A History of the Person in America Before the Civil War

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Abstract

This dissertation excavates the intellectual origins of the legal idea of a person and traces its expression in American politics from the settlement of New England through the eve of the American Civil War. Using statutes, law books, sermons, records of debates, reports of cases, and works of political theory, this study argues that so far from distilling the highest hopes of freedom, the idea of a person admitted of—and was perhaps most ably characterized by—the idea of a slave. Chapter one revisits the writings of seventeenth-century Puritans in the Massachusetts Bay Colony and demonstrates that by 1641, both a voice in government and licit enslavement depended not on what was due to the governed, but on an inscrutable gift from the free to an elect. The second chapter, reaching back to pagan antiquity, places William Blackstone's 1765 *Commentaries on the Laws of England* in a new light, investigating the transmission of Roman renderings of persons (*personas*) into the free and the enslaved, and justice (*iustitia*) as "the constant and perpetual will to give to each his *ius*," down to a thirteenth-century English law book known as *Bracton*. Blackstone, driving a wedge between his own work and *Bracton*, wrote not that persons were the reason for all rights, but that rights were the end of laws, which led him to divide his own commentaries into two books: *Of the Rights of Persons* and *Of the Rights of Things*. The notion of a "person," however, did not make it into the Declaration of Independence in 1776 because delegates in General Congress swept it away with the clause in Thomas Jefferson's rough draft specifying the Atlantic slave trade as a grievance against the king, and this remarkable excision is the focus of chapter three. Denied security in unalienable rights, the enslaved assumed the shape of what Blackstone had called "artificial persons" whose every need was the occasion for rulers to grant or withhold the object. Chapter

four argues that in 1787, when the men who drafted the U.S. Constitution identified the enslaved as objects of governance and counted them for the purpose of political representation while denying them a share of sovereign power, they established a government shaped to abandon the enslaved to the caprice of the free, internalizing the violence required to keep property rights in persons safe. Ending the dissertation with a return to gifts to an elect, the final chapter examines Chief Justice Roger Taney's opinion in *Dred Scott v. Sandford* (1857). Taney declared that "negroe[s], whose ancestors were imported into this country, and sold as slaves" were "persons," but not "people," who had never been "supposed to possess any political rights which the dominant race might not withhold or grant at their pleasure." Rightly maligned as the most repugnant Supreme Court decision in American history, Taney's opinion nevertheless rested on the centuries-long endurance of a division of persons into the free and the enslaved, and, in turn, bore compelling witness to a heritage in which it was not security in rights, but the profound vulnerability wrought by their distribution, that captured what it was to be a person in America before the Civil War.

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Acknowledgments

Sometimes in life we receive good things. These good things arrive quietly, perhaps in the day or perhaps in the night, and when they get to us, however they get to us, the measure of their mark on our lives—like the measure of anything, really—takes time to dawn on us. So it was with the opportunity to work on a doctorate in the Department of History at Harvard University. When that chance came for me, all those years ago, I intuited that it would open up an embarrassment of riches, but not even now, at the end of things, do I have the eyes to measure the magnitude of what came my way, and all that it meant for my life. Cambridge, Massachusetts, with its river and teeming libraries, has been my home, and it is my hope that as the days open out to weeks, months, and to years, my work will disclose, in big and small ways, the content and scope of the intellectual riches, and happiness, I found here.

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One of my favorite novelists once wrote that scholars can become inadequate from all the nothing but books, and about this she was correct. In this spirit, then:

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Thank you, Amanda Diener and Jaco Hoffman, two gentle and beautiful souls, for giving me a home when I needed one, and thank you, Margie Lawson and Lane Lambert, for loving me like your child.

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And, finally, and most significantly, to my mother, father, brother, and sister, you already know: I could not live without you. I love you all the time.

Several old logs and stumps imposed upon me, and got themselves taken for wild beasts. I could see their legs, eyes, and ears, or I could see something like eyes, legs, and ears, till I got close enough to them to see that the eyes were knots, washed white with rain, and the legs were broken limbs, and the ears, only ears owing to the point from which they were seen. Thus early I learned that the point from which a thing is viewed is of some importance.

Frederick Douglass, *My Bondage and My Freedom*

Introduction

Slavery (*servitus*)…is so called from "saving" (*servo*), not "serving" (*servio*).
Bracton, *On the Laws and Customs of England* (ca. 1220-50)

This is a story about the idea of the person in a corner of the world that became the United States of America. It begins with John Cotton, Puritan divine, in 1641, and it ends some time later, with Roger Taney, Chief Justice of the United States Supreme Court, in 1857. In between, it pauses in 1753, when William Blackstone began a series of lectures on the laws of England at the University of Oxford; in 1776, when signatories to the Declaration of Independence unilaterally absolved "these United Colonies…from all Allegiance to the British Crown"; and in 1787, when delegates to a meeting in Philadelphia, Pennsylvania convened to revise the Articles of Confederation and ended up drafting the U.S. Constitution. Its temporal scope, then, is vast, and this breadth will be a source of the work's strength and its weakness. Size had been a problem in 1787, you see. Could a republic maintain stability if stretched over a territory as vast as the United States, was the question. Let us try, was the answer, and it is my answer too.

Half a century after the representatives of the United States in General Congress declared independence under the self-evident truth "that all Men are created equal" and "endowed by their Creator with certain unalienable rights," including "Life, Liberty, and the Pursuit of Happiness," Frederick Douglass, an enslaved man in Maryland, looked out over the world with his friends and observed that "we could see no spot this side of the ocean, where we could be free."[1] If Thomas Paine was correct, then, when he wrote in an introduction to *Common Sense* in February 1776 that "the cause of America," so intent on inquiring into the pretensions of rulers in order to

[1] *A Declaration by the Representatives of the United States of America, In General Congress Assembled* (Philadelphia, John Dunlap, 1776); Frederick Douglass, *Narrative of the Life of Frederick Douglass, an American Slave, Written by Himself*, ed. David Blight, 2nd ed. (Boston: Bedford, 2003), 96. The Anti-Slavery Office published the first edition of *Narrative of the Life of Frederick Douglass* in May 1845 in Boston.

repel encroachments on what was right, "is in a great measure the cause of all mankind," then twentieth-century poet Langston Hughes captured an equally evident truth about the course of human events when he wrote, "America never was America to me."[2]

In 1975, historian Edmund S. Morgan identified the simultaneous rise of liberty and slavery in North America as "the central paradox of American history." "The paradox is American," he wrote, "and it behooves Americans to understand it if they would understand themselves."[3] Morgan thought that the key to the puzzle lay in Virginia, but this dissertation accepts his charge (still urgent) while seeking answers elsewhere: northward, and longer back.

On February 7, 1866, after a revolution, a civil war, and an amendment to the Constitution eliminating slavery except as punishment for crime, Douglass, who had astutely perceived the want of freedom on the westerly side of the Atlantic before his escape from bondage at the age of twenty in 1838, met President Andrew Johnson.[4] "Your noble and humane predecessor placed in our hands the sword to assist in saving the nation," he said of the late President Abraham Lincoln during that interview, "and we do hope that you, his able successor, will favorably regard the placing in our hands, the ballot with which to save ourselves."[5] That stirring, luminous petition lies at the epilogue to the story this dissertation will tell, beyond Taney, and its preface lies earlier, well before Cotton, in the medieval world, where it was said that "slavery" (*servitus*) was so called not from "serving" (*servio*), but from "saving" (*servo*). "In

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[2] Introduction to Thomas Paine, *Common Sense* (Philadelphia: R. Bell, 1776), n.p.; *The Collected Poems of Langston Hughes* (New York: Vintage, 1994), 189.

[3] Edmund S. Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* (1975; repr., New York: Norton, 2003), 4-5.

[4] "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." US Constitution, Amendment XIII, Sec. 1.

[5] W.E.B. Du Bois, *Black Reconstruction: An Essay Toward a History of the Part Which Black Folk Played in the Attempt to Reconstruct Democracy in America, 1860-1880* (New York: Russell and Russell, 1935), 297.

ancient times," an English law book composed in the first half of the thirteenth century, which came to be known as *Bracton*, explained, "it was the practice of princes to sell captives and thus save rather than kill them."[6] This dissertation returns to that old, unlikely place, where enslavement was the perverse corollary of a voluntary choice, a gift of life, because learning lessons there might open a way toward better understanding the magnitude of the deprivation Douglass suffered. On that winter day in 1866, Douglass, a free black man, stood before Andrew Johnson in the White House and asked for the opportunity to save himself. A breathtaking moment it was. "God save the king!" had been the joyous acclamation of the people to express their collective acceptance of, and loyalty to, the monarch in England, and perhaps, in this light, measuring the distance between sovereigns and slaves is one way for historians to measure the distance between the freedom and slavery Morgan expressed as the paramount American paradox.[7] Douglass, though, was a free man and not a slave when he stood before Johnson, and he knew that freedom would not mean freedom so long as the newly emancipated suffered governors, or rulers, whom they did not authorize to act by their votes. That Douglass's petition to save himself was just that, a request, both pointed forward to the distance that would grow between the free and the free in America after the Civil War, and pointed backward to the earliest expression of licit enslavement in English America. That backward path, now, is the one the rest of these pages will settle into and journey down, trying to study America's paradox as Douglass so shrewdly did: as a riddle that staked salvation.

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[6] Samuel E. Thorne, trans., *Bracton on the Laws and Customs of England* (Cambridge, Mass.: Harvard University Press, 1968), 29-30.

[7] Leopold G. Wicham Legg, ed., *English Coronation Records* (New York: E.P. Dutton, 1901), xvi, xxvii, who writes that since the days of William the Conqueror (and down to today), the Archbishop of Canterbury asked the people if they would accept the prince and the people shouted their assent. The coronation service was translated into English in 1603. Find "GOD SAVE KING CHARLES" in Legg, 250; "God save King James" in Legg, 293; and "God save King William and Queen Marie" in Legg, 323.

In the most comprehensive investigation of the law of American slavery to date, *Southern Slavery and the Law, 1619-1860* (1996), historian Thomas D. Morris partitions the bulk of his work into two parts: "Slaves as Property" and "Slaves as Persons."[8] In the former he explores the law's treatment of the enslaved as objects of property claims, and in the latter he explores occasions where the law treated the enslaved as objects of its protections and commands. The work of Pennsylvanian jurist George M. Stroud, for one, could easily inspire such a study. In the first chapter of his *A Sketch of the Laws Relating to Slavery* in 1827, Stroud wrote that "the genuine and *degrading* principle of slavery, inasmuch as it places the slave upon a level with *brute* animals, prevails universally among the slave-holding states"; and in the second chapter, he went even further, defining "the cardinal principle of slavery" as this: "that the slave is not to be ranked among *sentient beings*, but among *things*."[9] In that work, though, Stroud confessed that there were laws "which regard the slave as *property*," as well as those "which treat of the slave as *a member of civil society*," and three decades later, in 1858, Thomas Reade Rootes Cobb, the reporter for the Georgia Supreme Court, would make the same point more clearly in his *An Inquiry into the Law of Negro Slavery*.[10] After arguing that "negro slavery is in no wise opposed to the law of nature," Cobb wrote that "the negro slave in America…occupies a double character of person and property," and then explained that he would commit his present, first volume to "considering the slave…AS A PERSON," and a forthcoming, second volume to "considering the slave…AS PROPERTY," a promised sequel he never produced because a war

[8] Thomas D. Morris, *Southern Slavery and the Law, 1619-1860* (Chapel Hill: University of North Carolina Press, 1996). For an important critique of this encyclopedic work, see Walter Johnson's book review in "Inconsistency, Contradiction, and Complete Confusion: The Everyday Life of the Law of Slavery," *Law and Social Inquiry* 22, no. 2 (1997): 405-33.

[9] George M. Stroud, *A Sketch of the Laws Relating to Slavery in the Several States of the United States of America* (Philadelphia: Kimber and Sharpless, 1827), 11, 22-3.

[10] Stroud, *A Sketch*, 21.

came instead. The twofold organization of his work, he wrote, was "a natural division of our subject."[11] The next year, in 1859, Chief Justice Roger Taney, sitting as a circuit court judge in the case of *United States v. Amy*, would get at the same duality. "We must not lose sight of the twofold character which belongs to the slave," he advised. "He is a person, but also property. As property, the rights of the owner are entitled to the protection of the law. As a person, he is bound to obey the law, and may, like any other person, be punished if he offends against it."[12]

Back in the debate over whether to ratify the U.S. Constitution in 1788, James Madison, a Virginian and leading member of the proceedings in Philadelphia, had written the following in a stumbling attempt to defend the three-fifths clause, which apportioned representation in the House of Representatives by adding "the whole number of free Persons" to "three fifths of all other Persons."[13] Some will wonder, he knew, why "slaves ought to be included in the numerical rule of representation," and to allay those concerns, Madison assumed the voice of "one of our Southern brethren" in the fifty-fourth essay of *The Federalist* and put pen to paper to explain:

> But we must deny the fact, that slaves are considered merely as property, and in no respect whatever as persons. The true state of the case is, that they partake of both these qualities: being considered by our laws, in some respects, as persons, and in other respects as property. In being compelled to labor, not for himself, but for a master; in being vendible by one master to another master; and in being subject at all times to be restrained in his liberty and chastised in his body, by the capricious will of his owner,--the slave may appear to be degraded from the human rank, and classed with those irrational animals which fall under the legal denomination of property. In being protected, on the other hand, in his life and in his limbs, against the violence of all others, even the master of his labor and his liberty; and in being punishable himself for all violence committed against others,--the slave is no less evidently regarded by the law as a member of the society, not as a part of the irrational creation; as a moral person, not as a mere

[11] Thomas R.R. Cobb, *An Inquiry into the Law of Negro Slavery in the United States of America. To Which is Prefixed An Historical Sketch of Slavery* (Philadelphia: T. & J. Johnson & Co., 1858), 82-3.

[12] *United States v. Amy*, 24 F.Cas. 792, 810 (1859).

[13] US Constitution, Art. I, Sec. 2

> article of property. The federal Constitution, therefore, decides with great propriety on the case of our slaves, when it views them in the mixed character of persons and of property. This is in fact their true character.[14]

Inspired by the provocative record above, this dissertation, as originally conceived, set out to trace a distinction between "persons" and "things" across time.[15] That is not what the project ended up doing, however, and this not only because such a study would have reproduced the organization of Cobb's nineteenth-century proslavery apologia. The composers of *Bracton* leaned on ancient sources when they wrote that the foremost division of persons in the realm of England was into the free and the slave, and the somersaults of Stroud and Cobb and Taney and

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[14] James Madison, "The Federalist No. 54," in *The Federalist*, ed. Robert Scigliano (New York: Modern Library, 2000), 349.

[15] "If there is one assumption that seems to have organized human experience from its very beginnings it is that of persons and things," Roberto Esposito writes in *Persons and Things: From the Body's Perspective*, trans. Zakiya Hanafi (Malden, Mass.: Polity Press, 2015), 1. The two works that have most powerfully shaped my own thinking about a manipulable slave character are Colin Dayan's brilliant *The Law is a White Dog: How Legal Rituals Make and Unmake Persons* (Princeton: Princeton University Press, 2011); and Malick W. Ghachem, "The Slave's Two Bodies: The Life of an American Legal Fiction," *William and Mary Quarterly* 60, no. 4 (2003): 809-42, both of which focus attention on what Ghachem describes as a "tension between the natural and legal bodies of the slave," more fundamental and encompassing, he writes, than "the relative place of property and personhood in the law of slavery" (812). Studies investigating what Madison called "the mixed character of persons and of property" in the bodies of the enslaved include Ariela Gross, *Double Character: Slavery and Mastery in the Antebellum Southern Courtroom* (Princeton: Princeton University Press, 2000); Mark Tushnet, *The American Law of Slavery, 1810-1860: Considerations of Humanity and Interest* (Princeton: Princeton University Press, 1981); Andrew Fede, *People Without Rights: An Interpretation of the Fundamentals of the Law of Slavery in the U.S. South* (New York: Garland, 1992); and numerous articles: Terrance F. Kiely, "The Hollow Words: An Experiment in Legal Historical Method as Applied to the Institution of Slavery," *De Paul Law Review* 25 (1976): 853-58; J. Thomas Wren, "A 'Two-Fold Character': The Slave as Person and Property in Virginia Court Cases, 1800-1860," *Southern Studies* 24 (1985): 417-32; A. Leon Higginbotham, Jr., and Barbara K. Kopytoff, "Property First, Humanity Second: The Recognition of the Slave's Human Nature in Virginia Civil Law," *Ohio State Law Journal* 50 (1989): 511-40; James H. Kettner, "Persons or Property? The Pleasants Slaves in the Virginia Courts, 1792-1799," in *Launching the "Extended Republic": The Federalist Era*, eds. Ronald Hoffmann and Peter J. Albert (Charlottesville: University Press of Virginia, 1996), 136-55; and Paul Finkelman, "Slavery in the United States: Persons or Property?" in *The Legal Understanding of Slavery: From the Historical to the Contemporary*, ed. Jean Allain (New York: Oxford University Press, 2012), 105-34.

All stand in stark contrast to troubling older studies that pointed to "concern for the personality of the slave" or "solicitude for the black defendant," and in so doing, appeared to defend or look favorably upon the work of antebellum southern courts. These studies include: Arthur F. Howington, "'Not in the Condition of a Horse or an Ox': *Ford v. Ford*, the Law of Testamentary Manumission and the Tennessee Courts' Recognition of Slave Humanity," *Tennessee Historical Quarterly* 34 (1975): 249-63, 250; A.E. Keir Nash, "A More Equitable Past? Southern Supreme Courts and the Protection of the Antebellum Negro," *North Carolina Law Review* 48 (1970): 197-241; and Nash, "Fairness and Formalism in the Trials of Blacks in the State Supreme Courts of the Old South," *Virginia Law Review* 56 (1970): 64-100, 65.

Madison, this dissertation submits, merely obscured the ongoing relevance of that old distinction. The pages that follow intentionally part ways with a historiographical commonplace that suggests that the "person" distilled the highest hopes of "freedom," while "thing" or "property" distilled the lowest depths of "slavery."[16] My investigation is not into a division between persons and things; it is into the depths of subjection that persons could suffer.

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[16] David Thomas Konig typifies this tendency when he writes that in suing Irene Emerson, Harriet Scott and Dred Scott "were exercising their agency to claim the legal status of 'person' and to escape the absolute powerlessness and legal death embodied by slavery." "Legal personhood and the minimal dignity it conferred may not have meant *equal* personhood, and the second-class status of Antebellum free persons of color may have mocked the 'dignity' they sought," he writes; "nevertheless,…we can argue that insofar as legal personhood afforded personal autonomy it 'can be understood in instrumental terms: as providing a necessary precondition to economic inclusion and material empowerment.'" Konig, "The Long Road to Dred Scott: Personhood and the Rule of Law in the Trial Court Records of St. Louis Slave Freedom Suits," *UMKC Law Review* 75, no. 1 (2006): 53-79, 54-5, quoting Christopher Bracey, "Dignity in Race Jurisprudence," *University of Pennsylvania Journal of Constitutional Law* 7, no. 3 (2005): 669-720, 676. As Malick Ghachem has pithily observed, "a legal person is not the same as a natural person," and both are historically contingent, that is to say, the meaning of both has changed across time and space and context. Ghachem, "'No Body to be Kicked?' Monopoly, Financial Crisis, and Popular Revolt in 18th-Century Haiti and America," *Law & Literature* 28, no. 3 (2016): 403-31, 404. In Roman law, the word, "persons," simply referred to human beings, slave or free, as objects of law, but over time this idea narrowed to become the formal name for bearers of rights and duties in the eye of the law, or even more generally, to borrow the terminology of Ngaire Naffine, the name used to separate those who may act in law from those who may not. While historians of the United States have debated whether enslaved humanity counted as persons or things in American law, legal historian Keechang Kim, using Roman sources, has argued powerfully against "extirpating slaves from the company of persons," and insisted that scholars must reckon with, instead of deny, "the dreadful possibility that some persons may be totally and openly denied legal liberty which other persons are allowed to enjoy." Kim, *Aliens in Medieval Law: The Origins of Modern Citizenship* (New York: Cambridge University Press, 2000), 201, following W.W. Buckland, *The Roman Law of Slavery: The Condition of the Slave in Private Roman Law from Augustus to Justinian* (Cambridge: Cambridge University Press, 1908). What it takes to count as a "person" in law has been energetically debated among legal scholars, and a selection of this literature includes: "What We Talk About When We Talk About Persons," *Harvard Law Review* 114, no. 6 (2001): 1745-68; Susanna Blumenthal, "The Default Legal Person," *UCLA Law Review* 54, no. 5 (2007): 1135-265; Michael Stokes Paulsen, "The Plausibility of Personhood," *Ohio State Law Journal* 74 (2013): 13-73; Ngaire Naffine, "Who are Law's Persons? From Cheshire Cats to Responsible Subjects," *Modern Law Review* 66, no. 3 (2003): 346-67; Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Portland, Oregon: Hart, 2009); Margaret Davies and Ngaire Naffine, eds., *Are Persons Property? Legal Debates about Property and Personality* (Burlington, VT: Ashgate, 2001); Philippe Ducor, "The Legal Status of Human Materials," *Drake Law Review* 44, no. 2 (1996): 195-260; Margaret Jane Radin, "Property and Personhood," *Stanford Law Review* 34, no. 5 (1982): 957-1015; and Jeffrey Douglas Jones, "Property and Personhood Revisited," *Wake Forest Journal of Law & Policy* 1, no. 1 (2011): 93-136.

The concern of this dissertation, however, differs from the above. I look beyond the strict system of rules that the law embodied and cast a wider net, studying works that attempted to render lucid the elusive body of the body politic, and records of debate about the same. I investigate how the idea of the "person" was used, and how it figured, at different moments in time between the seventeenth and nineteenth centuries, focusing my attention on arguments about how human beings should govern and be governed. I have found that students of the past may most ably see the person not by measuring autonomy or capacity for rights, but by observing the gap that yawned at junctures where someone needed something, really needed something, and that need was an occasion for someone else to give or withhold the object.

