. 33.

Henry, succeeded in convincing the jury to award a single pound in damages. Jefferson himself participated in a less renowned case in 1771. While his account of the case *Godwin et al. v. Lunan* is a legal opinion and not a pamphlet, the brief is similar to the *Summary View* in its style and its historical narrative.[46] Like in that pamphlet, Jefferson's goal was to trace the history of established religion in England to Saxon times, determine its original state before the Norman Conquest, and then investigate how kings and nobles had brought community parishes under royal and noble control. While in the *Summary View* Jefferson had focused on land tenures, in the *Godwin* brief he focused on the patronage of a parish and the rights and responsibilities that the patron had in the parish's management.

The question that concerned Jefferson was whether the General Court, sitting as an ecclesiastical court, had the authority to decide a matter of church administration, as opposed to ecclesiastical crimes and civil disputes. While he recognised that the General Court had ecclesiastical authority, he "conceived that it did not follow thence that they might deprive the defendant of his parish, because visitation and deprivation are no parts of the office of an ecclesiastical judge."[47] Therefore, Jefferson wanted to find out whether the General Court could legally exercise those rights under some other authority. To do this, he turned to history, and laid out three areas of enquiry. First, he wanted to know what the history was of the first establishment of England's churches under the Saxons. Second, he wanted to know how different "kinds of constitutions" had developed for these churches. Third, he wanted to know who was responsible for the administration of each type of church.[48]

Under the Saxons, Jefferson reported, there were "no parochial divisions" and the bishops had lived "in common" with the petty clergy.[49] As the borders of Christendom in Britain expanded, however, and as the number of the faithful increased, territory was laid out by the clergy into parishes. Using evidence from Hume's *History of England* and Blackstone's *Commentaries*, Jefferson dated this development to the mid-seventh century. By the mid-ninth century, the Saxon kings and nobles were building churches which their tenants were expected to pay tithes to upkeep. These churches were known

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[46] Thomas Jefferson, "Godwin *et al. v.* Lunan", in *Reports of Cases Determined in the General Court of Virginia*. William S. Hein & Co., Inc.: Buffalo, NY. 1981, pp. 96-108.

[47] Ibid., p. 97.

[48] Ibid., p. 97.

[49] Ibid., p. 97.

as *donatives*, for their executive authority lay with the patron who had donated their initial endowment.[50]

"In process of time", Jefferson recorded, many of the parish patrons lost their executive authority to the bishops, who gained control over the nomination of pastors. This second type of church was known as a *presentative*, because the patron had to present his nomination to the bishop for approval. Using Coke's *Institutes* and Selden's *Tythes*, Jefferson dated this development to the reigns of the Angevin Kings Henry II and John.[51] Therefore, the creation of *presentatives* dated to the time period closely following the consolidation of the feudal nobility and coinciding with the Anglo-Norman invasion of Ireland. Yet again, Jefferson found that eighteenth-century practices had their origins in the century following the Norman Conquest.

There was a third class of church as well, the *collative*, which accounted for the "residue of the parishes, after the donatives and *presentatives* were taken off". The *collatives* were directly administered by the bishops, because they had no patrons, and instead were either built at a bishop's direction, or were converted from "the old British temples into Christian churches" at their direction. "Light as this foundation was, it gave them some color for *collating* the clerk," Jefferson noted, "and this having been exercised by them from the infancy of Christianity, has acquired the force of immemorial custom, and given reality to the right now known by the name of *collation*."[52]

The different classes of churches had different patrons who exercised the executive rights of patronage, which included the nomination of the pastor, the donation or induction of the nominee "with actual possession" of the office and its accouterments, including its glebe, and visitation "which is the superintending his conduct after he is in possession. The latter is the object of the present enquiry; as it includes deprivation" and Jefferson was persuaded that all churches in Virginia were donatives.[53] This meant that the right of visitation lay with the Crown.

How did Jefferson come to such a conclusion? No king or queen had ever set foot in Virginia, so how could the Crown be the patron of the parish churches? Virginia's parishes had all been founded and endowed by an Act of Assembly in 1661, Jefferson

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[50] Ibid., p. 98.
[51] Ibid., p. 98.
[52] Ibid., p. 99.

explained, and had been approved by the King-in-Council. "Again, if we consider the community, as made up of King and People, the King will then be the patron of our churches, it being a known branch of the royal prerogative, that where the King and his subjects are joint founders, the rights of patronage vest in the King."[54] In situations when the King was unable to visit in person, he could delegate a visitor *pro tempore*; if he declined to do so, the visitation fell by default to the king's Chancellor or a person exercising chancery authority.

Since the Crown had the right of patronage, it could appoint pastors as it could any other civil office, but this had not always been the case in practice. The Act of 1661 divided patronage responsibilities between the parishioners and the king's royal governor, with the parishioners nominating and the governor inducting the clergyman; but "the unfitness of the people to judge of (the clergymen's] qualifications, had soon caused the vestries to usurp this right", and the elites in control of each parish had soon gained control of the process.[55] At this point, the overlap between vestry and House of Burgesses was not great enough to prevent reform and, in an Act of 1748, "the right of nomination was restored to the crown, except for the first twelve months after an avoidance, during which it was given to the vestrymen of the parish."[56]

This compromise reflected wider practice in Virginia government, and showed just how closely civil and ecclesiastical government in Virginia had become fused by the 1770s. "The King being considered as the founder and patron of the church, if nothing had been said, would have possessed both rights of nomination and investiture," Jefferson summarised, but the Act of 1748 delegated the nominating power for one year. "It is similar to the case of sheriffs and inspectors, who are nominated by the [county] court, but commissioned or invested with their office by the Governor."[57]

The result of all of this was that the Crown retained all other rights of a patron, including the rights of visitation. Therefore, the Crown could deprive an errant pastor if it so chose, and it could delegate authority in this matter, as in all personnel matters, to

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[53] Ibid., p. 100.

[54] Ibid., p. 105.

[55] Ibid., p. 105.

[56] Ibid., p. 106. The Act Jefferson references is the same one that established glebes at 200 acres, referenced in fn. 13. See 22 George II, c. XXXIV, "An Act for the Support of the Clergy, and for the regular collecting and paying of the Parish Levies" in Hening Vol. VI, p. 90.

[57] *Godwin et al. v. Lunan*, p. 107.

the Chancellor; but since the Chancellor was not in America either, the authority was further delegated to "the members of this honorable court who possess the powers of the Chancellor: not indeed sitting on this bench as a court of chancery, but as a court of visitation at any other time or place, at which you shall think proper to call the incumbent before you."[58] The argument went for naught, however as the "court adjudged that they possessed ecclesiastical jurisdiction in general, and that as an ecclesiastical court they might proceed to censure or deprive the defendant, if there should be sufficient cause."[59]

External Control: The Episcopacy Controversy

By 1776, the colonial government, in the form of the General Assembly and the General Court, had constructed a well-articulated model of church governance that emphasised local control and which emanated, via patronage, from the Crown while bypassing any episcopal middle authority. The Church of England in Virginia, while embracing the Anglican liturgy, was decidedly un-episcopal in character. Vestrymen at the local level conducted the business of their parishes, including the hiring and firing of clergymen, operating according to mandates of the General Assembly and turning to the General Court for adjudication of controversies. This time-tested system was threatened in the 1760s with the introduction of the Episcopacy Controversy, a movement by northern Anglicans, the minority in their colonies, to established the Church of England in the north via the creation of an American episcopate that would oversee the Church of England in all the colonies, including Virginia.[60]

As we saw in chapter one, according to Jefferson's *Refutation of the Argument that the Colonies Were Established at the Expense of the British Nation,* the original letter of patent granted by Queen Elizabeth I to Sir Walter Raleigh specified that colonies in America were to be governed according to "the Christian faith then professed in the

[58] Ibid., p. 108.

[59] Ibid., p. 108.

[60] The Episcopacy Controversy is treated at length by Carl Bridenbaugh in *Mitre and Sceptre: Transatlantic Faiths, Ideas, Personalities, and Politics, 1689-1775.* Oxford: University Press, 1962, pp. 316-323; and Nancy L. Rhoden in *Revolutionary Anglicanism: The Colonial Church of England Clergy During the American Revolution.* New York: University Press, 1999, pp. 37-63.

Church of England".[61] Unlike in Ireland, where the local Church of Ireland was modeled on the Church of England yet independent of it, in the North American colonies the Established Church was still part of the Church of England. A similar link between the colonies and the metropolitan centre that tied Virginia's landed estates to the Manor of Greenwich also tied its parishes to the Diocese of London.[62]

As part of the colonial settlement to England's Glorious Revolution, the Bishop of London assumed oversight of the colonies in what Nelson describes as an "extra-diocesan responsibility."[63] In the northern colonies, where Dissenting denominations such as the Congregationalists were established by colonial law, the Bishop was assisted in his duties by the Society for the Propagation of the Gospel (SPG), a charitable group headquartered in London that helped the bishop to recruit clergymen to go to America. In the southern colonies, where the Church of England was established, the bishop was assisted by a local commissary.[64] In Virginia, the commissary sat on the privy council, and the incumbent in the 1760s, James Blair, was active in promoting episcopacy as well as using the College of William and Mary to train a new generation of Virginian clergy.

The calls for an American bishop, who would exceed the role of the Bishop of London by overseeing the colonies directly, began in the SPG-dominated northern colonies and spread south during the years 1768-1771. Commissary Horrocks, who had replaced Blair, called a convention of Virginia's hundred Anglican parsons and the faculty of the College to debate whether to join the northerners in their request to London. Only eleven clergymen attended the convention, and with Horrocks they voted eight-to-four to apply for a bishop. Two of the four dissenting clergymen, Samuel Henley and Thomas Gwatkin, both professors at the College, took their dissent public via Virginia's newspapers, denouncing Horrock's convention as unrepresentative.

At the same time, sensing a threat to its own authority, the General Assembly denounced the convention's petition. Richard Bland, a vestryman and member of the House of Burgesses, noted that "if this scheme had been effected, it would have overturned all the acts of Assembly relative to ecclesiastical jurisdiction." The entire "ecclesiastical constitution" of Virginia "must be altered if a Bishop is appointed in

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[61] "A Refutation of the Argument that the Colonies Were Established at the Expense of the British Nation", in TJ Papers, Vol. I, p. 277.

[62] See chapter 3.

[63] Nelson, *A Blessed Company*, p. 122.

[64] Ibid., pp. 122-124.

America with any Jurisdiction at all."[65] As historian Peter M. Doll explains it, the imperial ministry in London "believed that colonial society had to be remodeled as much as possible on the English constitution in church and state to ensure colonial loyalty to the mother country."[66]

For Bland, the issue in 1771 was that episcopacy was a holdover of Catholicism. "I profess myself a sincere son of the established church, but I can embrace her Doctrines without approving of her Hierarchy, which I know to be a Relick [*sic*] of the Papal Incroachments [*sic*] upon the Common Law."[67] For Jefferson in 1776, the issue was episcopacy's use as a tool of monarchy. Quoting John Milton, who quoted King James I before him, Jefferson noted that with "no bishop" there could be "no king".[68] Doll elaborates that by the 1559 Act of Supremacy, Parliament had fused the legal status of subjecthood with membership in the Church of England. "Thenceforward there could not be two jurisdictions, papal and royal, within the one realm," Doll writes, "but only the one, monarchical source of authority."[69]

Furthermore, the imposition of a bishop was contrary to the donative church patronage that Jefferson had argued in the *Godwin v. Lunan* case. A bishop could take Virginia's donatives and transform them into collatives under direct ecclesiastical control. This was an affront both to the authority of the General Assembly to legislate for the Established Church, as well as the General Court's authority to hear ecclesiastical cases. In the Middle Ages, England had used the extension of the Archdiocese of York as a way of undermining Scotland's claim to sovereignty and, in like fashion, the creation of an American episcopate was an issue fraught with constitutional implications for the colonies. Nancy Rhoden notes that "since the creation of American bishoprics would be

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[65] Richard Bland, quoted in Bridenbaugh, *Mitre & Sceptre*, p. 319.

[66] Peter M. Doll, *Revolution, Religion, and National Identity: Imperial Anglicanism in British North America, 1745-1795.* Madison, WI: Fairleigh Dickinson University Press, 2000, p. 29.

[67] Richard Bland, quoted in Bridenbuagh, *Mitre & Sceptre*, p. 319.

[68] "Notes on Episcopacy", in TJ Papers, Vol. I, p. 552. The extent to which Milton was an influence for Jefferson is debatable. While there are many coincidences, a direct linkage is more difficult to prove than with Locke, but the echoes of Milton's Protestant republicanism are tantalising. For more information, see George F. Sensabaugh, "Jefferson's Use of Milton in the Ecclesiastical Controversies of 1776."

[69] Doll, *Revolution, Religion, and National Identity*, p. 15.

accomplished most likely by Act of Parliament", the issue of episcopacy became rolled into the larger controversy of colonial legislative rights during the revolutionary crisis.[70]

The 1776 Convention: First Steps to Reform

When the Virginia Convention met in 1776, its members took steps to forestall a challenge to Establishment as part of the revolution by including a toleration provision as Article XVI of the Virginia Declaration of Rights. As originally worded, the religious clause was simply a restatement of the spirit of the English Act of Toleration and related statutes, which suspended many penalties on English Dissenters without challenging the authority of the Church of England. In the Virginia context, there was nothing particularly groundbreaking about it and it would likely have gone without much notice had it remained unchanged, however James Madison seized upon an opening to radically change the composition of Virginia's political and civil society. Madison moved that the Convention go beyond a mere reaffirmation of toleration and towards outright disestablishment of the Church of England and the complete secularisation of Virginia government.

The original draft of the Declaration of Rights, written in committee by George Mason, called for Virginians "to enjoy the fullest Toleration in the exercise of Religion, according to the Dictates of Conscience", unless the exercise of one's religious belief infringed upon the rights of others established in paragraph one of the Declaration, and that "it is the mutual Duty of all, to practice Christian Forbearance, Love and Charity towards Each other." The language adopted in the committee's draft was essentially the same.[71] Madison's draft retained Mason's preamblar language while substantially altering the paragraph's enacting clause. As did Mason, Madison declared religion to be a matter of private conscience, but did not limit government to protecting dissenters via toleration. Instead, Madison proposed that the Convention declare that "therefore, no man or class of men ought, on account of religion to be invested with peculiar emoluments or privileges; nor subjected to any penalties or disabilities unless under &c [*sic*]".[72]

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[70] Rhoden, *Revolutionary Anglicanism*, p. 37.

[71] "First Draft of the Virginia Declaration of Rights", in GM Papers, Vol. I, p. 278.

[72] "Madison's Amendments to the Declaration of Rights", in JM Papers, Vol. I, p. 174.

Madison had just proposed the disestablishment of the Church of England in Virginia. By removing emoluments and privileges, the established church would be unable to draw upon government revenues for its support. Meanwhile, by removing the reference to "Christian Forebearance, Love and Charity", Madison was effectively secularising the new republic by removing even a mention of Christianity as a theological concept or a loose affiliation of denominations. The rest of the Convention recognised the radicalism of Madison's approach, and rejected it. Facing the loss both of the cause of free exercise of religious conscience and the effort to disestablish, Madison offered a compromise resolution restoring the language of Christian charity and withdrawing the "emoluments or privileges" clause. Instead of gutting the established church's revenue stream, Madison compromised with language guaranteeing "that all men are equally entitled to enjoy the free exercise of religion". This language provided more protection to Dissenters than mere toleration but did not actually disestablish the Church of England. That battle would have to wait, to be resumed at a later time when the public mood had changed and a higher-profile ally could press the case.

III - Private Conscience

Before introducing his reform bills to the House of Delegates in October 1776, Jefferson outlined the argument he would make to his colleagues in favour of disestablishment. These speaking notes, written in shorthand, are preserved as part of the Boyd edition of Jefferson's papers.[73] They contain a four-part argument against Establishment that would later appear in substantially similar form in the *Notes on Virginia*.[74] The substance of Jefferson's argument was that religion was an intrinsically private affair, and therefore out of the proper business of the government under the social contract. For guidance in assembling his argument, Jefferson relied on extensive notes from John Locke's *A Letter Concerning Toleration* and miscellaneous other writings such as *The Reasonableness of Christianity*, as well as "A Letter Concerning Enthusiasm" by Locke's student, the 3rd Earl of Shaftesbury, grandson to the 1st Earl of

[73] "Jefferson's Outline of Argument in Support of His Resolutions", in TJ Papers, Vol. I, pp. 535-539.

[74] "Query XVII - Religion" in *Notes*, pp. 157-161.

Shaftesbury whom Pocock numbered among the neo-Harringtonians, as discussed in the previous chapter.[75]

While Jefferson's research into Establishment touched upon such issues as the authority of the General Court in ecclesiastical affairs, and of the use of bishops as tools of the Crown, as with land reform he eschewed a direct attack on aristocracy in favour of an appeal to liberalism. He was mainly concerned with liberty of conscience, which he considered to be a natural right retained by individuals under the social contract, and which had been usurped through an unholy alliance between clerics and Crown. While the bishops formed an important part of this alliance, there were other culprits, such as the monks whom Jefferson blamed for fraudulently inserting ecclesiastical law into the law books of Saxon England, and the Presbyterian clergy who were eager to displace the Episcopalians for control of Establishment, replacing one form of spiritual oppression with another.

I have organised Jefferson's written argument into four parts. First, he reviewed six crimes and liabilities placed upon dissenters by the Establishment. Second, he addressed the use of selective persecution to hold the entire population "in terrorum" to the Established Church, before contrasting it to the relatively positive history of regimes that embraced toleration rather than persecution. Third, he disputed the state's right to interfere in religious matters, arguing that conscience was not a necessary part of the social contract and explaining why belief was a solely private matter. Fourth and finally, he explained why Establishment necessarily meant the state attempting to impose uniformity of belief, and why this was neither desirable nor attainable. Before discussing these four points, I will briefly explain the content of the reform laws that he proposed, and at the end of this section I will explain how his argument finally came to fruition in the Statute for Establishing Religious Freedom.

Jefferson's Reforms 1776-1779

The question of reform of Virginia's religious establishment was a pressing one both in order to satisfy demands by Dissenters that religious laws be brought into accordance with Article XVI, and because the satisfaction of those demands was necessary to fully enlist Dissenters in the war effort. As John Ragosta has noted,

[75] This bibliographic information is given by Boyd *et al*. in their editorial note to "Notes on Locke and Shaftesbury", in TJ Papers, Vol. I, pp. 544-550.

Dissenters initially had more to gain by remaining loyal to a British colonial government that had attempted to enforce the Act of Toleration than to a revolutionary regime composed of the very same ruling clique, the leading Virginia gentry, who had been their persecutors before the war.[76] Once the legislature was seated in October 1776, Jefferson took the lead from Madison on church reform. Jefferson's proposed legislation during his three years in the legislature fall into two groups: the legislation he proposed as an ordinary member in the autumn of 1776, and the second slate of bills he proposed as the chairman of the Committee of Revisors in June 1776.

There were two bills in 1776: the "Bill for Disestablishing the Church of England and for Repealing Laws Interfering with Freedom of Worship", and the "Bill for Exempting Dissenters from Contributing to the Support of the Church." The first bill removed criminal liability from Dissenters, who previously had been subject to harsh repression for non-attendance at Anglican services and for conducting their own competing services. The second bill relieved Dissenters from taxation in support of Establishment, but made exceptions for taxation in support of poor relief and preserved church property that had been purchased with public funds.

These two bills were complementary, but were not intended as a single slate of reforms. Had the first bill passed without changes, it would have disestablished the Church of England immediately and no further reform would have been required. As it was, the Assembly passed the bill removing criminal liability while removing the language disestablishing the Church. This meant that taxation did need to be addressed through a second bill. Therefore, Dissenters had been relieved of criminal and financial liability by the end of 1776, although the Church remained formally established and the liabilities could be reinstated by the Assembly at any time.

Jefferson's second round of reform, in particular the salient Statute for Establishing Religious Freedom, was written in an unstable environment in which Dissenters had won important exemptions from persecution, but remained discriminated against under the law. When the Committee of Revisors reported its proposed slate of statutes to the legislature in June 1779, eight of them (nos. 79-86) had some sort of relationship to public religion. Bills 79-81 relieved the Church of a role in public education, Bill No. 82 disestablished the Church, and Bills Nos. 83-86 sorted out various aspect of

[76] Ragosta, *Wellspring of Liberty*, pp. 18, 71-86

administration such as marriage licenses.[77] Like the rest of the Revisal, these bills were not acted upon before Jefferson left the Assembly to become governor, and the proposals lay idle for years before religious controversy renewed in 1784, after the conclusion of the war.

Crimes and Liabilities

"The first settlers in this country were emigrants from England, of the English church, just at a point in time when it was flushed with complete victory over the religious of all other persuasions," Jefferson wrote in the *Notes on Virginia*, introducing the topic of religion in Query XVII. "Possessed, as they became, of the powers of making, administering, and executing the laws, they shewed [*sic*] equal intolerance in this country with their Presbyterian brethren, who had emigrated to the northern government."[78] This amounted to a betrayal of the promise of the colonies for a fresh start and a haven from the religious wars of Europe. In particular, Jefferson pointed to the example of the Quakers, who "flying from persecution in England … cast their eyes on these countries as asylums of civil and religious freedom; but they found them free only for the reigning sect."[79]

Through successive acts of the General Assembly, Virginia's colonial government made being a Quaker a capital offence. These laws "made it penal in parents to refuse to have their children baptised; had prohibited the unlawful assembling of Quakers; had made it penal for any master of a vessel to bring a Quaker into the state; [and] had ordered those already here, and such as should come thereafter, to be imprisoned till they should abjure the country."[80] The penalty for up to two trespasses was minor, but the penalty for a three-time offender was death. Although this provision was seldom if

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[77] See Daniel L. Dreisbach's work above, p. ___.

[78] Jefferson, *Notes on Virginia*, p. 157.

[79] Horn explains that the Quakers were caught up in the wider war between Reform Protestants and the High Churchmen in seventeenth-century England. The High Churchmen considered the Quakers to be Independents (Congregationalists) in league with the Levellers. Their beliefs were "an appeal to God for spiritual nourishment (freely granted to all men and women willing to open their hearts), the simplicity of ritual, an emphasis on the intrinsic equality of believers, and the importance placed on religious community." (Horn, *Adapting to a New World*, pp. 394-399) In short, the Quakers were everything that the High Churchmen were not, which explains the violence against them.

[80] Jefferson, *Notes on Virginia*, p. 157.

ever used, that did not detract from the severity and barbarity of the law. "If no capital execution took place here, as did in New-England, it was not owing to the moderation of the church, or spirit of the legislature, as may be inferred from the law itself; but to historical circumstances which have not been handed down to us."[81]

The laws against Quakers were a particularly salient part of Virginia's criminal liabilities on Dissenters, all the more dramatic given Quakers' harmlessness and pacifism. In his argument outline, Jefferson identified six liabilities under English law that formed the basis for subsequent Virginia statutes against Dissenters and nonconformists of all sorts. These liabilities included the common law crimes of apostasy, heresy, and recusancy; the English statutes against "popery" and profaneness; and the requirement that all taxpayers pay towards the financial support of the Established Church. Conviction for apostasy led to the gradual suspension of a defendant's civil rights, culminating in imprisonment for the third offence, and heresy could carry the death penalty. Recusancy, which included nonconformity to the Thirty-Nine Articles of the Church of England, was also a felony; it was this part of the common law under which the anti-Quaker statutes were justified. Recusants could be punished with sentences as light as a fine or as harsh as the death penalty.[82]

Jefferson's research led him to conclude that these three common law categories were not only crimes against natural liberty, they were crimes against the common law itself. In his Legal Commonplace Book, Jefferson expressed his scepticism that laws enforcing the Establishment of the church could even be part of a common law that derived its authority from its genesis in time immemorial. "[F]or we know that the Common law is that system of law which was introduced by the Saxons on their settlement in England, and altered from time to time by proper legislative authority from that to the date of the Magna charta [sic]which terminates the period of the Common law, or Lex non scripta, and commences that of the Statute law, or Lex scripta," Jefferson recorded. "This settlement took place about the middle of the 5th century, but Christianity was not introduced till the 7th, century, the conversion of the first Christian king of the heptarchy having taken place about the year 598, and that of the last about

[81] Ibid., p. 157.

[82] "Jefferson's Outline of Argument in Support of His Resolutions", in TJ Papers, Vol. I, pp. 535-536.

686. Here then was a space of 200 years during which the Common law was in existence, and Christianity no part of it."[83]

Further research into the many other ecclesiastical crimes under English law led Jefferson to conclude that the ecclesiastical elements of the common law had been inserted by monks into a compendium of the laws of King Alfred, and that this "monkish fabrication" had gone overlooked by subsequent legal scholars. "[T]he very words of Alfred himself prove the fraud," Jefferson noted, "for he declares in that preface that he has collected these laws from those of Ina, of Offa, Aethelbert and his Ancestors, saying nothing of any of them being taken from the scripture."[84] The repeal of statutes enforcing these forgeries would restore the common law to its original state under the Saxons, although for once it was someone other than the Normans who was responsible for corrupting England's ancient system of laws.

Persecution and Toleration

"[People will be surprised at details of these persecuting statutes]," Jefferson noted to himself in his outline. "[Most men imagine persecution to be unknown to our laws. The legal status of religion is little understood]."[85] This was in part to do with what Jefferson referred to as "[the spirit of the times favoring rights of conscience]."[86] In the *Notes on Virginia*, he went into more depth on this matter, inveighing against "tyrannical laws": "It is true, we are as yet secured against them by the spirit of the times. I doubt whether the people of this country would suffer an execution for heresy, or a three years imprisonment for not comprehending the mysteries of the Trinity. But is the spirit of the people an infallible, a permanent reliance?"[87] Jefferson thought people were rational, but he did not think they were perfect. "Besides, the spirit of the times may alter, will alter. Our rulers will become corrupt, our people careless."

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[83] LCB 873.

[84] LCB 879.

[85] Jefferson's outline was rendered in shorthand, which I have translated into bracketed quotes to the best of my ability. I have provided the original shorthand for all quotes in the interest of clarity. Original shorthand: "Gent. wll. b. surprizd a. detl. yse. persecutg. stat. / mos. men imagne. persecn. unknn. t. ur ls." In "Jefferson's Outline of Argument in Support of His Resolutions", in TJ Papers, Vol. I, p. 536.