Before Cobb set out to divide his own work into categories of person and property, William Blackstone, an English lawyer and fellow at Oxford's All Souls College, on September 22, 1759, requested three manuscripts of *On the Laws and Customs of England*, also known as *Bracton*, from the Bodleian Library. The men who composed that book, inscribed on parchment in medieval Latin, wrote that the whole of the law pertained either to persons (*personas*), or to things (*res*), or to actions (*actiones*); they divided persons (*personas*) into free (*liberi*) and slave (*servi*); and they explained that persons, connected to an idea about heightened but not monopolized dignity, were the reason for all rights (*iura*). Blackstone in his turn, however, when he sat down to describe the laws of England in what became his incredibly influential *Commentaries on the Laws of England*, first published in London in 1765, subordinated "persons" to "things" insofar that he made rights the ends of law instead of persons the reason for all rights. In *Dred Scott v. Sandford* in 1857, Chief Justice Roger Taney would write that "negroe[s], whose ancestors were imported into this country, and sold as slaves" were "persons," yes, but not "people," who had never been "supposed to possess any political rights which the dominant race might not withhold or grant at their pleasure," and that infamous opinion, this dissertation will argue, while odious, was consistent with what had come before by at least two measures.[17] It abided faithfully to the rights to property in persons protected by the U.S. Constitution, ratified in 1788, and it realized again a homology between the ideas of justice and mercy in whose shadow liberty and a voice in government, both, depended not on what was due, but on an inscrutable gift from a condescending superior. The following pages, then, will begin and end in the same place, with justice as mercy.

This dissertation is divided into five chapters. The first chapter explores a test of saving grace required among first-generation settlers of the Massachusetts Bay Colony to determine

[17] *Dred Scott v. Sandford*, 60 U.S. 393, 403, 412-3 (1857).

church membership from roughly 1636 to 1679. Reformed Protestants in a Calvinist tradition, early Massachusetts Puritans believed that humans were by nature bad, very bad, so bad that damnation and eternal punishment was their due, and they trusted in God's sovereign choice to save whom he chose to save. Ministers hoped the test of saving grace would keep church membership to those who could demonstrate the work of God in their lives, but church membership became a statutory requirement for freemanship (a name that began as a designation for voters), in 1631, lasting to 1664, and the chapter argues that this 1631 rule made a voice in government dependent on an undeserved gift, impossible for humans to fully discern. Reading these records together with the Body of Liberties of 1641, which defined slavery as *Bracton* had, the corollary of a captor's voluntary choice to withhold death and grant life, and Edward Coke's 1642 commentary on the Magna Carta, which travelled into North America in 1687, the chapter concludes that the ideas of both justice and mercy derived force from the risk or fear of ruination or destruction and the potential of recovery or redemption, and that at the core of both ideas lay the phenomenon of giving something to an elect, which was as old as the poetry of Simonides.

The second chapter excavates what lay behind, or before, Blackstone's *Commentaries on the Laws of England*, necessary because of the work's influence in British North America and later, the United States of America. Blackstone owed an enormous debt to the chaotic and hybridized treatise he borrowed in 1759 (a work inscribed on the skins of dead beasts, which retained the imprint of arm pits and hip bones and hair follicles, as well as the errant cuts of the knife used for fleshing), for it effected the importation into the English tradition of the Roman template he would use to organize his course of lectures at All Souls, begun on November 6, 1753, and subsequent four-book *Commentaries:* that the whole of the law pertains either to persons or to things or to actions. In his hands that commonplace yielded, however, if not in

whole then in part, as he mediated its terms such that he altered how the "person" figured. He isolated and prioritized a definition of *lex* he attributed to Cicero above the millennia-old division of the *ius* into persons, things, and actions; he translated the Latin word *ius* as the English word "right"; and whereas for Bracton, "persons," connected to an idea about heightened but not monopolized dignity, were the reason for all *iura*, for Blackstone, "the first and primary end of human laws is to maintain and regulate these absolute rights of individuals." The difference made a difference. After discussing Blackstone's changes, the chapter suggests that students of the past seeking to better understand the "person" would do well to focus not on what William Penn called "Birth-rights," but on occasions where someone needed something, really needed something—something like escape from abuse, or a chance at life—and that need was an occasion for someone else to give or withhold the object. If my view is correct, the exemplar of the person becomes the enslaved instead of the free.

To see that the law could deem persons either slave or free is to see justice and mercy in the same frame, and the third chapter jumps forward to the American Revolution to draw attention to the missing person in the Declaration of Independence. The "person" did not make it into the Declaration of Independence because delegates in General Congress swept it away with the clause in Jefferson's rough draft specifying the Atlantic slave trade as a grievance against the king. This chapter uses that remarkable excision to argue that limiting security in unalienable rights to an elect in 1776 put at stake a fate more elemental than so-called freedom. It put at stake the permissibility of, and correspondent vulnerability to, gifts. Investigating first what American polemicists during the era of the war for independence thought they deserved, the chapter proceeds to demonstrate that time and again, and emphatically, American writers from James Otis in 1764 to John Adams to John Dickinson to Thomas Jefferson, rejected the noun gift,

except only God's, and accepted the verb *to give* and its corollary *to receive* only if it meant a restoration deserved. In 1765, James Otis, following William Blackstone, wrote that the rights of "artificial persons" were exhausted by those given to them by a donor, whereas "natural persons" had some birthrights that emphatically disallowed donation. In 1776, when delegates to the Virginia Convention meeting in Williamsburg edited its Declaration of Rights between late May and early June in order to ensure that slaves would not benefit from the equality of men provision, what decided the question was not that the slave was not a "man," or even that she was altogether rightless, but that she stood outside society, and so, could enjoy the security of neither, and by implication, might receive a similitude of those rights as gifts, not unlike Otis's artificial person. The polemicists' concern about subjection to an external power, subordination at mercy, got at a political, but also a moral insight, and any theories built from it stood on the shoulders of real and not imagined slaves.

The fourth chapter focuses on the meeting of the deputies in convention for revising the federal system of government in 1787. James Wilson said that investing sovereignty in the people was "the great panacea of human politics." That healing balm, however, which in Benjamin Franklin's luminous phrasing regarded the ruled as masters and the rulers as servants, suffered from an ambiguity in America that would expose to hazard the very union the new form of political association was designed to preserve, indeed make "more perfect." In 1787, framers laid the "groundwork," in James Madison's words, for the U.S. government in a scheme of political representation that counted those whom framers denied the choice to escape a condition exhausted by expressions not required by claims on their part, that is, framers laid the groundwork for the U.S. government in a scheme of political representation that counted the enslaved, whom framers wished to exclude from sovereign power. The national government,

moreover, designed to operate on "all persons and things, so far as they are objects of lawful government," internalized the violence required to keep rights to property in persons safe. After the convention, on October 24, 1787, Madison wrote Jefferson to say that he thought the plan of government committed to prose in the U.S. Constitution would prevent "a civil war," but, as time would tell, he was sorely mistaken about that.

Finally, the fifth chapter concludes where the dissertation began, with justice as mercy, as brought to fruition in Roger Taney's decision in *Dred Scott v. Sandford* in March of 1857, when the chief justice argued that "negroe[s], whose ancestors were imported into this country, and sold as slaves" were "persons," yes, but not "people," who had never been "supposed to possess any political rights which the dominant race might not withhold or grant at their pleasure."[18] In the ancient and medieval worlds, persons constituted one of the three objects of law, yes, but also the category for all free humans and all slaves, and those because of whom all rights (*iura*) were established. This chapter attempts to understand the course from that moment to this moment, from the old to the ostensibly new, for at the latter the Chief Justice of the United States Supreme Court drew attention to vulnerability to caprice and concluded that a "race" was enslaved. In that opinion, Taney wrote that the knowledge of justice belonged to those who counted as the sovereign people in 1787, and by that measure, the chapter ultimately argues, turning his argument inside out: sovereignty, more accurately, that absolute and irresistible authority from which there was no appeal, lay with the enslaved, and with all of their ancestors, and with all of their descendants, down to today, as yesterday, and for as long as the government should endure. Frederick Douglass pointed the way to that higher ground when he, before a crowd gathered in Corinthian Hall in Rochester New York on July 5, 1852, exposed to view what may, in the

[18] 60 U.S. 403, 412-3 (1857).

history of American letters, remain its most poignant insight. "There is not a man beneath the canopy of heaven, that does not know that slavery is wrong for him," he said.[19]

Dred Scott was the culmination of a long history instead of a disavowal of that history. Tracing the expression of the idea of a person in America forward from 1641 to 1857 is one way to ascertain the depths of that truth, of whose magnitude there was perhaps no greater evidence than Douglass's petition for the opportunity to save himself. Travelling from the Massachusetts Bay Colony to the American Revolution and the U.S. Constitution, and finally to the eve of the Civil War, this dissertation, very simply, will puzzle over the relationship between the slaveholder and the slave, and by extension, between rulers and the ruled. At the last, then, after considering what learned men left unimagined, the conclusion will be simple: the idea of a person admitted of—and was perhaps most ably characterized by—the idea of a slave.

[19] Frederick Douglass, *Oration, Delivered in Corinthian Hall, Rochester* (Rochester: Less, Mann, and Co., 1852), 19.

Chapter the First

Justice as Mercy

PH. But what is Justice?
LA. Justice is the giving to every Man his own.
PH. The Definition is good, and yet tis Aristotles; what is the Definition agreed upon as a Principle in the Science of the Common Law?
LA. The same with that of Aristotle.

Thomas Hobbes, *A Dialogue between a Philosopher and a Student, of the Common Laws of England* (1681)

In 1642, Miles Flesher and Robert Young printed a commentary on the Magna Carta by Sir Edward Coke (who had died "in his bed quietly, like a lambe," according to a friend, on an autumn night in 1634), and there, on the posthumous pages of *The Second Part of the Institutes of the Laws of England*—in discourses on statutes ranging from the Magna Carta to marriages, decayed bridges, hospitals, horses in fairs, houses of correction, rogues and vagabonds, cottages, and printers and binders of books, in that order—Coke had written that "the Law of England, is a Law of mercy."[1] He had shit on his mind when he wrote that remark, penned with respect to clause 14 of the final version of the Magna Carta, issued in February of 1225 by King Henry III, but that clause had appeared differently, as clause 20, in the original grant given by King John in June of 1215, and *Second Part* did not disclose the difference because Coke used only the final version of the charter, which Henry had issued after not one, but three revisions of the initial grant.[2]

[1] Edward Coke, *The Second Part of the Institutes of the Lawes of England, Containing the Exposition of many ancient, and other Statutes; Whereof you may see the particulars in a Table following* (London, 1642), 28. For Sir Julius Caesar's account of Coke's death, see Frederick Andrew Inderwick and Richard Arthur Roberts, eds., *A Calendar of the Inner Temple Records* (London, 1898), 2:lxix. Over the course of human events, a peaceful death like that, "without any groans or outward signs of sickness, but only spent by age," as Caesar wrote of his friend's passing, has been far from universal.

[2] William Blackstone was the first to distinguish between, and identify the different texts for, the 1215, 1216, 1217, and 1225 versions of the charter, and he did so in *The Great Charter and Charter of the Forest* (Oxford: Clarendon

The phrase, "Law of mercy," had by 1642 appeared but four times in the reports of cases of the Courts of King's Bench and Common Pleas, in 1608, 1610, 1613, and 1624. In the first, *Beecher's Case*, at issue whether a plaintiff who relinquished his suit for a debt on two bonds should be amerced, the King's Bench answered affirmatively, explaining in the course of the decision that "amercement is in Latin called *misericordia*; and the cause thereof is, because by the common law (which is a law of mercy) no man ought to be amerced so much as he deserves, but less."[3] In the second, *The Poulterers' Case* in 1610, at issue whether Stone, who had been falsely charged with robbery by "many other poulterers of London" and bound to appear at the assizes after marrying "the widow of a poulterer in Gracechurch Street," may have an action against his conspirators, the same court observed that "the common law is a law of mercy, for it prevents the malignant from doing mischief, and the innocent from suffering it."[4] Likewise in the third case, *King v. Walter Thomas*, reported in 1613, which took up directions to a jury in a "case of murther," Coke for the King's Bench derided dissemblers who had "much slandered our common law in the case of trials of offenders for their lives," and praised "the law of England," which was, as he described it, "a law of mercy." The judge, Coke explained there, "before whom the trial is, is to look unto the indictment, and to see that the same be sound, and good in point of law; the Judge ought to be for the King, and also for the party indifferent," as he should see "that justice be done to the party."[5] And the last, *Bubles*, before the Court of Common Pleas in 1624,

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Press, 1759). "There is no transaction in the antient part of our english history more interesting and important, than the rise and progress, the gradual mutation, and the final establishment of the charters of liberties," he wrote in the introduction; "and yet there is none that has been transmitted down to us with less accuracy and historical precision" (i).

[3] *Beecher's Case* 77 E.R. 559, 564 (1608).

[4] *The Poulterers' Case* 77 E.R. 813, 815 (1610).

[5] *King v. Walter Thomas*, 80 E.R. 1022 (1613).

which asked what court should determine questions of inheritance arising from the doings of an administrator of an infant during his minority, the court expressed that "our law in its institution was a law of mercy, and will indeavour to justifie Acts made in obedience to that, and to excuse defaults of disobedience."[6]

The first and last cases are easier for the modern historian to understand as concordant, or at least not discordant, with whatever "a law of mercy" might have meant: to receive less punishment than one deserved, and to be excused for a default, but the second and third are more difficult, for they suggest that preventing the malignant from doing mischief and the innocent from suffering it, as a position of indifference toward, and even doing justice to, a party, were somehow merciful phenomena, standing alone or in the light of a contrast. To put it another way, these cases suggest that the malignant, the innocent, the one for whom the judge was indifferent, and the one to whom justice was done, enjoyed an expression not required by claims on their part, that is to say, failed to deserve the treatment delivered to them.[7]

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[6] *Bubles*, 124 E.R. 87, 88 (1624).

[7] "Law of Mercy" had also appeared in two law dictionaries by 1642. In John Rastell's *An Exposition of Certain difficult and obscure words, and termes of the lawes of this realme* (London, 1595) under Abjuration: "Abiuration is an oth that a man or woman shall take w[h]e[reby] they have committed felony, & flie to the Church or churchyard, or to any other place priviledged for safegarde of their lives, choosing rather perpetual banishment out of the realm, the[n] to sta[n]d to the law & to be tried of the felony…And this law was instituted by S. Edward the Confessor, a king of this Realme before the Conquest, and was grounded upon the law of mercie, & for the love & reverence no doubt that he & other his successours did beare unto the house of God, or place of prayer and administration of his woord & sacrame[n]ts, which we call the Church" (4 recto and 5 recto); and John Cowell's *The Interpreter: or Booke Containing the Signification of Words: Wherein is set foorth the true meaning of all, or the most part of such Words and Termes, as are mentioned in the Lawe Writers, or Statutes of this victorious and renowned Kingdome* (London, 1607) under Sanctuarie: "Sancutarie (*Sanctuarium*) is a place privileged by the prince, for the safegard of mens lives, that are offenders, being founded upon the lawe of mercie, and upon the great reverence, honour, and devotion, which the Prince beareth to the place, whereunto he granteth such a privilege" (n.p.). For illuminating circularity, see "Lorde have mercie upon us. Christe have mercie upon us. Lorde have mercie upon us" from "An Ordre for Mattyns dayly through the yere" in *The Book of Common Prayer* (London, 1549), transcribed in *The Book of Common Prayer: The Texts of 1549, 1559, and 1662*, ed. Brian Cummings (New York: Oxford University Press, 2011), 12, an expression immediately followed by the Lord's Prayer and then the following exchange between the minister and people:

> *Prieste*. O Lorde, shewe thy mercy upon us.
> *Aunswere*. And graunte us thy salvacion.
> *Prieste*. O Lorde save the kyng.

The twentieth clause of the original Magna Carta, given under the hand of the King of England in 1215, became clause 15 in the first revised re-issue of November 12, 1216, clause 16 in the second revised re-issue of November 6, 1217, and clause 14 in the third and final revised re-issue on February 11, 1225.[8] That original provision, given in 1215, had recorded the following commitment of King John:

> A *liber homo* shall be amerced for a small offence only according to the degree of the offence; and for a grave offence he shall be amerced according to the gravity of the offence saving [*salvo*] his contenement [*contenemento suo*]. And a merchant shall be amerced the same way, saving his merchandise [*mercandisa sua*]; and a villein in the same way, saving his wainage [*wainagio suo*], should they fall into our mercy [*misericordiam nostrum*]. And none of the aforesaid

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Answere. And mercifully heare us, when we cal upon thee. (12 [1549], 110 [1559])

Richard Hakluyt the younger wrote of "the lawe of mercie" in *The Principall Navigations, Voiages and Discoveries of the English nation* (London: George Bishop and Ralph Newberie, 1589), 290, when describing how punishment practices in "Moscovie, which hath the name also of Russia," differed from those in England according to "the Moscovits" (the Moscovits imprisoned and often beat those convicted of theft, he wrote, whereas the English hanged them); and William Shakespeare used the idea of mercy powerfully in the desperate plea of Tamora, Queen of the Goths, uttered to Titus Andronicus, conqueror of the Goths, on her knees in Act 1, Scene 1 of *The Most Lamentable Romaine Tragedie of Titus Andronicus* (London: John Danter, 1594). Sweet mercy, she urged, was nobility's distinguishing sign:

> Stay Romaine brethren, gratious Conquerour,
> Victorious Titus, rue the teares I shed,
> A mothers teares in passion for her sonne:
> And if thy sonnes were euer deare to thee,
> Oh thinke my sonne to be as deare to mee.
> Sufficeth not that we are brought to Rome
> To beautifie thy triumphs, and returne
> Captiue to thee, and to thy Romaine yoake:
> But must my sonnes be slaughtered in the streets
> For valiant dooings in their Countries cause?
> O if to fight for king and common-weale,
> VVere pietie in thine, it is in these:
> Andronicus, staine not thy tombe with bloud.
> Wilt thou draw neere the nature of the Gods?
> Draw neere them then in being mercifull,
> Sweete mercie is Nobilities true badge,
> Thrice Noble Titus, spare my first borne sonne. (n.p.)

"Die he must," the conqueror replied.

[8] At the first revised re-issue of November 12, 1216, "if they fall into our mercy" became "if he [the villein] falls into our mercy," and the second revised re-issue of November 6, 1217, received the insertion "of some one else, not our own" between "villein" and "in the same way," in that stroke abandoning villeins on royal manors to the king's caprice.

> amercements shall be imposed except by the oaths of good [*proborum*; or honest] human beings [*hominum*] from the neighborhood.[9]

In the early thirteenth century, amercements (literally, at the mercy) were discretionary monetary punishments for misdeeds exacted after the unhappy party had surrendered himself and all that he had to the mercy of the king. The Magna Carta made the following changes to this practice: amercements should be proportionate to the offence, in no case should the offender lose his means of livelihood, and the amount should be fixed by impartial assessors and not left to the discretion of the king. The contenement of the *liber homo* and the merchandise of the merchant pointed to one's means of earning a living, and as specified in this clause, each had to be preserved, or, kept safe. The reform aimed to protect the offender from losing the stuff he needed

[9] For the English translation, see Carl Stephenson and Frederick George Marcham, eds., *Sources of English Constitutional History*, vol. 1, *A Selection of Documents from A.D. 600 to the Interregnum*, rev. ed. (New York: Harper & Row, 1972), 119. For the Latin, see William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* (New York: Burt Franklin, 1958), 284. In this dissertation, I return to original Latin sources, as relevant, and as a rule, translate the Latin word *homo* as the English word "human" instead of "man," though the common translation of *liber homo* was of course "free man." In *Second Part*, Coke reflected on the meaning of *liber homo* in three places, under the amercement clause, under the first clause, and under the twenty-ninth clause. Under the amercement clause, he wrote that the phrase *liber homo* in this context meant "a free-holder," but "extendeth as well to sole Corporations, as Bishops et. as to lay men, but not to Corporations aggregate of many, as Major and Commonalty, and the like, for they cannot be comprehended under these words *liber homo*" (27). Of the charter's first clause, in which John "granted to all *liberis hominibus* of our kingdom for us and our heirs forever, all the liberties hereinunder written," Coke wrote that "these words (*omnibus liberis hominibus regni*) doe include al persons Ecclesiasticall and temporall incorporate politique or natural, nay they extend also to villeines, for they are accounted free against all men saving against the Lords" (4); and finally, of the 29th clause, Coke wrote that the phrase *liber homo* extended "to villeins, saving against their Lord, for they are free against all men, saving against their Lord," as well as "to both sexes, men and women" (45). Scholarly consensus is that Coke was correct about women but misleading about villeins. The word *homo* did capture women in many of the charter's chapters (though women did not serve on juries, only exceptionally held public office, suffered life in the protection of men, and saw their opportunities for controlling any land they might have had rights to limited in the extreme), but the word did not intend to capture the unfree. The king gave his concessions "to all *liberis hominibus* of our kingdom," and as David Carpenter has argued, the charter "did nothing at all to challenge the basic restrictions of unfreedom. On the contrary, it reinforced them, making it very clear that the unfree were indeed subject to the will of their lords." The only clause in which villeins appeared by name was the amercement concession, and the only clause in which women appeared by name was the fifty-fourth, which conceded that "no one shall be seized or imprisoned on the appeal of a woman [*femine*] for the death of any one but her husband." For more, see David Carpenter, *Magna Carta* (New York: Penguin, 2015), 101-115, quote at 111; McKechnie, *Magna Carta*, 115, 195; J.C. Holt, *Magna Carta*, 3rd rev. ed. (New York: Cambridge University Press, 2015), 33-48, 239-40, which includes a discussion of Coke's complicity in advancing the Magna Carta as an affirmation of fundamental law and the liberty of the subject; and Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I*, 2nd ed. (Cambridge: Cambridge University Press, 1952), 1:412-32, 482-5.

to sustain himself and those dependent on him.[10] To elucidate contenement to his own readers in the early seventeenth century, Coke gave some examples: the armor of a soldier, for one, and the books of a scholar, for another. This concession, in theory, allowed the offender to remain who he was even after his misdeed, to have something to return to, as it were, as if to get the chance to hold on to a piece of life as it existed before trouble came, and so—as William Penn would explicitly acknowledge at Old Bailey in 1670 when a jury found him not guilty of tumultuous assembly yet he anyway suffered the charge of contempt of court, a fine of forty marks, and an order to stay in prison until he paid it—it partook of the same standard that undergirded clause 39 (which became clause 32, and then clause 35, and then, finally, clause 29), that "no *liber homo* shall be…in any way destroyed [*destruatur*]."[11] As Coke pointed out in his commentary on what had become clause 29 by 1225, the adverbial phrase, "in any way" (*aliquo modo*) modified the verb "destroy" only, giving the verb special status in that concession, which prohibited, according to him, "all things, by any manner of meanes tending to destruction," excessive amercements included.[12]

Contenement was to the *liber homo*, as merchandise was to the merchant, as wainage was to the villein, an unfree peasant. "*Wainagium*," wrote Coke of the king's concession, "is the contenement or countenance of the Villein, and cometh of the Saxon word *Wagna*, which

[10] For helping me to understand this abstruse article, I am indebted to McKechnie, *Magna Carta*, 284-94, and Carpenter, *Magna Carta*, 111.

[11] For English, see Stephenson and Marcham, *Sources*, 121. For Latin, see McKechnie, *Magna Carta*, 375. The verb *destruo* meant, literally, to pull down what was built up. Upon receiving his fine and prison time, Penn asked, "Fines, for what?" and then objected, "I ask, if it be according to the fundamental laws of England, that any Englishman should be fined or amerced, but by the judgment of his peers or jury; since it expressly contradicts the 14th and 29th chapters of the Great Charter of England, which say, 'No freeman ought to be amerced but by the oath of good and lawful men of the vicinage.'" A.E. Dick Howard transcribes the exchange in *The Road from Runnymede: Magna Carta and Constitutionalism in America* (Charlottesville: University Press of Virginia, 1968), 81-2.

[12] Coke, *Second Part*, 48.

signifieth a Cart or Waine, wherewith he was to do Villein service, as to carry the dung of the Lord out of the scite of the Mannor unto the Lords land, and casting it upon the same, and the like, and it was great reason to save his wainage, for otherwise the miserable creature, was to carry it on his back; it is said here *Wainagio suo* [the villein's wainage], but yet the Lord may take it at his pleasure."[13] This dissertation begins, then, by remembering a man carrying shit on his back (mean, ugly work) because the instrument he needed to accomplish his work was taken from him by the man whose waste he carried.

In this concession of the Magna Carta, consistently from 1215 to 1225, it is clear that mercy intimated, or even necessitated, an asymmetry of power. The great legal historian Frederic William Maitland (who managed, an admirer once said, to command "the dry bones to live, and henceforth they are alive") guessed that "very likely there was no clause in Magna Charta more grateful to the mass of people than that about amercements," but, as the inserted words at the time of the charter's second revision in 1217 helped to make clear, the concession protected villeins on non-royal manors from the king and not from the vicissitudes of the lord over them.[14] As historian and modern charter commentator William Sharp McKechnie takes care to emphasize, "The King must not take so much from any lord's villeins as to destroy their usefulness…; that was all."[15] If one possible ground for the concession was for the offender to remain who she was before the misdeed, even after the misdeed—to not go missing, as it were—then there was a difference between the destruction of a human and the destruction of her usefulness. Coke concluded his commentary on the villein's wainage with a lament for a rise in

[13] Coke, *Second Part*, 28.

[14] Robert Livingston Schuyler remembering Maitland in his introduction to *Frederic William Maitland Historian* (Berkeley: University of California Press, 1960), 45. Maitland cited in McKechnie, *Magna Carta*, 287n1.

[15] McKechnie, *Magna Carta*, 292.

the number of suits in his day (which amercements were designed to deter), writing that while "the Law of England is a law of mercy, yet is it a Law, which is now turned into a shadow," but the point: in *Second Part of the Institutes of the Lawes of England*, as printed in London in 1642, concessions related to saving the *liber homo* or the merchant or the villein, or any of the same's usefulness, from utter destruction had an intellectual connection to the idea of mercy, which is fascinating indeed.[16]

Coke's commentary on the Magna Carta travelled into North America under another name, by way of a small 63-page pamphlet, *The Excellent Priviledge of Liberty & Property Being the Birth-Right of the Free-born Subjects of England*, printed with no author, no publisher, and no date. It marked the first publication of the Magna Carta in America, and not until the following note appeared at the bottom of a broadside almanac:

> Printed and Sold by *William Bradford*, near *Philadelphia* in *Pennsylvania*, pro *Anno* 1687
> There is now in the Press, *The Excellent Priviledge of Liberty and Property*

did the publisher become known as William Bradford (not the Separatist Puritan), the first printer in Pennsylvania and later, New York.[17] Prepared by or for William Penn, a Quaker

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[16] Coke, *Second Part*, 28. On June 13, 1616, Coke was called before the Privy Council to receive reprimands "uppon his knees" for styling himself "lord chief justice of England, wherein he could challenge noo more But lord chief justice of the King Bench," and for allowing his coachman "to ryde Bare-headed before him, which was more, then any way he could Assume, or challenge to himself." Coke answered the latter charge with the claim that "his coachman did it only for his own ease and not by his [Coke's] commandment." MS Harley 1767, 47recto-48verso, British Library.

[17] In 1639, Elizabeth Glover, the widow of Josse Glover, who had died on the journey from England to New England with his press onboard, and a locksmith named Steven Day set up English America's first printing press in Cambridge, Massachusetts. Boston followed in 1675, Jamestown, Virginia in 1682, Maryland and Philadelphia in 1685, and New York in 1693. Morris L. Cohen reports these dates in Morris L. Cohen, "Legal Literature in Colonial Massachusetts," in *Law in Colonial Massachusetts 1630-1800*, vol. 62, *Publications of the Colonial Society of Massachusetts* (Boston: The Colonial Society of Massachusetts, 1984), 246-50. 246. The broadside that disclosed the publication information for *The Excellent Priviledge* was Daniel Leeds, *AN ALMANACK For the year of Christian Account 1687* (Philadelphia: William Bradford, 1687). For it, I am indebted to "Penn's 'Excellent Priviledge,'" *Bulletin of Friends Historical Association* 21, no. 2 (1932): 101-105. For background and discussion on the pamphlet, see Winthrop Hudson, "William Penn's *English Liberties*: Tract for Several Times," *William and Mary Quarterly* 26, no. 4 (1969): 578-85; Edwin B. Bronner, "First Printing of Magna Charta in America, 1687," *The American Journal of Legal History* 7, no. 3 (1963): 189-197; Morris L. Cohen, "An Historical Overview of American Law Publishing," *International Journal of Legal Information* 31, no. 2 (2003): 168-178, 172; Howard,

controversialist who had requested and received from Charles II "a tract of land in America" he would name after his father, *The Excellent Priviledge* provided an English translation of the final 1225 charter together with "a learned Comment upon it," both of which the compiler copied, without attribution, from radical Whig Henry Care's pocketsize *English Liberties: or, The Free-Born Subject's Inheritance* (1680). The first part of *English Liberties*, in its turn, had copied, though with attribution, large swaths of prose from Coke's commentary, and there it had concentrated on and so lifted most from Coke's gloss on clause 29 of the 1225 charter, which had conceded this:

> No *liber homo* shall be captured or imprisoned or disseised of any free tenement or liberties or free customs, or outlawed or exiled or in any way destroyed, nor will we go against him or send against him, except by the lawful [*legale*] judgment of his peers or by the law of the land [*legem terrae*]. To no one [*nulli*] will we sell, to no one [*nulli*] will we deny or delay right or justice [*rectum vel iusticiam*]."[18]

The Road from Runnymede, 88-90; and most recently, the first chapter of Craig Yirush's *Settlers, Liberty, and Empire: The Roots of Early American Political Theory, 1675-1775* (New York: Cambridge University Press, 2011), 29-50. I began to outline this chapter in the summer of 2015 after I requested to have the steep ticket price for the British Library's "Magna Carta: Law, Liberty, Legacy" exhibit waived on account of my dissertation research. This request was refused, and I was undeservedly *given* a family ticket by a kind research room supervisor who took pity on me. The exhibit placed Penn's *Excellent Priviledge* beside Virginia's Declaration of Rights (1776), which guaranteed that "all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity," and I found the pairing troubling in the extreme. I still do. I revisit discuss Virginia's Declaration of Rights in the third chapter of this dissertation.

[18] For English, see Stephenson and Marcham, *Sources*, 121. For Latin, see McKechnie, *Magna Carta*, 375 and 395. The second reissue had added "of any free tenement or liberties or free customs," between "disseised" and "or outlawed." For a transcription of Penn's ca. 1680 petition to Charles II, with a conjectural restoration of the right-side of the paper, which time has worn away, see document four in Richard S. Dunn and Mary Maples Dunn, eds., *The Papers of William Penn*, vol. 2, *1680-1684* (1982), 32-33. It began:

> For the King's Majesty
> The Humble Address of William Penn
> Son to Sir William Penn, deceased
> Sheweth,
> That having sought payment for debts due to his father
> In Ireland by the Oppression of the Lord Treasurer this account was not settled at this father's
> decease (though most of it remitted by order of the Ordnance Office) he was forced
> to borrow every Penny of it, by reason that since the year 1672 His Majesty's Treasury of
> England was under the Stop of the Exchequer, so that the debt now amounts to 16,000
> with the growing Interest of it, and 9 years having passed, the petition humbly prays
> for the Relief of his own, and his Mother's great debts and otherwise certain Ruin

Coke's transcription of the clause in its original Latin in *Second Part* in 1642 had transposed "right" and "justice" (as imprints of the 1225 charter's confirmation by King John's grandson, Edward I, in 1297 had done since 1508), and his English commentary had translated "no one" in the final sentence as "no man," rendering his explanation of the clause into something like a prayer uttered in unison:

> We shall sell to no man Justice or Right.
> We shall deny to no man Justice or Right.
> We shall defer to no man Justice or Right.[19]

The gendering of "no one," as old as the first English translation of the charter by courtier George Ferrers's in 1534, met everyone who read *Excellent Priviledge* in Pennsylvania, too, for Bradford, following Care, printed it just that way. "We will sell to no man, we will not deny or defer to any man either Justice or Right," those pages read.[20]

The Excellent Priviledge did not touch upon "law of mercy," but *English Liberties* had, twice. Once, on page 62, Care included it in notes on *An Act for Safety and Preservation of His Majesties Person and Government, against Treasonable and Seditious Practices and Attempts* (1661), after explaining that the punishment for high treason would unfold by drawing, hanging, disemboweling, beheading, and quartering the so adjudged. "Since the Law of England, which is

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"To no one will we sell, to no one will we deny or delay either right or justice," stood alone in the original charter of 1215 as clause 40. Clauses 39 and 40 became clauses 32 and 33, and then clauses 35 and 36, and then finally, in 1225, drafters combined them into one: clause 29.

[19] Coke, *Second Part*, 46. For the order of "right or justice" in the 1225 version of the charter, cf. McKechnie, *Magna Carta*, 504; and Coke, *Second Part*, 45. For the twenty-ninth clause in Edward's confirmation of the charter in 1297, see *Statutes of the Realm*, 1:117, and for the first Latin imprint, see *Magna Carta* (London: Richard Pynson, 1508), folio 5 verso.

[20] George Ferrers, trans., *The boke of Magna Carta*, (London, 1534), folio 7 verso; Care, *English Liberties*, 15; and Penn, *Excellent Priviledge*, 14. For a later translation, which rendered the line, "We will sell to no Man, We will not deny, or defer to any Man, either Justice or Right," see Edward Cooke [not the same], trans., *Magna Carta* (London, 1680), 46. Coke did not provide a full English translation of the Magna Carta in 1642; rather, his English commentary disclosed his understanding of the Latin text.

a Law of Mercy, does in Favour of Life, not only order a man to be Tried by a Jury of his Country and Equals, but also allows him to refuse, and have Liberty of excepting against so many of those as shall be Impannelled for that purpose," he wrote; "It cannot be supposed that the same Law ever intended that the Prisoner should be denyed a Copy of the Pannel of his Jury." Then again, for a second time, on page 128, Care referred to mercy in a comment on *An Act for the Better securing the Liberty of the Subject and for Prevention of Imprisonments beyond Seas* (1679), which came to be known, famously, as the Habeas Corpus Act (1679) and ordered sheriffs—or more generally, those under whom anyone imprisoned for a criminal offence (with the exception of treason or felony) lay in custody—to "bring or cause to be brought the Body of the Partie soe committed or restrained" up before the appropriate court in order to "certifie the true causes of his Detainer or Imprisonment." "There are three things, which the Law of England (which is a Law of Mercy) principally Regards and taketh care of, viz. Life, Liberty and Estate," Care began in his reflections on that guarantee. "Next to a man's life, the nearest thing that concerns him, is freedom of his person, For indeed what is Imprisonment, but a kind of Civil Death?" For Care, then, as his prose suggests, trial by jury and one's say in the composition of that jury, as even regard and care of the freedom of his person against wrongful imprisonment, conveyed a notion of undeservedness.[21]

To the translation of Magna Carta and its comment, the compiler of *Excellent Priviledge* appended a translation of the 1297 confirmation of the charter under Edward I, as well as both an abstract of Charles II's charter to William Penn of March 4, 1681, and "The Charter of Liberties," as the title page had it, that Penn himself had on April 2, 1683, "declared, granted, and confirmed…unto all the Free-men, Planters, and Adventurers" in the place over which

[21] 13 Car. II, c. 1 (1661) found at *Statutes of the Realm* 5:304-6; and 31 Car. II. c. 2 (1679) found at *Statutes of the Realm* 5:935-8.

Charles had "ma[d]e, create[d], and constitute[d]" Penn "the true and absolute proprietary [proprietor]."[22] Handling the Magna Carta's amercement concession, the compiler of *Excellent Priviledge* transformed Care's "any others Villain than ours" into "any other Alien than ours," but transferred clause 29, delivered in the voice of the king, unchanged: "We will sell to no man, we will not deny or defer to any man either Justice or Right," keeping the subtitle that Coke had not used: "None shall be condemned without Tryal: Justice shall not be sold or defered."[23]

In *Second Part of the Institutes of the Laws of England*, Coke had elucidated that phrase, "justice or right," by explaining that justice was a product, or an outcome, that one might "have," an outcome that imbued the having with adverbs (freely, fully, and speedily) and also assumed adjectives for itself (free, full, and speedy). If and only when justice acquired those "three qualities" was "both justice and right" achieved, Coke insisted, and justice was the "end" for which "law" was the "mean."[24] Justice (*justiciam*) and right (*rectum*), then, were similar but

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[22] Penn, *Excellent Priviledge*, 50. For Charles II's charter to Penn, see Jean R. Soderlund, ed., *William Penn and the Founding of Pennsylvania 1680-1684: A Documentary History* (Philadelphia: University of Pennsylvania Press, 1983), 41-49, quote at 42. In *Excellent Privilege*, what Penn referred to on the title page as "the charter of liberties" was his second *Frame of Government*, granted on April 2, 1683, "being the thirty fifth year of the King, and the third year of my Government" (61). Note well the possessive. Penn's first frame of government of April, 20, 1682, was published as *The FRAME of the GOVERNMENT of the Province of Pennsilvania in AMERICA: Together with certain LAWS Agreed upon in England by the GOVERNOUR and Divers FREE-MEN of the aforesaid Province*, in whose preface Penn wrote that he was moved to contrive and compose the frame and the laws for Pennsylvania for the following reason: "to the great end of all government, viz.: to support power in reverence with the people, and to secure the power from the abuse of power; *that they may be free by their just obedience*, and the magistrates honorable for their just administration. For liberty without obedience is confusion, and obedience without liberty is slavery [emphasis mine]" (Soderlund, ed., *William Penn*, 122). The "laws agreed upon in England by the governor and diverse of the freemen of Pennsylvania, to be further explained and confirmed there by the first Provincial Council and General Assembly that shall be held in the said Province, if they see meet," printed in this first *Frame of Government* from page 7 to 11, contained these: "that all Courts shall be open, and Justice shall neither be sold, denyed nor delayed" (article 5), "that all Fines shall be moderate, and saving mens Contenements, Merchandize or Wainage" (article 18), "that there shall be a Registry for all Servants, where their Names, Time, Wages, and Dayes of Payment shall be Registred" (article 23), and "that Servants be not kept longer than their time; and such as are Careful be both justly and kindly used" (article 29). It was possible then, according to Penn, for one "to be…justly…used."

[23] Cf. Care, *English Liberties*, 11; and Penn, *Excellent Priviledge*, 8. Care, *English Liberties*, 14-15; and Penn, *Excellent Privilege*, 13-14.

[24] Coke, *Second Part*, 55-56.

different ideas for Coke; neither exhausted the other. "Right is taken here for law," he wrote, "in the same sense that *ius*, often is so called. Because it is the right line, whereby Justice distributive is guided and directed." Justice was for him an action or behavior one could "doe" as directed by the line of right—right what "discovereth, that which is tort, crooked or wrong…for as right signifieth law, so tort, crooked or wrong, signifieth injurie, and *injuria est contra ius*, against right"—but the rich and capacious Latin word *ius* has never had an English-language equivalent, and that is this chapter's first point.[25] The word in English was lost, replaced, at different times, and by different authors, with "right" and "law" certainly, but also "due" or "own."[26] In his commentary on the Magna Carta, Coke asserted that both "right" and *ius* meant "law," but that, at the same time, *ius* and "right" might collapse into one another. Right "discovereth that which is…wrong," he wrote, before adding that "it is called Right, because it is the best birth-right the Subject hath, for thereby his goods, lands, wife, children, his body, life, honor, and estimation are protected from injury and wrong," and that it "is sometime taken for the right it selfe, that a man hath by law to land."[27] For Coke, the idea of "justice" in what became the 29th clause of the Magna Carta did not exhaust the idea of "right" (while the former needed the latter), and "right"

[25] Coke, *Second Part*, 55-6.

[26] For an illuminating discussion, see Kenneth Pennington, "*Lex* and *ius* in the Twelfth and Thirteen Centuries," in *Lex and Ius: Essays on the Foundation of Law in Medieval and Early Modern Philosophy*, eds. Alexander Fidora, Matthias Lutz-Bachmann, and Andreas Wagner (Stuttgart: Frommann-Holzboog, 2010), 1-25. "*Ius* was a term rich in resonances," he writes. "*Ius* reminded the jurists constantly of the transcendental significance of the legal system. It existed not just to establish right and wrong and to punish the wicked. It was the source of justice, equity, and rights." *Ius* had both objective and subjective shades of meaning in Roman law, and meant not only an objective situation that was right as opposed to wrong, but also a subjective right. Translating *ius* as "right" in Ulpian's definition of justice, to be discussed below, would tend toward the subjective, while translating it as "due" would tend toward the objective. See Charles Donahue Jr., "*Ius* in the subjective sense in Roman law," in *A Ennio Cortese*, eds. Domenico Maffei, Italo Birocchi, Mario Caravale, Emanuele Conte, and Ugo Petronio (Rome: Il Cigno Edizioni, 2001), 507. In the first chapter of *Natural rights theories: Their origin and development* (New York: Cambridge University Press, 1981), Richard Tuck argues that the origin of the word *ius*, its use "by the early Romans in the context of a primitive method of divine judgment," helps us see that "*ius* was taken to be something objectively right and discoverable," adding that "in this sense it remained as a kind of synonym for 'law' throughout the history of Latin as an effective language" (8).

[27] Coke, *Second Part*, 56.

had both objective and subjective valences. Penn, following Care, imported all of this, Bradford printing, on page 33 of *Excellent Priviledge*, "The Law is called *Rectum*, because it discovereth that which is…wrong; … *Injuria est contra Jus*, Injury is against Right."

Historians have debated the authorship of *The Excellent Priviledge*, but Penn almost certainly wrote the "To the Reader," signed Philopolites, before selectively copying Care's Introduction. Philopolites worried that "it may reasonably be supposed that we shall find in this part of the world, many men, both old and young, that are strangers, in a great measure, to the true understanding of that inestimable Inheritance that every Free-born Subject of England is Heir unto by Birth-right," and he defined "that inestimable Inheritance" as "that unparallel'd Priviledge of Liberty and Property, beyond all the Nations in the world beside."[28] To remedy this, Penn presented his readers with "that antient Garland, the Fundamental Laws of England, bedeckt with many precious Priviledges of Liberty and Property, by which every man that is a Subject to the Crown of England, may understand what is his Right, and how to preserve it from unjust and unreasonable men." The inheritance was the subject's right, his birth-right, Penn wrote, and he was to seek to preserve it by educating himself about the fundamental laws, which Penn described as "that excellent and discreet Ballance that gives every man his even proportion, which cannot be taken from him." The subject's even proportion could not be taken away, but the subject could give it away; that is, it was alienable. Penn wished, he wrote, that his work might "raise up Noble Resolutions in all the Free-holders in these new Colonies, not to give away any thing of Liberty and Property that at present they do, (or of right as Loyal English Subjects, ought to) enjoy, but take up the good Example of our Ancestors, and understand, that it is easie to part with or give away great Priviledges, but hard to be gained, once lost."

[28] In *Second Part*, Coke wrote that "the best inheritance that the Subject hath, is the Law of the Realme" (63).