[86] Original shorthand: "happly. ye. Spirt. of times in favr. of rts. of Conscce." Ibid., p. 536.

[87] Jefferson, *Notes on Virginia*, p. 161.

It was Jefferson's conviction that Virginia was undergoing what J.G.A. Pocock calls a "Machiavellian moment", what classical republicans believed to be the point in the life of a republic in which its citizens are at their maximum level of virtue. It was this that made Disestablishment so urgent. If the people were made complacent by the *zeitgeist* of the revolution, Jefferson feared, they would be caught unawares at a later time. He saw this as an inevitable product of the passage of time. "From the conclusion of this war we shall be going down hill. It will not then be necessary to resort every moment to the people for support. They will be forgotten, therefore, and their rights disregarded."[88]

In the meantime, Jefferson concluded, the retention of the persecuting statutes served a very useful purpose for the Establishment, in that the statutes functioned as "in terrorum" laws whose very existence was sufficient to coerce Dissenters into conformity. These acts were not justifiable because everyone must assume that the laws could be executed at any time. The result was to "[leave everyone at the mercy of a bigot]" who chose to capriciously enforce the law. Furthermore, "[everyone should know under what law [they] live]" and should "[not be obliged to the spirit of the times for protection]." This was "[not secure government]" but instead put people "[at the mercy of events]."[89]

"The fantastical points for which we generally persecute are often very questionable as we may be assured by the very different conclusions of people," Jefferson recorded from Locke's *Letter*.[90] As a consequence, Locke argued, the ethic of persecution ought to be replaced by an ethic of toleration. Jefferson concurred in this assessment, arguing that "former efforts at toleration have succeeded" except in cases, such as that of Calvinist rule in Britain, whereby a dissenting sect used toleration to replace an established sect and assume its place as a new oppressor. The "true mode" was "only for all to concur, & throw open to all" the right to worship freely. The different denominations - Anglican, Presbyterian, Baptist, Quaker - in Virginia society would balance one another and prevent a similar usurpation. "[The present church is too

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[88] Ibid., p. 161.

[89] Original shorthand: "Ans. acts in terrm. nt. justifble. - m. presme. wll. b. xd. / leave evy. one at mercy of *Bigot*. / evy. one shd. kn. undr. wt. law lives. / shd. nt. b. oblgd. recr. to Spirt. of ti. fr. protctn. / ys. is nt. Secure govmt. - bt. at mercy of events." In "Jefferson's Outline of Argument in Support of His Resolutions", in TJ Papers, Vol. I, pp. 536-537.

[90] "Notes on Locke and Shaftesbury", in TJ Papers, Vol. I, p. 544.

strong for any one sect]" to challenge, Jefferson argued, "[but too weak against all]" to maintain its hegemony against the united front of all Dissenters.[91]

Writing in the context of Britain's seventeenth-century revolutions, which were strongly imbued with religious issues and ramifications, Locke was quite practical in how he thought toleration should be executed. "How far does the duty of toleration extend?" Jefferson recorded. "1. No church is bound by the duty of toleration to retain within her bosom obstinate offenders against her laws. 2. We have no right to prejudice another in his civil enjoiments [*sic*] because he is of another church."[92] The private nature of religious belief set it apart from other areas the government might choose to regulate. "Compulsion in religion is distinguished peculiarly from compulsion in every other thing … I cannot be saved by a *worship* I disbelieve & abhor" [emphasis in original].[93] Jefferson was of a similar mind. "But it does me no injury for my neighbor to say that there are twenty gods, or no god. It neither picks my pocket nor breaks my leg …. Constraint may make [a Dissenter] worse by making him a hypocrite, but it will never make him a truer man."[94]

To that end, Locke recommended that the law be made as consistent as possible. "Whatsoever is lawful in the Commonwealth, or permitted to the subject in the ordinary way, cannot be forbidden to him for religious uses," Jefferson paraphrased, and "whatsoever is prejudicial to the commonwealth in their ordinary uses & therefore prohibited by the laws, ought not to be permitted to churches in their sacred rites … this is the true extent of *toleration*."[95]

Opinion and Rational Individualism

Following upon Locke's argument for toleration, Jefferson next argued that the state could not justly legislate religious observance because personal belief was not part of the social contract. Transcribing from Locke, Jefferson wrote that the "commonwealth is 'a society of men constituted for preser[ving] their *civil <rights> interests*" (emphasis in

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[91] Original shorthand: "ye. prest. chch. too strong for any 1 sect, bt. too weak agt. all." In "Jefferson's Outline of Argument in Support of His Resolutions", in TJ Papers, Vol. I, p. 537.

[92] "Notes on Locke and Shaftesbury", in TJ Papers, Vol. I, p. 546.

[93] Ibid., p. 547.

[94] Jefferson, *Notes on Virginia*, p. 159.

[95] "Notes on Locke and Shaftesbury", in TJ Papers, Vol. I, p. 547.

original), which are "life, health, indolency of body, liberty, and property".[96] Here, Jefferson and Locke seem to be equating civil rights with state-protected natural rights, but the list is not exhaustive. Other rights, rights that the commonwealth is not instituted to preserve, remain outside its purview. Whereas any of the rights listed by Locke may be circumscribed for the good of the community - property may be taxed, criminals may be jailed or executed - rights not so surrendered should be beyond the magistrate's control.

Locke's reason for this was because "the magistrate's [jurisdiction] extends only to civil rights and from these [considerations]: the magistrate has no power but [what the] people" gave to him.[97] Following on this, Jefferson argued to the General Assembly that "[when men enter society they surrender as little as possible]" to ensure that their civil rights were respected by the civil government.[98] "The rights of conscience we never submitted, could not submit," he elaborated in the *Notes on Virginia*. "The legitimate powers of government extend to such acts only as are injurious to others."[99] To afford government the authority to police men's thoughts would swiftly lead to attempts to impose uniformity of conscience, efforts which he considered to be the source of much of the misery in human history, and beyond the purview of the laws meant to protect men's material interests.

In other words, "it does me no injury for my neighbour to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg."[100] While freedom to life and liberty were natural rights that government was instituted to protect from the uncertainties of the state of nature, which justified the compromise of some other rights in order to make effective government possible, "[religious rights are not *necessarily* surrendered]" since their surrender was not essential to the fulfillment of the state's mandate.[101] This was a consistent piece of Jefferson's constitutional thought from the revolution through his time as a leader of the federal opposition party: that the written

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[96] Ibid., p. 545.

[97] Ibid., p. 545.

[98] Original shorthand: "whn. mn. ent. Socty. Surrendr litt. as posble./Civl. rts. all yt. r. nec. to Civl. govmt." In "Jefferson's Outline of Argument in Support of His Resolutions", in TJ Papers, Vol. I, p. 537.

[99] Jefferson, *Notes on Virginia*, p. 159.

[100] Ibid., p. 159.

[101] Original shorthand: "Religs. rts. nt. nec. surrd." In "Jefferson's Outline of Argument in Support of His Resolutions", in TJ Papers, Vol. I, p. 537.

constitution, the manifestation of the social contract, could only give powers to the state that were essential to its mandate, not powers that were implied or merely convenient.[102]

In keeping with both Reform Protestantism and rational individualism, Jefferson believed that the nature of faith is personal. "The life & essence of religion consists in the internal persuasion or belief of the mind," Locke declared. "No man has *power* to let another prescribe his faith. [F]aith is not faith [without] believing. [N]o man can conform his faith to the dictates of another."[103] Furthermore, "I cannot give up my guidance to the magistrate; because he knows no more of the way to heaven than I do & is less concerned to direct me right than I am to go right."[104] What Jefferson took away from this was that the "[individual cannot surrender conscience - is answerable to God]" and that belief was an "unalienable" right. "[God requires everyone to act according to their own belief, that belief is founded on evidence offered to his mind, as things appear to himself, not to another]".[105]

To equate the social contract with cession of the right to one's own mind was to fundamentally misunderstand the nature and limits of the commonwealth. Jefferson argued that Establishment, and all of the persecuting laws that remained in Virginia's legal code, amounted to "religious slavery, under which a people have been willing to remain, who have lavished their lives and fortunes for the establishment of their civil freedom."[106] For the revolutionary settlement in Virginia to be intellectually and morally consistent, it would have to adopt the same liberal ethos that Jefferson was seeking to incorporate in his other republican reforms, and abjure any pretension to enforcing uniformity of religious opinion while simultaneously extolling plurality of political opinion.

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[102] This insight can go a long way towards explaining other elements of Jefferson's strict constructionist constitutionalism, such as his opposition to Alexander Hamilton's Bank of the United States in the 1790s and Jefferson's own ambivalence towards the constitutionality of the Louisiana Purchase in 1803. The source of these later constitutional views was the restrictive social contractarianism he developed, under the influence of Locke, in the 1770s.

[103] "Notes on Locke and Shaftesbury", in TJ Papers, Vol. I, p. 545.

[104] Ibid.,. 547.

[105] Original shorthand: "Indivd. cnt. surrdr. - answble. to God/If is *unalienable right*, […] is Religs./God recres. evy. act acdg. to *Belief*/yt. Belf. foundd. on Evdce. offd. to his mind./as yngs. appr. to hims. nt. to anoth." In "Jefferson's Outline of Argument in Support of His Resolutions", in TJ Papers, Vol. I, p. 537.

Enquiry and Uniformity

For Jefferson, true religious faith was not irrational enthusiasm, but the product of reflection and consideration upon one's place in the world and relationship with God. Religious belief was thus an individual opinion reached through rational means. By natural right, Jefferson argued, a man had as much right to his religious opinions as to those in any other field of knowledge. "Was the government to prescribe to us our medicine and diet, our bodies would be in such keeping as our souls are" under the Establishment, he wrote in the *Notes on the State of Virginia*. "Thus in France the emetic was once forbidden as a medicine, and the potatoe [*sic*] as an article of food. Government is just as infallible too when it fixes systems in physics. Galileo was sent to the inquisition for affirming that the earth was a sphere: the government had declared it to be as flat as a trencher, and Galileo was obliged to abjure his error."[107] By comparing the establishment of the Protestant Episcopal Church to the Catholic inquisition, Jefferson held up all establishments, whether Protestant or Catholic, as objects of contempt.

Instead, Jefferson argued that free enquiry was in fact the friend of rational Christianity, for religious truth would withstand scrutiny whilst untruth would be exposed. "Reason and free enquiry are the only effectual agents against error. Give a loose to them, they will support the true religion, by bringing every false one to their tribunal, to the test of their investigation. They are the natural enemies of error, and of error only. Had not the Roman government permitted free enquiry, Christianity could never have been introduced."[108] In Jefferson's opinion, rational Christianity had nothing to fear from free enquiry, and his choice of the phrase indicated that he saw harmony between his conception of religious faith and the various Enlightenment "enquiries" into moral philosophy that postulated the theories of divinely-inspired natural law and natural rights which in turn formed the basis of Jeffersonian politics. Religion, philosophy and politics thus formed a self-reinforcing circle of enquiry leading to constant improvement, if left uninterrupted by government interference.

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[106] Jefferson, *Notes on Virginia*, p. 159.

[107] Ibid., pp. 159-160. The sentiment expressed here is very similar to an excerpt from the *Encycploedie*, and may have been intentionally crafted to appeal to Jefferson's intended French readership for the *Notes on Virginia*. See LCB 855.

[108] Jefferson, *Notes on Virginia*, p. 159.

This viewpoint was shared by other moderate Christian literati such as the Presbyterian Rev. Samuel Stanhope Smith, a correspondent of Jefferson's who was also acquainted with Madison from their time together at the College of New Jersey. "The reasons for a public religion have always seemed to me inconclusive," Smith wrote to Jefferson as the Statute for Religious Freedom was unveiled in 1779. "If christianity is of divine original it will support itself or forfeit its pretensions; and upon this principle it first undertook to discipline the world. And if there be no religion of divine authority except the religion of nature, the state may well be contented to leave men in the condition which the Deity himself hath left them with regard to his worship, and permit every man to be his own interpreter of that natural law."[109]

Indeed, religious establishment was particularly anathema to moderate Presbyterians like Smith, whose faith was premised upon rejection of pretensions to infallibility by mortal men. Jefferson ruminated upon how a thousand states in history had established a thousand different sects as the true religion, and that "reason and persuasion are the only practicable instruments" for determining which, if any, were true. "What has been the effect of coercion? To make one half the world fools, and the other half hypocrites," Jefferson asked rhetorically. "But every state, says an inquisitor, has established some religion. No two, say I, have established the same. Is this a proof of the infallibility of establishments?"[110]

For Jefferson, uniformity of religion was not only the fount of mischief, but it ran against his entire liberal inclination in philosophy and life. "Subject opinion to coercion: whom will you make your inquisitors? Fallible men; men governed by bad passions, by private as well as public reasons. And why subject it to coercion? To produce uniformity. But is uniformity of opinion desireable? No more than face and stature."[111] Then, employing physiognomic analogy, Jefferson conjured the grotesque image of a Procrustean bed, with inquisitors mutilating the consciences of their victims in order to force them into a determined mold of thought. Uniformity of religion was not just incorrect, it amounted to the torture of the soul.

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[109] "From Samuel Stanhope Smith", 19 April 1779, in TJ Papers, Vol. II, pp. 254-255.
[110] Jefferson, *Notes on Virginia*, p. 160.
[111] Ibid., p. 160.

The Statute for Establishing Religious Freedom

The final product of this extensive reasoning on separation of church and state was the Statute for Establishing Religious Freedom, proposed by Jefferson in June 1779 after his and Madison's previous, unsuccessful attempts to disestablish the Church of England through Article XVI and the legislation of autumn 1776. The lengthy preamble to the statute reiterated the arguments that Jefferson had made to the Assembly three years prior. The "opinions and belief of men depend not on their own will, but follow involuntarily the evidence proposed to their minds", the Statute read, for "Almighty God hath created the mind free, and manifested his supreme will that free it shall remain by making it altogether insusceptible of restraint."[112]

While Jefferson did not mention ecclesiastical aristocracy directly, he did argue that those who sought to impose piety via the law were actually people of "impious presumption", who "being themselves but fallible and uninspired men, have assumed dominion over the faith of others." Such ecclesiastical aristocrats across the ages "hath established and maintained false religions over the greatest part of the world and through all time." Furthermore, having gain controlled of state support, these aristocrats then ruled through coercion, using taxation to prop up their "sinful and tyrannical" clerical orders. This coercion was underscored by the civil liabilities imposed on dissenters, "depriving him injuriously of those privileges and advantages to which, in common with his fellow citizens, he has a natural right." As a result, the aristocracy would not be comprised of those who were truly best fitted to lead, but by those who were best able to "externally profess and conform" to the established faith, in order to gain "a monopoly of worldly honours and emoluments."[113]

The Statute for Establishing Religious Freedom would therefore restore that "natural right" to "profess, and by argument to maintain … opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect [one's] civil capacities." Jefferson even went so far as to try to shame a hypothetical future, reactionary Assembly from attempting to repeat the Statute. Although "this Assembly, elected by the people for the ordinary purposes of legislation only, have no power to restrain the acts of succeeding Assemblies … we are free to declare, and do declare, that

[112] No. 82 "A Bill for Establishing Religious Freedom", in TJ Papers, Vol. II, p. 545.
[113] Ibid., pp. 545-546.

the rights hereby asserted are of the natural rights of mankind", and that any repeal or other measure to "narrow its operation" would be "an infringement of natural right."[114]

IV - Public Morality

Jefferson's argument did not sway his colleagues in the House of Delegates in the autumn of 1776, who only agreed to suspend the parish levies on Dissenters for the duration of the war. The problem was two-fold. First, and most obviously, the vestrymen who sat in the Assembly were reluctant to upend the carefully calibrated county-parish system, and all that it entailed for local order as well as their personal influence, without a clearer understanding of what would come next. Second, disestablishment of the church, which functioned as a promoter of morality in society, was at least on the face of it contrary to the ideology of republicanism's focus on virtue as the most important moral force in society. Leading Virginians such as Richard Henry Lee proclaimed that "the experience of all time shows religion to be the guardian of morals."[115] The solution proposed by the proponents of continued Establishment was to allow the major Dissenting sects to join the Anglican Church (swiftly reconstituted as the Protestant Episcopal Church after independence) as part of a plural Establishment supported by a general assessment that would replace the parish levies. Jefferson countered that public morality could best be promoted through a universal system of education, and a reliance on the farming lifestyle as a perpetually self-replicating source of virtue.

The Incorporation & General Assessment Acts of 1784-85

With the ratification of the peace treaty with Britain in late 1783, the need for war mobilisation and taxation ended, and religious issues returned to the attention of the Virginia Assembly. The autumn 1784 session concerned itself with the twin issues of church property holding and church finance - specifically, the still unresolved status of the real estate of the Established Church, which was now severed from the Church of England, and the status of ecclesiastical taxation that had been suspended in the 1770s. The solution was the incorporation of the Established church under Virginia law as the Protestant Episcopal Church, and the general assessment of all Virginians for the

[114] Ibid., pp. 546-547.
[115] R.H. Lee to James Madison, in JM Papers, Vol. VIII, p. 149.

financial support of the denomination of their choice. The Incorporation Act passed, while the General Assessment was defeated in the House of Delegates.

The Incorporation Act was not itself objectionable. Madison himself acknowledged to Jefferson that "the necessity of some sort of incorporation for the purpose of holding and managing the property of the Church could not well be denied."[116] Over the course of the war, a quarter of the commonwealth's parishes had closed their churches due to financial concerns and to being located in Dissenter-majority counties.[117] The question had to do with the manner of the incorporation. Under the terms of the Incorporation Act, the church was incorporated as the Protestant Episcopal Church, with its clergy and vestrymen collectively comprising its legal personhood, and a Convention of clergymen and a delegate from each parish acting as its legislative body. Opposition to the Act did not emerge until after it had been passed, with the vestries displeased that the Convention had been granted the power of selecting clergy and the rest of the laity petitioning the Assembly in objection to the undemocratic mode of selecting the Convention's membership.[118]

As Madison described it, the House had overlooked the fact that with one lay delegate and one clergyman from each parish, the clergy would have an equal say with the vestries in the administration of the new church.[119] Self-selection of their own membership had been good enough for the vestrymen before the revolution, but now that circumstances changed and it was the clergy who wanted to self-select, the possibility of a self-perpetuating clergy looked very much like a true ecclesiastical aristocracy. The vestrymen, whose proxies in the House of Delegates had missed this detail, wanted the act amended to double the number of lay members of the Convention. The displeasure was more pronounced in a lay petition to the House, denouncing the Virginia Assembly's meddling in church affairs and arguing that, by giving the clergy authority to legislate for the laity in the Convention, the Assembly had violated the laity's "fundamental right of Chusing [*sic*] their own Legislators."[120] The petition was thus a blow both to the principle of establishment and to the principle of episcopacy,

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[116] "From James Madison", 9 January 1785, in TJ Papers, Vol. VII, p. 594.

[117] "Copy of a Protestant Episcopal Church Petition", in JM papers, Vol. VIII, p. 313, n. 2.

[118] "From James Madison", 9 January 1785, in TJ Papers, Vol. VII, pp. 588-599.

[119] Ibid., p. 594.

and underscores the extent to which the colonial Establishment had adopted elements of self-governance, elements which the laity were not willing to give up.

The Incorporation Act was thus considered to have been a mistake, and after disestablishment it was repealed and replaced with a more liberal act that allowed any church to incorporate itself and reserved all decisions on church governance to those corporations, an obvious nod to the former Dissenters whose forms of governance varied widely.[121] It is important to note that, while the Incorporation Act had only applied to the Established Church, it was viewed by its supporters, such as Edmund Pendleton, as being the first of many incorporations of churches in Virginia and thus not a privilege for the Protestant Episcopal Church alone.[122] Pendleton conceived of incorporation acts as being consistent with the plural establishment of many churches envisioned under the general assessment.

The General Assessment itself should not be underestimated as an enormous change in a society that had known only a single Established church as a stabilising force in society. This stabilisation was both social, in that it kept the social hierarchy intact, but also moral in that state-supported religion was considered conducive to the cultivation of good public morality. This nexus of public religion and morality was what Fred J. Hood has called the "theocratic concept" and it was held by many of Virginia's denominations, not only the Episcopalians.[123] Hood argues that conservative Protestants of all denominations "conceived of religious liberty as a religious dogma compatible with an established religion and that the legal separation of church and state did not alter that belief or its influence."[124] Therefore, just as the clergy of the Episcopalian Church had supported the terms of incorporation before being turned back by their laity, the clergy of other denominations, notably the Presbyterians, supported plural establishment funded by compulsory taxation before a revolt in their back pews compelled them to reverse their position in favour of disestablishment.

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[120] "Copy of a Protestant Episcopal Church Petition", in JM Papers, Vol. VII, pp. 312-314.

[121] Ragosta, *Wellspring of Liberty*, p. 134

[122] Ibid., p. 122

[123] Fred J. Hood, "Revolution and Religious Liberty: The Conservation of the Theocratic Concept in Virginia." *Church History: Studies in Christianity and Culture* 40, no. 02 (1971): 170-181

[124] Ibid., p. 171

The appeal of the plural establishment can be over-stated, however, and the wide appeal of the proposal to laymen of otherwise liberal temperament must be noted so as to dispel the notion of a clerical cabal seeking favors at public expense. George Washington, John Marshall, Edmund Pendleton, Richard Henry Lee and Patrick Henry all supported the General Assessment. “Refiners may weave as fine a web of reason as they please, but the experience of all times shows Religion to be the guardian of morals - and he must be a very inattentive observer in our Country, who does not see that avarice is accomplishing the destruction of religion, for want of a legal obligation to contribute something to its support,” Lee wrote to Madison, proceeding to frame his support for general assessment as consistent with Article XVI and the principle of religious freedom. “The declaration of Rights, it seems to me, rather contends against forcing modes of faith and forms of worship, than against compelling contribution for the support of religion in general. I fully agree with the presbyterians, that true freedom embraces the Mahometan and the Gentoo as well as the Christian religion. And upon this liberal ground I hope our Assembly will conduct themselves."[125]

Naturally Occurring Virtue

For Jefferson, singular or plural Establishment was harmful to virtue because it imposed uniformity, whereas true virtue was the product of individual character. This character would be shaped not by compulsory church attendance, but would instead have a much broader base by occurring naturally from the lifestyles of Virginians that he had been shaping through his other reforms. Jean Yarbrough, in her study of Jefferson’s moral thought entitled *American Virtues*, identifies naturally occurring benevolence as the centre-piece of Jefferson’s plan for republican virtue, supplemented by agrarian virtue from the freehold farmer’s lifestyle and civic virtue from participation in local governance. To the extent that Jefferson had a concrete plan for encouraging virtue after disestablishment, Yarbrough’s account is generally accurate.

One of the things that made Jefferson’s liberalism work, which made him a social contractarian in the tradition of Locke and not of Hobbes, was his optimistic view that human nature was good and that human beings would generally act upon that nature. Yarbrough, calling upon Jefferson’s commonplace books as well as his retirement

[125] Richard Henry Lee to James Madison, 26 November 1784, in JM papers, Vol. VIII, pp. 149-152.

correspondence, labels him a follower of the Scottish moral sense school, in particular an adherent to Lord Kames' *Essays on the Principles of Morality*.[126] While Locke allowed that the state of nature was not necessarily a state of war, Kames and other like-minded Scots went farther and argued that human beings were naturally benevolent towards one another, and that this benevolent moral sense was the basis of natural sociability, and hence all of the other institutions of society.

While there is much circumstantial evidence from the Legal Commonplace Book to support the claim that Kames was an inspiration to Jefferson on the matter of property law, there is less to argue that he was an inspiration for Jefferson's views of morality. In a retirement letter, Jefferson acknowledged that Kames' *Essays* had influenced him as a student, but that he did not read the book again after leaving his collegiate studies.[127] A more proximate letter from August 1787 seems to place Jefferson within the Scottish school generally rather than as an adherent of Kames in particular. In it, Jefferson advises his nephew, Peter Carr, to shun the study of moral philosophy, arguing instead that the use of his moral sense would be enough to guide him through life.

"I think it lost time to attend lectures in this branch. He who made us would have been a pitiful bungler if he had made the rules of our moral conduct a matter of science," Jefferson declared.[128] He then went on to make a generic statement of moral sense theory. "Man was destined for society. His morality therefore was to be formed to this object. He was endowed with a sense of right and wrong merely relative to this. This sense is as much a part of his nature as the sense of hearing, seeing, feeling; it is the true foundation of morality, and not the truth, &c., as fanciful writers have imagined. The moral sense, or conscience, is as much a part of man as his leg or arm. It is given to all human beings in a stronger or weaker degree, as force of members is given them in a greater or less degree. It may be strengthened by exercise, as may any particular limb of the body. This sense is submitted indeed in some degree to the guidance of reason; but it is a small stock which is required for this: even a less one than what we call Common sense. State a moral case to a ploughman and a professor. The former will decide it as

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[126] Jean M. Yarbrough, *American Virtues : Thomas Jefferson on the Character of a Free People* .

[127] "To Thomas Law", 13 June 1814, in TJ Ret. Papers, Vol. VII, pp. 412-415.

[128] "To Peter Carr, with Enclosure", 10 August 1787, in TJ Papers, Vol. XII, p. 14.

well, and often better than the latter, because he has not been led astray by artificial rules."[129]

Jefferson's choice of a farmer was significant, for he aimed to enhance the natural effects of benevolence through the virtues inculcated by the farming lifestyle. In the *Notes on Virginia*, he asserted that his nation of farmers would replace the Children of Israel as "the chosen people of God, if ever he had a chosen people, whose breasts he has made his peculiar deposit for substantial and genuine virtue."[130] In light of Disestablishment, this label becomes more significant, becoming a sort of agrarian, secular Calvinism. Jefferson saw the pursuit of yeoman agriculture as an inherently virtuous pursuit, as it inculcated values of hard work, responsibility, and thriftiness.[131] It also served as a bulwark against the vices of commercialism, though this was not airtight, for as seen in chapter three Jefferson saw land ownership both as a republican means of ensuring personal independence and a liberal means of earning a living to support oneself, including through the sale of surplus in a market.