Penn wrote that "the Fundamental Laws of England" were the route the free-born subject should travel to get at an understanding of "what is his Right, and how to preserve it." "His Right" was his "inestimable Inheritance," that is, "that unparall'd Priviledge of Liberty and Property," and the fundamental laws—"that excellent and discreet Balance that gives every man his even proportion"—disclosed to him what was his. The free-born subject could give away what was his, but another could not take it from him without consequences.

That something given (by whom, Penn never said) could become a vindicable right is the perplexing difficulty, the historical problem, at the heart of this chapter. The letter to the reader did not use the word "justice," but the thought Penn captured, that the ancient garland, the fundamental laws of England "gives every man his [something]," shared a lineage with the thought the authors of a law book composed contemporaneously with the issues and reissues of the Magna Carta in the first half of the thirteenth century had copied down from the Roman jurist Ulpian, who wrote in the third century CE that justice was "the constant and perpetual will to give to each his *ius*" (*est autem iustitia constans et perpetua voluntas ius suum cuique tribuens*).[29] The next chapter of this dissertation will turn to that book, *On the Laws and Customs of England* (*De Legibus et Consuetudinibus Angliæ*), printed since 1569 as *Bracton*, but for now, it serves to say that its expression of justice was perhaps the Roman rendering of the Golden Rule, derived from Matthew 7:12 of the New Testament, which the King James Version of the Bible, published for the first time in 1611, translated as, "Therefore all things whatsoever ye

[29] *Bracton On the Laws and Customs of England*, trans. Samuel E. Thorne (Cambridge: Belknap Press of Harvard University Press, 1968), 2:23, using Justinian's *Digest* at 1.1.10, which appeared in Justinian's *Institutes* at 1.1.1. See *The Digest of Justinian*, eds. Theodor Mommsen and Paul Krueger, and trans. Alan Watson (Philadelphia: University of Pennsylvania Press, 1985), I:2a; and *Imperatoris Iustiniani Institutionum*, comp. J.B. Moyle (Oxford: Clarendon Press, 1903), 97. Of the significance of *Bracton*, Maitland wrote, in profoundly gendered terms that read like a hagiography, "Twice in the history of England has an Englishman had the motive, the courage, the power to write a great readable, reasonable book about English law as a whole." He was speaking, of course, of Bracton and Blackstone. See F.W. Maitland, ed., *Bracton's Note Book* (London: C.J. Clay & Sons, 1887; reprint Buffalo: Hein, 1999), I:8.

would that men should do to you, do ye even so to them: for this is the law and the prophets," and it communed with Ulpian's three precepts of *ius* (*iuris praecepta*): to live honorably (*honeste,* which could also mean virtuously), to not harm anyone, and to give to each his own (*suum cuique tribuere*).[30]

The thought was old, very old, Greek in origin, with roots tracing back to pagan antiquity, and it perhaps got its start from a poet named Simonides, quoted on the earliest pages of Plato's *Republic*, written in Greek in the fourth century BCE and arguably the first great work of political philosophy in the Western tradition, in a scene that unfolded after a slave, on an errand for his master, ran up behind two men, Socrates and Glaucon, walking back to town, and tugged at Socrates's cloak, telling him, "Polemarchus says you are to wait."[31] Back in Polemarchus's house, in a circle of stools that to all appearances did not include one for Polemarchus's unnamed slave, the conversation moved from old age, to sex, to inherited wealth, to anxieties about impending death, and then to a question about whether justice was nothing but telling the truth and "returning anything you may have received from anyone else," like giving back some weapons borrowed.[32] Socrates asked his interlocutor if that rule would apply even if the lender went mad between the time of his giving and the time he requested its return, and

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[30] Kenneth Pennington connects Ulpian's definition of justice to the Golden Rule at Pennington, "*Lex* and *ius*," 3. For other expressions of what came to be known as the Golden Rule, see Matthew 22:37-40, which recorded, "Jesus said unto him, Thou shalt love the Lord thy God with all thy heart, and with all thy soul, and with all thy mind. This is the first and great commandment. And the second is like unto it, Thou shalt love thy neighbour as thyself. On these two commandments hang all the law and the prophets"; Luke 6:31, which recorded, "And as ye would that men should do to you, do ye also to them likewise"; and finally, Tobit 4:15 of the Apocrypha, which recorded, "And what you hate, do not do to anyone" (NRSV). Ulpian's three *iuris praecepta* may be found at *Digest of Justinian*, Mommsen and Krueger, 2a (entry 1.1.10.1); and for a rare intellectual biography of Ulpian, see Tony Honeré, *Ulpian: Pioneer of Human Rights* (New York: Oxford University Press, 2002).

[31] Plato, *The Republic*, ed. G.R.F. Ferrari and trans. Tom Griffith (New York: Cambridge University Press, 2000), 327a. To repeat, the work scholars consider the first great contribution to political philosophy in the Western tradition unfolded only after a slave spoke in order to instruct.

[32] Plato, *Republic*, 331c.

several permutations of the thought followed: to return what you have been given, to pay everyone what is owed to him, and to give back what has been received for safe-keeping, which devolved into the suggestion that what Simonides meant by "what was owed" was "what was appropriate for him," and ultimately, helping friends and harming enemies, treating friends well and enemies badly, treating the unjust badly and the just well, and helping a friend if he is good and harming an enemy if he is bad.[33] Socrates rejected all of this on the ground that "it is not right to treat anyone badly under any circumstances," in favor of an idea that justice was the keeping of what is properly one's own, what is one's own is what suits one by nature, one's function or role in society suits one, and "people's ownership and use of what belongs to them, and is their own, can be agreed to be justice."[34]

For Aristotle, also writing in Greek in the fourth century BCE, one sort of justice, particular or partial justice (as opposed to complete justice, which Aristotle considered a virtue) was "some sort of mean," and the just "a sort of proportion," if distributive, and arithmetical, if corrective.[35] "To go to a judge is to go to justice," he wrote. "For the ideal judge is so to speak animate justice."[36] The just, then, "is intermediate, since the judge is so. The judge restores equality."[37] One's own was what was equal, an equal share. "This is indeed the origin of the word *dikaion* [just]," Aristotle wrote, "it means *dicha* [in half], as if one were to pronounce it

[33] Plato, *Republic*, 331c-335e, quotes at 332c.

[34] Plato, *Republic*, 335e and 434a.

[35] Aristotle, *Nicomachean Ethics*, trans. and ed. Roger Crisp (New York: Cambridge University Press, 2000), 1131a-1132a.

[36] Aristotle, *Nicomachean Ethics*, trans. H. Rackham, Loeb Classical Library 73 (Cambridge, Mass.: Harvard University Press, 1934), 277 (using page instead of line), replacing Rackam's "justice personified" with "animate justice," a translation Ernst Kantorowicz provides in his magisterial, unforgettable *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton: Princeton University Press, 1957), 132.

[37] Aristotle, *Nicomachean Ethics*, trans. Crisp, 1132a.

dichaion; and a *dikast* [judge] is a *dichast* [halver]."[38] And Cicero, writing in Latin instead of Greek some time later, in the first century BCE, at one juncture, in *On the Laws*, on a walk among tall poplars and the green and shady bank, singing birds, and river noise, leveled out human beings to a new kind of equality. "Those who have been given [*data*] reason [*ratio*] by nature have also been given right reason [*recta ratio*]…all [*omnibus*] have reason and therefore *ius* has been given to all,"[39] he wrote, but he continued to conceptualize justice in terms of giving from one to another, as demonstrated at other junctures: in *On the Nature of the Gods* ("…justice, which distributes to each his own [*suum cuique distribuit*]..."[40]), in *To Herennius* ("justice is equity, giving [*tribuens*] *ius* to each thing in proportion to its worth [*pro dignitate*]"[41]), in *On Ends* ("this disposition of the mind, giving to each his own [*suum cuique tribuens*] and maintaining with generosity and equity that human solidarity and alliance of which

[38] Aristotle, *Nicomachean Ethics*, trans. Rackham, 277 (using page instead of line). Cf. Aristotle, *Topics*: "Furthermore, you must see whether in his description he passes over the genera, for example, when he defines justice as 'a state productive of equality,' or 'distributive of what is equal'; for by such a definition he passes over virtue, and so by omitting the genus of justice he fails to state its essence" (143a16); and "You should also consider whether the term defined is rather applied in virtue of something other than what is expressed in the description assigned, Take, for example, the definition of 'justice' as 'a capacity for distributing what is equal'; for a just man is rather he who deliberately choses to distribute what is equal than he who has the capacity for doing so; so that justice could not be a capacity for distributing what is equal; for then a man would be most just who has the greatest capacity for distributing what is equal" (145b36). Aristotle, *Topica*, ed. and trans. E.S. Forster, Loeb Classical Library 391 (Cambridge, Mass.: Harvard University Press, 1960), 587 and 589, 605 and 607 (pages). Cf. also Aristotle, *Rhetoric*: "Justice is a virtue which assigns to each man his due in conformity with the law; injustice claims what belongs to others, in opposition to the law" (1366b9). Aristotle, *The 'Art' of Rhetoric*, trans. John Henry Freese, Loeb Classical Library 193 (Cambridge, Mass.: Harvard University Press, 1926) 91 and 93 (pages).

[39] The passage in full: "Those who have been given *ratio* by nature have also been given *recta ratio*, and therefore *lex* too, which is *recta ratio* in commands and prohibitions; and if they have been given *lex*, then they have been given *ius* too. All have *ratio*, and therefore *ius* has been given to all" (*quibus enim ratio natura data est, isdem etiam recta ratio data est, ergo et lex, quae est recta ratio in iubendo et vetando; si lex, ius quoque; et omnibus ratio; ius igitur datum est omnibus*). Cicero, *De Re Publica De Legibus*, trans. Clinton Walker Keyes, Loeb Classical Library 213 (Cambridge, Mass.: Harvard University Press, 1928), 332 (Latin) and *On the Commonwealth and On the Laws*, ed. James E.G. Zetzel (New York: Cambridge University Press, 1999), 117 (English).

[40] Cicero, *De Natura Deorum*, trans. H. Rackham, Loeb Classical Library 268 (Cambridge, Mass.: Harvard University Press, 1933), 320.

[41] The passage in full: "Iustitia est aequitas ius uni cuique rei tribuens pro dignitate cuisque." Cicero, *Rhetorica ad Herennium*, trans. Harry Caplan, Loeb Classical Library 403 (Cambridge, Mass: Harvard University Press, 1954), 162.

I speak, is termed justice"[42]), and in *On Invention* ("justice is a habit of mind which gives to each one's desert [*suam cuique tribuens dignitatem*] while preserving the common advantage"[43]).

The Roman jurist Ulpian picked up these Ciceronian definitions, but changed course, keeping the verb *tribuo* and the anonymous "each," but dropping "common advantage," replacing "disposition of the mind" and "habit of mind" with "will" (*voluntas*), and replacing *dignitas* ("worth" or "desert") with *ius*, to make it: "justice is the constant and perpetual will to give to each *ius suum*."[44] This was the definition that made it into Justinian's *Digest* and *Institutes*, and then into *Bracton*, which clerks of what would become the King's Bench composed in England in the 1220s and 1230s, contemporaneously with the revisions and re-issues of the Magna Carta, receiving interpolations and additions by later editors through the 1250s.

The simple point derivable from this selection of very old works written by men who were not women is this: up to the era of the Magna Carta and *Bracton*, one expression of justice had been a giving or a keeping of what one had received, and the direct object was understood variously, at different times and in different contexts, to provide but five examples: as a weapon, a role in the city, an equal share, *dignitas*, and *ius*. This was the lineage Penn stepped into in 1687, after colonization of the North American mainland was well under way, when he wrote in his letter to the reader for *The Excellent Priviledge*, that "the Fundamental Laws of England…gives every man his even proportion."

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[42] The passage in full: "…quae animi affectio suum cuique tribuens atque hanc quam dico societatem coniunctionis humane munifice et aeque tuens iustitia dicitur." Cicero, *De Finibus Bonorum et Malorum,* trans. H. Rackham, Loeb Classical Library 40 (Cambridge, Mass.: Harvard University Press, 1931), 468-9.

[43] The passage in full: "Iustitia est habitus animi communi utilitate conservata suam cuique tribuens dignitatem." Cicero, *On Invention*, trans. H.M. Hubbell, Loeb Classical Library 386 (Cambridge, Mass.: Harvard University Press, 1949), 328-9.

[44] This expression of justice, set in the terms of respecting the *ius* of others, had excised the common good.

In the early morning hours of March 24, 1603, Elizabeth Tudor—by whose "especial grace" letters patent to Humphrey Gilbert and Walter Raleigh had issued in 1578 and 1584, respectively, for travel to and habitation of "all the soile of all such lands, territories, and Countreis" they might discover and possess, "with full power to dispose thereof," which Gilbert used to sail to Newfoundland, and his half brother, Raleigh, in his turn, to Roanoke—died in her bed, and when she was gone, her thirty-seven-year-old cousin, James VI, King of Scotland, a poet of some renown, stepped into the place she left vacant to become James I, King of England, too.[45] According to the authoritative report by Coke in *Calvin's Case* in 1608, which resolved a dispute contrived to test what benefits went to Scottish subjects born after James's accession, "ligeance," instead of law, was the tie that bound every last subject to the natural, instead of politick, body of the king, and so Robert Calvin, a three-year-old boy, born into that two-way relation of obedience and protection, could sue for English land in an English common law court in England.[46] For the purpose of acquiring liberty as a personal legal status by the measure of this thought, it was political subjection that counted, that swung as the definitive hinge, a "true and faithful," indeed intimate, relation between the subject and what Coke variously described as the king's natural "body," "capacity," or "person"—that part of him that power enough (as the king's "politick body or capacity" or "mystical body" did not) to die, yes, and also "to do justice and judgment according to right and equity, and to maintain the peace, &c. and to find out and discern the truth."[47]

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[45] "Charter to Sir Walter Raleigh" and "Letters Patent to Sir Humfrey Gylberte" in Francis Newton Thorpe, *The Federal and State Constitutions* (Buffalo: William S Hein & Co., 2002), 1:54, 49, quotation from the former.

[46] William Cobbett, ed., *Complete Collection of State Trials*, vol. II (London, 1809), cols. 613-4, and 624-5.

[47] Cobbett, *State Trials*, col. 627.

Since at least 161 CE, when a Roman citizen named Gaius wrote an elementary legal textbook, "the first division of the *ius* of persons" had been this: "that all human beings are either free or slave," but here, in *Calvin's Case*, penned over three decades before *Second Part*, Coke put his finger on the new division as he saw it: political subjection had supplanted the removal of personal subjection as the necessary criterion for liberty.[48] "Every man is either…an alien born, or…a subject born," Coke wrote.[49] *Calvin's Case* decided that liberty was no longer to be distributed as if it were a material commodity like a loaf of bread, say, whose bits were to be pinched off in order that each may receive a proportion; rather, as Solicitor General Francis Bacon argued as counsel for Calvin, *all* subjects born into a duty of obedience to the king, and so into the body politick, were "complete and entire," that is, as legal historian Keechang Kim has elegantly phrased it, the recipients of the *entirety* of a plentitude of liberty.[50] On this account, liberty, a legal condition that tracked distinctions among persons, denied distribution: everyone born into an obligation of obedience to the king, which was exacted by the law of nature, Coke wrote, should get all of it.[51] The question to be asked, then, to figure out whether an individual counted as free or not, was not whether she was owned or dominated by another or no, but whether she stood within or without "the politick body," which Coke explained "is framed by the policy of man."[52] "By the law of England the subject, that is natural born, hath a capacity or

[48] *The Institutes of Gaius*, trans. Francis de Zulueta (Oxford: Clarendon Press, 1946), 4.

[49] Cobbett, *State Trials*, col. 637. In the first volume of *Commentaries on the Laws of England* (Oxford: Clarendon, 1765), William Blackstone would write that "the first and most obvious division of the people is into aliens and natural-born subjects" (1:354). Kim argues that his was "a masterful summary" of generations of legal development on "the *summa divisio* of the law of personal status" since *Calvin's Case*, but as I will argue in the third chapter, that watershed in the *summa divisio,* as I see it, was into "persons…natural, or artificial" (1:119).

[50] Cobbett, *State Trials*, col. 582; and Keechang Kim, *Aliens in Medieval Law: The Origins of Modern Citizenship* (New York: Cambridge University Press, 2000), 195, and more extensively, 176-99, and 200-11.

[51] Cobbett, *State Trials*, col. 632.

[52] Cobbett, *State Trials*, col. 623; and Kim, *Aliens in Medieval Law*, 190-2.

ability to all benefits whatsoever," Bacon said during argument of the case.[53] "Hee, that is born an intire and perfect subject, ought by reason and lawe to have all the freedoms, priviledges, and benefites pertaining to his birth-right in all the kings dominions," Lord Chancellor Ellesmere said during the same.[54]

Legal historian Daniel Hulsebosch has argued that *Calvin's Case* played a formative role in developing the idea that emigrating English subjects carried some rights with them when they travelled to settle elsewhere, rights that escaped the jurisdictional reach of the common law courts and became "the heritage and resource of the English people."[55] The plan of government agreed to on November 15, 1636, by the General Court of New Plymouth, a colony planted by Separatist Puritans (carrying a patent granted by the Virginia Company) who had on November 11, 1620, "covenant[ed] and combine[d]…together into a civil body politic," supports this argument.[56] "Finding that as freeborne subjects of the State of Engl. we hither came indewed with all and singular the privileges belonging to such," the measure (perhaps the first written constitution in the modern world) observed, "in the first place we thinke good that it be establish[ed] for an act That according to the due privilege of the subject aforesaid no imposicon law or ordnance be made or imposed upon us by ourselves [or others at] present or to come but such as shal be made [or] imposed according to the free liberties [of the] State and Kingdome of

[53] Cobbett, *State Trials*, col. 582-3. "The law," he had said in a previous breath, "that proceeds upon general reason, and looks upon no mens faces, affecteth and privilegeth those which drew their first-breath under the obeisance of the king of England."

[54] Cobbett, *State Trials*, col. 691.

[55] Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830* (Chapel Hill: University of North Carolina Press, 2005), 31-2.

[56] "Agreement Between the Settlers at New Plymouth," in *Foundations of Colonial America: A Documentary History*, ed. W. Keith Kavenagh (New York: Chelsea House Publishers, 1973), 246, an agreement that would become known colloquially as the Mayflower Compact.

England and no otherwise.[57] The following pages intend to draw a very different historical picture, however, a picture that traces not what "we hither came indewed with," as was the boast of settlers in Plymouth, but something else again, for *An Act for the liberties of the people*, agreed to in March of 1639 by the General Assembly of Maryland, a proprietary colony created in 1632 by a charter given by Charles I to Cecilius Calvert, suggested that subjection, and what attended it, would figure in North America very differently than it had in England. Slavery as a domestic practice had already been eradicated for centuries in England by the time the General Court of New Plymouth wrote that privileges belonged to freeborne subjects, yet an Atlantic slave trade mobilized in England's name would gain momentum in the latter half of the seventeenth century to become the chief carrier of Africans to the Americas through the eighteenth century.[58] Maryland's *Act for the liberties of the people*, which confirmed this, that

> all the Inhabitants of this Province being Christians (Slaves excepted [)] Shall have and enjoy all such rights liberties immunities priviledges and free customs within this Province as any naturall born subject of England hath or ought to have or enjoy in the Realm of England by force or vertue of the common law or Statute Law of England (saveing in such cases as the same are or may be altered or changed by the Laws and ordinances of this Province)[,][59]

laid subjection bare as a fraught boast.

In 1608, no English monarch had any legitimate power at all to extend the reach of the laws of England beyond the realm of England because the only international authority to date

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[57] David Pulsifer, ed., *Records of the Colony of New Plymouth in New England*, vol. 11, *Laws 1623-1682* (Boston: William White, 1861), 6. Editor Donald Lutz refers to this act as "a candidate for the honor of being the first true written constitution in the modern world" in *Colonial Origins of the American Constitution: A Documentary History* (Indianapolis: Liberty Fund, 1998), 61.

[58] These statistics can be found in David Eltis, *The Rise of African Slavery in the Americas* (New York: Cambridge University Press, 2000), 9, 37-8; and David Richardson, "The British Empire and the Atlantic Slavery Trade, 1660-1807," in *The Oxford History of the British Empire*, vol. 2, *The Eighteenth Century* (New York: Oxford University Press, 1998).

[59] "An Act for the liberties of the people" in William Hand Browne, ed., *Archives of Maryland: Proceedings and Acts of the General Assembly of Maryland*, vol. 1, *January 1637-8--September 1664* (Baltimore: Maryland Historical Society, 1883), 41.

was the pope, and neither the queen nor the king was the pope. Issue letters patent and charters for cross-Atlantic exploration and access, though, queens and kings nevertheless did from Henry VII's grant to John Cabot in 1496, and shortly before the *postnati* case, in 1606, James had given suitors license "to deduce a colony of sundry of our People into that part of America commonly called VIRGINIA."[60] This study looks northward, though, to the earliest legal codification of chattel slavery in North America in "that Parte of Newe England in America" that lay near "the Bottome of a certayne Bay there, comonlie called Massachsuetts, alias Mattachusetts, alias Massatusetts Bay," which got its start in letters made patent by Charles I on March 4, 1629, and tries to make plain that once personal subjection in the shape of slavery gained a foothold, a distribution among subjects, a giving of liberty to an elect, took root too.[61]

[60] Thorpe, *The Federal and State Constitutions*, 3783. In *Calvin's Case*, Coke did not expressly address the implications of his decision for the American colonies, but he did distinguish between inherited and conquered overseas territories. Scotland was a kingdom "by descent," Coke argued, so his theory about the moral and legal structure of the kingdom applied, but in other places, places where a Christian king conquered infidels, say, the so conquered, as unconvertible subjects of the devil and not the king, were permanent alien enemies who saw their laws immediately destroyed and could, "until certain laws be established amongst them," have no privileges, no laws, but those that the king might choose to withhold or grant "at his pleasure." Cobbett, *State Trials*, col. 638. Were the king to conquer a Christian kingdom, contrariwise, its laws remained intact until the king chose to change them. From the perspective of Westminster, these distinctions threw into question what English liberty, if any, might visit emigrant settlers in America, as its indigenous inhabitants were not Christian, but settlers of North America would adopt their own theories of sovereignty. "The English Crown," as historian of political thought Anthony Pagden has summarized, "never had any clear conception of what were the grounds for the occupation of the Americas," and *de facto* self-government, if not *de facto* independence, was the rule. Anthony Pagden, "Law, Colonization, Legitimation, and the European Background," in *The Cambridge History of Law in America*, vol. 1, *Early America (1580-1815)*, eds. Michael Grossberg and Christopher Tomlins (New York: Cambridge University Press, 2008), 29.

[61] "The Charter of Massachusetts Bay 1629" in Thorpe, *Federal and State Constitutions*, 3:1847. This dissertation finds that personhood admitted of enslavement, or, to put it another way, that enslavement was a possibility for persons. With that insight in hand, it fast becomes difficult to understand where the enslaved stood in communal society in terms of political subjection to the sovereign power, and Chapters Three to Five will try to work through that question.

II.

William Penn's claim in 1687 about a vindicable right to the privilege of liberty due to the free-born subject coursed alongside another understanding of one's own or due, an understanding from Reformed Protestantism that proceeded from a different basic premise, that humans were bad, very bad, so bad that damnation and eternal punishment was one's due, and no one could save herself. This counterpoise suggests a historical homology between theories enslavement and Christian theology, and between the ideas of justice and of mercy. Penn wrote that liberty was the free-born subject's inheritance, his birth-right, but confessed also that it was given to the subject without likewise confessing the tension between a right and a grant or a gift.[62] If Penn's right was given to him, then he failed to explain where, or with whom, it originated; he failed to explain how it could be the object of a delivery. The inheritance was scrutable, Penn intimated, the result of some claim or faculty on the recipient's part that must be deferred to by others. What I mean to argue in the following pages is that in early Massachusetts Bay, the legal condition of "freedome" in the "body polliticke," which began as "the power of chuseing" rulers, like the legal condition of slavery, was the corollary of a voluntary gift, and that this insight reveals both freedome and slavery as admitting of nonobligatory condescension toward an elect. It is one of the principal arguments of this dissertation that the common law's oldest expression of justice, at whose ancient root lay the presumption that the law may deem "persons" either free or slave, contained just that admission within itself, and can be traced forward through the course of human events in English North America and the new United States to the American Civil

[62] In the aftermath of the execution of Charles Stuart on January 30, 1649, Thomas Hobbes, an English political philosopher, wrote about the difference between a law, on the one hand, and a donation from the sovereign, on the other. "The phrase of a Law is *Jubeo*, *Injungo*, *I Command*, and *Enjoyn*," he wrote, while "the phrase of a Charter is *Dedi*, *Concessi, I have Given*, *I have Granted*." Thomas Hobbes, *Leviathan*, ed. Richard Tuck (New York: Cambridge University Press, 1991), 200.

War. This chapter, on the proximity of saving grace and enslavement in Massachusetts Bay, and the next, on the place of the person in the first legal treatise in England to describe the whole of English law, will try to lay the foundation for that argument, which the proceeding chapters will carry forward to 1857.

As the planting of Massachusetts Bay unfolded from 1629, after Charles I created the Governor and Company by his letters patent, the articulate Puritan theologians leaving England to build a new home in that part of the world attempted to create an intellectually, spiritually, legally, and politically integrated society marked by a thoroughgoing, indeed dogged, belief in universal degeneracy and inherent sin, the inability in the estate of sin to will anything good or to by one's strength convert into the estate of grace, election to salvation, a low opinion of unredeemed humanity, God's direct control of quotidian existence, and God's mercy as the necessary criterion for salvation.[63] As historian of American religious history, Mark Noll, has explained, not until this "theological canopy" cracked in Massachusetts Bay could alternative presuppositions like universal moral reason (*ratio*), inherent harmlessness, human volition as a principle of free activity, and a high opinion of unredeemed human nature surface and allow for a transfer of responsibility for the health of communal life from God to humanity, say, or widespread agitation against a terrestrial tyrant like a parliament or a king.[64]

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[63] Charles I, "by the grace of God, Kinge of England," created "the Governor and Company of the Massachusetts Bay in Newe-England" by letters patent dated March 4, 1629, and in 1630, when the ship *Arbella* left with Governor of the Company, John Winthrop, a non-separating Puritan (who suffered from an infected hand), and the letters patent, in accordance with an agreement that the company's records captured on August 29, 1629 (Shurtleff, *Records*, 51), the company's headquarters and the site of local governance, which were originally two, became one. Original settlers did not wish to separate from the Church of England, but they did want to further and intensify its Reformation. Calvinist Puritans loathed Archbishop Laud's Arminianism, for example, a theological position that proposed that humans were free to accept or reject God's prevenient grace.

[64] See Mark Noll's fascinating *America's God: From Jonathan Edwards to Abraham Lincoln* (New York: Oxford University Press, 2002), 3-72, quote at 32. This paragraph makes sweeping and generalizing claims in order to attend to a belief among Massachusetts Puritans about election as a product of God's sovereignty, and to do so succinctly. Two caveats, then, are in order. First, I agree with David Hall, who has argued that "we have no way of knowing how many of the colonists were devout Calvinists, for no one took a census of beliefs," and reasons that

"Original sin is the contrariety of the whole nature of man to the Law of God, whereby it being averse from all good, is inclined to evil," Thomas Shepard, minister of the church in Newtown (as of May 2, 1638, Cambridge) from February 1, 1636, until his death in 1649, wrote in his catechism.[65] "Man hath no free-will to any spiritual good," he explained, and conversion, he instructed, required an experience of humiliation "whereby the Spirit cuts the Soul off from self-confidence in any good it hath or doth. Especially, by making it to feel its want, and unworthiness of Christ, and hence submitteth to be disposed of as god pleaseth."[66] In a relation of his own religious experience, written when he was about fifty years old, John Winthrop, elected to the office of Governor of the Massachusetts Bay Company on October 20, 1630, confessed his own experience of humiliation. "I knew I was worthy of nothing for I knew I could doe nothing for him or for my self," he wrote of an understanding he came to at the age of thirty. "I could only mourn, and weep to think of free mercy to such a vile wretch as I was."[67] For everyone convinced of God's election, it was the case that absolute subjection to the sovereign will of God, a lesson canonized in the ninth book of Romans, which described a God who said, "I will have mercy on whom I will have mercy, and I will have compassion on whom I will have

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"the church attracts most people intermittently—more in some seasons of the year than others, and more at certain points in the life cycle." David Hall, *Worlds of Wonder, Days of Judgment: Popular Religious Belief in Early New England* (Cambridge, Mass.: Harvard University Press, 1989), 15. Second, I hope that my focus on theology does not give the false impression that I am reproducing the argument that acquisitive, commercial capitalism was antithetical to Puritan piety. I am not. For a powerful expression of that nexus, see Mark Peterson, *The Price of Redemption: The Spiritual Economy of Puritan New England* (Stanford: Stanford University Press, 1997).

[65] The General Court ordered "that Newtowne shall henceforward be called Cambrige" on May 2, 1638. Shurtleff, *Records*, 1:228.

[66] Thomas Shepard, *The First Principles of the Oracles of God* (London: for John Rothwel, 1655), 8.

[67] *Winthrop Papers*, vol. 3, *1631-1637* (Boston: Massachusetts Historical Society, 1943), 342. Literary historian Abram C. Van Engen has identified "the experience of grace itself—and the representation of that grace" as "Puritanism's primary distinguishing feature" and explained that "though they divided over emphases, Puritan ministers preached a remarkably similar version of the conversion process focused on predestination." Abram Van Engen, *Sympathetic Puritans: Calvinist Fellow Felling in Early New England* (New York: Oxford University Press, 2015), 13.

compassion," demanded a coming to terms with the frightful possibility that God had not chosen them to save and that they were, in consequence, irrevocably damned.[68] Winthrop knew this when he wrote, "Yea I was perswaded I should love him though he should cast mee off," in his personal religious account, and Joanna Sill struggled with the same self-abnegation when she, at some point between 1638 and 1645, stood up before the church in Cambridge (formerly Newtown) to movingly convey a narrative of her own religious experience. "She saw her nature how vile it is," Shepard scribbled down in a small leather notebook he kept to record the confessions in his church. "She thought she was living but found it hard if the Lord should damn her and never show mercy yet to be content."[69]

A year before Miles Flesher and Robert Young printed Coke's *Second Part* as an elaborately-plated, 745-page book to be sold by Ephraim Dawson, Richard Meighen, William Lee, and Daniel Pakeman in Fleetstreet in 1642, two smaller books by Puritan minister John

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[68] Romans 9:15 in the King James, or Authorized, Version of the Bible, printed for the first time in 1611. The Geneva Bible, produced earlier, in 1560, by English Protestant refugees fleeing Mary Tudor, a Catholic, had translated the thought differently. "I will have mercie on him, to whome I will shewe mercie; and wil have compassion on him, on whome I will have compassion," the Geneva Bible rendered the line, with the following marginal note attached: "As the onelie wil & purpose of God is the chief cause of election & reprobacion: so his fre mercie in Chirst is an inferior cause of salvacion, & the hardening of the heart, an inferior cause of damnacion." *The Geneva Bible: A facsimile of the 1560 edition* (Madison, Wisconsin: University of Wisconsin Press, 1969), 73 verso in the Newe Testament. Clergymen in Massachusetts Bay preferred the King James Version, and it became, Harry Stout has argued, "the primary text on which New England's Bible Commonwealth would rest." For illuminating discussions of the Bible in New England, see Harry S. Stout, "Word and Order in Colonial New England," in *The Bible in America: Essays in Cultural History*, eds., Nathan Hatch and Mark Noll (New York: Oxford University Press, 1982), 19-38, quote at 20; and Jill Lepore, *Book of Ages: The Life and Opinions of Jane Franklin* (New York: Knopf, 2013), 11-14, 49-52.

[69] *Winthrop Papers*, 3:342; and George Selement and Bruce Woolley, eds., *Thomas Shepard's* Confessions in *Publications of the Colonial Society of Massachusetts*, Volume 58 (Boston: Colonial Society of Massachusetts, 1981), 51-2. While I will argue below that making such a narrative obligatory for church membership would render a voice in government contingent on the impossible: human discernment of an inscrutable gift, I recognize that these narratives gave lay women and men a space to engage in what Darren Staloff has described as "lay oratory." David Hall, too, argues that these public accounts were occasions for lay women and men to demonstrate that they, "empowered by their literacy and by their access to other printed narratives than sermons,…possessed the confidence to speak for themselves about the ways in which they had experienced the workings of the law and grace." See Darren Staloff, *The Making of an American Thinking Class: Intellectuals and Intelligentsia in Puritan Massachusetts* (New York: Oxford University Press, 1998), 30; and Hall, *Worlds of Wonder*, 119-39, quote at 119.

Cotton of Boston, who settled in Massachusetts Bay in 1633 and became one of the ablest of ministers preaching New England's way of Puritanism, were printed in London, too: *AN ABSTRACT OR THE LAVVES OF NEW ENGLAND, As they are novv established*, printed for F. Coules and W. Ley at Paules Chain, and *GODS MERCIE MIXED WITH HIS IVSTICE*, printed by G.M. for Edward Brewster, and Henry Hood at the Bible on Fleet-Bridge, and in S. Dunstanes Church-yard. In the latter, a book of sermons, Cotton worked from the dual premises that "there is no man that lives in an estate of nature, but is in a cursed estate," and that the "judgement fit for their sinnes" was the outpouring of God's wrath to the end of humanity's utter undoing.[70] If human equality was to be found in this view, it lay in a universal birthright to, borrowing the words of Shepard, "the eternal separation and ejection of the soul after death, and soul and body after judgment, from God, into everlasting torments in hell."[71]

According to this tenet of Calvinism, which New England Puritans perceived as a deep truth, God gratuitously chose to deliver his elect out of the estate of sin and misery and into the estate of salvation by providing and offering to them a mediator, Jesus Christ (a "servant" in the prose an assembly called by the English Long Parliament chose for its Larger Catechism, finished in October 1647, and a "slave" according to St. Paul's letter to the church in the city of Philippi in the first century CE), who satisfied God's justice by feeling and bearing the weight of

[70] Cotton, *Gods Mercie*, 61, 56, 15.

[71] Shepard, *The First Principles of the Oracles of God,* 8. Rachel Wheeler has noted the "oddly egalitarian" character of God's election among the naturally sinful in "'Friends to Your Souls': Jonathan Edwards' Indian Pastorate and the Doctrine of Original Sin," *Church History* 72, no. 4 (2003): 736-65, quote at 765. While election obviously left an undetermined swath of humanity damned to hell, all of humanity was in the pool from which God chose, that is, God may just as soon have saved a prince as a peasant, because both the mighty and the lowly suffered precisely the same nature. It was in this light that Puritan clergy understood the verse: "God is no respecter of persons" (Acts 10:34), which Bracton had copied from the Vulgate when he wrote that while "with God, no human whomsoever is esteemed, free or slave, since God is no respecter of persons," it was quite the contrary "with humans," among whom lived popes and bishops, dukes, earls, and barons, the free and the slave. Thorne, *Bracton*, 2:32.

God's wrath and laying down his life as an offering for sin, enduring death.[72] To those for whom Christ purchased redemption, God gave "an heart to submit to his colours," Cotton wrote, and were these elect to become abraded, that is, were they to "believe…in him" and "turne from" their nature, corrupted by inheritance since the fall of Adam, they would be saved.[73] To enjoy the gift, then, the elected had to accept the gift.

This staying of God's hand, this stopping short of what could deservedly be imposed on humanity—"what sorry things wee bee," Cotton lamented—was a "wonderfull mercy" that revealed, yes, but also necessitated God's power. "When God shall be pleased to pardon and heale such sinners, it magnifies the glory of the rich grace of God," he wrote. "It shall stand for a monument of his mighty power…stand for a Trophy of glorious victory."[74] Mercy, then, was "powerfull and great," but it was also "great power."[75] "Let men come and see and know that God must put foorth mighty power and strength, if ever hee shew mercy to such wretches as wee are," Cotton implored. "[Let it be that] when a man sees and knows hee stands in neede of the

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[72] *The Humble Advice of the Assembly of Divines, Now by the Authority of Parliament sitting at Westminster, Concerning a Larger Catechisme, presented by them lately to both Houses of Parliament* (London: by A.M., 1647), 11. Paul wrote that Christ took the form of a "slave" in Philippians 2:7, and the Vulgate rendered it as such, *servi*, but neither the Geneva nor the King James Bibles did, both choosing "servant" instead. "If there be therefore any consolation in Christ," Paul wrote according to the KJV, "if any comfort of love, if any fellowship of the Spirit, if any bowels and mercies:

> Fulfil ye my joy, that ye be like-minded, having the same love, being of one accord, of one mind. Let nothing be done through strife or vainglory; but in lowliness of mind let each esteem other better than themselves. Look not every man on his own things, but every man also on the things of others. Let this mind be in you, which was also in Christ Jesus: Who, being in the form of God, thought it not robbery to be equal with God: But made himself of no reputation, and took upon him the form of a servant, and was made in the likeness of men. (Philippians 2:1-7)

The Geneva Bible, however, did include this interesting marginal commentary: "If Christ being verie God equal with Father, laid aside his glorie, and being Lord, became a servant, and willingly submitted himself to moste shameful death, shall we which are nothing but vile sclaves, through arrogancie treade downe our brethren, & preferred our selves?" *Geneva Bible*, 92 verso in The Newe Testament.

[73] Cotton, *Gods Mercie*, 64, 12.

[74] Cotton, *Gods Mercie*, 66, 67.

[75] Cotton, *Gods Mercie*, 71, 70.

great power of God in forgiving and pardoning him, [he likewise sees and knows] that God shall never forgive such sinnes as his, unless *in the multitude of his* [God's] *mercies he put away his* [man's] *iniquities*."[76] Mercy necessitated power over those to whom God's accounting and accepting as righteous was not due but was nevertheless delivered; indeed, it was power *because* what God delivered, man did not deserve. If mercy shewn, then power put forth.

God's pardon, understood as a voluntary and not compulsory withholding of destruction, exacted an obligation that was refused at great cost. "If a man bee borne in a cursed estate, and allow himself therein, and so fall short of the grace of God, God takes this as a just matter and cause of provocation," Cotton warned. "God takes it as a matter of great indignation, when men resolve to live and die in an estate of nature."[77] The unregenerate were not only eternally damned in this view, but "vicious and evil persons" against whom God "proclaimes warre" and with whom peace was not possible.[78] "If they will fight it out" instead of "lay[ing] downe armes against mee…then I will burn them up," Cotton wrote, assuming the voice of God. "But if they will be saved, let them come and take hold of my strength, and they shall see that fury is not in mee."[79] The platform of church discipline adopted by the Cambridge Synod in Massachusetts in 1648, drawn up by Richard Mather, minister of the church in Dorchester, and given a preface by another, perhaps Cotton, would make the same belligerence its own, dividing the church into the "triumphant" and the "militant." As printed at Samuel Green's rude press the next year:

> The Catholick Church, is the whole company of those that are elected, redeemed, & in time effectually called from the state of sin & death unto a state of Grace, & salvation in Jesus Christ.

[76] Cotton, *Gods Mercie*, 70.

[77] Cotton, *Gods Mercie*, 53, 62.

[78] Cotton, *Gods Mercie*, 53.

[79] Cotton, *Gods Mercie*, 68.

> This church is either Triumphant, or Militant. Triumphant, the number of them who are Gloryfied in heaven: Militant, the number of them who are conflicting with their enemies upon earth.[80]

These enemy belligerents suffered degradation from God's own, Cotton added in *GODS MERCIE MIXED WITH HIS IVSTICE*, such that "all the use, and the best service that evill men can doe, is to bee fruitfull and helpful to beasts, to worldly and sinfull men like themselves."[81]

The idea of mercy, epitomized by God saving the souls of an undeserving elect, necessitated power, and itself admitted of, did not eschew, war, and here lay the profound connection to enslavement. Early modern theories of enslavement in the literature on the law of nature (*ius naturale*) and the law of nations (*ius gentium*) were by 1641 drawing on an idea that Justinian's *Digest*, a mammoth collection of writings extracted from Roman jurists in 533 CE, had expressed as this:

> Freedom [*libertas*] is the natural power [*facultas*] of each [*cuique*] to do what one pleases [*libet*], unless prohibited by force or *ius*. Slavery [*servitus*] is an institution [*constitutio*] of the *ius genitum*, by which someone is, against nature [*contra naturam*], subjected to the dominion of another [*dominio alieno…subicitur*]. Slaves [*servi*] are so called, because generals have a custom of selling [*vendere*] their captives [*captivos*] and thereby saving [*servare*] rather than killing [or destroying, *occidere*] them: and indeed they are said to be *mancipia*, because they are taken [*capiantur*] from the enemy [*ab hostibus*] by the hand [*manu*].[82]

A committee of three working under the eponymous emperor applied the same in Justinian's *Institutes*, also composed in 533 CE, almost precisely to the letter, and the editors and interpolators of *Bracton* in thirteenth-century England did likewise. *Bracton*, however, modulated the thought, understanding it through the lens of a secondary source written by Italian law professor, Azo of Bologna. This is what *Bracton* ultimately put to prose:

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[80] *A Platform of Church Discipline* (Cambridge in New England: S.G, 1649), reproduced in Williston Walker, *The Creeds and Platforms of Congregationalism* (New York: Pilgrim Press, 1991), 204.

[81] Cotton, *Gods Mercie*, 56.

[82] *Digest* 1.5.4 at Mommsen and Krueger, *Digest*, 15a-b.

> Liberty [*libertas*] is the natural power [*facultas*] of each to do what one pleases, unless prohibited by force or *ius*…Slavery [*servitus*] is an institution of the *ius genitum*, by which someone is, against nature, subjected to the dominion of another. It is so called from "saving" [*servando*], not "serving" [*serviendo*], for in ancient times it was the practice of princes to sell captives and thus save [*servare*] rather than kill [*occidere*] them. They may also be called *mancipia*, because they are taken from the enemy by the hand. That is why, when they are given *libertas* as a gift [*donentur*], they are called *manumitti*, as if released from the hand [*a manu dimitti*].[83]

Slavery was the alternative to death, the result of the captor's willing and voluntary (nonobligatory) choice to restrain from imposing what he could deservedly impose on an enemy. If manumission was the gift of *libertas*, then slavery was the corollary of the perverse gift of life.

Building upon the work of Catholic theologian and political theorist Francisco de Vitoria, Alberico Gentili, an Italian jurist who fled religious persecution around 1579 and found safety in England with the help of Queen Elizabeth's Italian tutor, through whom he enjoyed benefactions that made possible admission to Oxford University in 1581, understood the same in three lectures published in Latin 1588 and 1589, and as *Three Books on the Law of War* (*De Iure Belli Libri Tres*) in 1598.[84] In *De Iure Belli,* Gentili explained that while "slavery is among the greatest ills which befall surrendered or captured soldiers, since by it one is subjected to another's *dominio* and reduced to the condition of a beast [*pecus*]," indeed, "deprived of one's nature," becoming "a thing [*res*] instead of a person [*persona*]," he had "no hesitation in saying that the condition of slavery is just [*iustum*], for it is an institution [*constitutio*] of the *ius*

[83] Thorne, *Bracton*, 29-30.