In addition to benevolence and agrarian virtue, the third element identified by Yarbrough is civic virtue. As we saw in chapter two, Jefferson envisioned a state government that maximised citizen participation. The mere act of participation in public affairs through voting, holding local office, jury duty, and militia service, amongst other duties, would encourage virtue in the citizens undertaking these tasks. While somewhat tautological - a republic thrives only with virtuous citizens, and citizens may be virtuous only through participation in the republic - this was a standard part of republican theory. Yarbrough does identify some differences between Jefferson and the classical republicans.[132] While the classics emphasised the role of leaders who would inspire virtue by their example, Jefferson emphasised the autonomy of the citizen. He also liberalised his republicanism by using self-interest as a virtue, not a vice, arguing that rational individuality, particularly through education, would increase virtue even further.

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[129] Ibid., p. 15. This is highly consistent with the moral philosophy laid out by Adam Smith in *The Theory of Moral Sentiments*, in which "natural sympathy", or empathy as we would call it today, is the basis of all morality. This similarity underscores Yarbrough's point.

[130] Jefferson, *Notes on Virginia*, p. 165.

[131] Yarbrough, *American Virtues*, pp. 55-102.

Conclusion

In this chapter I have tried to explain why Jefferson included disestablishment of the Church of England in Virginia amongst his reforms to undo "feudal and unnatural distinctions", and to address the issue of what the new republic would do to encourage virtue once there was no longer an Established Church to make people moral. To that end, I have explained what Establishment actually meant in the context of colonial Virginia - how it was built upon a system of patronage that stemmed from the days of the Anglo-Normans, and how Jefferson came to believe that the common law itself had been corrupted by the clergy.

Like other elements of feudalism, Jefferson's proposal for disestablishment embraced liberal solutions predicated on the rational individualism of the republic's citizens. His argument, largely inspired by Locke, was not that religion was irrelevant, but that it could best be observed through the dictates of one's own conscience, and that liberty of conscience was a natural right not alienated under the social contract. In adopting Locke's approach, Jefferson was also acting in the tradition of the seventeenth-century English republicans, who made conscience their own cause for war when fighting the High Churchmen who formed the core of the Royalist camp during the English Civil Wars.

In contrast to his liberal argument for disestablishment, however, Jefferson did not have nearly so well articulated a plan for encouraging virtue once there was no longer an Established Church, an issue that was even more pressing now that Virginia wished to be a self-governing republic reliant on the virtue of its own citizens in order to survive. Jefferson seemed to put his faith in people continuing to attend church voluntarily, and in becoming virtuous through the lifestyle choice of yeoman farming, as well as participating in civic life. Their natural benevolence would make up for whatever the parish, the family farm, and the local courthouse failed to provide.

Jefferson's optimistic outlook on people's natural moral psychology seems to account for his entire plan for republican virtue. The evidence is scant that he had any true plan should his hopes prove unfounded - should people refuse to attend church, should they choose commerce over farming, should they stay home rather than participate in civic life. Indeed, his own outlook on republican time, that the process of corruption would soon begin, and the time for the reform was now, simply raises the

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[132] Ibid., pp. 103-105.

further question of why he included no further reforms to steer the morals of the people once the revolution was over?

The answer appears to be that while Jefferson had no plan for Virginia's current generation of adults, he did hope to shape the morals of succeeding generations through education. When the Statute for Religious Freedom was passed at long last in 1786, it was accompanied by another piece of legislation, the Bill for the More General Diffusion of Knowledge, that was intended to set up a system of universal education. This statewide school system would inculcate good morals from a very early age through the study of the classics of republican writing. That school system, and how it would also shape the structure of Virginian society, will be one of the subjects of the fifth and final chapter of this thesis.

Chapter Five:
Natural Citizenship

The land reforms and the Statute for Establishing Religious Freedom were two major blows against feudalism as Jefferson defined it, and were substantial steps towards reforming Virginian society, but in and of themselves were not enough to effect the social revolution that Jefferson envisioned. While these laws concerned major institutions in society, they did not concern the relationships between different classes of people, nor did they conclusively settle the relationship between the individual and the state. The fourth element of Jefferson's reform programme was to redefine citizenship by altering the legal definition of allegiance, and to redefine class by organising social rank based on an individual's capacity for refinement.

Jefferson's reforms relied on a single idea: that relationships within society should adhere as closely as possible to the law of nature. In a patriarchal society, such as a feudal monarchy, allegiance was defined within an hierarchy; but Jefferson considered this form of society to be unnatural, arguing instead that a republic based on natural law, under which individuals voluntarily joined the social contract and could also leave it via emigration, was the better form of social organisation. Therefore Jefferson took an existing legal concept, natural allegiance, and redefined it from a patriarchal allegiance towards a father figure and instead made it refer to a fraternal allegiance towards the other members of the polity.

Re-ordering the ranks in society was more difficult, because, while redefining allegiance was an expected part of a war of independence, the Virginian elites did not envision their political revolution as also including a social revolution. Jefferson proposed that Virginia's existing system of social ranking, based largely on hereditary wealth, should be gradually replaced by a "natural aristocracy" cultivated within a public school system and based on a mixture of wealth and talent.[1] What would define a person's place in this new social order was his capacity for personal improvement from

[1] "To John Adams", 28 October 1813, in TJ-Adams Correspondence, Vol. II, pp. 387-392.

an unrefined to refined state of civility, with political refinement given priority over social refinement.[2]

While Jefferson wanted universal access to education, he did not expect the results of education to be uniform. In particular, he expected refinement to be closely linked to gender and race, and as a result he did not see a political role for women in addition to their civil responsibilities, nor did he think that blacks could play any role in society with whites. While initially vocal in his opposition to slavery as an institution, Jefferson was not in favour of racial integration, believing it impossible to achieve, and denigrating those free blacks who made the attempt. In time, he accommodated himself to slavery as well, and the final versions of his reform bills preserved the institution.

While Jefferson did not use the term "natural citizenship", this artificial label accurately describes the combination of natural allegiance and natural aristocracy, and this chapter will explain how he constructed this new way of thinking about social order. First, I will review the existing, feudal form of natural allegiance then part of the common law, and Jefferson's redefinition based on the natural right of expatriation. Second, I will explore Jefferson's proposed state education system, a replacement for Virginia's patchwork of religious schools, and how its structure would influence class structure. Third, I will go into depth regarding Jefferson's theory of refinement in the context of Enlightenment social thought, and how he came to believe that the capacity for refinement was determined by race. Fourth and finally, I will review a series of class laws which he included in the Revisal of the Laws, and how these class laws would have worked with the education system to provide fuller structure to Virginian society.

I - Historiography

The historiography on Jefferson and education is closely linked with that of Jefferson and citizenship. Scholars agree on the importance Jefferson placed upon his Bill for the More General Diffusion of Knowledge, which he placed alongside his property reforms

[2] Gordon Wood has written a very perceptive account of Jefferson's views on social distinctions, noting that Jefferson's hostility may have been rooted in childhood ostracism for his father's undistinguished genealogy by his better-bred maternal cousins. Wood correctly points out that Jefferson's blue blood ran from his mother's side, meaning that it was only his father's earned wealth as a surveyor that enabled the younger Jefferson to be included in Virginia's primogeniture-based society. See Gordon S. Wood, "Thomas Jefferson, Equality, and the Creation of a Civil Society". *Fordham Law Review* 64, 1995-96: 2133-2147, in particular p. 2139.

and the Statute for Establishing Religious Freedom as his most important works as a legislator. Historians have focused on three key themes of Jefferson's education reforms: the secularisation of education, the structural consequences of the reforms (particularly as relates to natural aristocracy), and the design of an educational curriculum for training good citizens. All three approaches have important ramifications for this chapter.

As seen in the last chapter, removing the institutional role of religion from civil government was Jefferson's major concern with the Statute for Religious Freedom, but he also wished to remove it from childhood education. In keeping with his Lockean views, Jefferson did not want religious instruction interfering with a child's *tabula rasa*, variously being described by Lorraine Smith Pangle and Thomas L. Pangle as "follow[ing] Locke rather closely", by Roy J. Honeywell as "[holding] several of" Locke's educational views, and by Holly Brewer as basing his educational program on the Lockean premise that "in order to be a participatory citizen, a person needed to be able to exercise reason".[3] David M. Post argues that Jefferson's adaptation of Locke was "developmental" in that he took Locke's philosophies of mind and education, added to them natural benevolence, and incorporated them into a republican program of social engineering.[4] Robert M. Healey notes, however, that such engineering, if rigidly enforced, could actually have the effect of entrenching existing divisions.[5] Jefferson's main objection to religious instruction seems to have been that children were too impressionable to intelligently process religious teachings; instead, they should be inculcated in secular morality from the classics and history.[6] The Pangles are quite

[3] See Lorraine Smith Pangle and Thomas L. Pangle, *The Learning of Liberty: The Educational Ideas of the American Founders*. Lawrence, KS: University Press of Kansas, 1993, pp. 106-124, quote at p. 259; Roy J. Honeywell, *The Educational Work of Thomas Jefferson.* New York: Russell & Russell, 1964, p. 171; and Holly Brewer, "Beyond Education: Thomas Jefferson's 'Republican' Revision of the Laws Regarding Children". In *Thomas Jefferson and the Education of a Citizen*. Edited by James Gilreath. Washington, DC: Library of Congress, 1999, pp. 48-62, at p. 52.

[4] David M. Post, "Jeffersonian Revisions of Locke: Education, Property-Rights, and Liberty." *Journal of the History of Ideas* 47, no. 1 (1986), pp. 147-157.

[5] Robert M. Healey, *Jefferson on Religion in Public Education*. New Haven: Yale University Press, 1970, p. 201.

[6] The Pangles devote a lengthy treatment to the topic of Jefferson and moral education. See *The Learning of Liberty*, pp. 250-264. See also Norbert Sand, "The Classics in Jefferson's Theory of Education." *The Classical Journal* 40, no. 2 (1944), pp. 92-98.

critical of Jefferson in this regard, arguing that "Jefferson lived and wrote as though the young did not know the nature of true happiness, but needed to be taught it."[7]

A similar secularisation was slated to take place at the College of William and Mary. While much has been written on Jefferson's sponsorship of the University of Virginia (UVA) in 1817, his efforts at reforming higher education began during the revolution, first in his Bill for Amending the Constitution of the College of William and Mary, and then through his membership on the College's board of visitors while serving as governor; UVA was Jefferson's second attempt much later in life.[8] Before the revolution, the college largely replicated the curriculum of an Oxford college, and Jefferson introduced significant reforms in order to bring the college in line with his primary and secondary reforms, most notably the creation of America's first professorship of law.[9] Robert Polk Thomson notes that the strongest resistance to Jefferson's collegiate reforms came from the Dissenters who benefited from the Statute for Religious Freedom, because they feared that the college's Anglican affiliation would not be sufficiently severed.[10] Despite the direct relationship of the college to both education and religious establishment, it is surprising that little work has been written on the collegiate reforms, with most scholarly attention being devoted to the subsequent activity at the University of Virginia.[11]

The structural aspect of the educational reforms is somewhat contested. Harold Hellenbrand, in *The Unfinished Revolution*, argued that Jefferson conceived of his educational system as an attack on the undeserved patrimony of rich children whose parents could afford private education, which gave them an inherited advantage over

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[7] Pangle and Pangle, *The Learning of Liberty*, p. 253

[8] Jennings L. Wagoner gives substantial treatment to Jefferson's higher education reforms, and notes that Jefferson intended the state university to be the "capstone" of the education system, but failed in the task of developing the "cornerstones" of the primary and secondary schools, in *Jefferson and Education*. Monticello Monograph Series. Charlottesville: Thomas Jefferson Memorial Foundation, 2004, p. 14. Wagoner's account of the founding of UVA emphasises the extent to which this later endeavour was a collaborative effort with Jefferson's friends and allies, and benefited from their input.

[9] See Herbert A. Johnson, "Thomas Jefferson and Legal Education". In *Thomas Jefferson and the Education of a Citizen*. Edited by James Gilreath. Washington, DC: Library of Congress, 1999, pp. 103-114.

[10] Robert Polk Thomson, "The Reform of the College of William and Mary, 1763-1780." *Proceedings of the American Philosophical Society* 115, no. 3 (1971): 187-213.

the children of the poor and middling, who could not afford such tuition.[12] Furthermore, Hellenbrand posits that Jefferson intended for the school system to function *in loco parentis*, effectively replacing the parents of pupils.[13] This is a rather startling claim, but seems to form the basis of Peter Onuf's analysis, which places the educational reforms within the context of Jefferson's generational theory of sovereignty.[14] Onuf sees Jefferson's educational reforms as promoting a new kind of republican fatherhood, in which the state redressed inherited inequalities through the education system. While not explicitly endorsing Hellenbrand's *in loco parentis* interpretation, Onuf's is remarkably similar.[15]

The issue of patrimony closely links to the most significant aspect of educational structure: the importance of "natural aristocracy" in Jefferson's plans for Virginia's post-feudal society.[16] John Carson has devoted significant attention to this important aspect of the Bill for the More General Diffusion of Knowledge, persuasively arguing that, contra to many interpretations, Jefferson was not interested in using education to promote democracy, but instead to promote a different form of aristocracy.[17] Carson differentiates Jefferson's thinking between two categories of democratic "basic political rights, which he believed applied broadly to whole categories of citizens", and aristocratic "allocations of civic and political power, which he argued should accrue to individuals as a result of their particular set of virtues and talents".[18] Jefferson, like many other eighteenth-century educational theorists, "assumed the persistence of a

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[11] The only other dedicated study I am able to find is a brief article from 1934. See J.A.C. Chandler, "Jefferson and William and Mary." *The William and Mary Quarterly* 14, no. 4 (1934): 304-307.

[12] See Harold Hellenbrand, *The Unfinished Revolution: Education and Politics in the Thought of Thomas Jefferson*. Newark, NJ: University of Delaware Press, 1990.

[13] This notion is rejected by Michael Grossberg, Frank Shuffleton, Holly Brewer, and Jan Lewis in their contributions to *Thomas Jefferson and the Education of a Citizen*. See Grossberg, "Citizens and Families: A Jeffersonian Vision of Domestic Relations and Generational Change"; Shuffleton, "Binding Ties: The Public and Domestic Spheres in Jefferson's Letters to His Family"; Brewer, "Beyond Education"; and Lewis, "Jefferson, the Family, and Civic Education". In *Thomas Jefferson and the Education of a Citizen*. Edited by James Gilreath. Washington, DC: Library of Congress, 1999, pp. 2-76.

[14] For full discussion of generational sovereignty, see Introduction, pp. 14-16.

[15] See Peter Onuf, *The Mind of Thomas Jefferson*. Charlottesville: University of Virginia Press, 2007, pp. 169-176.

[16] This concept was briefly referred to in the Introduction, p. 14.

[17] See John Carson, "Differentiating a Republican Citizenry: Talents, Human Science, and Enlightenment Theories of Governance." *Osiris* 17 (2002): 74-103.

whole range of hierarchies".[19] Jefferson's, by being grounded in natural distinctions, would therefore be just, in contrast to feudal or other artificial forms of distinction based on custom, wealth or class.[20]

Other historians have preferred to emphasise the Bill's democratic aspects rather than its aristocratic ones, arguing that the general citizenship training intended to be available to elementary school students was as important as the leadership training to be provided in the grammar schools and college. For example, Cameron Addis labels Jefferson "the most democratic of the Founders", in part due to his educational reforms, and Douglas L. Wilson has noted that, while Jefferson desired to impose a literacy requirement for citizenship, he also wanted to make the necessary education available for free to all whites, including girls and the poor.[21] Likewise, Richard D. Brown notes that through his "crucial equation of virtue and knowledge", Jefferson hoped to make it at least theoretically possible that even a low-born student could become a natural aristocrat, were he able to earn the necessary scholarship money.[22] Jennings L. Wagoner, Jr. notes that while Jefferson's proposed curriculum had many functions, the most important was to promote good governance by inculcating student-citizens in political history during their compulsory elementary education.[23]

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[18] Ibid., p. 75.

[19] Ibid., p. 77.

[20] Claude C. Lammers makes the connection between feudal aristocracy and Jefferson's reforms explicit in "Jefferson's Aristocracy of Talent Proposal". *The Social Studies* 60, no. 5 (Oct. 1969), pp. 195-201. Lammers notes that there is a real tension between the ethic of egalitarianism and the ethic of excellence, and that while Jefferson's division of society into "the laboring and the learned" entrenched social division, the role of merit in determining class membership provided a workable compromise between the two ethics.

[21] See Cameron Addis, "Jefferson and Education". In *The Blackwell Companion to Thomas Jefferson*, Francis D. Cogliano, ed. Oxford: Blackwell Publishing Ltd, 2012, pp. 457-473, at p. 457; and Douglas L. Wilson, "Jefferson and Literacy". In *Thomas Jefferson and the Education of a Citizen*. Edited by James Gilreath. Washington, DC: Library of Congress, 1999, pp. 79-90.

[22] Richard D. Brown, "Bulwark of Revolutionary Liberty: Thomas Jefferson's and John Adams's Programs for an Informed Citizenry." In *Thomas Jefferson and the Education of a Citizen*. Edited by James Gilreath. Washington, DC: Library of Congress, 1999, pp. 91-102, at p. 100.

[23] Jennings L. Wagoner, Jr., "'That Knowledge Most Useful to Us': Thomas Jefferson's Concept of Utility in the Education of Republican Citizens." In *Thomas Jefferson and the Education of a Citizen*. Edited by James Gilreath. Washington, DC: Library of Congress, 1999, pp. 115-133.

Benjamin R. Barber attributes a desire for direct democracy to Jefferson, but this is probably going too far.[24] While Jefferson certainly wanted the public to monitor the activities of their officials, the proposal for a natural aristocracy seems to indicate that he did not think that the mass of the people would take direct part in governance.[25] As Peter Onuf notes, the question of whether Jefferson really was a democrat is an unresolved one.[26] Perhaps it is irresolvable. Building on the work of John Carson and Claude C. Lammers, which emphasises the inequality within Jefferson's reforms, the view I will argue in this chapter is that his primary concern was in replacing a feudal social order with one that was constructed according to (more or less) natural gradations of merit. His liberal belief in rational individuality and individual capacity for improvement, as well as his popular sovereignty, may appear to be the marks of a democrat, but Jefferson never abandoned the view that people should be ruled by their betters. He simply wanted to change who those betters were.

II - Allegiance

The fundamental problem of allegiance was one of deciding the basis on which a person could be considered inside or outside the body politic. Under the common law, allegiance was a patriarchal relationship between king and subject that derived from feudalism. From very early in the revolution, Jefferson began arguing for a redefinition of this "natural" allegiance, arguing that it was in fact unnatural to bind someone to his birthplace against his will. Following his redefinition of allegiance in the *Summary View* and other writings, Jefferson proposed a series of reforms, beginning with his draft constitution, that changed Virginia's laws to replace feudal subjecthood with a more flexible republican citizenship.

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[24] Benjamin R. Barber, "Education and Democracy: Summary and Comment". In *Thomas Jefferson and the Education of a Citizen*. Edited by James Gilreath. Washington, DC: Library of Congress, 1999, pp. 134-152.

[25] Brian Steele puts it thus: "Jefferson's natural aristocracy would harvest republican leadership from the fields of the public as the ultimate fruit of its cultivation of that public." Steele, *Thomas Jefferson and American Nationhood*. Cambridge: University Press, 2012, pp. 156-157.

[26] Peter Onuf, "Jefferson and American Democracy". In *The Blackwell Companion to Thomas Jefferson*, Francis D. Cogliano, ed. Oxford: Blackwell Publishing Ltd, 2012, pp. 397-418. The crucial thing, going back to Onuf's scholarship on generational sovereignty, is that while a natural aristocracy would emerge within each generation, it

Jurisprudential Background

Jefferson's citizenship bill proposed to replace one paradigm of citizenship, that of feudal allegiance under the common law, with an opposite paradigm, that of the natural right of expatriation. The former had been operative throughout English history but was given articulation in a legal opinion by Sir Edward Coke in his 1608 decision in *Calvin's Case*. It held that subjecthood under the monarchy of England was based on lineage and was inalienable. In contrast, the natural lawyers, including John Locke, argued that allegiance was alienable and that a subject could revoke that allegiance under certain conditions.[27]

Calvin's Case occurred soon after the accession of the King of Scots, James VI, to the throne of England, as James I, in 1603. King James I & VI ruled both kingdoms but they remained separate realms with their own parliaments, courts, and legal codes. In 1607, Robert Calvin, a *postnatus*, or Scottish child born after James' accession to the English throne, inherited lands in England. His inheritance was challenged by his English relations, Richard and Nicholas Smith, on the grounds that as, an alien, he was not eligible to inherit lands under common law. Calvin's attorneys challenged on the grounds that a subject of King James was a subject of any realm over which James ruled. Coke, as the chief justice of the Court of King's Bench, found for Calvin and laid out an intricate system of subjecthood that would govern inheritance throughout the British Empire for the next two centuries, and which was binding in Virginia at the time of independence.[28]

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was not capable of projecting influence beyond that generation's lifespan; an aristocracy of virtue and talent could not be entailed, nor could it be reserved to the first son.

[27] There is a small but detailed body of work on British and American citizenship law in the early modern period. For Britain, see Clive Parry, *British Nationality: Including Citizenship of the United Kingdom and Colonies and the Status of Aliens*. London: Stevens, 1951; and Phil Withington, *The Politics of Commonwealth: Citizens and Freemen in Early Modern England*. Cambridge: University Press, 2005. For the colonies and United States, see Douglas Bradburn, *The Citizenship Revolution: Politics and the Creation of the American Union, 1774-1804*. Charlottesville: University of Virginia Press, 2009; David Kazanjian, *The Colonizing Trick: National Culture and Imperial Citizenship in Early America*. Minneapolis: University of Minnesota Press, 2003; James H. Kettner, *The Development of American Citizenship, 1608-1870*. Chapel Hill: University of North Carolina Press, 1978; and Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in US History*. New Haven: Yale University Press, 1997.

[28] For a full explanation of the case, which my own account is closely based upon, see Kettner, *Development of American Citizenship*, pp. 16-28.

Coke explained in his decision that there were four types of allegiance - natural, acquired, local, and legal - and that Calvin was bound by the first, since he was a natural-born subject of James. This natural allegiance established a bond between James and Calvin, in which Calvin offered his allegiance in exchange for James' protection as sovereign - the *duplex et reciprocum ligamen*. This bond could never be voided - even were Calvin to reside in a territory conquered by a foreign power, and thus have a conflicting, *acquired* allegiance to a new sovereign, his natural allegiance to James remained. As historian James H. Kettner explains, because "the primal obligations of allegiance and protection remained perpetual and inviolate, no subject could ever lose his natural allegiance. He might abjure the kingdom and leave the country, but he could not break the tie that bound him to his king the father of his country."[29]

While the opposing lawyers argued that the King of England and the King of Scotland were two legally distinct persons, and that the coincidence of their occupation by the same individual was immaterial under the law, Coke rejected their argument and declared that the crown and its wearer were inseparable. While the laws on inheritance to the English and Scottish crowns were determined by the two separate parliaments, for the duration of the coincidence of their holding by James and his legal heirs the monarchy of England and Scotland was a combined one. Coke declared that all *postnati* Scots were to be considered subjects of the realm, not aliens, and were entitled to the same legal protections as natural-born Englishmen.

In understanding Coke's reasoning, Kettner notes the importance of the analogy of the natural family, "where a common paternity made sons and daughters into brothers and sisters; it transcended the boundaries separating Scotland and England and brought *postnati* Scotsmen and native Englishmen together as fellow subjects, and it supplied authority and natural obligation to those legal and political systems created by man."[30] This is an observation of crucial importance, for it shows that while Coke could have relied simply on the parliamentary statutes establishing the separate monarchies of England and Scotland, and agreed with the Smiths' lawyers that the combined monarchy was a coincidence and nothing more, he chose instead to rely on natural principles and reason that surpassed the limited scope of the statutes and could inform the new law he was creating to deal with a previously unimagined situation.

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[29] Ibid., p. 19.
[30] Ibid., p. 23.

This theory of perpetual, natural allegiance was called into question later in the seventeenth century with the Glorious Revolution. Unlike the 1649 regicide, in which a small faction of radical Puritans in the Rump Parliament deposed and executed the king, and were later discredited, the 1689 removal of James II from the throne was supported by some Tories and most Whigs in the English political establishment and was ratified by subsequent legislation and events. Recognising the need to justify their actions within the legal framework of *Calvin's Case*, the revolutionaries claimed that the king had abdicated his office and that he, not they, had broken the bond of allegiance and protection. The revolutionaries' contemporary, the philosopher John Locke, justified the revolution on different grounds, arguing that, as part of his contractarian theory of government, a right of resistance that superseded natural allegiance could be invoked when the monarch, as chief magistrate, had betrayed the trust which merited allegiance.

Kettner notes that Locke's natural right of resistance was not the same as a full natural right of expatriation. Locke could justify collective resistance only when there was egregious abuse by the ruler; an individual subject could not void his natural allegiance on a whim. Kettner identifies the crucial difference between Coke and Locke as lying in how they perceived nature. Coke "depended upon a state of nature in which some men were bound to obey and others were bound to protect", whereas Locke "posited instead a primal state in which all men were essentially equal or, if not equal, at least autonomous."[31] Contractarianism, therefore, was a key philosophical principle that underlined both interpretations.

In the eighteenth century, Locke's philosophy of political society based on natural right was further developed by philosophers of the law of nations. It was the Swiss jurisprudential writers, Emmerich Vattel and Jean Jacques Burlamaqui, who developed a full-fledged concept of a natural right of expatriation from one's birthright political community.[32] Even as they were incorporating expatriation into the law of nations, William Blackstone was making allowance for some sort of annulment of allegiance in the common law itself. While early editions of his *Commentaries on the Laws of England* emphasised the Cokean doctrine of natural allegiance, a later edition made allowance for the suspension of allegiance with "the united concurrence of the legislature."[33]

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[31] Ibid., pp. 53-54.
[32] Smith, *Civic Ideals*, p. 80.
[33] Kettner, *Development of American Citizenship*, pp. 54-55.