[84] In his lecture on the law of war (*de iure belli*), delivered at the University of Salamanca on June 19, 1539, Vitoria argued that the pool of enslaveables in war extended to the innocent as well as to the guilty. This is what he wrote: "One may lawfully enslave the innocent under just the same conditions as one may plunder them. Freedom and slavery are counted as goods of fortune; therefore, when the war is such that it is lawful to plunder all the enemy population indiscriminately and seize all their goods, it must also be lawful to enslave them all, guilty and innocent alike," with the proviso that "it is not lawful to enslave fellow Christians, at any rate during the course of the war." Francisco de Vitoria, *Political Writings*, ed. Anthony Pagden and Jeremy Lawrance (New York: Cambridge University Press, 1991), 318.

genitum."[85] He explained also that while nature did not require slavery (as Aristotle argued), it did not prohibit it either.[86] "Slavery is really in harmony with nature," he wrote; "not indeed according to her first intent, by which we were all created free, but according to a second desire of hers, that sinners should be punished." Slavery did not derive from cruelty of the captor or a natural disposition of the captive; rather, it derived from something more mundane: humans free by nature may become enslaved "because of their wickedness and sins."[87] Putting it plainly, "the law of nature has not ordained that men should not become slaves," he wrote, "we are not created free by nature so absolutely that very many of us may not be made slaves."[88] To this he included a necessary condition in addition, "Add to this that the *ius genitum* about making slaves provides that prisoners be slaves if those who have captured them so desire [*velint*]…although the *lex* asserts that what is taken from the enemy at once becomes the property of the captors, it is not understood to mean that it becomes theirs even if they do not wish it [*volentium*]."[89] The will (*voluntas*) of the captor to do what she need not do (withhold death) was required for

[85] Alberico Gentili, *De Iure Belli Libri Tres* (Oxford: Clarendon, 1933). The first volume is a photographic reproduction of the 1612 edition in Latin, and the second volume is a translation by John C. Rolfe. For English, 2:328 and 330. For Latin, 1:534 and 538. Elsewhere in the same work he wrote that "one who is made a slave becomes another [*alius*] and ceases to exist, exactly as on the other hand one who becomes free after being a slave, becomes another [*alius*] and begins at that time to have an existence," 2:118 and 1:192.

[86] In *The Politics*, Aristotle wrote the following exchange: "But is there any one thus intended by nature to be a slave, and for whom such a condition is expedient and right, or rather is not all slavery a violation of nature? There is no difficulty in answering this question, on grounds both of reason and of fact. For that some should rule and others be ruled in a thing not only necessary, but expedient; from the hour of their birth, some are marked out for subjection, others for rule." Aristotle, *The Politics*, ed. Stephen Everson (New York: Cambridge University Press, 1988), 6.

[87] Gentili, *De Iure Belli*, 2:330.

[88] Gentili, *De Iure Belli*, 2:331 and 332.

[89] Gentili, *De Iure Belli*, 2:331; 1:540.

enslavement's legitimacy, Gentili asserting affirmatively "that through it the killing of captives was prevented."[90] Summing it up pithily, he wrote, "Slavery is all but death."[91]

Dutch jurist Hugo Grotius built upon the same again in *De Iure Belli ac Pacis*, published for the first time in Latin in 1625, and translated alternatively as *The Law of War and Peace* or *The Rights of War and Peace*. In that work, Grotius concurred that slavery was neither required nor prohibited by nature, and that it was, in the context of war, a voluntary and willing refrain from inflicting licit, utmost severity on the guilty and innocent alike, allowable by the *ius genitum*, but he made it clearer than anyone before him yet had that a debt exacted by the captor's nonobligatory restraint was the rope that traversed the gap between person and thing, and liberty and slavery, as well as the vector of slavery's inheritability.[92] "Slavery is against nature, but it is not repugnant to natural justice," he wrote. "Not only they who surrender themselves, or submit by promise to slavery, are reputed slaves; but all whatsoever taken in a solemn war, as soon as they shall be brought into a place whereof the enemy is master."[93] The *ius gentium* conceded the power of enslavement "for no other reason," he argued, "than that

[90] Gentili, *De Iure Belli*, 2:332.

[91] Gentili, *De Iure Belli*, 2:328.

[92] In 1722, England's Court of Chancery would argue in *Mr. Justice Eyre v. Countess of Shaftsbury* that the allegiance Coke discussed in *Calvin's Case* in 1608 was a debt of gratitude. This is what the report of the case recorded: "It appears from *Bracton*, lib. 3, cap. 9, and *Fleta*, cap. 2, and Stamford, fo. 37, that the King is protector of all his subjects; that in virtue of his high trust, he is more particularly to take care of those who are not able to take care of themselves, consequently of infants, who by reason of their nonage are under incapacities; from hence natural allegiance arises, as a debt of gratitude, which can never be cancelled, though the subject owing it goes out of the kingdom, or swears allegiance to another prince." 24 E.R. 659, 666. While there was no natural slavery in England, then, there was natural political subjection, which endured generation to generation by way of a debt. In *The Development of American Citizenship, 1608-1807* (Chapel Hill: University of North Carolina Press, 1978), James Kettner argues that before the American Revolution, British North Americans retained Coke's argument about allegiance as their own, but jettisoned its immutable and perpetual properties, making protection and allegiance "the quid pro quo of a contract, each given in return for the other according to the terms of an ongoing agreement" such that "neither party could default without releasing the other from his obligation" (166). He calls it a "blend[ing] of Coke and Locke to their own ends" (166).

[93] Hugo Grotius, *The Rights of War and Peace*, ed. Richard Tuck, from the edition of Jean Barbeyrac (Indianapolis: Liberty Fund, 2005), 1360-1.

captors being tempted by so many advantages might be inclined to forbear that rigour allowed them by the law, of killing their prisoners, either in the fight, or some time after," emphasizing that enslavement was by voluntary choice and not obligation to save the life of the captive. "I said that they might be inclined to forbear," he wrote, "for there is no sort of agreement to engage them to it, if we only respect this *ius gentium*, but a motive drawn from Interest."[94] By this voluntary choice for life motivated by interest, he wrote, "what is taken from the enemy, by the *ius gentium*, is instantly the captors, so also *liberi homines* are made slaves" and humans (*homines*) are placed "in the same rank with things [*res*]."[95] This gift, moreover, exacted a debt on the children born to women in captivity, "because if the captor had been pleased to have used his utmost power, he might have prevented their being born."[96] This allowed slavery to become hereditable, the ongoing corollary to the original, ruinous, gift of life to someone at the absolute mercy of another. The cruelty of the gift was not lost on Grotius, for he thought it one of the reasons why enslavement was not allowed among Christians, who "should be better instructed by the great recommender of every act of charity, than not to be diverted from the killing of unhappy humans [*hominibus*], unless they may be allowed the exercise of a somewhat less cruelty."[97]

In that other book of Cotton's published in 1641, *The Abstract or the Laws of New England*, not actually established as law but printed erroneously as such in London, and again in 1655, too spoke of war. Drawn up by Cotton in response to the General Court's May 25, 1636,

[94] Grotius, *War and Peace*, 1364.

[95] Grotius, *War and Peace*, 1365-6. For a reproduction of the Latin edition of 1646, see Hugo Grotius, *De Iure Belli ac Pacis Libri Tres*, ed. James Brown Scott (Washington: Carnegie Institute of Washington, 1913), 492.

[96] Grotius, *War and Peace*, 1364.

[97] Grotius, *War and Peace*, 1372. For the Latin see, the Carnegie Institute of Washington's edition at 493.

entreaty that "the Govn^{r}, Deputy Govn^{r}, Tho: Dudley, John Haynes, Rich: Bellingham, Esq, M^{r} Cotton, M^{r} Peters, & M^{r} Shepheard…make a draught of lawes agreeable to the word of God, w^{ch} may be the ffundamentalls of this commonwealth, & to present the same to the next General Court," but subsequently shelved, the ten chapters, proceeding from the first, "Of Magistrates," ended with thirteen provisions on "causes Criminall between our People and Forraine Nations."[98] As they stipulated, restitution was to go to "any of another Nation" whose complaint was "found to be true"; a minister was to travel with the Army "for their instruction and incouragement"; "fainthearted men," as well as unmarried betrothed men and newly married men who had "built or planted" but not yet "received the fruits of their Labours" were "not to be pressed or forc'd against their wils to go forth to wars"; and aid was not to be accepted or sought from "men of corrupt or false Religion." Cotton's proposed laws did not provide for enslavement, but they did provide for justice. The second and third clauses of the tenth chapter of his *Abstract* reproduced clause 40 turned clause 29 of the Magna Carta, but in its own New England way. This is what Cotton wrote:

> 2. In case the people of another Nation have done any important wrong, to any of ours, right is first to be demanded of the Governor of that people, and Iustice upon the malefactors, which if it bee granted and performed, then no breach of peace to follow.
> 3. If right and Iustice be denied, and it will not stand with the honour of God and safety of our Nation, that the wrong be passed over, then war is to be undertaken and denounced.

[98] That request continued: "… And it is ordered, that in the meane tyme the magistrates & their assosiates shall pceede in the courts to hear & determine all causes according to the lawes nowe established, & where there is noe law, then as neere the lawe of God as they can; & for all business out of Court for w^{ch} there is noe certaine rule yet sett downe, those of the standing counsell, or some two of them, shall take order by their best discrecon, that they may be ordered & ended according to the rule of Gods word." Nathaniel B. Shurtleff, *Records of the Company of the Massachusetts Bay in New England*, vol. 1, *1628-1641* (Boston: William White, 1853), 174-5. Winthrop reported that Cotton presented "a model of Moses his judicials, compiled in an exact method" to the General Court on October 25. James Kendall Hosmer, ed., *Winthrop's Journal*, vol. 1, *1630-1649* (New York: Charles Scribner's Sons, 1908), 196.

After using "right and Iustice" as a means to legitimate war, Cotton proposed that "women, especially such as have not lyen by man, little children and cattle, are to be spared and reserved for spoile" and as such spoyles, should be "divided into two parts, between the Souldiers and the Common-wealth that sent them forth." At the last, then, at the conclusion of his draft, in the empty space below women and cattle, the *Abstract* received a kind of antiphon:

> The Lord is our Iudge,
> The Lord is our Law-giver,
> The Lord is our King, He will save us.

before coming to FINIS.[99]

Between the 1636 request by the General Court for a draft of laws to lay the ffundamentalls of the commonwealth, and the publication of Cotton's shelved abstract in London in 1641, colonists from Plymouth, Massachusetts Bay, and newly-fashioned Connecticut, together with their Mohegan and Narragansett allies, had fought a ferociously violent war with the Pequot Indians, so violent and so obscene that it moved the Narragansetts into astonished disgust at what the English were capable of. As recorded by John Underhill, captain of the militia force that ambushed a Pequot village near the Mystic River on the morning of May 26, 1637, burning—from the west side, to the south side, to the center, to the ground—at least four hundred men, women, and children in the space of just half an hour, all with "sufficient light from the word of God for our proceedings," the Narragansetts, who had witnessed the slaughter, rendered their own judgment, crying out, "It is naught, it is naught, because it is too furious, and slaies too many men."[100] Reflecting on the devastation wrought at his own firebrand, Underhill

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[99] John Cotton, *An Abstract or the Lawes of New England, as they are now established* (London, 1641), 14-15.

[100] John Underhill, *News from America; or, a New and Experimentall Discoverie of New England* (London, 1638), 40, 43, the latter cited in Jill Lepore, *The Name of War: King Philip's War and the Origins of American Identity* (New York: Vintage, 1998), 116.

remembered the "many courageous fellowes" among the Pequots who "perished valiantly," fighting through the flames as "the fire burnt their very bowstrings." "Mercy they did deserve for their valour," Underhill wrote, "could we have had opportunitie to have bestowed it."[101]

On the face of it, the point of difference between the idea of justice and the idea of mercy expressed in the two works of John Cotton in 1641 was this: the stuff justice delivered, whatever it was, was deserved ("Iustice upon the malefactors"), whereas the stuff mercy delivered, whatever it was, was not deserved ("God shall never forgive such sinnes as his, unless in the multitude of his mercies he put away his iniquities").[102] The latter idea addressed the one in whom, John Calvin had written in his *Institutes of the Christian Religion* in 1559, "there cannot be found…a worth which could make God a debtor"; it addressed the one about whom the Larger Catechism finished by the Westminster Assembly in October of 1647 would conclude plainly:

> Q. *What misery did the fall bring upon mankinde?*
> A. The Fall brought upon mankind the losse of Communion with God, his displeasure and curse, so as we are by nature children of wrath, bond-slaves to Sathan, and justly liable to all punishments in this world, and that which is to come.
> …
> Q. *Doth God leave all mankind to perish in the estate of sin and misery?*
> A. God doth not leave all mankind to perish in the estate of sin and misery into which they fell by the breach of the first Covenant, commonly called the Covenant of Works; but, of his meer love and mercy, delivereth his elect out of it,

[101] Underhill, *News from America*, 39. For the enslavement of captives in that ugly war, see Wendy Warren, *New England Bound: Slavery and Colonization in Early America* (New York: Liverlight Publishing Corporation, 2016), 92-5, including her invaluable footnotes; and Christopher Tomlins, *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America 1580-1865* (Cambridge: Cambridge University Press, 2010), 426n86. For a book length treatment of the war, see Alfred Cave, *The Pequot War* (Amherst: University of Massachusetts Press, 1996), and for the astonishing magnitude of Indian enslavement in America at the hands of Europeans, see Andrés Reséndez, *The Other Slavery: The Uncovered Story of Indian Enslavement in America* (Boston: Houghton Mifflin Harcourt, 2016).

[102] Cotton, *An Abstract*, 14; Cotton, *Gods Mercie*, 70.

> and bringeth them into an estate of salvation by the second Covenant, commonly called the Covenant of Grace.[103]

Of the same bond-slaves, the Westminster Assembly's Confession of Faith, completed earlier, in December of 1646, which the Cambridge Synod in New England received and accepted in 1648, had expressed this:

> Those whom God effectually calleth, he also freely justifieth: not, by infusing righteousnesse into them, but by pardoning their sins, and by accounting and accepting their persons as righteous; not, for any thing wrought in them, or done by them, but for Christs sake alone; nor, by imputing faith it self, the act of beleeving, or any other evangelicall obedience, to them, as their righteousnesse, but, by imputing the obedience and satisfaction of Christ unto them, they receiving, and resting on him and his righteousnesse by faith; which faith, they have, not of themselves, it is the guift of God.[104]

Calvin's Case in 1608 had suggested that were equality to be found in the realm, it coursed from natural subjection to the king, and in the early seventeenth-century Puritan thought of Massachusetts Bay, a kindred equality was to be found. God's mercy addressed a community whose every last member, so far from naturally free, was from birth a bond-slave to Satan, equally deserving of all punishments in this world, and the next, and equally unable to save herself without a gift, condescending, from another.

The idea of mercy figured differently on the civill terrain, and it was not as simple as exception, pardon, or the sparing and reserving of virgins as spoyle. Just as President Abraham Lincoln would centuries later say that "the world has never had a good definition of the word

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[103] John Calvin, *Institutes of the Christian Religion*, trans. Henry Beveridge (Grand Rapids: William B. Eerdmans Publishing Company, 1989), 453. *The Humble Advice of the Assembly of Divines, now by the Authority of Parliament sitting at Westminster, concerning a Larger Catechisme, presenting by them lately to both Houses of Parliament* (London, 1647), 6-7.

[104] *The Humble Advice of the Assembly of Divines, now by the Authority of Parliament sitting at Westminster, concerning a Confession of Faith* (London, 1626), 20-21. In 1648, the Cambridge Synod in Massachusetts assented and attested to "the whole confession of faith (for substance of doctrine)…excepting only some sections in the 25 [Of the Church] 30 [Of Church Censures] & 31 [Of Synods and Councels]." Preface to the Cambridge Platform at Walker, *Creeds and Platforms*, 195.

liberty," the English-speaking world has never had a good definition of *ius*, the direct object the book called *Bracton* taught ought to be delivered to each by *iustitia*, and perhaps justice itself, wherever the practice of slavery put down roots, had less to do with desert or merit than with choice.[105]

On board the *Arbella*, or at some point before, as evidence suggests that manuscript copies circulated among hands before the ship set sail from England for New England on April 8, 1630, John Winthrop had proclaimed, at the very start of his discourse, that "God Almighty in his most holy and wise providence hath so disposed of the condition of mankind, as in all times some must be rich some poor, some high and eminent in power and dignity; others mean and in subjection." God did this, Winthrop explained, so that "every man might have need of other, and from hence they might be all knit more nearly together in the bond of brotherly affection," and that, with the high and eminent acting as God's stewards on earth, God may count himself "more honored in dispensing his gifts man to man, than if he did it by his own immediate hand." Winthrop continued loftily:

> All men being thus (by divine providence) ranked into two sorts, rich and poor; under the first, are comprehended all such as are able to live comfortably by their own means duly improved; and all others are poor according to the former distribution. There are two rules whereby we are to walk one towards another: JUSTICE and MERCY. These are always distinguished in their act and in their object, yet may they both concur in the same subject in each respect; as sometimes there may be an occasion of shewing mercy to a rich man, in some sudden danger of distress, and also doing of mere justice to a poor man in regard of some particular contract, etc.

Winthrop distinguished justice from mercy but did not hold them apart as mutually exclusive. He did not elaborate on the respective acts and objects of the twain, but he did say that justice and mercy might "concur in the same subject." While the regular subject of justice was the "rich

[105] *The Collected Works of Abraham Lincoln*, ed. Roy Basler (New Brunswick: Rutgers University Press, 1953), 7:301.

man" and the regular subject of mercy was the "poor man," sometimes, he said, the two exchanged places such that mercy could be "shew[n]" to a rich man, and "mere justice" done to a poor man. The two ideas, ostensibly contrary, enjoyed utmost primacy in Winthrop's thought, for at the climax of his sermon he implored, "Now the only way to avoid this shipwreck and to provide for our posterity is to follow the counsel of Micah, to do justly, to love mercy, to walk humbly with our God, for this end, we must be knit together in this as one man."[106]

The ideas of justice and mercy, however, concurred in more than their subjects. As this chapter has tried to show, both derived force from the risk or fear of ruination or destruction and the potential of recovery or redemption. Allowing the villein to keep his wagon in order to carry his lord's shit off the manor, conceding that no *liber homo* shall be in any way destroyed, giving every man his even proportion, enslaving the captive, or sparing the virgin, all, worked a perverse salvation because of the vastly uneven positions from which the giver gave and the receiver received; and at the core of both ideas—and here I will conclude—lay the phenomenon of giving something to an elect, which was as old as the poetry of Simonides and, strikingly, captured the General Court's codified expression of lawful enslavement too.

In 1641, the same year printers in London put Cotton's *Abstract* and *Gods Mercie* to paper in London, the General Court of Massachusetts Bay adopted the Body of Liberties, drawn up by Nathaniel Ward, a minister from Ipswich who had been a barrister back in London before joining the clergy. While this enumeration of ratified "freedomes" began with the observation that "the free fruition of such liberties Immunities and priveledges as humanitie, Civilitie, and Christianitie call for as *due to* every man in his place and proportion without impeachment and Infringment hath ever bene and will be the tranquilitie and Stabilitie of Churches and

[106] John Winthrop, "Christian Charity, A Model Hereof," in *Puritans in the New World: A Critical Anthology*, ed. David Hall (Princeton: Princeton University Press, 2004), 165, 166, 169.

Commonwealths [emphasis mine]," not one inhabitant in the colony, according to document's 91st provision, enjoyed safety from the possibility of slavery. The Body of Liberties permitted "slaverie, villinage, or Captivitie," as long as "it be lawfull Captives taken in just warres, and such strangers as willingly selle themselves or are sold to us," which, Ward wrote, "exempts none from servitude who shall be Judged thereto by Authoritie."[107] This was the first legislative elucidation of allowable enslavement in North America, and so it follows, then, fascinatingly and significantly, that all theories of enslavement fashioned in the place that became the United States of America postdated this point of origin: the gift of life.[108]

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[107] William Whitmore, *The Colonial Laws of Massachusetts. Reprinted from the Edition of 1672, with the Supplements through 1687* (Boston: Rockwell and Churchill, 1890), 33 and 53.

[108] For more on the orginary significance of this provision, see George Moore, *Notes on the History of Slavery in Massachusetts* (New York: D. Appleton and Co., 1866), 10-19; A. Leon Higginbotham, *In the Matter of Color: Race and the American Legal Process: The Colonial Period* (New York: Oxford University Press, 1978), 61-2; Richard Bailey, *Race and Redemption in Puritan New England* (New York: Oxford University Press, 2011), 62-3; Tomlins, *Freedom Bound*, 424-6; and Wendy Warren, *New England Bound*, 12, 34-5. Warren, 35, following Moore, reports that the law merely described and sanctioned a slaving practice that already existed.

This 1641 expression of licit enslavement, embraced by the General Court in 1648 and again in 1658 after an expansion to remove the qualifier "strangers," made its way into the laws his Royall Highness James Duke of York and Albany established in 1664 for his proprietorship in America. There, under the heading "BONDSLAVERY" (between "BILLS" and "BOUNDS"), the laws stipulated that "noe Christian shall be kept in Bond Slavery, Villenage or Captivity except Such as shall be judged thereunto by Authority or Such as willingly have sould or shall sell themselves…This Law shall not extend to sett at liberty Any Negroe or Indian Servant who shall turne Christian after he shall have been bought by Any Person." For it, see "The Duke of York's Laws," transcribed from the copy on file at the Public Record Office, in Gail McKnight Beckman, comp., *The Statutes at Large of Pennsylvania in the Time of William Penn* (New York: Vantage Press, 1976), 71-111, 78. Christopher Tomlins in *Freedom Bound*, 425, notes in his discussion of the same that the final sentence of the provision does not appear in other extant drafts of the document.

Salvation through Christ, accepted in baptism, would prove to not work escape from terrestrial subjection. The Fundamental Constitutions of Carolina in 1669, co-authored by John Locke, stipulated this in its 107th provision: "Since charity obliges us to wish well to the souls of all men, and religion ought to alter nothing in any man's civil estate or right, it shall be lawful for slaves, as well as others, to enter themselves, and be of what church or profession any of them shall think best, and, therefore, be as fully members as any freeman. But yet no slave shall hereby be exempted from that civil dominion his master hath over him, but be in all things in the same state and condition he was in before." See Francis Newton Thorpe, *The Federal and State Constitutions* (Washington: Government Printing Office, 1909), 5:2785. Christ shall not save, that provision had it; the condition of one's soul ought to alter nothing in any man's civil estate or right, and so, church members could live under the civil dominion of a terrestrial master. This was codified in February 1690/91 as "no slave shall be free by becoming a christian, but as to payment of debts, shall be deemed and taken as all other goods and chattels." See David J. McCord, ed., *The Statutes at Large of South Carolina* (Columbia, S.C.: A.S. Johnson, 1840), 7:343. Virginia had passed the first statute on that score in September of 1667: "Whereas some doubts have risen whether children that are slaves by birth, and by the charity and piety of their owners made pertakers of the blessed sacrament of baptisme, should by vertue of their baptisme be made ffree; *It is enacted and declared by this grand assembly, and the authority thereof*,

Winthrop's ship arrived at Salem on June 12, 1630, and on October 19, Winthrop convened the first General Court, where he, with the Deputy Governor, Thomas Dudley, and six assistants, together with the adult male settlers who had assembled and expressed their consent by a raise of hands, agreed "that the ffreemen should have the power of chuseing Assistants when there are to be chosen, & the Assistants from amongst themselves to chuse a Governor and Deputy Governor, whoe with the Assistants should have the power of makeing lawes and chuseing officers to execute the same."[109] Winthrop invited the assembled to put themselves forward to become "freemen" (108 men submitting their names the same day), but the provision of October 19th narrowed the substantive content of "freeman" from an expansive legislative power, as the patent had it, to a voting power only. According to the patent, the powers of governance over both the company and "the saide Landes and Plantacon" were concentrated in the hands of a governor, deputy governor, eighteen assistants, and "Freeman," that is,

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that the conferring of baptisme doth not alter the condition of the person as to his bondage or ffreedome; that diverse masters, ffreed from this doubt, may more carefully endeavor the propagation of christianity by permitting children, though slaves, or those of greater growth if capable to be admitted to that sacrament." See William Waller Hening, *The Statutes at Large* (New York: R. & W. & G. Bartow, 1823), 2:260. For a fascinating and important discussion of this provision see Kathleen M. Brown, *Good Wives, Nasty Wenches, & Anxious Patriarchs: Gender, Race, and Power in Colonial Virginia* (Chapel Hill: for the Ohohundro Institute of Early American History and Culture by the University of North Carolina Press, 1996), 107-36, especially 135-6. Maryland followed suit with a profusion of its own prose in 1671: "where any Negro or Negroes Slave or Slaves being in Servitude or bondage is are or shall become Christian or Christians and hath or have Received or shall att any time Receive the Holy Sacrament of Baptizme before or after his her or their Importacon into this Province the same is not nor shall or ought the same be denyed adjudged Construed or taken to be or to amount unto a manumicon or freeing Inlarging or discharging any such Negroe or Negroes Slave or Slaves or any his or their Issue or Issues from his her their or any of their Servitude or Servitudes Bondage or bondages." See *Archives of Maryland: Proceedings and Acts of the General Assembly of Maryland April 1666- June 1676* (Baltimore: Maryland Historical Society, 1884), 2:272. New Jersey followed in 1704, and New York in 1706. In Massachusetts Bay, Cotton Mather in "A LARGER CATECHISM for the Negroes of a bigger Capacity" appended to his *The Negro Christianized. An ESSAY to EXCITE and ASSIST that GOOD WORK, the INSTRUCTION of Negro-Servants in Christianity*, would explain why baptism would give no legal claim to freedom to those who decided to say, "I chuse God the Father for my Father; I chuse God the Son, for my Saviour; I chuse God the Spirit for my Leader." "Is there no guarding against this Inconvenience?" he asked. "But it is all a Mistake. There is no such thing. What Law is it, that Sets the Baptized Slave at Liberty? Not the Law of Christianity: that allows of Slavery; Only it wonderfully Dulcifies, and Mollifies, and Moderates the Circumstances of it." Cotton Mather, *The Negro Christianized* (Boston: B. Green, 1706), 36, 45, 26. Run and do not walk to Tomlins's discussion of baptism's inability to manumit at *Freedom Bound*, 460-3, footnotes too, to which this, my own footnote, is indebted.

[109] Shurtleff, *Records,* 1:79.

stockholders, scarce few of whom emigrated, and the change on October 19, 1630, expanded the meaning of "freeman" but at the same time, narrowed its attendant privileges to one: suffrage. Assistants, whom freemen chose and who already had the powers of justices of the peace, together with the governor and deputy governor, whom assistants chose among themselves, would make the laws.[110] At the next meeting of the General Court on May 18, 1631, however, the meaning of "freeman" was radically changed again when Winthrop, Dudley, and five assistants agreed that "to the end the body of the commons may be pserved of honest & good men,…for time to come noe man shalbe admitted to the freedome of this body polliticke, but such as are members of some of the churches within the lymitts of the same."[111] On May 9,

[110] "The Charter of Massachusetts Bay 1629" in Thorpe, *Federal and State Constitutions*, 3:1853. For powers of the justice of the peace, see Shurtleff, *Records*, 1:74 (August 23, 1630).

[111] Shurtleff, *Records,* 1:87. George Haynes notes some exceptions, reporting that when Massachusetts Bay absorbed inhabitants from Dover, the Piscataqua settlements, Exeter, and Maine settlements into its own jurisdiction, it designated freemen on conditions that did not require church membership. See Haynes, *Representation and Suffrage in Massachusetts*, 1620-1691 (Baltimore: Johns Hopkins Press, 1894; New York: Johnson Reprint Corporation, 1973), 52. Citations refer to the Johnson edition. At home, the General Court in 1647, "taking into consideration ye usefull ptes & abilities of divrs inhabitants amongst us, which are not freemen, which, if impved to publicke use, ye affaires of this comon wealth may be ye easier carried an end, in ye severall townes of this iurisdiction," agreed to allow freemen within any town "to make choyce of such inhabitants, though non freeman, who have taken or shall take ye oath of fidelity to this government" to serve on juries and to have a vote "in ye choice of ye select men for towne affaires, assessmt of rates, & other prudentials." Shurtleff, *Records*, 2:197. The oath for non-freemen residents to be taken by "evy man of or above the age of twenty yeares, whoe hath bene or shall hereafter be resident within this jurisdiccon by the space of sixe monthes, as an householder or soiorner, and not infranchised," had been approved on April 1, 1634. For it, see Shurtleff, *Records*, 1:115. The General Court approved the oath for freemen the next month, on May 14, 1634. For it, see Shurtleff, *Records*, 1:117. "The Oath of a Free-man," printed on a broadside by the Glover-Day press in 1639 in Cambridge was the first thing ever printed in North America. For more on that landmark, see Morris L. Cohen, "Legal Literature in Colonial Massachusetts," in *Law in Colonial Massachusetts 1630-1800* (Boston: The Colonial Society of Massachusetts, 1984), 246-50. On August 3, 1664, the General Court responded to a letter from Charles II, who had on June 28, 1662, written his "trusy and wellbeloved" to confirm the patent granted by his father, the by-then executed Charles I, and demand, among other things, "that all the freeholders of competent estates, not vitious in conversacon & orthodoxe in religion, (though of different persuasions concerning church government,) may have their votes in the election of all officers, both civill & military." In response, the General Court repealed the 1631 law limiting freemanship to church membership, and in its place enacted a rule that made church membership one of two possible paths to eligibility. According to this new rule, Englishmen older than 24 who were householders and settled inhabitants of the jurisdiction may qualify for freemanship if they 1) were church members, or 2) presented to the court two certificates: one from a minister attesting that they were "orthodox in religion, & not vitious in thiere lives," and a second from the majority of the selectmen of their town attesting that they were freeholders rateable to the value of ten shillings. Shurtleff, *Records*, 4, part II: 117-8. The entry of Governor Edmund Andros and the short-lived Dominion of England put these complicated rules into abeyance in 1686, and after the vacation of the 1629 patent in

1632, the General Court (composed now of the governor, deputy governor, assistants and freemen) reacquired the power to choose the governor, deputy governor, and assistants, and on May 14, 1634, it reacquired legislative power, too, ordering in addition that every town may choose two or three deputies to represent their freemen in the General Court, thus supplanting the primary body of freemen with a representative body for all business except the election of "magistrates & other officers."[112] Winthrop had voluntary relinquished what was allowed the company's leaders, assistants, and stockholders by the patent: the capacious power to not only legislate for the colony, but to order "all other Matters and Thinges" at their pleasure, so long as "not contrarie or repugnant to the Lawes and Statuts of this our Realme of England," but the road to freemanship, which meant a share in governance, while rid of the requirement to buy company shares, would be open, yes, but not wide.[113]

1684, a new charter for the colony by William and Mary in 1691 superseded them. The new patent is found at Thorpe, *Federal and State Constitutions*, 3:1870-1886, with rules pertaining to suffrage at 1878-9.

[112] Shurtleff, *Records*, 1: 95, 117, 118. On September 8, 1636, the General Court set a minimum of ten freemen per town for the purpose of qualifying for the privilege of sending a deputy, and on March 9, 1637, it ordered "that no person shall hencefourth bee chosen to any office in the commonwealth but such as is a freeman." Shurtleff, *Records*, 1:1 78, 188.

[113] Thorpe, *Federal and State Constitutions*, 3:1857, 1853. Shurtleff, *Records*, 1:118-9 (May 14, 1634). The October 19, 1630, provision for enlarging freemanship beyond the bounds of the company proper, has figured prominently in a vast number of historical accounts seeking to trace the course of representative democracy, popular sovereignty, and constitutionalism in America. For a twentieth-century example, see Andrew C. McLaughlin, *The Foundations of American Constitutionalism* (New York: New York University Press, 1932), and for two recent, twenty-first-century examples, see David Hall, *A Reforming People: Puritanism and the Transformation of Public Life in New England* (New York: Knopf, 2011) and James Kloppenberg, *Toward Democracy: The Struggle for Self-Rule in European and American Thought* (New York: Oxford University Press, 2016), 67-88. The May 18, 1631, provision tying freemanship to church membership has figured likewise, but controversially, as historians—reading the complicated rules the General Court enacted for colony and town differently, and working with a limited range of extant seventeenth-century records—have for decades debated whether (and if so, to what degree) this requirement narrowed political participation down to a slim slice of the colony's inhabitants. In *Plaine Dealing* (1642), 73, Thomas Lechford wrote that "three parts of the people of the Country remained out of the Church," and Thomas Hutchinson in *The History of the Colony of Massachusetts-Bay* (Boston, 1764), 26, called it "a most extraordinary order," which, had it been enacted by the English parliament, he guessed, "would have been the first in the roll of grievances." More recently, however, Michael Winship reports the current consensus among historians when he writes that "probably well over a majority of men in the colony voted in the 1630s, even if the colony's different filtering mechanism allowed for a strikingly different conceptual political universe" than in England, where in 1640, he reports, "only around a third of adult males" met the voting requirement there, which since 1430 had been the ownership of land that earned forty shillings in rent each year. Michael Winship, *Godly Republicanism: Puritans,*

In 1636, Cotton responded to a group of English noblemen, Lord Say, Lord Brooke, "and other persons of quality," who had proposed to settle in Massachusetts on the condition of the satisfaction of their demands. In answer to the lords' tenth demand that "that the rank of freeholders shall be made up of such, as shall have so much personal estate there, as shall be thought fit for men of that condition, and have contributed, some fit proportion, to the public charge of the country, either by their disbursements or labors," Cotton wrote back, absolutely not. "None are admitted freemen of this commonwealth but such as are first admitted members of some church or other in this country, and of such, none are excluded from the liberty of freemen," he answered. "For, the liberties of the freemen of this commonwealth are such, as require men of faithful integrity to God and the state, to preserve the same."[114] The identification of freemanship with what Thomas Lechford, the first practicing lawyer in Massachusetts Bay, called the "company beleevers gathered out of this world," though, was not the extent of it.[115]

Pilgrims, and a City on a Hill (Cambridge, Mass.: Harvard University Press, 2012), 200-1. For a detailed summary of the extremely tedious numbers debate, see B. Katherine Brown, "The Controversy over the Franchise in Puritan Massachusetts, 1854-1974," *William and Mary Quarterly* 33 (1976): 212-241. This project, though, is not interested in categorizing the practices of Massachusetts Bay as arbitrary or democratical. It is interested in calling attention to, and thinking carefully about, what the church membership requirement actually meant: that a voice in government for the inhabitants in Massachusetts Bay from at least 1631 to 1664 was made contingent on human discernment of an inscrutable gift.

[114] John Cotton, "Certain Proposals Made by Lord Say," transcribed in Edmund Morgan, ed., *Puritan Political Ideas 1558-1794* (Indianapolis: Hackett, 1965), 165-7. "Their liberties, among others, are chiefly these," he continued:

> 1. To chuse all magistrates, and to call them to account at their general courts. 2. To chuse such burgesses, every general court, as with the magistrates shall make or repeal all laws. Now both these liberties are such, as carry along much power with them, either to establish or subvert the commonwealth, and therewith the church, which power, if it be committed to men not according to their godliness, which maketh them fit for church fellowship, but according to their wealth, which, as such, makes them no better than worldly men, then, in case worldly men should prove the major part, as soon they might do, they would as readily set over us magistrates like themselves, such as might hate us according to the curse, Levit. xxvi. 17 ['And I will set my face against you, and ye shall be slain before your enemies: they that hate you shall reign over you; and ye shall flee when none pursueth you'] and turn the edge of all authority and laws against the church and the members thereof, the maintenance of whose peace is the chief end which God aimed at in the institution of magistracy. 1 Tim. ii. 1. 2 ['I exhort therefore, that, first of all, supplications, prayers, intercessions, and giving of thanks, be made for all men; For kings, and for all that are in authority; that we may lead a quiet and peaceable life in all godliness and honesty'].

[115] Thomas Lechford, *Plaine Dealing: Or, News from New-England* (London, 1642), 8. Lechford arrived at Boston in June of 1638 and promptly returned to Old England in August of 1641, after undergoing denial of church

Over the course of the decade between 1630 and 1640, churches in Massachusetts Bay established and entrenched a test of saving grace as a criterion for membership, and the test, perhaps codified with an enactment of the General Court in 1636, ordering "that noe pson, being a member of any churche which shall hereafter be gathered without the approbacon of the magistrates, & the greater parte of the said churches, shalbe admitted to the ffredome of this comonwealth," was more than mere confession of faith, assent to a covenant, or evidence of good behavior.[116]

This test, in effect, required the impossible: for candidates to demonstrate the work of saving grace on their souls, which was beyond human comprehension. God's gift was an inscrutable gift. Describing the trial in *Church-Government and Church-Covenant Discussed* (1643), Richard Mather explained that candidates had to "speake concerning the Gift and Grace of Justifying Faith in their soules, and the manner of Gods dealing with them in working it in their hearts," and in *The Way of the Churches of Christ in New England* (1645), Cotton confessed the trial's hopeless imperfection. "In this trial, we doe not exact eminent measure, either of knowledge, or holiness," Cotton wrote, "but doe willingly stretch out our hands to receive the weake in faith, such in whose spirits wee can discerne the least measure of breathing and panting after Christ, in their sensible feeling of a lost estate."[117] The platform adopted by the Cambridge Synod of 1648 tried to pin down the test more precisely, explaining in the twelfth

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membership and thus "the Sacrament, and all place of preferment in the Common-Wealth," which forced him, he wrote, "to make my living by writing petty things." *Plaine Dealing*, 69. Among those "petty things," impressively however, was an official manuscript copy of the colony's Body of Liberties in 1641.

[116] Shurtleff, *Records*, I:168-9. On the same day, March 3, 1636, the General Court established "foure greate Quarter Courts" and four inferior, or county, courts. Edmund S. Morgan discusses the test of saving grace at *Visible Saints: The History of a Puritan Idea* (Ithaca: Cornell University Press, 1965), 80-112.

[117] Richard Mather, *Church-Government and Church-Covenant Discussed* (London, 1643), 23. John Cotton, *The Way of the Churches of Christ in New England* (1645), 58.

chapter, "Of Admission of members into the Church," that in the examination and trial of "*Repentance* from sin & *faith* in Jesus Christ," which required a "personal *relation* of their spirituall estate" and a "declaring of Gods manner of working upon the soul," candidates "must profess & hold forth in such sort, as may satisfie *rationall charity* that the things are there indeed." That chapter began with the following statement of principle: "The *doors* of the Churches of Christ upon earth, doe not by Gods appointment stand so wide open, that all sorts of people good or bad, may freely enter therein at their pleasure; but such as are admitted thereto, as members ought to be *examined & tryed* first; whether they be fit & meet to be received into church-society, or not."[118]

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[118] Walker, *Creeds and Platforms*, 222 and 221-2. The restriction of church membership to women and men who successfully demonstrated God's work of saving grace in their lives would cause problems down the road, namely, about whether the children of church members who did not, in adulthood, successfully demonstrate God's work of saving grace could baptize their children. A decision of a synod in 1662 said that they could, though they were still barred from communion, and historians have called this the half-way covenant. For the decision, see Proposition 5th at Walker, *Creeds and Platforms*, 328, which expressed this: "Church-members who are admitted in minority, understanding the Doctrine of Faith, and publickly professing their assent thereto; not scandalous in life, and solemnly owning the Covenant before the Church, wherein they gave up themselves and their Children to the Lord, and subject themselves to the Government of Christ in the Church, their Children are to be Baptized." A synod in 1679 decided that "it is requisite that persons be not admitted unto Communion in the Lords Supper without making a personal and publick profession of their Faith and Repentance, either orally, or in some other way, so as shall be to the just satisfaction of the Church," and while that statement might have endorsed the test of saving faith, it is also possible, Morgan has argued, that it meant "no more than a profession of faith was needed." *Visible Saints*, 147. As of 1677, Samuel Stoddard, whom Patricia Tracy reports served as a chaplain in Barbados for two years after his graduation from Harvard in 1662, was not requiring evidence of saving grace to determine membership in his church in Northampton, and in 1699, the Brattle Street Church would follow. Darren Staloff argues that these choices were no innovation, however, as dissenters expressed their views from the beginning and the test never enjoyed universal consensus. Patricia J. Tracy, "Solomon Stoddard," *American National Biography Online*, February 2000; and Staloff, *Making of an American Thinking Class*, 30. Hall discusses controversy, too, at *A Reforming People*, 116-8 and 123-6, and Van Engen identifies the witch trials in Salem between 1692 and 1693 as the "natural endpoint of the long endeavor to confirm as members only those that one could reasonably be sure were saved." "When the Salem witch trials collapsed," he argues, "this effort became, to many, suspect." *Sympathetic Puritans*, 209.

Different understandings of how to discern the experience of saving grace, what counted as evidence of it, had roiled the colony into the controversy that resulted in the banishment and excommunication of Anne Hutchinson, a visionary, in November 1637 and March 1638 respectively, between which dates she lived as a prisoner under house arrest. As literary scholar Abram Van Engen has creatively and productively argued in a recent reinterpretation of the controversy, Winthrop, Shepard, and other colony elders defended experiences that fell below the level of rapture, while Anne Hutchinson and her antinomian allies insisted that direct revelation, immediate witness of the Lord, was the only experience that sufficed as evidence of the gift of salvation, which no number of ordinary affections, she believed, could disclose. Elders wanted to yield to those mundane experiences for the purpose of determining church membership, though, and in the end, after two trials, one before the General Court and one before Hutchinson's Boston congregation, and for reasons not limited to disagreement about what qualified

When William Penn sat down to write a letter to his reader under the name of Philopolites in the eighth decade of the seventeenth century, and he decided to write down that by studying "the Fundamental Laws of England" (that "excellent and descreet Balance that gives every man his even proportion, which cannot be taken from him"), one may come to "understand what is his Right, and how to preserve it from unjust and unreasonable men," he perhaps failed to comprehend how complicated, and how very consequential, had been the act of giving, and how delicately close to difference between safety and want, life and death. The unmerited, inscrutable gift of life to an elect among subjects, with no prior obligation on the part of the giver, but the imposition of a debt on the recipient who refused at great peril, suggests a new way to understand the delivery of salvation to the sinner, slavery to the captive, and a voice in government to the church member in the Massachusetts Bay Colony, for these phenomena, this dissertation submits, were less occasions of norm and exception or exclusion and inclusion, than a simple realization of justice long understood and its homologue mercy.

Compromising any claim to a Birth-rights, both enslavement and a voice in government in Massachusetts in 1641 were statutorily tethered to gifts that exposed liberty as the product not of desert, but of choice. To see the gap that opened up at junctures where someone needed something, really needed something—something like a wagon or chance at life—and that need

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as evidence of salvation, Hutchinson was cast out. "In the name of our Lord Jesus Christ and in the name of the Church I doe not only pronounce you worthy to be cast out, but *I doe cast you out* and in the name of Christ *I doe deliver you up to Sathan* that you may learne no more to blaspheme to seduce and to lye," Hutchinson's excommunication order inveighed. "Therefor *I command you* in the name of Christ Jesus and of this Church *as a Leper to withdraw your selfe out of the Congregation*." During the trial, Hutchinson had issued a warning to the men who sat in her judgment. "Take heed how you proceed against me," she advised; "for I know that for this you goe about to doe to me, God will ruine you and your posterity, and this whole State." David Hall, ed., The *Antinomian Controversy, 1636-1638: A Documentary History*, 2nd ed. (Durham, Duke University Press, 1990), 388, 273. I am indebted here to Van Engen, *Sympathetic Puritans*, 59-89, a paradigm-shifting work that rewrites the history of the antinomian controversy not as division between rapture, spiritual freedom, and emotion, on the one hand, versus reason, subordination, and obedience, on the other, but as a debate over what qualified as evidence of one's salvation. Michael Winship moved in that direction, too, in *Making Heretics: Militant Protestantism and Free Grace in Massachusetts, 1636-1641* (Princeton: Princeton University Press, 2002).

was an occasion for someone else to give or withhold the object, is to see justice and mercy in the same frame. This way of seeing will guide the rest of these pages, to the end.