Jefferson's Attempt at Redefinition

When Jefferson first put his thoughts on allegiance in writing with his *Summary View of the Rights of British America* in 1774, he attempted to invoke a natural right of expatriation while avoiding a complete break with the Cokean interpretation of natural allegiance. He did this by circumscribing his definition of the right of expatriation. Rather than claiming that the colonists had expatriated themselves from the crown, Jefferson claimed that they had expatriated themselves from parliamentary rule. By adopting such a restrained approach, Jefferson was then able to appeal to the king, on the grounds of natural allegiance, to protect his loyal subjects in the colonial realms from his other subjects in Great Britain.

The *Summary View* was predicated upon the king's enduring place as the head of society. The *Summary View* was "an humble and dutiful address" to the king regarding the "incroachments" [sic] by "the legislature of one part of the empire", the British Parliament, against a group of others, the colonial assemblies.[34] Thus framed, the *Summary View* was an appeal for protection by the king in exchange for the allegiance to his person that was expected of the colonists. While this arrangement is contractarian, its Cokean versus Lockean undertones are plain when one considers that the *Summary View* is an appeal for protection by the sovereign, not a call for resistance.

The common law tone of the pamphlet becomes more explicit when it is recognised that, when Jefferson spoke of an empire of independent states united by one crown, he intended to invoke the historical circumstances that provided the context for Calvin's Case. In his *Autobiography*, he explained that he had thought of the relationship between Virginia and Britain as similar to "that of England and Scotland, after the accession of James" and before the 1707 Union.[35] By framing the relationship as the same under law, Jefferson accepted the accompanying legal precedent and appealed to it for his own advantage.

At the same time, Jefferson also incorporated elements of natural law theory - not the Lockean right of resistance, which was not yet called for, but the doctrine of expatriation that had been developed by Burlamaqui and Vattel. Jefferson sought to

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[34] "A Summary View of the Rights of British America", in TJ Papers, Vol. I, pp. 121-136.

[35] Jefferson, *Autobiography*, p. 14.

establish the exercise of this right within England's past in order to establish its bona fides for Virginia's present. Thus, he first explained how the Saxon emigration from Germany to Britain had been an exercise in "which nature has given to all men, of departing from the country in which chance, not choice has placed them, of going in quest of new habitations, and of there establishing new societies, under such laws and regulations as to them shall seem most likely to promote public happiness." The English emigration to the American colonies, including Virginia, did not "distinguish materially … from the Saxon emigration" and was a repeat exercise of the same right.[36]

The invocation of a natural right of expatriation, as well as his first invocation of happiness as the foundation of political society, places Jefferson's thinking on the matter squarely within the natural law tradition espoused by Burlamaqui, Vattel, and others.[37] This was largely antithetical to Coke's doctrine of natural allegiance, and indeed Jefferson even asserted that the colonies retained the kings of Britain by choice, not by obligation. That said, Jefferson did not press the point, for the *Summary View* was addressed to the king as an appeal. He found a way to accept both natural allegiance and natural rights by qualifying that the right of expatriation he was espousing referred to legislative authority, not monarchical authority. Jefferson was forging an uncomfortable intellectual compromise: he was trying to walk a line between the King and Parliament, but the argument logically led to an abjuration of allegiance to both.

Indeed, the introduction to the *Summary View* stated that the pamphlet only addressed the attempts "made by the legislature of one part of the empire, upon those rights which god and the laws have given equally and independently to all" legislatures under the "common sovereign". The Saxons had made the free choice to "establish" in England "that system of laws which has so long been the glory and protection of that country", and the American colonists had made a free choice to prudently "adopt that system of laws" for themselves upon their emigration.[38] While Jefferson was displeased with the king's passivity in the face of Parliament exceeding its authority, and while he

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[36] "A Summary View of the Rights of British America", in TJ Papers, Vol. I, pp. 121-122.

[37] Of the two Swiss philosophers, Jefferson seems to have leaned more towards Burlamaqui. Burlamaqui was included in a special book order Jefferson placed in 1769 at the beginning of his involvement in the colonial crisis, while Vattel was not. See "From Perkins, Buchanan & Brown", 2 October 1769, in TJ Papers, Vol. I, pp. 33-34.

[38] "A Summary View of the Rights of British America", in TJ Papers, Vol. I, pp. 121-122.

urged the king to resume the exercise of the veto that had not been used since the reign of Queen Anne, he did not break with the king by overtly threatening to withdraw colonial allegiance because of the lack of royal protection.

That break did not come until the autumn of 1775, when the king formally declared the colonies out of his protection. The "Declaration of the Causes and Necessity for Taking Up Arms", which Jefferson had co-drafted with John Dickinson on behalf of Congress in July 1775, explicitly stated that the colonial rebellion was against Parliament, not the king himself. When the king declared the colonies out of his protection in October 1775, and openly supported the authority of Parliament over that of the colonial assemblies, Jefferson noted, George III voided the king's share of the obligations under natural allegiance, "it being a certain position in law, that allegiance and protection are reciprocal, the one ceasing when the other is withdrawn".[39] From that point, it was not long before Jefferson invoked the natural right to resistance in the Declaration of Independence.

The Declaration of Independence was also notable for a shift in Jefferson's thinking on expatriation. While in the *Summary View* he had been constrained by the need to balance natural right with natural allegiance, with independence Jefferson was freed intellectually as well as politically, and no longer needed to conform to feudal allegiance. In his rough draft of the Declaration, Jefferson charged the king with complicity in endeavouring "to prevent the population of these states; for that purpose obstructing the laws for naturalisation of foreigners, refusing to pass others to encourage their migrations hither; & raising the conditions of new appropriations of lands."[40] Nearly identical language was included in the preamble to the draft constitution which Jefferson sent to the Virginia Convention.

The draft constitution contained a further provision regarding emigration. Under the "rights public and private", Jefferson codified the natural right of expatriation by designating Virginia's western lands for settlement and eventual partition as "one or more" new states, which "shall be established on the same fundamental laws contained in this instrument, and shall be free and independant [*sic*] of [Virginia] and all the world." Likewise, immigrants coming in to the state need only swear an oath at the end

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[39] Jefferson, *Autobiography*, p. 14.

[40] "Jefferson's 'original Rough draft' of the Declaration of Independence", in TJ Papers, Vol. I, p. 424.

of a seven-year residency requirement, and they "shall be considered as residents and entitled to all the rights of persons natural born."[41]

Jefferson's Reform Legislation

In the period from July 1774 to July 1776, the outbreak of war and the Crown's renunciation of protection led Congress to formally end allegiance to the British monarchy. Jefferson de-emphasised the importance of natural allegiance accordingly with these developments. It might be expected that, upon independence, he would seek a swift return to the common law definition as a way of cementing individuals' allegiances to the new republic. What is striking about the legislation Jefferson authored is that, having abandoned natural allegiance, he stayed away from it, supporting instead the principle of the natural right of expatriation, which he sought to codify in legislation. On the issue of immigration, Jefferson turned his back on the common law, considering it to have departed from the principles of natural law that it was, ideally, supposed to uphold.

On 14 October 1776, the same day he introduced his bill reforming entail and the day before introducing the bill establishing the Committee of Revisors, Jefferson proposed a "Bill for the Naturalisation of Foreigners". Once again, Jefferson found himself opposed by Edmund Pendleton. In a bit of a twist, this time it was Pendleton who had conceived of the bill, and Jefferson who altered it. Pendleton's bill had been written so as only to encourage Protestants; Jefferson altered it to include more liberal provisions encouraging immigration of Europeans in general.[42]

While Jefferson's reputation is as a liberaliser of immigration law, a reputation that is borne out by the content of his legislation, it should not be overlooked that he was an ambivalent reformer. Unrestricted immigration threatened to upset the social stability of the republic. In the *Notes on Virginia*, Jefferson warned of the dangers of unrestricted immigration from foreign lands that did not share the national characteristics of Virginia. "They will infuse into it their spirit, warp and bias its direction, and render it a

[41] "Third Draft by Jefferson", in TJ Papers, Vol. I, p. 363. At first glance, this might not seem to involve the natural right of expatriation, since Jefferson thought to bind the future states to Virginia's fundamental law; however, since the new states were being established within Virginia's territory, this was understandable, and the fundamental law included provision for amendment after those states became independent.

[42] "Bill for the Naturalisation of Foreigners", in TJ Papers, Vol. I, pp. 558-559.

heterogeneous, incoherent, distracted mass," Jefferson warned. It was in the common interest to put restriction on immigration, in the interests of a society "more homogenous, more peaceable, more durable."[43]

Nonetheless, immigration could be a net good for the state, if it were targeted correctly. Thus, Jefferson thought that while if "they come of themselves, they are entitled to all the rights of citizenship," he doubted "the expediency of inviting them by extraordinary encouragements." The one group for which extraordinary encouragements should be offered was "useful artificers" who could economically develop the country. "The policy of that measure depends on very different considerations," he clarified. "Spare no expense in obtaining them. They will after a while go to the plough and the hoe; but, in the mean time, they will teach us something we do not know."[44]

This showed an idiosyncratic vision of economic development contrary to the views of developmental progression that were widespread at the time. The 1770s was a decade coming late in the Enlightenment project of understanding the development of society over long arcs of time, and of the relationship between physical attributes such as the means of subsistence and production, and moral attributes such as the design of constitutions and legal codes. Writers such as Adam Smith in his *The Wealth of Nations* and Lord Kames' *Sketches of the History of Man*, among others, held that the development of economy and society was linear and progressive. In the *Notes*, Jefferson was suggesting that the artisans and knowledge of an advanced commercial or manufacturing society could be assimilated into Virginia's agricultural society without actually changing that society. In fact, he was saying that the more advanced immigrants would actually give up their professions and training in order to become simple farmers. Jefferson's understanding of the process of assimilation, and of the manner in which intellectual progress affected the constitution of a society, was fundamentally at odds with the dominant views of his day.

In addition to being unorthodox, the views expressed in the *Notes on Virginia* do not exactly match the content of the legislation for which he was responsible, indicating further ambivalence on this issue. Jefferson's revision of Pendleton's draft bill made two important changes. First, it broadened the scope of the bill to include all European

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[43] Jefferson, *Notes on Virginia*, pp. 84-85.
[44] Ibid., p. 85.

immigrants, not only the Protestant denominations that made up the majority of Virginia's population. This was at odds with his views on social cohesion, and shows the great importance he placed upon religious freedom. In a battle between conscience and cohesion, conscience won. Second, while Pendleton's draft bill merely confirmed the existing estates of aliens who wished to become citizens, Jefferson added inducements for immigration such as fifty-acre land grants and twenty-dollar reimbursements for travel expenses.[45] Far from withholding "extraordinary encouragements" to potential unskilled immigrants, Jefferson was here taking positive action to include encouragements in legislation.

While the Bill for the Naturalisation of Foreigners focused on immigration, the issue of emigration, and the larger issue of allegiance to the republic, was not addressed until Jefferson took up "A Bill Declaring Who Shall Be Deemed Citizens of This Commonwealth" as Bill No. 55 of the Revisal of the Laws. The bill was entirely different in character from Jefferson's proposals in the draft constitution and the Bill for the Naturalisation of Foreigners. While those works had concerned themselves with the practical aspects of managing immigration, the citizenship bill concerned itself with establishing a system of allegiance to the new republic. By returning to a key theme of the *Summary View*, Jefferson sought to define republican citizenship entirely differently from feudal subjecthood.

Jefferson wrote the bill in order to make it easy both to become a citizen of Virginia, and to give up that citizenship. While in the draft constitution he called for a seven-year residency requirement, he reduced this to five in the Bill for the Naturalisation of Foreigners, and now reduced it again to two years of residency. After that, any white resident could "before any court of record give satisfactory proof by their own oath or affirmation" that he intended to become a loyal citizen.[46] For children, Coke's decision from Calvin's Case was preserved, and a child of parents who were citizens at the time of the birth was a citizen by birthright. All non-citizens were to be considered aliens. This largely preserved the existing common law system of natural allegiance intact.

It was the rest of the bill that shattered the other half of the Cokean equation: that once allegiance was established at birth, it could not be given up. Jefferson stipulated

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[45] "Bill for the Naturalization of Foreigners", in TJ Papers, Vol. I, pp. 558-559.

[46] Bill No. 55, "A Bill Declaring Who Shall Be Deemed Citizens of This Commonwealth", in TJ Papers, Vol. II, pp. 476-477.

that, “in order to preserve to the citizens of this commonwealth, that natural right, which all men have of relinquishing the country, in which birth, or other accident may have thrown them, and, seeking subsistence and happiness wherever they may be able, or may hope to find them”, any citizen could “[relinquish] the character of a citizen, and shall depart the commonwealth” after having so declared to a magistrate.[47] This passage from the bill reaffirmed the position Jefferson had taken in the *Summary View* and made it binding in law: that the chance circumstances of one’s birthplace and parentage did not void the right to seek happiness wherever it may be found.

III – Education

Once Jefferson had redefined the boundaries of the polity through his citizenship laws, he was still confronted with how to organise society within those boundaries. The existing patriarchal social order, which he was already doing so much to try to reform through property laws, could not stand if Jefferson’s republic was to work. While the property laws were intended to break up the largest estates, Jefferson wanted to inject further dynamism into the mix by providing universal public education. Under his Bill for the More General Diffusion of Knowledge, all citizens of the republic would receive a basic education at state expense, while secondary and tertiary education would be open to anyone who could pay, either from family money or, more important, from earning a scholarship. Modest by later standards, in this context Jefferson’s education reforms were an important complement to his reforms of property and allegiance. The school system would identify the most able people in Virginia and, through educational refinement, raise them into positions where they could be of public use.

Design of the School System

Prior to independence, Virginia had many institutions of learning, but these were not centralised or even regulated and did not comprise an “education system” in the modern meaning of the word.[48] Public provision for education was limited to the

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[47] Ibid., p. 477.

[48] There is a lengthy historiography on education in colonial Virginia. See Holly Brewer, "Apprenticeship Policy in Virginia: From Patriarchal to Republican Policies of Social Welfare." In *Children Bound to Labor: The Pauper Apprentice System in Early America.* Edited by Ruth Wallis Herndon and John E Murray. Ithaca: Cornell University Press, 2009; J.L. Blair Buck, *The Development of Public Schools in Virginia, 1607-1952*.

regulation of apprenticeships. England's Poor Law of 1601, which regulated apprentices for indigent children, was subsequently re-enacted and amended by the colonial assembly.[49] In addition to this law for vocational training, the parishes of the Established Church often provided schooling for a fee, and some philanthropic organisations established free schools scattered throughout the colony.[50] These schools were often established against the wishes of official opinion. One early royal governor, Lord Berkeley, went so far as to declare that "learning has brought disobedience and heresy, and sects into the world and printing has divulged them and libels against the best of government. God keep us from both."[51]

To Jefferson, the education of the public had a close relationship to the legitimacy of authority. Feudalism, he found in Robertson's *History of Charles V*, had been upheld in part by the ignorance and illiteracy of the masses, and nobles and kings had often been as ignorant as their subjects, unable to even sign their own names. The path out of this intellectual darkness had run through two technological innovations: the invention of paper and Gutenberg's movable press. Only technology was able to "[usher] in the light" of greater literacy, leading to the Reformation and then the Enlightenment.[52]

The new education system which Jefferson proposed made universal literacy its most important priority. Jefferson envisioned a three-tier system, with a universal system of primary education at the bottom, a selective system of grammar schools in the middle, and the College of William and Mary at the top. The primary schools would be controlled by locally-elected aldermen, while authority in the grammar schools would be split with administration handled by aldermen and the curriculum set by the Board of Visitors at William and Mary.

Curriculum at the primary level was closely detailed in Jefferson's "Bill for the More General Diffusion of Knowledge". The students were to receive three years of instruction in "reading, writing, and common arithmetick" and were also to be taught

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Richmond: Commonwealth of Virginia, 1952.: Thomas Kirby Bullock, "Schools and Schooling in Eighteenth Century Virginia." Duke University, 1961; Sheldon S. Cohen, *A History of Colonial Education, 1607-1776*. New York: John Wiley & Sons, 1974; Lawrence A. Cremin, *American Education: The Colonial Experience*. New York: Harper & Row Publishers, 1970; and Guy Fred Wells, *Parish Education in Colonial Virginia*. New York: Columbia University Press, 1923.

[49] See Hening I/260 and I/336-337.

[50] Buck, *Development of Public Schools*, pp. 14-18.

[51] Berkeley, quoted in Buck, *Development of Public Schools*, p. 3.

the content of "Graecian, Roman, English, and American history."[53] Every child eligible to become a citizen was expected to receive three years of education with their tuition paid for by the state; the number of primary schoolhouses was thus expected to be great, and Jefferson carefully laid out the rules by which they should be administered.

While each county would have multiple primary schoolhouses, each grammar school would cover multiple counties and would receive a much smaller number of students. With equal detail to that of the primary schools, Jefferson laid out the procedures for locating the grammar schools and went into some detail as to their curriculum, which should include "the Latin and Greek languages, English grammar, geography, and the higher part of numerical arithmetick, to wit, vulgar and decimal fractions, and the extraction of the square and cube roots."[54] The Visitors of the College of William and Mary would have the authority to further elaborate upon the grammar school curriculum as they saw fit.

Finally, the College of William and Mary would be reformed and turned into a state university. This would be the least "public" of all the state educational institutions, maintaining its fee-based system of tuition. Jefferson proposed to secularise it, however, by removing Church of England control and instituting curricular reforms that would reorient its teaching around subjects of public usefulness. This included the organisation of dedicated chairs of law and of medicine, as well as the teaching of modern languages and of architecture and engineering. It also continued the emphasis on republican-suitable humanities with coursework on the classics as well as the Saxons and other Germanic "republican" societies.[55]

Jefferson's Philosophy of Education

Rhetorically, the preamble to the Bill for the More General Diffusion of Knowledge reads like an extension of the Declaration of Independence. Jefferson deemed it "expedient for promoting the publick [sic] happiness that those persons, whom nature hath endowed with genius and virtue, should be rendered by liberal education worthy

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[52] LCB Entry 761.

[53] Bill No. 79, "A Bill for the More General Diffusion of Knowledge", in TJ Papers, Vol. II, p. 528.

[54] Ibid., pp. 529-531.

to receive, and able to guard the sacred deposit of the rights and liberties of their fellow citizens". The leadership of Virginia should be drawn from its most able, "without regard to wealth, birth or other accidental condition or circumstance". To avoid the concentration of education, and hence leadership, in the hands of the hereditarily wealthy, a universal system of primary education feeding into leadership programmes at the secondary and collegiate levels should be instituted because "it is better that such should be sought for and educated at the common expence of all, than that the happiness of all should be confined to the weak or wicked".[56]

This preamble raised several philosophical questions. What was the nature of the "happiness" that Jefferson had now referred to twice as the basis of public policy? What theory of mind was at work in shaping his view of human improvability? How were "genius and virtue" defined? How could the rudiments of genius and virtue be refined from basic human attributes into the stuff of citizens, and how could citizens be refined into leaders? What appears at first glance to be a technical document on local educational administration actually rests, via its preamble, on a broader philosophy of education.

"Happiness", as Jefferson conceived it in the Declaration of Independence, appeared as a natural right protected by the social contract, alongside Locke's "life" and "liberty".[57] Education, therefore, was the means by which individuals and societies could realise their individual and collective desires. Burlamaqui conceived of happiness as a liberal, individualist experience. Jefferson, emphasising individuality in his writings, seems to have come to a similar view in the Declaration. The purpose of the Bill for the General Diffusion of Knowledge then seems to be straightforward: to implement the charge of the Declaration of Independence by giving each citizen the basic intellectual tools necessary to develop themselves so that they could enjoy their life and liberty to the fullest, and thereby achieve personal happiness.

But with the Bill for the More General Diffusion of Knowledge, he qualified happiness with the word "publick". Happiness, as defined as a matter of public policy,

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[55] Bill No. 80, "A Bill for Amending the Constitution of the College of William and Mary, and Substituting More Certain Revenues for Its Support", in TJ Papers Vol. II, pp. 535-543.

[56] Bill No. 79, "A Bill for the More General Diffusion of Knowledge", in TJ Papers Vol. II, p. 527.

ceased to be an individual goal and instead became a public good. By stating that the purpose of his pyramidal system of education, and merit-based scholarships, was to create a feeder system for talented young leaders, Jefferson raised the issue of the collective happiness of society. The recipients of grammar school and collegiate education were expected to use their education to be responsible leaders of their communities and of the state. Education at all levels could very well have positive individual effects, but what justified the state's sizable expenditure of resources was the necessity of having good leaders and of citizens capable of rationally selecting and following them.

In addition to a concept of public welfare, any education system had to have some sort of theory of mind behind it. Jefferson's contemporaneous writings are largely silent on this, although he was certainly aware of Locke's theory of mind in the *Essay on Human Understanding*, which stipulated that human beings lack innate ideas, and which in turn informed his *Letter Concerning Education*.[58] While Jefferson's correspondence is empty in this regard, the Legal Commonplace Book does contain excerpts from Claude Adrien Helvetius' *De L'homme*.[59] Helvetius began with Locke's theory of mind and further developed it into a theory of education. As historian John Carson has shown, Helvetius, in his earlier work *De L'esprit*, arrived at the conclusion that, as a result of the tabula rasa, any person could be trained into being a genius via the proper education. For Helvetius, there was therefore no excuse for some individuals to be educated while others were not. Education should be universally available, with individuals improving as far as the education made available to them would allow.[60]

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[57] See Ray Forrest Harvey, *Jean Jacques Burlamaqui: A Liberal Tradition in American Constitutionalism.* Chapel Hill: University of North Carolina Press, 1937, pp. 191-121.

[58] Jefferson recommended the latter book to Robert Skipwith. See "To Robert Skipwith, with a List of Books for a Private Library", 3 August 1771, in TJ Papers, Vol. I, pp. 79-80. Furthermore, the theory of education Jefferson's adheres to in the *Notes on Virginia*, that education is founded upon observation, is consistent with Locke's theory of the *tabula rasa* in the *Essay*. See Jefferson, *Notes on Virginia*, p. 162.

[59] LCB Entry 849 discusses the nature of the soul in relation to ideas. For Helvetius, all ideas were learned. Therefore, the soul itself was a construct and was not innate. Jefferson's writings are silent as to his exact opinion of the book, although he did recommend it to his nephew Peter Carr as part of a general course of reading. "To Peter Carr, with Enclosure", 10 August 1787, in TJ Papers, Vol. XII, p. 18.

[60] Carson, *Differentiating a Republican Citizenry*, pp. 96-97. While Jefferson does not cite educational philosophy in his excerpts from *De L'homme*, the mere fact of his having intensively read the book shows his familiarity with Helvetius' ideas; at the very least,

Jefferson's interest in universal education could plausibly be attributed to his reading of *De L'homme*, but the same cannot be said for the particular points of his educational program. If Helvetius was correct, then universal and uniform education should yield universally uniform results.[61] Yet Jefferson had no intention of leveling society into a faceless mass of academically interchangeable automatons. The very existence of the pyramid running from the local schools to the College of William and Mary shows that he expected a uniform education system to yield varied results. He also did not discount the importance of outside factors such as wealth, freely acknowledging that those who could afford to pay for tuition would still rise through the system.

In the preamble, Jefferson asserted that "genius and virtue" had not been equally distributed by nature, and that some people were simply born with greater innate talent than others. The purpose of the Jeffersonian education system was to locate that talent and promote it. Jefferson was interested in a Helvetian system of universal education, regardless of talent, only to the point that it was necessary for training the masses to be citizens. Once the basic level of civic competence had been reached through completion of the primary education programme, the public interest largely ended and education returned to being a private good, with the exception of those who demonstrated leadership potential but lacked the personal wealth necessary to afford further education.

So the real question facing Jefferson was not the nature of mind but the nature of talent, and how best to find and promote it. This question was not a psychological one but a political one. What skills and attributes were most required for civic participation? How could an untrained human mind be refined into a citizen, and how could the most capable citizens be refined into leaders? The answer, given in his outline of the curriculum, was that basic numeracy and literacy, as well as a basic understanding of Western political history, were the necessary intellectual attributes of a citizen.

Leaders were expected to be even more refined. The local leaders who would emerge from the grammar schools would have a degree of worldliness necessary for

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his educational proposals form a response to Helvetius. Jefferson does not cite educational philosophy at any point in the Legal Commonplace Book, thereby making his engagement with sources somewhat more difficult to follow, though sources in and of themselves may still be identified. See also Stanley E. Ballinger, "The Idea of Social Progress Through Education in the French Enlightenment Period: Helvetius and Condorcet." *History of Education Journal* 10, no. 1/4 (1959): 88-99.

enlightened leadership. They would speak English and perform mathematics at a higher level of competency than their primary school counterparts, and their knowledge of Latin and Greek would enable them to comprehend the wisdom of the classical texts. What is striking about the secondary curriculum is its lack of subject-based content to complement the language and mathematical skills. Jefferson clearly envisioned that grammar school graduates would go on to a lifetime of learning, picking up subject material at their own pace out of their own personal libraries.

The state leaders would be the most refined of all. Not only would they have received the education of citizens at the primary level, and the education of local leaders at the secondary level, but their instruction at the College of William and Mary would give them a complete liberal education. Jefferson devoted an entire, separate bill to the reform of the administration and curriculum of William and Mary College. His goal was to replace ecclesiastical and out-dated subjects and professorial chairs with ones in areas relevant to public policy. A graduate of the College would no longer be the product of a mere aristocratic finishing school, and would instead be a degree-holder conversant in public policy and prepared for enlightened civic leadership as well as scientific plantation management or entry into the professions.

While Jefferson's proposed system was radical by Virginia's own stagnant standards, in which the landed aristocracy resisted any hint of social change, it was in turn quite conservative by the standards of Helvetius and the *philosophes*. Jefferson's education system was not intended to be a class leveller, nor even to create greater mobility between the classes. Instead, the intent was to create a pool of citizens, wide in numbers but shallow in knowledge, out of which would rise to the grammar schools those who could pay and those indigent few who could earn a scholarship. This "natural aristocracy" of "virtue and talents" (and wealth) would then form the pool of candidates to staff the state's administration, its courts, and its county offices, as well as serve as members of the legislature.[62]

Jefferson himself sometimes exaggerated the egalitarian nature of his reform, boasting in the *Notes on Virginia* that by "that part of our plan which prescribes the selection of the youths of genius from among the classes of the poor, we hope to avail the state of those talents which nature has sown as liberally among the poor as the

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[61] Carson, *Differentiating a Republican Citizenry*, p. 98.

[62] "To John Adams", 28 October 1813, in TJ-Adams Correspondence, Vol. II, p. 387.

rich".[63] Yet Jefferson's proposal was rather too modest to merit such a claim. By the text of the bill, one indigent student from each primary school would be sent to the regional grammar school on scholarship, and each year one indigent student from the grammar schools would be admitted on scholarship to the College; in the *Notes*, Jefferson deviated from this by stating that, while all the grammar school scholarships would be for "one or two years", only the top twenty students state-wide would have their scholarships renewed for up to four additional years, at which point ten would return to their homes and ten would receive three-year scholarships at the College.[64]

For all of his exaggeration and *post hoc* modifications to the bill, it is clear that Jefferson did realise that what he was proposing was progressive but not revolutionary. While primary education was universal, he wrote that the rest of the bill was mainly concerned with "furnishing to the wealthier part of the people convenient schools, at which their children may be educated, at their own expence."[65] This was a declaration, not an admission. Limiting social advancement to small numbers of the most able poor would foster social stability, both by convincing the poor that they had a chance for advancement in life and by assuring the wealthy that their positions were not threatened; and of course, the combined intellects of the meritorious poor and the educated wealthy would provide the leadership necessary for society to prosper.

In this important respect, that considerations of progress were balanced by factors of wealth and stability, Jefferson's natural aristocracy was not the same as a meritocracy. In a meritocracy, an individual may rise or fall according to their merits. In the natural aristocracy, one could stay put or advance, but never fall back. Personal wealth formed a social safety net - only by becoming too poor to afford school tuition fees could a family see its children fall in the social order. This meant social standing, and academic advancement, was the responsibility of the parents, particularly the father, not the responsibility of the student.

The continuing prominence of wealth in educational opportunity indicates that while the primary schools would have quite a broad student enrolment compared to the grammar schools, the enrolment at the grammar schools and at the College would look quite similar. Parents who would have had to pay for three years of tuition at the

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[63] Jefferson, *Notes on Virginia*, p. 148.

[64] Bill No. 79, "A Bill for the More General Diffusion of Knowledge", in TJ Papers Vol. II, p. 532. Contrast with the account in Jefferson, *Notes on Virginia*, pp. 146-147.

beginning of their child's education would now be able to spend those funds at the College instead, meaning that those who could previously have afforded only primary and secondary education could now afford the tertiary level as well.

By expanding opportunity to include those with enough money for partial, but not comprehensive, education, Jefferson was encouraging the growth of a broad-based and educated middle class. The small number of scholarship students would winnow as they advanced, but thanks to the free education at the primary level those fee-payers who passed grammar school were virtually assured of a place at the College of William and Mary. While the institutional structure of the education system was a pyramid, the structure of the student enrolment was more like a plateau, flat to either side and with a great, steep-sided bulge in the middle.

Such a large middle class was necessary to fill all of the new offices of the republican government. Not only did the existing county-level courts continue to need staffing, but all of the new schools would require masters, and at the state level Jefferson was sponsoring bills creating new executive agencies as well as an entire system of superior courts. In some cases, the constitution forbade people from serving as officials in multiple government branches; in others, the work load was simply too great for one person to do multiple jobs.[66] Candidates to fill these offices over the long-term would need to be found and trained; any candidate would need to be both well-educated enough to handle the responsibilities, and socially advanced enough to command the respect of his peers.

To the extent that it was part of creating a large middle class, the Bill for the More General Diffusion of Knowledge should be seen as a counterpart to Jefferson's land reforms. Like his property reforms, the bill was not a levelling project, but sought to decrease the concentration of wealth (in knowledge) while fostering the creation of a critical mass of middling citizens that would provide stability to the commonwealth and would be active participants and leaders in civic life. It also took steps to ensure that everybody got at least something: as the property reforms provided for universal land grants and equal inheritance, the Bill for the More General Diffusion of Knowledge sought to ensure that everybody received a minimum level of common education.

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[65] Ibid., p. 147.

[66] See John E. Selby, *The Revolution in Virginia, 1775-1783.* Charlottesville: University of Virginia Press, 1988, pp. 239-242.

IV - Race

The problem of race vexed Jefferson throughout his time spent in constructing the revolutionary settlement, and the disposition of Virginia's slave population was a thorny problem. He openly admitted that Virginia's race-based slavery was antithetical to his brand of liberal republicanism. The question was not whether slavery was wrong for Virginia, but what could be done about it. In the end, Jefferson decided that not much could be done.[67] The slavery bill which he included in the Revisal banned the importation of new slaves, but other than that kept the existing slave laws intact.

As we saw in the development of Jefferson's immigration policy, and as we shall see in the final section of this chapter, homogeneity was an important factor in Jefferson's planning. Jefferson argued that blacks were incapable of participating in the new, education-based natural aristocracy, and therefore could not be a homogenous part of

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[67] The historiography on Jefferson and slavery during the Founding period is more extensive than can be listed in a single footnote. Some of the more relevant entries include Daniel J. Boorstin, *The Lost World of Thomas Jefferson: With a New Preface.* Chicago: University Press, 1993; William Cohen, "Thomas Jefferson and the Problem of Slavery." *The Journal of American History* (1969), pp. 503-526; David Brion Davis, *The Problem of Slavery in the Age of Revolution, 1770-1823.* Ithaca: Cornell University Press, 1975; John P. Diggins, "Slavery, Race, and Equality: Jefferson and the Pathos of the Enlightenment." *American Quarterly* 28 (1976), pp. 206-26; Paul Finkelman, *Slavery and the Founders : Race and Liberty in the Age of Jefferson.* Armonk, NY: M.E. Sharpe, 2001 and Finkelman's "Jefferson and Slavery: 'Treason Against the Hopes of the World'." In *Jeffersonian Legacies.* Edited by Peter Onuf. Charlottesville, VA: University of Virginia Press, pp. 181-221; W.W. Freehling, "The Founding Fathers and Slavery." *The American Historical Review* 77, no. 1 (1972), pp. 81-93; Ari Helo and Peter Onuf, "Jefferson, Morality, and the Problem of Slavery." *The William and Mary Quarterly* 60, no. 3 (2003), pp. 583-614; Winthrop Jordan, *White Over Black: American Attitudes Toward the Negro, 1550-1812.* Chapel Hill: University of North Carolina Press, 1968; John Chester Miller, *The Wolf by the Ears: Thomas Jefferson and Slavery.* New York: Free Press, 1977; Edmund S. Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia.* New York: WW Norton & Company, 1975; Peter Onuf, "Every Generation Is An "Independant Nation": Colonization, Miscegenation, and the Fate of Jefferson's Children." *The William and Mary Quarterly* 57, no. 1 (2000), pp. 153-170; Onuf, "To Declare Them a Free and Independant People": Race, Slavery, and National Identity in Jefferson's Thought." *Journal of the Early Republic* 18, no. 1 (1998): pp. 1-46; Anthony S. Parent, *Foul Means: The Formation of a Slave Society in Virginia, 1660-1740.* Chapel Hill: University of North Carolina Press, 2003; *Law, the Constitution, and Slavery.* Edited by Paul Finkelman. Articles on American Slavery. New York & London: Garland Publishing, Inc., 1989; *Slavery & the Law.* Edited by Paul Finkelman. Madison, WI: Madison House, 1997; Philip J. Schwarz, *Slave Laws in Virginia.* Athens: University of Georgia Press, 1996; Jean Yarbrough, "Race and the Moral Foundation of the American Republic:

Virginian society. Furthermore, their lack of homogeneity meant that they could not feel *amor patriae* for the republic and were a dissonant, dangerous element of the population that needed to be controlled or expelled. The result was that Jefferson, while opposed to slavery in principle, justified it in practice by developing a social theory of racial distinctiveness that prohibited the integration of blacks into white society and which meant, in turn, that if slavery could not be ended and the slaves transported out of the country, then they would need to stay in bondage for the time being, for the protection of both whites and blacks.

Condemnations of Slavery

In the draft Declaration of Independence, Jefferson had listed the slave trade as his eighteenth grievance against the Crown, a grievance that was immediately removed by Congress. Jefferson couched his opposition not against slavery itself, but against the international slave trade, a crucial distinction that avoided the issue of domestic slave ownership while making the slave trade a piece in his larger criticism of the feudal-mercantile model of empire. The king "has waged cruel war against human nature itself", Jefferson wrote, placing the trade within the "unnatural" defects of feudal-mercantile society, "violating [nature's] most sacred rights of life & 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."[68]

What Jefferson declined to do was to discuss the ways in which slavery was damaging to domestic colonial society, and to empathise with the plight of the slaves themselves once they had arrived in America. His focus was clearly on how the abduction and transportation of slaves fit within his larger natural rights philosophy, especially considering how in the *Summary View* he had articulated a natural right of expatriation, presumably including the right to choose not to expatriate. That right was being violated every time a ship left Africa with its human cargo. This focus on the act of transportation conveniently kept the focus on mercantilism and off the actions of the American colonists who provided the markets for these slaves.

Another Look at the Declaration and the Notes on Virginia." *The Journal of Politics* 53, no. 01 (2009), pp. 90-105.

By the time the *Notes on Virginia* was published in 1784, Jefferson was no longer emphasising expatriation, and was now focused on the domestic consequences of slavery, emphasising how slavery was corrupting society.[69] "The whole commerce between master and slave is a perpetual exercise of the most boisterous passions, the most unremitting despotism on the one part, and degrading submissions on the other," he wrote.[70] Slavery also stood to undermine the refining education he wanted to make available in the public schools. "Our children see this, and learn to imitate it; for man is an imitative animal. This quality is the germ of all education in him. From his cradle to his grave he is learning to do what he sees others do."[71]

In addition, slaves could never be part of society. Slavery "destroys the morals of the one part" of society that held slaves, and "the amor patriae" of the slaves themselves, for "if a slave can have a country in this world, it must be any other in preference to that in which he is born to live and labour for another".[72] This was further complicated by slaves' racial distinctiveness from their white masters, and by the fact that they had been brought to America against their will, or were the children of such forced migrants. Peter Onuf argues that Jefferson viewed black slaves as a separate, captive nation that would undermine Virginia's integrity as a territorial nation-state.[73] Their emancipation would result in a binational state that would result in a civil war between the races, unless emancipation were followed by their forced expatriation.

If Jefferson was aware of the hypocrisy of decrying the forced expatriation of Africans from their home continent by British traders, and then proposing the same thing for Afro-Americans from Virginia, he gave no indication of it. Furthermore, he

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[68] "Jefferson's 'rough draft' of the Declaration of Independence", in TJ Papers, Vol. I, pp. 425-426.

[69] This was a significant development for Jefferson, as the *Notes on Virginia*, like the Declaration of Independence, was intended for a European audience. As a private author, Jefferson was far more willing to confront the defects of American society than he had been as a Congressional writer.

[70] Jefferson, *Notes on Virginia*, p. 162.

[71] Ibid., p. 162. To the extent that this statement may be taken as a serious statement of educational philosophy, it indicates that Jefferson accepted the Lockean view that human education is based on experience and that humans do not possess innate ideas.

[72] Ibid., p. 163.

[73] Onuf, "To Declare Them a Free and Independant People", pp. 1-46.

proposed to take no action of his own.[74] Whereas the spirit of the times did not satisfy Jefferson on the issue of religious freedom, it did satisfy him when it came to the freedom of slaves. "I think a change already perceptible, since the origin of the present revolution," he mused in the *Notes*. "The spirit of the master is abating, that of the slave rising from the dust, his condition mollifying, the way I hope preparing, under the auspices of heaven, for a total emancipation".[75]

Climate Theory

Jefferson's firm belief that blacks could not participate in the same society with whites, which effectively meant the continuation of slavery despite his personal support of a plan to expatriate blacks to a reserved colony, required some sort of intellectual rationale. The place Jefferson looked for justification was not in natural law, but in natural philosophy. Entries in his commonplace book show that Jefferson was fascinated by the implications climate had for political order. On climate, no philosopher wrote with greater authority than Montesquieu in *The Spirit of the Laws*, and Jefferson dutifully recorded entries from Montesquieu into his commonplace book. However, far from providing him with a justification, Montesquieu confounded Jefferson at every turn.[76]

Montesquieu, like other climate theorists, held that a temperate-to-cold environment was best for a virtuous and active citizenry. At first look, this could play into the hands of a pro-slavery advocate. After all, Europe was in the temperate zone that Montesquieu touted so favourably, and Africa was in the indolent, hot zone around the equator. But Montesquieu was not a racial theorist. The origins of one's ancestors

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[74] Jefferson claimed to have included emancipation and expatriation as an amendment to the slave bill presented to the Assembly as part of the Revisal of the Laws, but there is no evidence of this. Jefferson, *Notes on Virginia*, pp. 137-138.

[75] Ibid., p. 163.

[76] A small body of work concerns Jefferson's tortuous relationship with Montesquieu, from dutiful student in the 1760s and 1770s, to critic in the 1790s and disseminator of Destutt De Tracy's rebuttal essay in the 1800s. See Joyce Appleby, "What Is Still American in the Political Philosophy of Thomas Jefferson?" *The William and Mary Quarterly* 39, no. 2 (1982), pp. 287-309; David W. Carrithers, "Montesquieu, Jefferson and the Fundamentals of Eighteenth-Century Republican Theory." *French-American Review* 6, no. 2 (1982), pp. 160-188; James F. Jones, Jr., "Montesquieu and Jefferson Revisited: Aspects of a Legacy." *The French Review* 51, no. 4 (1978), pp. 577-585; and Douglas L. Wilson, "Thomas Jefferson's Early Notebooks." *The William and Mary Quarterly* 42, no. 4 (1985), pp. 434-452.

was of less importance than the environment in which an individual grew up. Ancestral origins in a temperate, or hot, zone were therefore meaningless.

Jefferson recognised the tenuousness of placing a justification for slavery, or any other sort of legal distinction, on Virginia's climate. The first problem, he noted, was that Virginia did not follow the normal rules of a longitudinal variation in climate. Instead, he wrote in the *Notes on Virginia*, Virginia's climate varied latitudinally. The climate of the Tidewater was different from that over the Fall Line, the Fall Line different from that of the Piedmont, and the Piedmont different from that of the mountains and vales past the Blue Ridge. Jefferson considered it "remarkable that, proceeding on the same parallel of latitude westwardly, the climate becomes colder in like manner as when you proceed northwardly."[77] Perhaps not coincidentally, this placed Monticello and the Piedmont in Virginia's most favourable, temperate climatic zone. Unfortunately for Jefferson, it provided no support for slavery.

In fact, it provided the opposite. Montesquieu warned that "[i]n order to conquer the laziness that comes from the climate, the laws must seek to take away every means of living without labor."[78] While the yeomen farmers of the Piedmont and the pioneers of the mountains might not need to worry about the heat of their climate, the plantation owners of the Fall Line and Tidewater, where the majority of Virginia's slaves were held, did have to worry about such things. Montesquieu wrote "[t]hat bad legislators are those who have favored the vices of the climate and good ones are those who have opposed them."[79] As a legislator, it was incumbent upon Jefferson to remedy the situation.

Jefferson could be excused for ignoring Montesquieu on this point - that is, if he had not explicitly agreed with him. "With the morals of the people, their industry also is destroyed" by slavery, Jefferson wrote in the *Notes*. "For in a warm climate, no man will labour for himself who can make another labour for him."[80] This boded ill for the future of the republic, but Jefferson had no plans to do anything about it beyond admonition. Besides, he held out the hope of the problem solving itself. "A change in our climate

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[77] Jefferson, *Notes on Virginia*, p. 75.

[78] LCB Entry 788. Montesquieu, *Spirit of the Laws*, p. 237. For all citations from Montesquieu, I am using the English translation from Montesquieu's *The Spirit of the Laws*. Edited by Anne M. Cohler, Basia C. Miller and Harold S. Stone. Cambridge Texts in the History of Political Thought. Cambridge: University Press, 1989.

[79] LCB Entry 788. Montesquieu, *Spirit of the Laws*, p. 236.

however is taking place very sensibly," he maintained. "Both heats and colds are become much more moderate within the memory even of the middle-aged."[81] A moderation in temperature would not end the problem of slavery, which was multi-faceted, but it would at least ameliorate the worst aspects of slavery's effects on the republic's vitality and work ethic.

Racial Capacity for Refinement

Finding nothing in climatic theory but reminders that slavery was unjustifiable, Jefferson turned from climate to race. Here he made his stand, but he made it alone. While the Legal Commonplace Book contains entries on climatic theory, none is to be found on racial theory. The digression on race which Jefferson makes while discussing the Revisal in the *Notes on Virginia* appears to be based more upon his own observations as a slave owner and upon snatches of half-remembered classical history than upon any Enlightenment-era study of race. His "suspicion" that "real distinctions which nature has made", that blacks lacked the same capacity for refinement as whites and were therefore barred from entering civil society, became Jefferson's stated justification for legally established racial separation.[82] In comparison to his discourses on natural rights, his explanation of the natural distinctions between whites and blacks is crude and unsophisticated, but it is not necessarily incompatible with his thesis in the *Autobiography* that the purpose of the Revisal was to eliminate "feudal and unnatural distinctions" within Virginian society.

Jefferson's distinctions between whites and blacks may be divided into two groups: physical and moral. Physically, Jefferson considered blacks to be loathsome. "They secrete less by the kidnies [*sic*], and more by the glands of the skin, which gives them a very strong and disagreeable odour [*sic*]," Jefferson intoned, apparently forgetting that people labouring in the fields all day do tend to sweat more than their non-laboring counterparts.[83] In addition, dark skin was aesthetically unappealing compared to white. And blacks seemed "to require less sleep" than whites, though on the other hand their laziness drove them to sleep whenever "abstracted from their diversions, and

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[80] Jefferson, *Notes on Virginia*, p. 163.
[81] Ibid., p. 80.
[82] Ibid., p. 138.
[83] Ibid., p. 139.

unemployed in labour."[84] The inconsistencies in Jefferson's account did not prevent him from basing racial distinctiveness, and the continuation of slavery, upon them.

These perceived inferiorities made it absolutely crucial that slavery be used to keep whites and blacks from interbreeding with each other - thus Jefferson was able to transform slavery from a means of economic production to a means of demographic control. "The circumstance of superior beauty, is thought worthy attention in the propagation of our horses, dogs, and other domestic animals," Jefferson wrote, so "why not in that of man?" He specifically conjured the spectre of bestiality, accusing black men of coveting white women "as is the preference of the Oran-ootan for the black women over those of his own species." Black slaves had so little self-control that they engaged in "the commerce between the sexes almost without restraint."[85]

Lack of physical refinement was less important to blacks' inability to participate in civil society than what Jefferson saw as their lack of moral refinement.[86] Here, Jefferson was determined to find fault in the most trivial of things so as to buttress his argument that they could not participate in white society, yet he attempted to seem dispassionate and fair-minded to outside observers. "In memory they are equal to the whites; in reason much inferior, as I think one could scarcely be found capable of tracing and comprehending the investigations of Euclid," Jefferson commented of slaves who had not had, and would never have, an opportunity for the kind of classical education that Jefferson was determined should be universal for whites. He avoided the issue of education by blaming household slaves for not having absorbed the culture of their masters via simple proximity, where they "might have availed themselves of the conversation of their masters." In contrast, Jefferson chose the example of Roman house slaves who "were often their rarest artists" and who "excelled too in science, insomuch as to be usually employed as tutors to their master's children."[87]

Likewise, Jefferson accused blacks of having deficient imagination, which he described as "dull, tasteless, and anomalous." In describing their literary abilities, he

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[84] Ibid., p. 139.

[85] Ibid., pp. 138, 141.

[86] Throughout his study of Jefferson's moral thought, Garry Wills argues that Jefferson agreed that blacks had the same moral sense as whites. While this may be the case, it does not fully account for the breadth of Jefferson's polemic against African moral and mental capacity. See Gary Wills, *Inventing America: Jefferson's Declaration of Independence.* New York: Doubleday Books, 1978.

[87] Jefferson, *Notes on Virginia*, p. 142.

commented that "[m]isery is often the parent of the most affecting touches in poetry. - Among the blacks is misery enough, God knows, but no poetry." Jefferson then provided an example of this supposedly non-existent poetry by declaring the works of Phyllis Wheatley, a free black poet, as "below the dignity of criticism." In unfavourable contrast, Jefferson held up the example of American Indians, who "astonish you with strokes of the most sublime oratory …. But never yet could I find that a black had uttered a thought above the level of plain narration; never see even an elementary trait of painting or sculpture."[88]

Together and taken at face value, these attributes formed a strong basis for the separation of the races. While Jefferson repeatedly idealised the prospect of colonising Virginia's black community in a foreign territory, his unwillingness to take any action towards that end meant the *de facto* retention of slavery. The slave bill that he proposed to the Assembly as part of the Revisal of the Laws re-codified slavery as part of Virginia's statute law, maintaining the strict separation between the races that he thought was necessary to preserve the purity and refinement of the white republic. It was a jarring aberration from his overall programme, supportable only by expediency and not by the enlightened standards of his views on allegiance and education.

V - A Republican Distinction of Ranks

From an understanding of Jefferson's views on race and on allegiance, the outline of a working framework towards law can be established. It is helpful to reflect on the statement in his *Autobiography* that the purpose of the Revisal of the Laws was to eliminate "feudal and unnatural distinctions" within Virginian society. Feudal and unnatural were not two complementary ideas, but rather two ways of expressing the same idea. In Jefferson's mind, there were two kinds of distinctions: those occurring within nature, and those occurring within society, which were, strictly speaking, unnatural. His goal as a legislator was to eliminate the social distinctions created by feudal law, and instead to bring social distinctions into harmony with natural law,

[88] Ibid., p. 140. Since they were outside the republic, the American Indians do not figure in this chapter. Jefferson did believe the Indians capable of the kind of refinement that was necessary for civic participation, but lamented that they would be unable to have the opportunity to reach that fulfilment. For a fuller account, see Anthony F.C. Wallace, *Jefferson and the Indians: The Tragic Fate of the First Americans.* Cambridge, MA: Belknap Press, 1999.

thereby rendering the line between natural and social distinctions blurred and meaningless.

The end result of such legal reform would be to change the nature of political society itself. Contractarians such as Thomas Hobbes, John Locke, and Jean Jacques Rousseau, viewed civil and political society as a separate state from the state of nature. Of them, Rousseau was the only one who viewed the change as a negative one in which humanity lost something valuable in the transition. Writers of the socio-political school of the Scottish and French Enlightenments, such as Lord Kames, William Robertson, and Helvetius (all of whom were extracted in the Legal Commonplace Book) took a different view, that the line between nature and civil society was not distinct, but rather that human society advanced through stages that proceeded naturally from one another - but that this natural progress could be interrupted and corrupted. Nowhere was this more explicitly stated than in Adam Smith's *The Wealth of Nations*, published at the same time as Jefferson was formulating his own views on society, in which Smith explicitly singled out feudalism as having perverted the natural progress of Western civilisation. Jefferson would later state that Smith's book was the finest work of political economy yet written.[89]

The evidence from within Jefferson's commonplace book, and his favourable comment regarding Smith's interpretation, indicate that he saw his role as a legislator as bringing Virginia's law into conformity with nature by a two-fold process of affirming distinctions found in nature while also eliminating distinctions formed solely by the feudal law. Where distinctions were naturally occurring, such as those between genders, races, or age groups, Jefferson retained them. Where they were contrary to natural law, and imposed by positive law, he either reformed them, as with feudal allegiance, or found an alternative natural justification for them that allowed them to be retained, as in the case of slavery. This resulted in a society that consisted of three classes established by law, with gradations within each to account for different types of distinctions.

Three Classes

The three classes Jefferson envisioned were those of slaves, citizens, and aliens, and were to be established by Bills Nos. 51, 55, and 56 of the Revisal, respectively. Each class

was constructed in different ways. While slavery had to be constructed entirely from statute, citizens and aliens were defined by a mixture of common law and statute law.

Bill No. 55, which has already been reported on in some depth in the discussion of the natural right of expatriation, was not the only bill defining the class of citizens of the commonwealth.[90] While it did establish birthright citizenship, the process of naturalisation and the process of expatriation, it did not go into detail on the citizen class's constituent groups. One of the major groups to be accounted for was that of white servants. Originally, the population of white immigrants in some condition of servitude, be it at will or under some form of indenture, had been quite large and had been the main means of white immigration into Virginia during the seventeenth century. By the 1770s, this group had been largely replaced by black slaves, but Jefferson considered it a significant enough portion of the population to merit its own statute. It is important to remember that, because citizenship was acquired by birth or via oath after a period of residence, and entailed no other qualification, a servant could be a citizen even if he or she owned no property and was legally dependent upon a master.

Jefferson's servitude bill (No. 52 of the Revisal) contained numerous protections for white servants and mandated that all servants be considered freemen and women upon their twenty-first birthdays.[91] This linked an unnatural legal status, that of servitude, with a naturally occurring one: age. In effect, Jefferson annexed servitude to custody law as it pertained to minors. Bill No. 52 contained many legal protections for servants, including the right to due process before being punished by a master, the guarantee of a living allowance, and the prohibition of contracts between master and servant during the period of servitude. Its provisions were similar to those of Revisal Bill No. 60, which further consolidated the law of servitude and minority by regulating the relationships between "Guardians, Infants, Masters, and Apprentices".[92]

Another important distinction within the class of citizens was that between men and women. Jefferson chose to retain the common law category of the *femme covert*, in

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[89] "To Thomas Mann Randolph, Jr.", 30 May 1790, in TJ Papers, Vol. XVI, pp. 448-449.

[90] Bill No. 55, "A Bill Declaring Who Shall Be Deemed Citizens of This Commonwealth", in TJ Papers, Vol. II, pp. 476-469.

[91] Bill No. 52, "A Bill concerning Servants", in TJ Papers Vol. II, pp. 473-475.

[92] Bill No. 60, "A Bill concerning Guardian, Infants, Masters, and Apprentices", in TJ Papers Vol. II, pp. 485-488.

which married women became submerged into the legal person of their husbands.[93] The citizenship bill made clear that, while women could become citizens in the same way as men, their status as citizens disappeared once they married and only re-emerged in widowhood. This system of coverture meant that a woman who was considered a citizen and person under the law on the day before her marriage ceased to be both the day after it - the only exception applied to dowries, which could be maintained separately from the husband's estate. This further illustrates the divide Jefferson saw between property rights, which he sought to equalise, and civil rights, which he sought to maintain divided based on what he saw as nature's separations.

In contrast to the great upheaval in citizenship law, the law on slavery remained largely as it had been before the revolution: statutory and based upon racial distinction. Jefferson claimed that he had drafted, in secret, an amendment to Bill No. 51, "A Bill concerning Slaves", which would have instituted gradual emancipation.[94] He described this amendment in the *Notes on Virginia* as having been intended to liberate the slaves, move them out of the state, and resettle them on lands outside of the United States where they could form a black commonwealth under the military protection of their white neighbours; however no record exists of this amendment, and it is unclear whether it was ever actually considered by the Committee of Revisors.[95] It is also worth

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[93] On women's rights in Virginia, see John G. Kolp and Terri L. Snyder, "Women and the Political Culture of Eighteenth-Century Virginia: Gender, Property Law and Voting Rights." In *The Many Legalities of Early America.* Edited by Christopher L Tomlins and Bruce H Mann. Chapel Hill: University of North Carolina Press, 2001; Patricia A. Padgett, "Legal Status of Women in Colonial Virginia, 1700-1785." Masters Thesis, College of William and Mary, 1967; Marylynn Salmon, *Women and the Law of Property in Early America.* Chapel Hill: University of North Carolina Press, 1986; S. Staves, *Married Women's Separate Property in England, 1660-1833.* Cambridge, MA: Harvard University Press, 1990; Linda L. Sturtz, ""As Though I My Self Was Pr[e]sent": Virginia Women with Power of Attorney." In *The Many Legalities of Early America.* Edited by Christopher L Tomlins and Bruce H Mann. Chapel Hill: University of North Carolina Press, 2001; and Sturtz, *Within Her Power: Propertied Women in Colonial Virginia.* New York & London: Routledge, 2002.

[94] Bill No. 51, "A Bill concerning Slaves", in TJ Papers, Vol. II, pp. 470-473.

[95] TJ *Notes*, pp. 137-138. Paul Finkelman has been very critical of Jefferson's claim, and gives it no credence, arguing that Jefferson took decisive action to entrench slavery on his own estates. See Finkelman, *Slavery and the Founders : Race and Liberty in the Age of Jefferson,* and "Jefferson and Slavery", in *Jeffersonian Legacies,* pp. 181-221. Dumas Malone avoids the issue, while Merrill Peterson thinks that Jefferson did take action, securing passage of a bill that prohibited importation of slaves from overseas, but did

noting that the right of expatriation presumably includes the right to stay where one already is, a right Jefferson noted had been violated by English slave traders in his original draft of the Declaration of Independence, and which he would have blithely violated again by declaring emancipated slaves outside of the protection of the laws unless they emigrated within one year of their emancipation.[96]

Jefferson did nod towards that passage of the Declaration when he included a provision in the slave bill emancipating any outside slave brought into Virginia for more than one year. But this was counter-balanced by such provisions as those of Bill No. 53, which gave the authorities permission to prevent a slave from exercising his natural right of expatriation by "apprehending and securing runaways".[97] In addition, unlike servants, slaves were forever doomed to their fate. The closely defined racial definition of hereditary slavery laid out in Bill No. 51 was further elaborated in Bill No. 54, "A Bill Declaring What Persons Shall be Deemed Mulattoes", which defined a person of creole blood as mulatto, and hence outside the protection of the laws, if one or more grandparents had been black.[98]

Finally, the status of aliens was changed by replacing the common law's restrictions on alien rights with much more liberal provisions that protected individual persons and property. The "Bill concerning Aliens" reaffirmed safe passage of foreign nationals under the law of nations, and provided a forty-day grace period for foreign nationals to exit Virginia in the event of war with their home country. These provisions were augmented by one of Jefferson's property laws, Bill No. 23 "A Bill Securing the Rights Derived from Grants to Aliens", which over-rode the common law prohibition on aliens owning land, and allowed them to hold property "the same as if they, to whom the grants or conveyances were made, had been citizens of the commonwealth, or had been such as were formerly called natural born subjects."[99] With that, Jefferson closed the book on the ties between land ownership, natural allegiance, and subjecthood.

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not take public credit for it. Merrill Peterson, *Thomas Jefferson & the New Nation: A Biography.* Oxford: University Press, 1970, pp. 152-153.

[96] Bill No. 51, "A Bill concerning Slaves", in TJ Papers, Vol. II, pp. 470-471.

[97] Bill No. 53, "A Bill for Apprehending and Securing Runaways", in TJ Papers, Vol. II, pp. 475-476.

[98] Bill No. 54, "A Bill Declaring What Persons Shall Be Deemed Mulattoes", p. 476.

[99] Bill No. 23, "A Bill Securing the Rights Derived from Grants to Aliens", in TJ Papers, Vol. II, pp. 409-410.

Homogeneity and Amor Patriae

The dichotomy of natural and unnatural distinction can partly, but not entirely, explain Jefferson's three-part division of society into citizens, slaves, and aliens. The other element was his concern with the issue, raised in the *Notes on Virginia*, of homogeneity in society. As Jefferson saw it, most if not all whites could be assimilated into civil society. Those who did not did so by choice, not obligation, and thus incurred some civil liability. Blacks, on the other hand, could not, thereby requiring that they be set aside as slaves or expelled from the state.

Historian Peter Onuf has struck upon the issue of homogeneity as the central theme of Jefferson's discussion of race in the *Notes on Virginia*. As Onuf explains it, Jefferson considered blacks to be a separate nation within Virginia, apart from the white nation that comprised Virginia's polity. It was this innate separateness that made it impossible for blacks, slave or free, to feel the *amor patriae* necessary to remain peaceably within the state.[100] Thus, Jefferson suggested a plan of emancipation and expatriation whereby slaves would be colonised outside of Virginia's borders. While Onuf accepts Jefferson's sincerity as a private citizen expressing his personal views, it would be a mistake to extend that judgment to his sincerity as a public figure writing legislation. Nowhere is there any evidence that Jefferson actually took legislative action to remedy the *amor patriae* problem via emancipation and colonisation.

Where he did take identifiable legislative action was in forestalling the *amor patriae* problem via continuing repression. Onuf correctly identifies Jefferson as believing whites and blacks to be in a state of war; this is borne out by Jefferson's comment in the *Notes* that slaves, whose labour has been stolen from them, have the right to abjure the property rights of their masters.[101] In the Lockean sense, this does constitute a state of war. But Jefferson, who was willing to take on the vested interests of the state's aristocracy to reform Virginia's inheritance and penal codes, and who was willing to take on the might of the Established Church for the cause of religious freedom, could not take it upon himself even to broach a solution to what was in fact a far greater problem: the specter of a race-genocide that could wipe out the entire society he was trying to

[100] See Peter S. Onuf, "To Declare Them a Free and Independant People", pp. 1-46. See also Jefferson's views on amor patriae in the *Notes on Virginia*, p. 163.

[101] Ibid., p. 142. See Onuf, "To Declare Them a Free and Independant People", p. 5.

reform. Instead, Jefferson simply kept the existing slave laws on the books, and confined his criticism to the pages of the *Notes on Virginia*.

Conclusion

At the beginning of this chapter, I introduced the concept of "natural citizenship", an ordering of political society based on the laws of nature. While Jefferson did not use the term, it is an accurate description of the synthesis of his views on natural allegiance and natural aristocracy. While natural allegiance under the common law in feudal England had been defined as the relationship between the patriarchal king and his subject, Jefferson redefined it as a fraternal relationship amongst equals under the social contract, voidable at any time under the natural right of expatriation. Natural aristocracy, the re-ordering of social rank based on individual refinement, would replace the feudal aristocracy based on land tenure and religious Establishment that Jefferson targeted with his other reforms.

Education would be the mechanism by which Jefferson would effect the transition to natural aristocracy. A system of universal education would give every child in the commonwealth an opportunity to learn the basics of Western civilisation via three years of classical education, and the most promising males would be promoted to grammar schools and the College of William and Mary in order to take their rightful places as the leaders of society. While open to both genders at the primary level, this education system was closed to blacks, whom Jefferson deemed morally unworthy, and intellectually incapable, of receiving such education. Jefferson's racial tautology - that blacks were unrefined and therefore should be denied the opportunity for refinement - served as an excuse for inaction on slavery. While Jefferson recognised slavery as an important element of Virginia's feudal society, it was the only part of that society he did not attempt to seriously reform through legislation - the only feudal blight for which he was willing to cede responsibility to the "spirit of the times".

Jefferson's success at instituting natural citizenship was mixed. With help from George Mason and James Madison, legislation closely following his citizenship bill was enacted, but the Bill for the More General Diffusion of Knowledge was rejected by the Assembly.[102] The other class legislation, including the slave bill, were passed in the

[102] See editorial note following "A Bill Declaring Who Shall Be Deemed Citizens of This Commonwealth", in TJ Papers, Vol. II, p. 478.

years following the submission of the Revisal of the Laws. This meant that while the classes of Virginian society were well-defined, there was no more social mobility than there had been before, with the exception of white immigration. The end result was that, even as Jefferson was only partly successful in dismantling the apparatus of feudalism, he was even less successful at raising up a new social order that could take feudalism's place. Like the watered down inheritance laws, Jefferson's legislation became an adjunct to the existing order rather than a challenge to it.

Conclusion

In the introduction to this thesis, I laid out three broad historiographical points.[1] One was that the liberal-republican synthesis constructed by historians from Bailyn to Pangle is necessary but not sufficient for understanding the American Revolution. The second was that, contrary to Hartz, feudalism did exist in America in the form of the Virginian feudal fragment. The third was that Jefferson's liberalism was a response to American feudalism, not a product of its absence, but that his liberal-republican approach to abolishing feudalism was inadequate to the challenge confronting him. In this conclusion, I will synthesise and summarise my own findings to fully explain the project of the "Jeffersonian moment" between 1774 and 1786, and then offer some thoughts as to the significance of these findings in the fields of the history of the American Revolution and the history of Anglo-American political thought.

Summary

Jefferson identified the feudal system as consisting of three parts: corrupted common law, secular and ecclesiastical aristocracy, and governance by prerogative. In chapter one, I introduced Jefferson's historical thought and identified a feudal-mercantile synthesis in his historical thinking, by which the colonisation of America was actually an act in a much longer feudal drama that commenced at the Norman Conquest. Jefferson's historical interpretation, particularly in the *Summary View*, introduced all three elements of feudalism as pertinent issues during the colonial crisis, tracing the root of the problems facing the colonists to King William I's claim of a prerogative to grant lands, the use of the prerogative as the authority justifying feudal land tenures that corrupted the common law, and the use of those tenures to raise a hereditary, landed aristocracy in England as well as to parcel out American territory to proprietorial lords. The same feudal law provided the constitutional framework for the British Empire, encompassing both Ireland and the American colonies under the same status of conquered realms.

In chapter two, I began tracing Jefferson's reforms as he sought to dismantle this three-pillared feudalism piece by piece. In his draft constitution, he moved to establish the new Virginian government on the basis of popular sovereignty and separation of

powers between distinct legislative, executive, and judicial branches of government. The prerogative powers previously exercised by the Crown were either reassigned to the legislature or discarded outright, and the judiciary was carefully hemmed in to prevent judges from exercising their own prerogative via the mixing of common law and chancery jurisdictions. Legitimate executive power, defined by Jefferson as the faithful execution of legislatively enacted statute, was vested in an "Administrator" that operated with the advice, but not necessarily the consent, of a Privy Council. In contrast, the constitution that was adopted by the Virginia Convention in 1776 ignored Jefferson's ideas and established a government that perpetuated the colonial, feudal system.

Not to be daunted, but with the constitutional route now unavailable to him, Jefferson set about attempting to enact his reforms via legislation upon resuming his seat in the Virginia legislature. In chapter three, Jefferson took on Virginia's aristocracy directly by introducing reform to the land law. These reforms were intended to undermine or even abolish feudal tenure while securing Virginia's western territories for the use of freeholders instead of the land companies formed by Virginia's wealthiest aristocrats. Recognising their own stake in feudal tenure, Jefferson's aristocratic opponents, led by Edmund Pendleton, sought simply to move the feudal apparatus into the custodianship of the House of Delegates. While Jefferson made some headway with his efforts against Virginia's landed aristocracy, they were not enough to level the field and undermine their power.

Even as Jefferson was taking on the state's secular aristocracy, he also made a major, and successful, attempt to take on its Established Church. Chapter four traced the development of Jefferson's Statute for Establishing Religious Freedom, and the basis for his argument that the Established Church was thwarting the natural right to liberty of conscience. We saw how Jefferson used a similar historical methodology to that of his land reforms in order to determine the nature of religious Establishment, and the remarkably clear way in which he thought feudalism was antithetical to both liberal and republican principles of the inviolability of the human mind. In contrast to the half-way success of using the land reforms to make Virginia a more conducive environment for yeomen farmers at the expense of the gentry aristocracy, the Statute for Establishing Religious Freedom was entirely successful.

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[1] See above, p. ___

In somewhat of a denouement, chapter five explored Jefferson's reforms of citizenship, education, and slavery, which I have grouped together under the label "natural citizenship". The citizenship bills which Jefferson proposed repeatedly through the 1770s were premised upon the natural right of expatriation, which would have replaced the common law artifice of "natural allegiance" to the Crown with natural allegiance to the polity of one's choosing. Furthermore, Jefferson sought to structure society by creating a universal public education system that would allow Virginia's most talented youth to rise to prominence, forming a new, "natural aristocracy" that would replace the old, feudal aristocracy. Slavery, however, would remain unchanged save for restriction on foreign imports, and Jefferson thought that the natural inferiority of Afro-Americans made them unable to compete in a natural aristocracy, and thus unfit to be citizens alongside their Anglo-American cohabitants.

Analysis

To what extent were Jefferson's reforms successful, taken here as a whole and assessed against the three-part feudal system? Did his reforms break Virginia's feudal aristocracy? Did he adequately reform the prerogative and the common law to remove their feudal components? The record on this is mixed. He was notably unsuccessful at influencing the Convention with his draft constitution. While they banned the royal prerogative, they essentially reassigned it to the legislature, an entity Jefferson considered hopelessly compromised by its close ties to local oligarchies at the county courts, and by the lack of functional separation of powers between the branches. This was a double failure, for it also meant that when Jefferson attempted his reforms in the legislature, with the exception of Article XVI of the Declaration of Rights he had to do it with almost no support to draw on within the written constitution itself.

The legislation Jefferson proposed was often weaker than what he had proposed in the draft constitution, most notably in the case of the land laws. While the six-point land reforms of the draft constitution would have struck feudalism at its tenurial core, Jefferson did not even propose legislation eliminating feudal tenures and instead contented himself with nibbling away at inheritance regulation. The bill abolishing primogeniture and establishing gavelkind did not even extend beyond intestate descents, meaning that aristocrats aided by expensive attorneys could easily circumvent the law and leave their estates intact, while yeomen who did not retain counsel would

see their small-holdings fragment among their children. Nor did Jefferson's proposals for western lands turn out much better. While he secured increased representation for western settlers in the House of Delegates, the land companies effectively commandeered his legislation and used it to enhance their own wealth and power.

Another major oversight in the reforms was the divorcing of tenures from any system of military support. The imposition of feudal tenures in Norman England had been in part to provide economic support for the costs of William I's army, not for its own sake. Jefferson seems to have overlooked the importance of political economy, failing to see that feudal law existed to fulfil military and economic, as well as political, needs. While Harrington, as Pocock points out, appreciated the relationship between land and arms, Jefferson saw a relationship solely between land and political authority.[2] Jefferson was conspicuously uninterested in military policy. His draft constitution banned a peacetime standing army and guaranteed the right to bear arms on private land, but contained nothing regarding a freeman's militia or other alternative military force, as Harrington's *Oceana* did. Nor did his legislation contain any military policy of note. This is all the more curious given his anxiety, expressed in a post-war letter to George Washington, that Continental Army officers would raise themselves into a hereditary aristocracy via the Society of the Cincinnati.[3]

Despite his failure to reform landed aristocracy, he was much more successful in his reforming of ecclesiastical aristocracy and the ecclesiastical components of the common law. Although passed a decade after Jefferson originally broached religious reform to a sceptical House of Delegates, the Statute broke the ecclesiastical authority of Virginia's aristocracy, and Dissenters flourished in the decades following its passage. This decisively severed Virginia's ties to the Church of England and removed state support for clergy. It also undermined the landed aristocrats who sat on the parish vestries, who no longer were able to use the church Establishment as a tool of their social and political control by enforcing ecclesiastical laws penalising nonconformity. The Statute for Religious Freedom should be seen as a reform of equal importance with the land laws, and a far more successful one at that, although even it was somewhat compromised by

[2] J.G.A. Pocock, "'Oceana': its argument and character", in *The Political Works of James Harrington*. Cambridge: University Press, 1977, p. 43.

[3] "To George Washington", 14 November 1786, in TJ Papers, Vol. X, pp. 531-532.

the fact that Jefferson did not seem to have a clear plan for dealing with public morality after the Church's disestablishment.

Back on the negative side of the ledger were Jefferson's reforms aimed at natural citizenship. He eventually got an immigration and allegiance bill enacted into law, but James Madison was unable to salvage the education bill when the Assembly passed the Statute for Religious Freedom in 1786. Natural aristocracy was thus a dead end. Furthermore, Jefferson never even attempted a meaningful reform of Virginia's slave laws. In not doing so, Jefferson failed to adequately account for the importance of slavery in promoting the emergence of the secular aristocracy. In his relentless focus on tenures and the legal side of feudal society, he seems to have overlooked the importance of the slave labour that worked the land held under those tenures. Slaves bore more than a passing functional resemblance to medieval *villeins*, even if their status under the law was different.[4] Likewise, the plantations bore many similar features to the manors that characterised feudal England. By focusing on law, it seems that Jefferson once again overlooked political economy, perhaps seeing it as a result, rather than a cause, of the feudal system.

Was It Feudal?

While Jefferson had a long-lasting concern with aristocracy, that description does not adequately convey the extent of his interest in things feudal in the 1770s. It was the feudal system which English settlers had brought to Virginia, not simply the social group of aristocrats that ran the colony, that Jefferson had in mind when he wrote the *Summary View of the Rights of British America* and later, as he explained to Edmund Pendleton, when he wrote his draft constitution for Virginia.[5] Nowhere in Jefferson's correspondence of the 1770s is the issue of aristocracy raised explicitly. Nor can issues as diverse as the royal prerogative or the infringement of liberty of conscience under common law be classified under a meaningful definition of aristocracy.

As I showed in the introduction, the definition of aristocracy has already been stretched by historians to cover a variety of people and things which Jefferson objected to, and not always in a consistent fashion on part of the historian. Meanwhile, the word

[4] This similarity is explored by Oscar Handlin and Mary F. Handlin, "Origins of the Southern Labor System." *The William and Mary Quarterly: A Magazine of Early American History* 7, no. 2 (1950): 199-222.

"feudal", while frequently used, has not attracted rigorous attention, having been relegated to quick asides and used in rhetorical fashion.[6] Yet Jefferson's own words in the 1770s indicate that feudalism held some importance to him, even if the total extent is debatable. Historians have never rejected the concept of feudalism in Jefferson's thought - Steele, Sloan, Brewer, Grossberg, and even Onuf mention it, and Hartz brings it up if simply to mock it - but nor have they actively pursued it and attempted to flesh out its meaning and relevance to his constitutional and legislative activities.[7]

It is perfectly fair to point out how often Jefferson used the word "aristocrat" upon his return to the United States from France, including in his description of his revolutionary activities in his *Autobiography*; but it is equally fair to point out how absent the word is from the extant revolutionary writings themselves. There appears to be a break in Jefferson's language, in or about the year 1789, when he stopped using the word "feudal" and started using the word "aristocrat".[8] I confess that I do not have a satisfactory explanation for the rhetorical shift, this thesis being a study of law and not rhetoric, but I do have a pair of hypotheses. The first is that in the years 1774-1779, when Jefferson wrote most of the documents examined in this thesis, he was still proximate to his legal studies and in close correspondence with his law mentor, George Wythe. I believe that Jefferson viewed the world through a lawyer's eyes, and the feudal law, which was part of his legal training, was the available paradigm through which to understand the events around him.[9] As he aged, his training as a lawyer ceased to be his only way of viewing the world, and his views adapted.

Second, in the 1770s Jefferson was still steeped in English Whig political thought, which looked backwards to Saxon times and took the concept of the ancient constitution very seriously. By the time of his entry into federal politics in the 1790s, the ancient

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[5] See "To Edmund Pendleton", 13 August 1776, in TJ Papers, Vol. I, pp. 491-494.

[6] See Introduction, pp. 13-18.

[7] See Introduction, pp. 14-17, notes 29, 34, 35, and 39.

[8] The earliest I am aware of Jefferson using the word "aristocrat" is in a 1785 letter to John Banister, Jr., on the subject of European education, but as late as 1789 he was still talking about feudal institutions. See "To John Banister, Jr.", 15 October 1785, in TJ Papers, Vol. VIII, pp. 635-638, and "To James Madison", 6 Sept. 1789, in TJ Papers, Vol. XV, pp. 392-398. This transition takes place well after Jefferson wrote his legislation, and indicates an evolution of his thinking while in France.

[9] This is also the opinion of David Thomas Konig in "Legal Fictions and the Rule(s) of Law: The Jeffersonian Critique of Common-Law Adjudication." In *The Many Legalities of*

constitution was no longer a relevant concept in the new American politics and the feudal paradigm was equally irrelevant. The 1790s called for forward-looking thinking against the artificial aristocracies of the future, rather than the feudal aristocracy of the past. It makes sense that Jefferson would begin to use the word "aristocracy", which is independent of feudal law, in this new setting. Indeed, his use of the Roman law word "usufruct", rather than the common law "allodial", to describe his generational theory may have been a first step down this road.[10]

If there is one thing which I hope this thesis has achieved, it is to have rehabilitated the use of the adjective "feudal" as a serious description in historical discussions of eighteenth century American political thought, furthering the process begun by Rowland Berthoff and John Murrin.[11] But that does not resolve the question of what this feudal system actually was, and whether it is meaningful in a historiographical sense. It is plain that Virginia did not have a feudal system in the style of medieval England, but as Jefferson pointed out in his correspondence with Edmund Pendleton, the feudal system was a comprehensive social ordering that had been reformed in some respects while enduring in others. A return to Hartz's fragment thesis, and Berthoff's and Murrin's feudal revival thesis, helps to shed light on the matter.

In thinking about whether or not Virginia might constitute a feudal fragment of English society, we should think about whether its feudal or liberal institutions were dominant (in the Hartzean sense). There is a difference between reformed feudalism and genuine liberalism. The most pertinent example here is Virginia's system of landholding. Socage tenure was not, as Hartz maintained, a liberal form of freeholding. It was a feudal tenure, just as much an intrinsic part of the feudal system as knight's-service or grand-serjeanty tenures. Hartz may have been correct that it was the most free of the feudal tenures, but that does not change its essentially feudal nature, as both

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Early America. Edited by Christopher L. Tomlins and Bruce H. Mann. Chapel Hill: University of North Carolina Press, pp. 97-117, at pp. 114-116.

[10] Peter Onuf may yet be right in his analysis of the Jefferson of the 1790s and 1800s, but I continue to believe that his interpretation of Jefferson and aristocracy is misapplied to the 1770s, as he tends to treat aristocracy as a social category rather than a legal category.

[11] Rowland Berthoff and John M. Murrin. "Feudalism, Communalism, and the Yeoman Freeholder: The American Revolution Considered As a Social Accident." In *Essays on the American Revolution.* Edited by Stephen G. Kurtz and James H. Hutson. Chapel Hill: University of North Carolina Press, 1973, pp. 256-288.

Jefferson and Pendleton acknowledged. For Jefferson, a genuinely liberal freehold could not be held under any feudal tenure. A freehold must be purely allodial.

As Hartz also said, another part of what defined a fragment was the mindset of its settlers at the time of their departure from Europe, which influenced how they adapted their institutions to the New World. Again, I would contest Hartz in this regard. Hartz defined his liberalism as approximately the philosophy of John Locke and the various interpretations thereof, including unconscious manifestations of said philosophy. But the Virginia colony was founded decades before Locke wrote, at a time when liberalism was but a gleam in the eye of the most radical Reform Protestants. Virginia, whether under Company or Crown rule, was not about fulfilling a dream of enlightened individualism. It was about making money while maintaining social order, first through the monopoly of the Virginia Company and later through the planter aristocracy, who added the trade in slaves to the Company's trade in tobacco.

While it is difficult to find a liberal mindset or institutions in Virginia, it is much easier to see indications of a feudal mindset and institutions that would qualify it as a feudal fragment. The Virginian experience was one of hierarchy and inequality, both in the domestic social order and in the basis of its major institutions, through the royal prerogative and the ultimate allegiance to the imperial Crown. The organisation of Virginia's counties and parishes, the lord-tenant relationship that characterised its landholding, its widespread slavery, its solidifying aristocracy of gentry and resident peer, and its governance as a compromise between prerogative and legislative power, are all reminiscent of England's feudal past, rather than its liberal future. Therefore, within Hartz's fragment paradigm, Virginia is better understood not as a liberal society with some feudal elements, but as a feudal society with growing tendencies towards liberalism, which Jefferson became the spokesman for.

What of the idea that Virginia was taking part in a pan-colonial feudal revival? Berthoff's and Murrin's interpretation is helpful, although Jefferson's differed in important ways. The revival thesis emphasises the economic aspect of the feudal system. Berthoff and Murrin believe that the feudal revival was about revitalising feudal land tenures in order for proprietors to extract rents, and in the process acquiring incomes that rivalled those of established English nobility. The result of this, however, was that the proprietors "divorced the pursuit of profit from any larger sense of community welfare", and the feudal revival was "more a matter of economic profit for

the proprietor than of mutual obligations between lord and man or landlord and community that might have harmonised the relationship".[12]

Jefferson argued something different. From his perspective, the feudal revival encompassed the pursuit of monetary profit through rent-seeking while also including the resuscitation of the kind of hierarchical and deferential social arrangements characteristic of England, with political consequences. The very thing he was fighting against was the gentry's capacity for equating their pursuit of profit (and power) with the common welfare, and of re-establishing the lord-tenant relationship characteristic of feudal society. Furthermore, while Berthoff and Murrin emphasise the feudal revival as a renewal of defunct feudal forms abandoned in the early decades of colonisation, Jefferson thought of the revival as the strengthening of an existing system of law and social arrangements that had been subjected to continuous use and adaptation since Norman times.

Both the fragment thesis and the revival thesis can help to shed light on Jefferson's feudal system, but neither is sufficient for explaining it. As Berthoff and Murrin note, Hartz's liberal fragment interpretation suffered from an anachronistic over-emphasis on nineteenth-century American society, reading Jacksonian egalitarianism back into the colonial period.[13] This does not mean that the fragment thesis itself is incorrect, but Hartz may have misapplied it. Had he taken the colonies individually, he might have classified the southern, slave-holding colonies differently than the northern, free labour colonies. The same could be said had he emphasised the feudal and liberal aspects of Virginian society differently.

Historiographical Consequences

If Hartz's main assumption is inaccurate, then both his and subsequent scholarship need to be re-evaluated. If Wood, and especially Pocock, are still correct that republicanism was the defining ideology of the American Revolution, then does the form that republicanism took have a different meaning in a feudal context? Pocock's work becomes more meaningful if Americans reforming their land laws were conscious Harringtonians rather than unconscious Lockeans, as Hartz deemed them. On the other hand, what of the liberal interpretation? If Appleby and others are correct, and

[12] Ibid., at pp. 267, 271.
[13] Ibid., p. 287.

particularly if Hartz was correct on Lockeanism while still wrong on feudalism, what does this mean? It means that American liberalism, with Jefferson at its forefront, is not the product of an absence of feudalism but is instead, as in Europe, a response to it.

I would also argue that recognising feudalism as an important and motivating factor for American revolutionaries may help historians break out of the liberal-republican dichotomy of the past fifty years. Joyce Appleby once challenged the republican revisionists for not adequately explaining why the colonists would choose republicanism as their ideology, but the same question could be asked of liberalism.[14] The answer I would posit is that republicanism and liberalism in eighteenth-century America were inter-related responses to a common feudal problem. This is consistent with the development of republicanism and liberalism in English thought, with Harrington and Locke, the fathers of the two respective traditions, self-consciously framing their ideas in opposition to an element of feudal society, be it landholding or patriarchy, that they found undesirable.

If republicanism and liberalism were both responses to feudalism in England, and if these ideologies were adopted in America during its own crisis, then the American revolutionaries, especially Jefferson and those who supported him, stand even closer with the English commonwealthmen than has previously been recognised. This commonwealth ideology, a blend of Harringtonian republicanism and Lockean liberalism, emerged out of the crisis of English feudalism in the seventeenth century, which was only resolved via the settlement to the Glorious Revolution in 1689.[15] Americans' adoption of English commonwealth ideology and rhetoric becomes more explicable, and more meaningful, if we recognise that they were participating in their own crisis of feudalism, in which their choice was between living as feudal dependants like the Irish, or attempting their own revolution that would radically redefine the terms of political society in the same fashion that the revolutionaries of 1688-89 attempted to redefine theirs.

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[14] Joyce Appleby, "Liberalism and the American Revolution." *New England Quarterly* 49, no. 1 (1976): 3-26.

[15] See Caroline Robbins, *The Eighteenth-Century Commonwealthman.* Cambridge, MA: Harvard University Press, 1959. For the crisis of English feudalism, see Eric J. Hobsbawm, "The General Crisis of the European Economy in the 17th Century." *Past & Present* , no. 5 (1954): 33-53; Hobsbawm, "The Crisis of the 17th Century--II." *Past & Present* , no. 6 (1954): 44-65; and H.R. Trevor-Roper, "The General Crisis of the 17th Century." *Past & Present* , no. 16 (1959): 31-64.

This in turn raises a further question: was the American Revolution an essentially British event? If the ideas in play were English, and the society in question was an English imitation, then what in the American Revolution was American as opposed to simply extra-British? Should 1776 stand alone, or should it stand with 1649 and 1688?[16] What about Europe in 1789, 1848, and 1917? Was Virginia's revolution in particular simply political or, as John Ragosta and Michael McDonnell have so recently argued, was it a social revolution as well?[17] If it was this more comprehensive sort of revolution (and the findings of this thesis strongly suggest that for Jefferson it was), then the American Revolution has much more in common with the sweeping, levelling anti-feudal revolutions of Europe's long nineteenth century than has been recognised in a historiography that has allowed, at most, its kinship with the prior British revolutions.

Future Research

The findings in this thesis point the way to several promising avenues of future research. The first is to probe deeper into the feudal nature of Virginian society. The second is to seek to expand the line of enquiry outwards to other colonies. The third is to examine feudalism as a rhetorical issue in the discourse of the American Revolution.

As regards Virginia, this thesis has been necessarily limited in my choice of Jefferson's reforms as the topic, rather than Virginian society itself. This was largely because the project began as strictly intellectual history, and only later broadened into the history of society itself as I sought to contextualise Jefferson's ideas. Thus, the topics covered are biased in favour of what Jefferson himself thought to be important. As I previously stated in this conclusion, Jefferson largely overlooked matters of political economy and military policy. Should I prepare this study for wider publication, I would want to do further research into those areas in order to present a more fully-rounded account of Virginian society.

In the *Summary View*, Jefferson made an intriguing statement, essentially alleging that the Stuart kings, using Virginia's charter territory as a source of unallocated Crown

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[16] See *Three British Revolutions: 1641, 1688, 1776.* Edited by J.G.A. Pocock. Princeton: University Press, 1980.

[17] See Michael A. McDonnell, *The Politics of War: Race, Class, and Conflict in Revolutionary Virginia.* Chapel Hill: University of North Carolina Press, 2007; and John A. Ragosta, *Wellspring of Liberty: How Virginia's Religious Dissenters Helped Win the American Revolution & Secured Religious Liberty.* Oxford: University Press, 2010.

lands, had parcelled out the proprietary colonies to some of their key supporters. Implicitly, Jefferson was making this statement as an analogy to William the Conqueror's assignment of baronies to his supporters after the Norman Conquest, as part of the *Summary View*'s comparative history of the British Empire. What this means is that Pennsylvania, New Jersey, Maryland, and the Carolinas may also have been feudal societies, with the proprietors enjoying the legal status of baronial lords. This is likely to be a matter of degree, and it is unlikely that Pennsylvania was as feudal as Virginia, but it is a topic worth exploring both as a matter of law and a matter of sociology.

Finally, aside from whether or not any of the other colonies were actual feudal societies, there is the separate question of whether "feudalism" was a concept with rhetorical importance during the American Revolution. In at least the case of John Adams' *A Dissertation on the Canon and Feudal Law*, feudalism was invoked as an actual issue with which the colonists had to deal, although in Adams' case he was invoking feudalism as a future danger rather than a present reality. It also seems that much of the opposition to the Quebec Act was, in part, a reaction against the perceived authoritarianism of French Canadian feudal society, embodied in its seigniorial political economy, its lack of a constituent assembly, and an established Catholic Church. Indeed, given that the Norman feudalism which Jefferson and others inveighed against was French in origin, the misgivings over Quebec seem naturally linked to a larger question of feudalism in colonial discourse.

Bibliography

Primary Sources

The Adams-Jefferson Letters: The Complete Correspondence Between Thomas Jefferson and Abigail and John Adams. Edited by Lester J. Cappon. 2 vols. Chapel Hill: University of North Carolina Press, 1959.

Carter, Landon. *The Diary of Landon Carter of Sabine Hall, 1752-1778.* Edited by Jack P. Greene. 2 vols. Charlottesville: University of Virginia Press, 1965.

Jefferson, Thomas. *The Autobiography of Thomas Jefferson, 1743-1790 : Together with a Summary of the Chief Events in Jefferson's Life.* Edited by Paul Leicester Ford and Michael Zuckerman. Philadelphia: University of Pennsylvania Press, 2005.

———. *The Commonplace Book of Thomas Jefferson : A Repertory of His Ideas on Government.* Edited by Gilbert Chinard. Baltimore: Johns Hopkins Press, 1926.

———. *Notes on the State of Virginia.* Edited by William Peden. Chapel Hill: University of North Carolina Press, 1982.

———. *Reports of Cases Determined in the General Court of Virginia. From 1730, to 1740; And From 1768, to 1772.* Reprint of 1829 edition. ed. Buffalo, NY: Williams. Hein & Co., Inc., 1981.

The Letters and Papers of Edmund Pendleton, 1734-1803. Edited by David John Mays. 2 vols. Charlottesville: University of Virginia Press, 1967.

The Papers of George Mason 1725-1792. Edited by Robert A. Rutland. 3 vols. Chapel Hill: University of North Carolina Press, 1970.

The Papers of James Madison. Edited by William T. Hutchinson and William M.E. Rachal. 17 vols. Chicago: University Press, 1962-.

The Papers of Thomas Jefferson. Edited by Julian P. Boyd, et al. 36 vols. Princeton: University Press, 1950-.

The Papers of Thomas Jefferson: Retirement Series. Edited by J. Jefferson Looney and Barbara B Oberg et al. 8 vols. Princeton: University Press, 2004-.

The Statutes at Large: Being a Collection of All the Laws of Virginia, From the First Session of the Legislature, in the Year 1619: Published Pursuant to An Act of the General Assembly of Virginia, Passed on the Fifth Day of February One Thousand Eight Hundred and Eight. Edited by W.W. Hening. 13 vols. Richmond: Printed by and for Samuel Pleasants, junior, printer to the commonwealth, 1823.

Secondary Sources

Books

Adams, Willi Paul. *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era.* Translated by Rita Kimber and Robert Kimber. Chapel Hill: University of North Carolina Press, 1980.

Alexander, Gregory S. *Commodity & Propriety: Competing Visions of Property in American Legal Thought, 1776-1970.* University of Chicago Press, 1997.

Andrews, Charles M. *The Colonial Period in American History: The Settlements, Vol. I.* New Haven: Yale University Press, 1964.

Appleby, Joyce. *Capitalism and a New Social Order: The Republican Vision of the 1790s.* New York: University Press, 1984.
———. *Liberalism and Republicanism in the Historical Imagination.* Cambridge, MA: Harvard University Press, 1992.

Bailey, Jeremy D. *Thomas Jefferson and Executive Power.* Cambridge: University Press, 2007.

Bailyn, Bernard. *The Ideological Origins of the American Revolution.* Cambridge, MA: Belknap Press, 1967.

Bassani, Luigi Marco. *Liberty, State, & Union: The Political Theory of Thomas Jefferson.* Macon, GA: Mercer University Press, 2010.

Billings, Warren M. *A Little Parliament: The Virginia General Assembly in the Seventeenth Century.* Richmond: Library of Virginia, 2004.
———. *The Old Dominion in the Seventeenth Century: A Documentary History of Virginia, 1606-1700.* Revised ed. Chapel Hill: University of North Carolina Press, 2007.
———. *Sir William Berkeley and the Forging of Colonial Virginia.* Baton Rouge: Louisiana State University Press, 2010.

Blitzer, Charles. *An Immortal Commonwealth: The Political Thought of James Harrington.* New Haven: Yale University Press, 1960.

Bloch, Marc. *Feudal Society.* 2 vols. Chicago: University Press, 1961.

Bond, Beverley W. *The Quit-Rent System in the American Colonies.* Gloucester, MA: Peter Smith, 1965.

Boorstin, Daniel J. *The Lost World of Thomas Jefferson: With a New Preface.* Chicago: University Press, 1993.

Bradburn, Douglas. *The Citizenship Revolution: Politics and the Creation of the American Union, 1774-1804.* Charlottesville: University of Virginia Press, 2009.

Bradshaw, Brendan. *The Irish Constitutional Revolution of the Sixteenth Century.* Cambridge: University Press, 1979.

Bridenbaugh, Carl. *Mitre and Sceptre: Transatlantic Faiths, Ideas, Personalities, and Politics, 1689-1775.* Oxford: University Press, 1962.

Brown, Robert E, and Katherine Brown. *Virginia, 1705-1786: Democracy or Aristocracy?* East Lansing: Michigan State University Press, 1964.

Buck, J.L. Blair. *The Development of Public Schools in Virginia, 1607-1952.* Richmond: Commonwealth of Virginia, 1952.

Buckley, Thomas E. *Church and State in Revolutionary Virginia, 1776-1787.* Charlottesville : University of Virginia Press, 1977.

Calabresi, Stephen G, and Christopher S. Yoo. *The Unitary Executive: Presidential Power From Washington to Bush.* New Haven & London: Yale University Press, 2008.

Canny, Nicholas P. *The Elizabethan Conquest of Ireland: A Pattern Established, 1565-76.* Hassocks: Harvester Press, 1976.
———. *Kingdom and Colony: Ireland in the Atlantic World, 1560-1800.* Baltimore: Johns Hopkins University Press, 1988.

Chinard, Gilbert. *Thomas Jefferson: The Apostle of Americanism.* Boston: Little, Brown and Co., 1933.

Cogliano, Francis. *Thomas Jefferson: Reputation and Legacy.* Charlottesville: University of Virginia Press, 2006.

Colbourn, H. Trevor. *The Lamp of Experience: Whig History and the Intellectual Origins of the American Revolution.* Liberty Fund Edition. Chapel Hill: University of North Carolina Press, 1965.

Commager, Henry Steele. *Jefferson, Nationalism, and the Enlightenment.* New York: George Braziller, 1975.

Cremin, Lawrence A. *American Education: The Colonial Experience.* New York: Harper & Row Publishers, 1970.

Davis, David Brion. *The Problem of Slavery in the Age of Revolution, 1770-1823.* Ithaca: Cornell University Press, 1975.

Dewey, F.L. *Thomas Jefferson, Lawyer.* Charlottesville: University of Virginia Press, 1986.

Dickerson, Oliver M. *The Navigation Acts and the American Revolution.* Philadelphia: University of Pennsylvania Press, 1951.

Dickinson, H.T. *Liberty and Property: Political Ideology in Eighteenth-Century Britain.* London: Methuen, 1977.

Diggins, John P. *The Lost Soul of American Politics: Virtue, Self-interest, and the Foundations of Liberalism.* Chicago: University Press, 1986.

Doll, Peter M. *Revolution, Religion, and National Identity: Imperial Anglicanism in British North America, 1745-1795.* Madison, WI: Fairleigh Dickinson University Press, 2000.

Dumbauld, Edward. *Thomas Jefferson and the Law.* Norman, OK: University of Oklahoma Press, 1978.

Dunn, John. *The Political Thought of John Locke.* Cambridge: University Press, 1969.

Dworetz, Steven M. *The Unvarnished Doctrine: Locke, Liberalism, and the American Revolution.* Durham & London: Duke University Press, 1994.

Elkins, S.M., and E.L. McKitrick. *The Age of Federalism: The Early American Republic, 1788-1800.* Oxford: University Press, 1993.

Elton, G.R. *Studies in Tudor and Stuart Politics & Government.* 2 vols. Cambridge: University Press, 1974.

Finkelman, Paul. *Slavery and the Founders : Race and Liberty in the Age of Jefferson.* Armonk, N.Y. : M.E. Sharpe, 2001.

Fischer, David Hackett. *Liberty and Freedom: A Visual History of America's Founding Ideas.* Oxford: University Press, 2005.

Fleming, Robin. *Kings and Lords in Conquest England.* Cambridge: University Press, 1991.

Franklin, Julian H. *John Locke and the Theory of Sovereignty: Mixed Monarchy and the Right of Resistance in the Political Thought of the English Revolution.* Cambridge: University Press, 1978.

Freeman, Douglas Southall. *George Washington: A Biography.* London: Eyre & Spottiswoode, 1951.

Gaustad, Edwin S. *Sworn on the Altar of God: A Religious Biography of Thomas Jefferson*. Grand Rapids, MI: W.B. Eerdman's, 1996.

Gilreath, James, ed. *Thomas Jefferson and the Education of a Citizen*. Washington, DC: Library of Congress, 1999.

Golden, James L., and Alan L. Golden. *Thomas Jefferson and the Rhetoric of Virtue.* New York: Rowman & Littlefield Publishers, Inc., 2002.

Golding, Brian. *Conquest and Colonisation: The Normans in Britain, 1066-1100.* London: St. Martin's Press, 1994.

Greene, Jack P. *Peripheries and Center: Constitutional Development in the Extended Polities of the British Empire and the United States, 1607-1788.* Athens: The University of Georgia Press, 1986.

———. *Pursuits of Happiness: The Social Development of Early Modern British Colonies and the Formation of American Culture.* Chapel Hill: University of North Carolina Press, 1988.

———. *The Quest for Power: The Lower Houses of Assembly in the Southern Royal Colonies, 1689-1776.* Chapel Hill: University of North Carolina Press, 1963.

Hartz, Louis. *The Liberal Tradition in America.* New York: Harcourt, Brace and Company, 1955.

———.*The Founding of New Societies: Studies in the History of the United States, Latin America, South Africa, Canada, and Australia*. New York: Harcourt, Brace& World, Inc., 1964.

Harvey, Ray Forrest. *Jean Jacques Burlamaqui: A Liberal Tradition in American Constitutionalism.* Chapel Hill: University of North Carolina Press, 1937.

Healey, Robert M. *Jefferson on Religion in Public Education.* New Haven: Yale University Press, 1970.

Hellenbrand, Harold. *The Unfinished Revolution: Education and Politics in the Thought of Thomas Jefferson*. Newark, NJ: University of Delaware Press, 1990.

Hirst, Derek. *Representatives of the People?: Voters and Voting in England Under the Early Stuarts.* Cambridge: University Press, 1975.

Honeywell, Roy. *The Educational Work of Thomas Jefferson.* New York: Russell & Russell, 1964.

Horn, James. *Adapting to a New World: English Society in the Seventeenth-century Chesapeake.* Chapel Hill: University of North Carolina Press, 1996.

Hyams, Paul R. *Kings, Lords and Peasants in Medieval England: The Common Law of Villeinage in the Twelfth and Thirteenth Centuries.* Oxford: Clarendon Press, 1980.

Isaac, Rhys. *The Transformation of Virginia.* Chapel Hill: University of North Carolina Press, 1982.

Jordan, Winthrop K. *White Over Black: American Attitudes Toward the Negro, 1550-1812.* Chapel Hill: University of North Carolina Press, 1968.

Kazanjian, David. *The Colonizing Trick: National Culture and Imperial Citizenship in Early America.* Minneapolis: University of Minnesota Press, 2003.

Keeton, George W. *The Norman Conquest and the Common Law.* London: Ernest Benn Ltd., 1966.

Kelly, James. *Poynings' Law and the Making of Law in Ireland, 1660-1800.* Dublin: Four Courts Press, 2007.

Kettner, James H. *The Development of American Citizenship, 1608-1870.* Chapel Hill: University of North Carolina Press, 1978.

Kishlansky, Mark A. *Parliamentary Selection: Social and Political Choice in Early Modern England.* Cambridge: University Press, 1986.

Koch, Adrienne. *The Philosophy of Thomas Jefferson.* New York: Columbia University Press, 1943.

Kolp, John Gilman. *Gentlemen and Freeholders: Electoral Politics in Colonial Virginia.* Baltimore: Johns Hopkins University Press, 1998.

Kramnick, Isaac. *Republicanism and Bourgeois Radicalism: Political Ideology in Late Eighteenth-Century England and America.* Ithaca, NY: Cornell University Press, 1990.

Lehmann, Karl. *Thomas Jefferson, American Humanist.* Chicago: University of Chicago Press, 1965.

Lehmann, William C. *Henry Home, Lord Kames, and the Scottish Enlightenment: A Study in National Character and the History of Ideas.* The Hague: Martinus Nijhoff, 1971.

Lennon, Colm. *Sixteenth-century Ireland: The Incomplete Conquest.* Dublin: St. Martin's Press, 1995.

Lieberman, David. *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain.* Cambridge: University Press, 2002.

MacPherson, C.B. *The Political Theory of Possessive Individualism.* Oxford: Clarendon Press, 1964.

Malone, Dumas. *Jefferson and His Time: Jefferson the Virginian.* London: Eyre and Spottiswoode, 1948.

Matthews, Richard K. *The Radical Politics of Thomas Jefferson: A Revisionist View.* Lawrence, KS: University of Kansas Press, 1984.

Mayer, David N. *The Constitutional Thought of Thomas Jefferson.* Charlottesville: University of Virginia Press, 1994.

McDonnell, Michael A. *The Politics of War : Race, Class, and Conflict in Revolutionary Virginia.* Chapel Hill: University of North Carolina Press, 2007.

McKisack, May. *The Parliamentary Representation of the English Boroughs During the Middle Ages.* Oxford: University Press, 1932.

Miller, John Chester. *The Wolf by the Ears: Thomas Jefferson and Slavery.* New York: Free Press, 1977.

Morgan, Edmund S. *American Slavery, American Freedom: The Ordeal of Colonial Virginia.* New York: W.W. Norton & Company, 1975.
———. *Inventing the People: The Rise of Popular Sovereignty in England and America.* New York: Norton, 1988.

Musson, Anthony, and W.M. Ormrod. *The Evolution of English Justice: Law, Politics and Society in the Fourteenth Century.* London: Macmillan, 1999.

Nelson, John K. *A Blessed Company: Parishes, Parsons, and Parishioners in Anglican Virginia, 1690-1776.* Chapel Hill: The University of North Carolina Press, 2001.

Ogilvie, Charles. *The King's Government and the Common Law, 1471-1641.* Oxford: Basil Blackwell, 1958.

Onuf, Peter, ed. *Jeffersonian Legacies.* Charlottesville, VA: University of Virginia Press, 1993.
———. *Jefferson's Empire: The Language of American Nationhood*. Charlottesville: University of Virginia Press, 2000.
———. *The Mind of Thomas Jefferson*. Charlottesville: University of Virginia Press, 2007.

Palmer, Robert C. *The County Courts of Medieval England, 1150-1350.* Princeton: University Press, 1982.

Pangle, Lorraine Smith, and Thomas L. Pangle. *The Learning of Liberty: The Educational Ideas of the American Founders.* Lawrence, KS: University Press of Kansas, 1993.

Pangle, Thomas L. *The Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosophy of Locke.* Chicago: University Press, 1988.

Parent, Anthony S. *Foul Means: The Formation of a Slave Society in Virginia, 1660-1740.* Chapel Hill: University of North Carolina Press, 2003.

Parry, Clive. *British Nationality: Including Citizenship of the United Kingdom and Colonies and the Status of Aliens.* London: Stevens, 1951.

Patterson, Caleb Perry. *The Constitutional Principles of Thomas Jefferson.* Austin: University of Texas Press, 1953.

Peterson, Merrill D. *Thomas Jefferson & the New Nation: A Biography.* Oxford: University Press, 1970.
———. *Thomas Jefferson: Religious Liberty and the American Tradition.* Fredericksburg, VA: Thomas Jefferson Institute for the Study of Religious Freedom, 1986.

Peterson, Merrill D., and R.C. Vaughan. *The Virginia Statute for Religious Freedom: Its Evolution and Consequences in American History.* Cambridge: University Press, 1988.

Pocock, J.G.A. *The Ancient Constitution and the Feudal Law : A Study of English Historical Thought in the Seventeenth Century: A Reissue with a Retrospect .* Cambridge : University Press, 1987.
———.*The Machiavellian Moment : Florentine Political Thought and the Atlantic Republican Tradition.* 2nd ed. Princeton, NJ: Princeton University Press, 2003.
———.*Virtue, Commerce, and History: Essays on Political Thought and History, Chiefly in the Eighteenth Century.* Cambridge: University Press, 1985.

Pocock, J.G.A., ed. *Three British Revolutions: 1641, 1688, 1776.* Princeton: University Press, 1980.

Pole, J.R. *Political Representation and the Origins of the American Republic.* London: Macmillan Press, 1966.

Ragosta, John A. *Wellspring of Liberty: How Virginia's Religious Dissenters Helped Win the American Revolution & Secured Religious Liberty.* Oxford: University Press, 2010.

Reid, John Phillip. *Constitutional History of the American Revolution (Abridged).* Madison: University of Wisconsin Press, 1986.

Reynolds, Susan. *Fiefs and Vassals.* Oxford: University Press, 1996.

Rhoden, Nancy L. *Revolutionary Anglicanism: The Colonial Church of England Clergy During the American Revolution.* New York: University Press, 1999.

Robbins, Caroline. *The Eighteenth-Century Commonwealthman.* Cambridge, MA: Harvard University Press, 1959.

Ross, Ian Simpson. *Lord Kames and the Scotland of His Day.* Oxford: Clarendon Press, 1972.

Salmon, Marylynn. *Women and the Law of Property in Early America.* Chapel Hill: University of North Carolina Press, 1986.

Sanford, Charles B. *The Religious Life of Thomas Jefferson*. Charlottesville: Virginia University Press, 1984.

Schwarz, Philip J. *Slave Laws in Virginia.* Studies in the Legal History of the South. Athens, GA: University of Georgia Press, 1996.

Scott, Jonathan. *Commonwealth Principles: Republican Writing on the English Revolution*. Cambridge: University Press, 2004.

Selby, John E. *The Revolution in Virginia, 1775-1783.* Charlottesville: University of Virginia Press, 1988.

Selsam, J. Paul. *The Pennsylvania Constitution of 1776: A Study in Revolutionary Democracy.* Philadelphia: University of Pennsylvania Press, 1936.

Sheldon, Garrett Ward. *The Political Philosophy of Thomas Jefferson.* Baltimore: Johns Hopkins University Press, 1991.

Sheldon, Garrett Ward, and Daniel L. Dreisbach, eds. *Religion and Political Culture in Jefferson's Virginia.* Oxford: Rowman & Littlefield, 2000.

Sheridan, Eugene R. *Jefferson and Religion.* Chapel Hill: University of North Carolina Press, 1998.

Shuffleton, Frank. *Thomas Jefferson: A Comprehensive, Annotated Bibliography of Writings About Him (1826-1980)*. New York & London: Garland Publishing, Inc., 1983.

———. *Thomas Jefferson, 1981-1990: An Annotated Bibliography*. New York & London: Garland Publishing, Inc., 1992.

Skinner, Quentin. *Liberty Before Liberalism.* Cambridge: University Press, 1998.

Smith, Rogers M. *Civic Ideals: Conflicting Visions of Citizenship in US History.* New Haven: Yale University Press, 1997.

Spahn, Hannah. *Thomas Jefferson, Time, and History.* Charlottesville: University of Virginia Press, 2011.

Spangler, Jewel L. *Virginians Reborn: Anglican Monopoly, Evangelical Dissent, and the Rise of the Baptists in the Late Eighteenth Century.* Charlottesville: University of Virginia Press, 2008.

Staves, S. *Married Women's Separate Property in England, 1660-1833.* Cambridge, MA: Harvard University Press, 1990.

Steele, Brian. *Thomas Jefferson and American Nationhood*. Cambridge: University Press, 2012.

Sturtz, Linda L. *Within Her Power: Propertied Women in Colonial Virginia.* New York & London: Routledge, 2002.

Sydnor, Charles S. *Gentlemen Freeholders: Political Practices in Washington's Virginia.* The University of North Carolina Press, 1952.

Tillson, Albert H. *Accommodating Revolutions: Virginia's Northern Neck in An Era of Transformations, 1760-1810.* University of Virginia Press, 2009.

Tomlins , Christopher L., and Bruce H. Mann., eds. *The Many Legalities of Early America.* Chapel Hill: University of North Carolina Press, 2001.

Wagoner, Jennings L. *Jefferson and Education.* Monticello Monograph Series. Charlottesville: Thomas Jefferson Foundation, 2004.

Wallace, Anthony F.C. *Jefferson and the Indians: The Tragic Fate of the First Americans.* Cambridge, MA: Belknap Press, 1999.

Wells, Guy Fred. *Parish Education in Colonial Virginia.* New York: Columbia University Press, 1923.

Wertenbaker, Thomas J. *Patrician and Plebeian in Virginia.* New York: Russell & Russell, 1959.

Williams, Ann. *The English and the Norman Conquest.* London: Boydell Press, 1995.

Wills, Gary. *Inventing America: Jefferson's Declaration of Independence.* New York: Doubleday Books, 1978.

Wilson, Douglas L. *Jefferson's Books.* Monticello Monograph Series. Charlottesville: Thomas Jefferson Memorial Foundation, 1996.

Withington, Phil. *The Politics of Commonwealth: Citizens and Freemen in Early Modern England.* Cambridge: University Press, 2005.

Wood, Gordon S. *The Creation of the American Republic.* Chapel Hill: University of North Carolina Press, 1969.
———. *The Radicalism of the American Revolution.* New York: Vintage, 1991.

Wright, Louis B. *First Gentlemen of Virginia.* Charlottesville: University of Virginia Press, 1982.

Yarbrough, Jean M. *American Virtues: Thomas Jefferson on the Character of a Free People .* Lawrence, Kan. : University Press of Kansas, 1998.

Book Chapters

Addis, Cameron. “Jefferson and Education.” In *The Blackwell Companion to Thomas Jefferson*, Edited by Francis D. Cogliano. Oxford: Blackwell Publishing Ltd., 2012, pp. 457-473.

Bailyn, Bernard. "Politics and Social Structure in Virginia." In *Seventeenth-Century America: Essays in Colonial History.* Edited by James Morton Smith. Chapel Hill: University of North Carolina Press, 1959, pp. 90-118.

Barber, Benjamin R. “Education and Democracy: Summary and Comment.” In *Thomas Jefferson and the Education of a Citizen*. Edited by James Gilreath. Washington, DC: Library of Congress, 1999, pp. 134-152.

Berthoff, Rowland and John M. Murrin. "Feudalism, Communalism, and the Yeoman Freeholder: The American Revolution Considered As a Social Accident." In *Essays on the American Revolution.* Edited by Stephen G. Kurtz and James H. Hutson. Chapel Hill: University of North Carolina Press, 1973, pp. 256-288.

Brewer, Holly. "Apprenticeship Policy in Virginia: From Patriarchal to Republican Policies of Social Welfare." In *Children Bound to Labor: The Pauper Apprentice System in Early America.* Edited by Ruth Wallis Herndon and John E. Murray. Ithaca: Cornell University Press, 2009, pp. 183-198.

———. “Beyond Education: Thomas Jefferson’s ‘Republican’ Revision of the Laws Regarding Children.” In *Thomas Jefferson and the Education of a Citizen*. Edited by James Gilreath. Washington, DC: Library of Congress, 1999, pp. 48-62.

Brown, Richard D. “Bulwark of Revolutionary Liberty: Thomas Jefferson’s and John Adams’s Programs for an Informed Citizenry.” In *Thomas Jefferson and the Education of a Citizen*. Edited by James Gilreath. Washington, DC: Library of Congress, 1999, pp. 91-102.

Dreisbach, Daniel L. "Religion and Legal Reforms in Revolutionary Virginia: A Reexamination of Jefferson's Views on Religious Freedom and Church-State Separation." In *Religion and Political Culture in Jefferson's Virginia.* Edited by Garrett Ward Sheldon and Daniel L. Dreisbach. Oxford: Rowman & Littlefield, 2000, pp. 189-218.

Elton, G.R. "'The Body of the Whole Realm': Parliament and Representation in Medieval and Tudor England." In *Studies in Tudor and Stuart Politics & Government.* Edited by G.R. Elton. 2 vols. Cambridge: University Press, 1974, pp. 19-61.

Finkelman, Paul. "Jefferson and Slavery: 'Treason Against the Hopes of the World'." In *Jeffersonian Legacies.* Edited by Peter Onuf. Charlottesville, VA: University of Virginia Press, 1993, pp. 181-221.

Grossberg, Michael. “Citizens and Families: A Jeffersonian Vision of Domestic Relations and Generational Change.” In *Thomas Jefferson and the Education of a Citizen*. Edited by James Gilreath. Washington, DC: Library of Congress, 1999, pp. 3-27.

Johnson, Herbert A. “Thomas Jefferson and Legal Education.” In *Thomas Jefferson and the Education of a Citizen*. Edited by James Gilreath. Washington, DC: Library of Congress, 1999, pp. 103-114.

Kolp, John G., and Terri L. Snyder. "Women and the Political Culture of Eighteenth-Century Virginia: Gender, Property Law and Voting Rights." In *The Many Legalities of Early America.* Edited by Christopher L. Tomlins and Bruce H. Mann. Chapel Hill: University of North Carolina Press, 2001, pp. 272-292.

Konig, David Thomas. "Legal Fictions and the Rule of Law: The Jeffersonian Critique of Common-Law Adjudication." In *The Many Legalities of Early America.* Edited by Christopher L. Tomlins and Bruce H. Mann. Chapel Hill: University of North Carolina Press, 2001, pp. 97-117.

Lewis, Jan. “Jefferson, the Family, and Civic Education.” In *Thomas Jefferson and the Education of a Citizen*. Edited by James Gilreath. Washington, DC: Library of Congress, 1999, pp. 63-76.

Neem, Johann N. “A Republican Reformation: Thomas Jefferson’s Civil Religion and the Separation of Church from State”. In *The Blackwell Companion to Thomas Jefferson*. Francis D. Cogliano, ed. Oxford: Blackwell Publishing, Ltd., 2012, pp. 91-109.

Onuf, Peter. “Jefferson and American Democracy.” In *The Blackwell Companion to Thomas Jefferson*, Edited by Francis D. Cogliano. Oxford: Blackwell Publishing Ltd., 2012, pp. 397-418.

Pocock, J.G.A. "'Oceana': Its Argument and Character." In *The Political Works of James Harrington.* Edited by J.G.A. Pocock. Cambridge: University Press, 1977, pp. 43-76.

Shuffleton, Frank. “Binding Ties: The Public and Domestic Spheres in Jefferson’s Letters to His Family.” In *Thomas Jefferson and the Education of a Citizen*. Edited by James Gilreath. Washington, DC: Library of Congress, 1999, pp. 28-47.

Sloan, Herbert. “The Earth Belongs in Usufruct to the Living.” In *Jeffersonian Legacies*. Edited by Peter Onuf. Charlottesville: University of Virginia Press, 1993, pp. 281-315.

Sturtz, Linda L. "'As Though I My Self Was Pr[e]sent': Virginia Women with Power of Attorney." In *The Many Legalities of Early America.* Edited by Christopher L. Tomlins and Bruce H. Mann. Chapel Hill: University of North Carolina Press, 2001.

Sydnor, Charles S. "Virginia: A Semiaristocratic Political System." In *Politics and Society in Colonial America: Democracy or Deference?* Edited by Michael G. Kammen. USA: Holt, Rinehart and Winston, Inc., 1967, pp. 62-66.

Wagoner, Jennings L., Jr. "'That Knowledge Most Useful to Us': Thomas Jefferson's Concept of Utility in the Education of Republican Citizens." In *Thomas Jefferson and the Education of a Citizen*. Edited by James Gilreath. Washington, DC: Library of Congress, 1999, pp. 115-133.

Wilson, Douglas L. "Jefferson and Literacy." In *Thomas Jefferson and the Education of a Citizen*. Edited by James Gilreath. Washington, DC: Library of Congress, 1999, pp. 79-90.

Journal Articles

Alexander, Gregory S. "Time and Property in the American Republican Legal Culture." *New York University Law Review* 66, no. 2 (1991): 273-352.

Alston, Lee J., and Morton Owen Schapiro. "Inheritance Laws Across Colonies: Causes and Consequences." *The Journal of Economic History* 44, no. 2 (1984): 277-287.

Amussen, Susan D. "Political Economy and Imperial Practice." *The William and Mary Quarterly* 69, no. 1 (2012): 47-50.

Appleby, Joyce. "Commercial Farming and The" Agrarian Myth" in the Early Republic." *The Journal of American History* 68, no. 4 (1982): 833-849.
———. "Ideology and Theory: The Tension Between Political and Economic Liberalism in Seventeenth-Century England." *The American Historical Review* 81, no. 3 (1976): 499-515.
———. "Liberalism and the American Revolution." *New England Quarterly* 49, no. 1 (1976): 3-26.
———. "What Is Still American in the Political Philosophy of Thomas Jefferson?" *The William and Mary Quarterly* 39, no. 2 (1982): 287-309.

Ballinger, Stanley E. "The Idea of Social Progress Through Education in the French Enlightenment Period: Helvetius and Condorcet." *History of Education Journal* 10, no. 1/4 (1959): 88-99.

Bennett, W.H. "Early American Theories of Federalism." *The Journal of Politics* 4, no. 03 (1942): 383-395.

Billings, Warren M. "The Growth of Political Institutions in Virginia, 1634 to 1676." *The William and Mary Quarterly* 31, no. 2 (1974): 225-242.

Black, B.A. "The Constitution of Empire: The Case for the Colonists." *University of Pennsylvania Law Review* (1976): 1157-1211.

Berthoff, Rowland. "The American Social Order: A Conservative Hypothesis." *The American Historical Review* 65, no. 3 (1960): 495-514.

Blinka, Daniel D. "Jefferson and Juries: The Problem of Law, Reason, and Politics in the New Republic." *The American Journal of Legal History* 47, no. 1 (2005): 35-103.

Brewer, Holly. "Entailing Aristocracy in Colonial Virginia: "Ancient Feudal Restraints" and Revolutionary Reform." *The William and Mary Quarterly* 54, no. 2 (1997): 307-346.

Brown, Elizabeth A.R. "The Tyranny of a Construct: Feudalism and Historians of Medieval Europe." *The American Historical Review* 79, no. 4 (1974): 1063-1088.

Burnard, Trevor. "Making a Whig Empire Work: Transatlantic Politics and the Imperial Economy in Britain and British America." *The William and Mary Quarterly* 69, no. 1 (2012): 51-56.

Carrithers, David W. "Montesquieu, Jefferson and the Fundamentals of Eighteenth-century Republican Theory." *French-American Review* 6, no. 2 (1982): 160-188.

Carson, John. "Differentiating a Republican Citizenry: Talents, Human Science, and Enlightenment Theories of Governance." *Osiris* 17 (2002): 74-103.

Chandler, J.A.C. "Jefferson and William and Mary." *The William and Mary Quarterly* 14, no. 4 (1934): 304-307.

Clarke, A. "The History of Poynings' Law, 1615-41." *Irish Historical Studies* 18, no. 70 (1972): 207-222.

Cohen, W. "Thomas Jefferson and the Problem of Slavery." *The Journal of American History* 56, no. 3(1969): 503-526.

Colbourn, H. Trevor. "Thomas Jefferson's Use of the Past." *The William and Mary Quarterly: Magazine of Early American History* 15, no. 1 (1958): 56-70.

Coss, P.R. "Bastard Feudalism Revised." *Past & Present* , no. 125 (1989): 27-64.

Crouch, David, and D A Carpenter. "Bastard Feudalism Revised." *Past & Present* , no. 131 (1991): 165-189.

Crow, Matthew. "Jefferson, Pocock, and the Temporality of Law in a Republic." *Republics of Letters: A Journal for the Study of Knowledge, Politics, and the Arts* 2, no. 1 (2010): 55-81.

Dawidoff, Robert. "Review: The Fox in the Henhouse: Jefferson and Slavery." *Reviews in American History* 6, no. 4 (1978): 503-511.

Densford, John P. "The Educational Philosophy of Thomas Jefferson." *Peabody Journal of Education* 38, no. 5 (1961): 265-275.

Dickinson, H.T. "The Eighteenth-Century Debate on the Sovereignty of Parliament." *Transactions of the Royal Historical Society* 26 (1976): 189-210.

Diggins, John P. "Slavery, Race, and Equality: Jefferson and the Pathos of the Enlightenment." *American Quarterly* 28, no. 2 (1976): 206-228.

Dreisbach, Daniel L. "New Perspective on Jefferson's Views on Church-State Relations: The Virginia Statute for Establishing Religious Freedom in Its Legislative Context, A." *American Journal of Legal History* 35 (1991): 172-204.

———. "Thomas Jefferson and Bills Number 82-86 of the Revision of the Laws of Virginia 1776-1786: New Light on the Jeffersonian Model of Church-State Relations." *North Carolina Law Review* 69 (1990): 159-212.

Edwards, R.D., and T .W. Moody. "The History of Poynings' Law: Part I, 1494-1615." *Irish Historical Studies* 2, no. 8 (1941): 415-424.

Freehling, W.W. "The Founding Fathers and Slavery." *The American Historical Review* 77, no. 1 (1972): 81-93.

Greene, Jack P. "Foundations of Political Power in the Virginia House of Burgesses, 1720-1776." *The William and Mary Quarterly* 16, no. 4 (1959): 485-506.

———. "Political Mimesis: A Consideration of the Historical and Cultural Roots of Legislative Behavior in the British Colonies in the Eighteenth Century." *The American Historical Review* 75, no. 2 (1969): 337-360.

———. "The Role of the Lower Houses of Assembly in Eighteenth-Century Politics." *The Journal of Southern History* 27, no. 4 (1961): 451-474.

Guttridge, G.H. "Thomas Pownall's the Administration of the Colonies: The Six Editions." *The William and Mary Quarterly* 26, no. 1 (1969): 31-46.

Hamowy, Ronald. "Jefferson and the Scottish Enlightenment: A Critique of Garry Wills's Inventing America: Jefferson's Declaration of Independence." *The William and Mary Quarterly* 36, no. 4 (1979): 503-523.

Handlin, Oscar, and Mary F Handlin. "Origins of the Southern Labor System." *The William and Mary Quarterly* 7, no. 2 (1950): 199-222.

Hart, J.F. "A Less Proportion of Idle Proprietors: Madison, Property Rights, and the Abolition of Fee Tail." *Washington. & Lee Law Review* 58 (2001): 167-194.

Helo, Ari, and Peter Onuf. "Jefferson, Morality, and the Problem of Slavery." *The William and Mary Quarterly* 60, no. 3 (2003): 583-614.

Hinton, R.W.K. "English Constitutional Doctrines From the Fifteenth Century to the Seventeenth: I. English Constitutional Theories From Sir John Fortescue to Sir John Eliot." *The English Historical Review* 75, no. 296 (1960): 410-425.

Hobsbawm, E J. "The Crisis of the 17th Century--II." *Past & Present* , no. 6 (1954): 44-65.
———. "The General Crisis of the European Economy in the 17th Century." *Past & Present* , no. 5 (1954): 33-53.

Honeywell, Roy. "A Note on the Educational Work of Thomas Jefferson." *History of Education Quarterly* 9, no. 1 (1969): 64-72.

Hood, F.J. "Revolution and Religious Liberty: The Conservation of the Theocratic Concept in Virginia." *Church History: Studies in Christianity and Culture* 40, no. 02 (1971): 170-181.

Hulsebosch, Daniel J. "The Plural Prerogative." *The William and Mary Quarterly* 68, no. 4 (2011): 583-587.

Humphrey, Thomas J. "Conflicting Independence: Land Tenancy and the American Revolution." *Journal of the Early Republic* 28, no. 2 (2008): 159-182.

Isaac, Rhys. "Religion and Authority: Problems of the Anglican Establishment in Virginia in the Era of the Great Awakening and the Parsons' Cause." *The William and Mary Quarterly* 30, no. 1 (1973): 4-36.

Jezierski, J.V. "Parliament or People: James Wilson and Blackstone on the Nature and Location of Sovereignty." *Journal of the History of Ideas* 32, no. 1 (1971): 95-106.

Johnson, R.R. " Parliamentary Egotisms": The Clash of Legislatures in the Making of the American Revolution." *The Journal of American History* 74, no. 2 (1987): 338-362.

Jones, J.F. ,Jr. "Montesquieu and Jefferson Revisited: Aspects of a Legacy." *The French Review* 51, no. 4 (1978): 577-585.

Kammen, Michael. "The Colonial Agents, English Politics and the American Revolution." *The William and Mary Quarterly: A Magazine of Early American History* 22, no. 2 (1965): 244-263.
———. "The Meaning of Colonization in American Revolutionary Thought." *Journal of the History of Ideas* 31, no. 3 (1970): 337-358.

Katz, Stanley N. "Republicanism and the Law of Inheritance in the American Revolutionary Era." *Michigan Law Review* 76, no. 1 (1977): 1-29.

Keim, C Ray. "Primogeniture and Entail in Colonial Virginia." *The William and Mary Quarterly* 25, no. 4 (1968): 545-586.

Kessler, Sanford. "Locke's Influence on Jefferson's 'Bill for Establishing Religious Freedom'." *Journal of Church & State* 25, no. 2 (1983): 231-252.

Koot, Christian J. "Balancing Center and Periphery." *The William and Mary Quarterly* 69, no. 1 (2012): 41-46.

Lammers, Claud C. "Jefferson's Aristocracy of Talent Proposal." *The Social Studies* 60, no. 5 (Oct. 1969), pp. 195-201.

Leslett, Peter. "The Gentry of Kent in 1640". *Cambridge Historical Journal*, 9 (1948): 148-174.

Lewis, Anthony M. "Jefferson's Summary View As a Chart of Political Union." *The William and Mary Quarterly* 5, no. 1 (1948): 34-51.

Maier, Pauline. "Whigs Against Whigs Against Whigs." *The William and Mary Quarterly* 68, no. 4 (2011): 578-582.

Matson, Cathy. "Imperial Political Economy: An Ideological Debate and Shifting Practices." *The William and Mary Quarterly* 69, no. 1 (2012): 35-40.

McFarlane, K.B. "Parliament and 'Bastard Feudalism'." *Transactions of the Royal Historical Society* 26 (1944): 53-79.

Morris, Richard B. "Primogeniture and Entailed Estates in America." *Columbia Law Review* 27, no. 1 (1927): 24-51.

Mott, R.J. "Sources of Jefferson's Ecclesiastical Views." *Church History* 3, no. 4 (1934): 267-284.

Murphy, Andrew R. "The Uneasy Relationship Between Social Contract Theory and Religious Toleration." *The Journal of Politics* 59, no. 2 (1997): pp. 368-392.

Nelson, Eric. "Patriot Royalism: The Stuart Monarchy in American Political Thought, 1769–75." *The William and Mary Quarterly* 68, no. 4 (2011): 533-572.

———. "Taking Them Seriously." *The William and Mary Quarterly* 68, no. 4 (2011): 588-596.

Newell, Margaret Ellen. "Putting the 'Political' Back in Political Economy (This Is Not Your Parents' Mercantilism)." *The William and Mary Quarterly* 69, no. 1 (2012): 57-62.

Niles, S.G., and G. Wallace. "Education in the Jeffersonian Tradition." *Education* 111, no. 2 (1990).

Onuf, Peter S. "Every Generation Is An 'Independant Nation': Colonization, Miscegenation, and the Fate of Jefferson's Children." *The William and Mary Quarterly* 57, no. 1 (2000): 153-170.
———. "'To Declare Them a Free and Independant People': Race, Slavery, and National Identity in Jefferson's Thought." *Journal of the Early Republic* 18, no. 1 (1998): 1-46.

Orth, John V. "After the Revolution: 'Reform' of the Law of Inheritance." *Law and History Review* 10, no. 1 (1992): 33-44.

Owen, J. Judd. "Locke's Case for Religious Toleration: Its Neglected Foundation in the Essay Concerning Human Understanding." *The Journal of Politics* 69, no. 1 (2007): pp. 156-168.

Pincus, Steve. "Reconfiguring the British Empire." *The William and Mary Quarterly* 69, no. 1 (2012): 63-70.
———. "Rethinking Mercantilism: Political Economy, the British Empire, and the Atlantic World in the Seventeenth and Eighteenth Centuries." *The William and Mary Quarterly* 69, no. 1 (2012): 3-34.

Pleasants, S.A. "Thomas Jefferson-Educational Philosopher." *Proceedings of the American Philosophical Society* 111, no. 1 (1967): 1-4.

Pocock, J.G.A. "Machiavelli, Harrington and English Political Ideologies in the Eighteenth Century." *The William and Mary Quarterly* 22, no. 4 (1965): 549-583.

Post, David M. "Jeffersonian Revisions of Locke: Education, Property-rights, and Liberty." *Journal of the History of Ideas* 47, no. 1 (1986): 147-157.

Priest, Claire. "Creating An American Property Law: Alienability and Its Limits in American History." *Harvard Law Review* 120 (2006): 385-459.

Quinn, D.B. "The Early Interpretation of Poynings' Law, 1494-1534." *Irish Historical Studies* 2, no. 7 (1941): 241-254.

Rainbolt, John C. "The Absence of Towns in Seventeenth-Century Virginia." *The Journal of Southern History* 35, no. 3 (1969): 343-360.

Russell, Conrad. "Thomas Cromwell's Doctrine of Parliamentary Sovereignty." *Transactions of the Royal Historical Society* 7 (1997): 235-246.

Sand, Norbert. "The Classics in Jefferson's Theory of Education." *The Classical Journal* 40, no. 2 (1944): 92-98.

Sandler, S. Gerald. "Lockean Ideas in Thomas Jefferson's Bill for Establishing Religious Freedom." *Journal of the History of Ideas* 21, no. 1 (1960): 110-116.

Sensabaugh, George F. "Jefferson's Use of Milton in the Ecclesiastical Controversies of 1776." *American Literature* 26, no. 4 (1955): 552-559.

Shalhope, Robert E. "In Search of the Elusive Republic." *Reviews in American History* 19, no. 4 (1991): 468-473.
———. "Race, Class, Slavery, and the Antebellum Southern Mind." *The Journal of Southern History* 37, no. 4 (1971): 557-574.
———. "Republicanism and Early American Historiography." *The William and Mary Quarterly* 39, no. 2 (1982): 334-356.
———. "Thomas Jefferson's Republicanism and Antebellum Southern Thought." *The Journal of Southern History* 42, no. 4 (1976): 529-556.
———. "Toward a Republican Synthesis: The Emergence of An Understanding of Republicanism in American Historiography." *The William and Mary Quarterly* 29, no. 1 (1972): 49-80.

Shammas, Carole. "English Inheritance Law and Its Transfer to the Colonies." *The American Journal of Legal History* 31, no. 2 (1987): 145-163.

Thomson, Robert Polk. “The Reform of the College of William and Mary, 1763-1780." *Proceedings of the American Philosophical Society* 115, no. 3 (1971): 187-213.

Trevor-Roper, H.R. "The General Crisis of the 17th Century." *Past & Present* , no. 16 (1959): 31-64.

Wilson, Douglas L. "The American Agricola: Jefferson's Agrarianism and the Classical Tradition." *South Atlantic Quarterly* 80 (1981): 339-54.
———. "Jefferson Vs. Hume." *The William and Mary Quarterly* 46, no. 1 (1989): 49-70.
———. "Thomas Jefferson's Early Notebooks." *The William and Mary Quarterly* 42, no. 4 (1985): 434-452.

Winship, Michael P. “Godly Republicanism and the Origins of the Massachusetts Polity." *William and Mary Quarterly* 63, no. 3 (2006): 427-462.

Wood, Gordon S. "The Problem of Sovereignty." *The William and Mary Quarterly* 68, no. 4 (2011): 573-577.
———. “Thomas Jefferson, Equality, and the Creation of a Civil Society”. *Fordham Law Review* 64, 1995-96: 2133-2147.

Yarbrough, Jean M. "Race and the Moral Foundation of the American Republic: Another Look at the Declaration and the Notes on Virginia." *The Journal of Politics* 53, no. 01 (2009): 90-105.

Unpublished Theses

Bullock, Thomas Kirby. "Schools and Schooling in Eighteenth Century Virginia." PhD Dissertation. Duke University, 1961.

Curtis, George M, III. "The Virginia Courts During the Revolution." PhD Dissertation. University of Wisconsin, 1970.

Gundersen, Joan Rezner. "The Anglican Ministry in Virginia, 1723-1766: A Study of a Social Class." PhD Dissertation. University of Notre Dame, 1972.

Heath, James A. "Thomas Jefferson: Architect of American Public Education." PhD Dissertation. Pepperdine University, 1998.

Murrin, John. “Anglicizing an American Colony: The Transformation of Provincial Massachusetts.” PhD Dissertation. Yale University, 1964.

Padgett, Patricia A. "Legal Status of Women in Colonial Virginia, 1700-1785." Masters Thesis, College of William and Mary, 1967.

Walker, Jessica Lorraine. "'Our Anglo-Saxon Ancestors': Thomas Jefferson and the Role of English History in the Building of the American Nation." PhD Dissertation. University of Western Australia, 2007.