Chapter the Second

Persons under Things

(Trust me) to give, it is a witty thing.
Ovid, *Elegies*, translated by Christopher Marlowe (ca. 1603)

On September 22, 1759, a man named William Blackstone requested three manuscripts from the Bodleian Library. He had been making requests for the unchained folios and manuscripts not immediately available to readers for a while, for over a decade, since February 10, 1743, to be precise, when he wanted to hold in his hands a 1604 quarto collection of Theocritus's Greek poetry together with Latin commentary, open it up, and use his eyes to read. He had never before requested NE F.4.13, Digby 222, or Tanner 189, however, and he would not do so again. Librarian Humphrey Owen recorded his request at the bottom of the fifth verso of a small paper daybook he had not been using long, opening it with his fingers and turning from the first, to the second, to the third, and to the fourth leaves, before finding the emptiness he needed to take his pen and write the following:

22. | NE F. 4. 13. D^{r} Blackstone Omn. Anim:

MS Digby 222. D^{r} Blackstone Omn. Anim.

MSS Tanner 189. D^{r} Blackstone Coll. Omn. Anim:

The daybooks on which Owen entered Blackstone's once and one time only request recorded book orders from readers, yes, but more. The tidy list of names in each: M^{r} Wood, M^{r} Sanford, M^{r} Hunt, M^{r} Swinton, M^{r} Pead, D^{r} Munro, M^{r} Bisse, M^{r} Merrick, and M^{r} Littleton, to take the verso facing the recto on which Blackstone's name first appeared:

10.

4^{o} T. 13. Art:Seld: __ Blackstone E Coll. Pemb:

piled up one on top of the other on paper marked with marginalia inside of bindings daubed with ink and smudged with fingers, scribbled over with ham-fisted crests and flowers and cartoon heads, and, significantly, inscribed with poetry too. The inside front cover of the daybook for 1730-41, for example, received the following epigraph from an unknown, unwitting someone,

Gentleman
a man[.]

This chapter begins, then, with a stack of names in a much handled book of requests that confessed of more than Theocritus, not the least of which the rule upon which the Bodleian's borrowing scheme operated, that what one requested, he would receive.[1]

William Blackstone was born on a day and died on a day and lived in between. By that small but not insignificant measure, he was like every last someone else who ever has been and will be. He composed the work that would commit his name to fame, *Commentaries on the Laws of England*, for the "raw and inexperienced youth," as he described his pupils, of his own

[1] Bodleian Library Records, e.560 and e.554. MS Digby 222 and MS Tanner 189 remain valid shelfmarks. NE [New End] F.4.13, however, does not; it is today MS Bodley 344. I deciphered the obscure signification with the help of Edward Bernard, *Catalogi librorum manuscriptorum Angliae et Hiberniae in unum collecti cum indice alphabetico* (Oxford, 1697), 124, and the intellectual generosity and institutional expertise of Head of Rare Books, Sarah Wheale; Medieval Manuscripts Curator, Bruce Barker-Benfield; and Colin Harris, who is the Superintendent of Reading Rooms and also a poet of the heart and friend of mine. I am grateful to Oliver House for giving me special access to the Library Records, and to Sarah Wheale for sharing with me her personal spreadsheet recreating the Bodley's eighteenth-century handlist, which allowed me to compile Blackstone's reading list at the Bodleian. The Bodleian Library opened to readers on November 8, 1602, on a medieval plan of stalls flanked by tiers of shelving filled with chained folios and large quartos, accompanied by desks. See the "Historical Introduction" to *The Bodleian in the Seventeenth Century: Guide to an exhibition held during the Festival of Britain 1951* (Oxford, 1951), 10. According to the statutes of the Bodleian Library, promulgated and confirmed on June 20, 1610, printed books "of a smaller size, in quarto and octavo, and which are kept in locked cases and under the custody of the librarian alone, that they may not be split by too much handling and turning of leaves, (in cases where they may be of great value for their antiquity, scarceness, price, beauty, or for anything else remarkable about them,) *must be shown to those who wish to see them* [emphasis mine]," and the same went for manuscripts. As per regulations approved in 1613, the librarian kept daybooks to record these requests. See "The Statues of the Public Bodleian Library, promulgated and confirmed in the House of Convocation, ANNO DOM. 1610, June 20th" and "Certain Statutes and Ordinances, made by the Curators of the Library, and publicly read and published in the House of Convocation, and Approved of by the same, on the thirteenth day of November, in the year of our lord 1613" in G.R.M. Ward, trans., *Oxford University Statutes* (London: Pickering, 1845-51), 248 and 266. According to I.G. Philip in "Libraries and the University Press" in *History of the University Of Oxford*, vol. 5, *The Eighteenth Century,* eds., L.S. Sutherland and L.G. Mitchell (Oxford: Clarendon Press, 1986), "between 1757 and 1761 all the chains were removed from the folio books and to all appearances the age of enlightenment had dawned" (739). The poem hides inside Library Records e.553.

intellectual home, the University of Oxford, in order to address "the evident want of some assistance in the rudiments of legal knowledge," and in the process, he introduced the study of the common law into a university's academic curriculum for the first time anywhere in the world.[2]

The magnitude of that work's influence, as measured by a change to the way law was learned, would influence education in England, yes, but would assume an even more striking size British North America, where it at long last provided a convenient entry point for students an ocean away from the printing presses and Inns of Court in London, to begin their legal studies. Without a college with a devoted professorship of English law until Thomas Jefferson established one at the College of William and Mary in 1779, and without a private law school until 1784, students seeking to learn the law in British North America either served as copyists in a court's clerk's office or paid for the privilege of studying under a lawyer, taking advantage in either case of their mentor's supply of imported law books. The labyrinthian complexity of Edward Coke's commentary on Littleton's *Tenures* once moved Joseph Story, who began to read law under Samuel Sewell in 1798, to sit himself down and weep bitterly, but James Kent, whose law lectures at Columbia would become the four-book *Commentaries on American Law* in 1826-30, remembered that when he happened upon Blackstone's *Commentaries* in the village he had

[2] William Blackstone, *Commentaries on the Laws* of England (Oxford: Clarendon Press, 1765), 31. This dissertation uses the facsimile of the first edition edited by Stanley Katz and published in Chicago by the University of Chicago Press in 1979. J.L. Barton thinks that earlier in the century, Thomas Wood, who penned *An Institute of the Laws of England* (1720), to be discussed at the very end of the chapter, as well as a letter on "why the general Knowledge of the Laws of England should be studied in the Universities," printed as *Some Thoughts Concerning the Study of Laws of England in the Two Universities* in 1708, might have given some instruction on the laws of England to his students at New College, Oxford. For that hypothesis, see J.L. Barton, "Legal Studies," in *History of the University of Oxford*, vol. 5, *The Eighteenth Century* (Oxford: Clarendon Press, 1986), 600.

escaped to when students at Yale dispersed during the American Revolution, "the work inspired me at the age of sixteen with awe and I fondly determined to be a lawyer."[3]

Blackstone became a lawyer, too, but he was born a poet and until he did not, he lived with his mother named Mary in a house with his brothers above his dead father's silk-draper's shop at the sign of "the Blew Boar near the Conduit in Cheapside LONDON"—all of it and them in the shadow of a cathedral named after a saint called Paul, but born Saul, whose magnificent outer dome crowned with a gilded ball and cross hid a more diminutive inner dome, made of brick. On the twenty-second day of September in 1759, he was thirty-six years old.[4] By then the

[3] Kent owned Philadelphia printer Robert Bell's 1771-2 set of Blackstone's *Commentaries*, though, and at some juncture he opened the fourth book, which is today held in Columbia Law School Library's Special Collections, to write the following in a marginal note set off, as was his routine, by the German pronoun *mein*: "This 4 vol. of Blackstone is handsomely written and is rather a light and general analysis of criminal law…It requires but ordinary talent and industry to compile such a volume." Coke's commentary on Littleton was published for the first time as *The First Part of the Institutes of the Lawes of England* in London for the Society of Stationers 1628, and it was followed posthumously by *The Second Part of the Institutes of the Lawes of England* in 1642, which the previous chapter of this dissertation discussed. Charles Warren describes Coke's presence in the colonial lawyer's library, Story weeping, and Kent's respect for Blackstone in *A History of the American Bar* (Boston: Little, Brown, and Company, 1911), 176, 182. Warren argues that "no reprint was made in America, prior to 1776, of Coke, or of any standard English law writer, except Blackstone" (16). Morris Cohen agrees, identifying Robert Bell's printing of *Commentaries* in Philadelphia in 1771-1772 as "the first major undertaking of this type in the whole of colonial America." Morris L. Cohen, "Legal Literature in Colonial Massachusetts," in *Law in Colonial Massachusetts 1630-1800*, vol. 62, *Publications of the Colonial Society of Massachusetts* (Boston: Colonial Society of Massachusetts, 1984), 256. For a helpful discussion of Blackstone's influence on formal and informal legal education in America, see Dennis R. Nolan, "Sir William Blackstone and the New American Republic: A Study of Intellectual Impact," *New York University Law Review* 51, no. 5 (1976): 731-68. For imported books, Coke among them, in the libraries of eighteenth-century American lawyers, see Herbert A. Johnson, *Imported Eighteenth-Century Law Treatises in American Law Libraries 1700-1799* (Knoxville: University of Tennessee Press, 1978); and "Historical Development of the American Lawyer's Library," *Law Library Journal* 61, no. 4 (1968): 440-62.

[4] William Blackstone was born on July 10, 1723, the third surviving and youngest son of Charles and Mary Blackstone. His father died five months before his birth, in February of 1723, and his mother died when Blackstone was just eleven-years old. According to one of his biographers, David A. Lockmiller, Blackstone and his brothers, Charles (born August 1719) and Henry (born 1722), were separated after Mary's death and never lived together again. Blackstone matriculated as a commoner of Pembroke College on December 12, 1738, to pursue a Bachelor of Arts degree. He changed course less than two years after matriculating, on July 9, 1740, to read for a Bachelor of Civil (that is, Roman) Law instead. He was elected to All Souls College in November 1743, earned a BCL on June 12, 1745, and earned a DCL (doctorate in laws) in April 1750. He wrote poetry as a schoolboy and perhaps up to March 1745, after his election to All Souls. Robert Dodsley published his *The Pantheon: A Vision* in 1747 and his "The Lawyer's Farewell to his Muse" in the fourth edition of *A Collection of Poems by Several Hands* in 1755. Both appeared anonymously. A manuscript "Select Poems and Translations," which included meditations on Theocritus's *Idylls*, has been lost. For biographies of Blackstone, see David A. Lockmiller, *Sir William Blackstone* (Chapel Hill: University of North Carolina Press, 1938); Ian Doolittle, *William Blackstone: A Biography* (London: W.S. Maney &

world's first professor of English, as opposed to Roman, law, as a boy he had opened his books to the first flyleaf and in thick, black, easy swoops of his pen drawn whirligigs in a circle around his name, and had at least once used a pencil to confess his place in the world on the same:

Ex Libr. WBlackstone
Coll Pemb. Commen[.]

He belonged to All Souls College, or, as it was known in its earliest days, The College of the Souls (*Collegium animarum*), but he had failed to gain entry on his first attempt, that is to say, he failed his first fellowship exam in November of 1742, or at least, he did not sufficiently impress the men and not women who met on the morrow of each All Souls Day to elect men and not women to fill fellowship vacancies, which were still divided, as per college statute, into two categories: Jurists and Artists. Neither exam scripts nor details about the fellowship selection process survive. Things come, and then they go.[5]

The University's Clarendon Press had published Blackstone's diagramic *An Analysis of the Laws of England* anonymously three years earlier, in 1756, an 180-page octavo, but his first

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Son, 2001); and most recently, Wilfred Prest, *William Blackstone: Law and Letters in the Eighteenth Century* (New York: Oxford University Press, 2008).

According to Bede's *The Ecclesiastical History of the English People*, "King Aethelberht built the church of the apostle St Paul in the city of London, in which Mellitus [bishop consecrated by Augustine] and his successors were to have their episcopal seat" in 604. Bede, *The Ecclesiastical History of the English People*, eds. Judith McClure and Roger Collins (New York: Oxford University Press, 2008), ii.3-4 at page 75. Paul's canonized letter to the church in Rome, written in Ephesus in the early 50s CE, which began, "From Paul, a servant of Christ Jesus who has been called to be an apostle," included this thought: "There is none righteous, no, not one." For it, see Romans 3:10 in the King James Bible.

[5] Convocation elected William Blackstone as the Foundation Professor of English Law in the University of Oxford on October 20, 1758. Blackstone drew playful swirls around his name on the recto of the first flyleaf of his copy of the 17th edition of John Milton's *Paradise Regained* (London, 1730), housed in Balliol College Library, 1550 b.13, and he admitted his status on the recto of the first flyleaf of his copy of Lawrence Fogg, *Theologiæ speculativæ* (London 1712), housed in Balliol College Library, 1550 d.27. I am enormously grateful to College Librarian Naomi Tiley and Assistant Librarian Fiona Godber for giving me such extensive access to Balliol's collections, both above and under ground. On the day I consulted Blackstone's copy of *Paradise Regained*, an undated call slip fell out: N° P 681. Apparently, David G. Worthy wanted to see the first volume of Pollock and Maitland's *History of English Law*, shelfmark 320 b 1/1, a book I have read many times myself. On that day in April of 2015, David came up from the grave to meet me and hand to me more evidence that the boundary between art and thought has been a porous one. Thank you, David.

treatise was not on law, but on architecture, and he never saw it published.[6] His private course of lectures on the laws of England had begun six years earlier, on Tuesday, November 6, 1753, and in the dining hall of All Souls, a building architect Nicholas Hawksmoor had designed to replicate the Chapel in reverse. In Blackstone's day, the Hall and the Chapel mirrored one another, with a vaulted passage in between, such that they dissected the college site in two and served as the college's central nerve and brace: the North Quadrangle on one side and the Court and South Quadrangle on the other. The Codrington Library paralleled the Hall-Chapel spine on the northernmost boundary and the High Street on the southernmost.[7] The series of lectures, then, that would in 1765 become *Commentaries on the Laws of England*, a book that became two and then three and then four—each quartos of precisely the same size—and then travel across a sea to become what James Madison described during the 1788 debate in Virginia on the adoption of the U.S. Constitution as "a book which is in every man's hand," had its beginnings of things in a room reserved for saying grace, eating meat, and drinking wine, which stood in fearful symmetry to a room reserved for confessing sin, receiving mercy, and partaking of the body and bloud of Christ.[8]

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[6] [William Blackstone], *An Analysis of the Laws of England* (Oxford: Clarendon Press, 1756). Blackstone's treatise on architecture survives as the Codrington Library's MS 333. He gave it the title "Elements of Architecture" and attached the following Preface: "The following Elements were first compiled in the summer of ye year 1743. They have been since revised and transcribed, with considerable additions and improvements, at leisure hours in ye years 1746 and 1747. The method made use of, and many of ye observations, are borrowed from Sir Henry Wotton's Elements. The rest are, in great part, taken from Monsr. Freart's Parallel, and Mr. Evelyn's Account of Architects and Architecture annexed to it; from Monsr. Perrault's Admirable translation and comment on Vitruvius, and his Abridgement of ye same author; and from Palladio's elegant Designs, as they are now illustrated by ye notes of Inigo Jones. A few mechanical Precepts, for ye more commodious drawing of several parts of architecture, are borrowed from Mr. Gibb's Rules; and as to ye several definitions, and synonymous terms of ye members, they have been chiefly furnished from Mr. Chambers's Cyclopedia."

[7] For a history of the college's site and buildings with a diagram, see "All Souls College" in *A History of the County of Oxford*, vol. 3, *The University Of Oxford*, eds. H.E. Salter and Mary D. Lobel (London, 1954), 173-93.

[8] Jonathan Elliot, ed., *The Debates of the Several State Conventions, on the Adoption of the Federal Constitution* (Washington, 1836), 3:501. Searching over 916 pamphlets, books, and newspaper essays produced in America between 1760 and 1805, Donald Lutz has found that Blackstone was the second most frequently cited European secular authority, immediately behind Montesquieu and before Locke. For his table, see Donald Lutz, *A Preface to*

The history of All Souls College began in letters patent granted by a king named Henry as an answer to the request of an archbishop known by the same name, to found, make, and rear "a certain perpetual College of one Warden and certain Scholars in Oxford" as a place of both study and of prayer. On December 14, 1437, Henry Chichele, Archbishop of Canterbury, purchased a spot "in Cate Street, at the corner of it, directly opposite to the eastern end of St. Mary's Church," as a manuscript history penned by Thomas Wenman, a fellow at All Souls from 1765, recorded, "urged…to erect a college destined to the maintenance of such who by their constant prayers might redeem out of the pains of purgatory" the souls those "who had unhappily fallen in the war between France and England," and such who might, moreover, "increase the number of the clergy, and promote the studies of theology, and the civil and canon [and not English] laws."[9] The earliest, and primary, purpose of Oxford's College of the souls in the eyes of its founder, it seems, was to secure salvation for the victims of war.

The previous chapter tried to focus attention on a homology between the ideas of justice and mercy by pausing over the first publication of the Magna Carta in America in 1687, and digging backward from it to the Body of Liberties in Massachusetts Bay in 1641, to see that both enslavement and a voice in government in Massachusetts in 1641 were statutorily tethered to an

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American Political Theory (Lawrence: University Press of Kansas, 1992), 136. While it is a good statistic to have, this dissertation understands Blackstone's influence as primarily pedagogical. His four-book *Commentaries* provided American students a convenient way to learn basic English legal principles. While the imported London edition cost American readers ten pounds a set, the set printed by Robert Bell in Philadelphia cost readers only three pounds per set. For All Souls College regulations concerning the reading of the Bible during dinner in Hall, see chapter 12 at G.R.M. Ward, trans. *The Statutes of All Souls College, Oxford; Now First Translated and Published* (London: Longman, Orme, Brown, Green, and Longmans, 1841), 47-9; for the celebration or saying of first and second vespers, and complines, matins, and high masses in the Chapel, see chapter 22 at 70-4; and for the suffrages and prayers to be exclaimed every morning as soon as the "warden, fellows, and scholars and chaplains" rise from bed, see chapter 23 at 75-7. I take the archaic spelling of blood from the order of communion in *The Book of Common Prayer* of 1662 reproduced in Brian Cummings, ed., *The Book of Common Prayer: The Texts of 1549, 1559, and 1662* (New York: Oxford University Press, 2011), 403. "The bloud of our Lord Jesus Christ, which was shed for thee," the minister said, delivering a cup of wine to the lips of the communicant. "Drink this in remembrance that Christs bloud was shed for thee, and be thankful." The 1662 version of *The Book of Common Prayer* would remain in force for over 300 years.

[9] Thomas Wenman History of the College in 7 volumes, Codrington Library, Warden's MS 22/1, 38-9.

inscrutable gift of life, one from God, and the other from a captor. Enslavement in North America, that chapter suggested, compromised William Penn's claim to a Birth-right because it exposed liberty (slavery's ostensible opposite) as the product not of desert, but of choice. This chapter, now, leaps forward to William Blackstone's *Commentaries* in the eighteenth century, but digs back even further to its medieval template, written in a world where the pious prayed for the salvation of the dead, in order, first, to see that the enslaved constituted a category of persons, and then, to pass fast through the hatch that allowed for escape from the rigidity of the free-slave distinction by assuming, as the work in Blackstone's hands guided, a different point of view.

One year after Chichele purchased a spot on Catte Street, on May 20, 1438, King Henry VI—acknowledging that "The Venerable Father Henry Chichele, Archbishop of Canterbury, Primate of all England, and Our Godfather, by whose hands We received the washing of holy baptism, hath besought Us" so to do—incorporated this college with his letters patent, giving a single name: "the Warden and College of All the Souls of the Faithful deceased at Oxford" (*Custos et Collegium Animarum Omnium fidelium defunctorum de Oxonia*), to a plurality of men ("the Warden and Scholars aforesaid for the time commorant therein, and their successors"), and making a body corporate with this prose:

> We, in compliance with the prayers of the same Our Godfather, do, in honor of our Lord Jesus Christ, the most glorious Virgin the blessed Mary his mother, and all the saints of God, rear, and by the tenor of these presents found, make, and establish, to last for all times, a certain perpetual College, to be governed according to the tenor of such ordinance, of one Warden and twenty Scholars, who are to abide in the said Town of Oxford and the University thereof, for the purpose of studying, and praying for the healthful state of Ourselves and of Our said Godfather while We live, and for Our souls when we shall have departed this life, and for the souls of the said Most illustrious Prince Our father, of Thomas, late Duke of Clarence, Our uncle, of the Dukes, Earls, Barons, Knights, Esquires, and subjects aforesaid, and for the souls of all the faithful deceased, on the site of a certain messuage called Berford Hall, lately called Charleton's Inne, six shops, and a plot thereto annexed, in Oxford, at a certain corner opposite to the eastern end of the parish Church of St. Mary the Virgin, in the streets call Catstreet and

> St. Mary-Street, containing in length one hundred and seventy-two feet, and in breadth one hundred and sixty-two feet.[10]

All of this came to pass by the force of King Henry's first-person yet plural will (*voluntas*). *Volentes et concedentes*, the patent read, "We will, and we grant." A college of study and prayer was what the king willed and granted to answer his Godfather. Very simply, Chichele asked, and he received, because the king chose to give. "The first step was to obtain the kings charter of incorporation," Wenman wrote of Chichele's plan for the establishment of the college, "and to secure as far as possible his royal protection. In this there was no difficulty, for the king had always entertained a fond affection for the archbishop, by whom he had been christend and whom he was used to call his godfather."[11]

Henry Chichele founded a college but he could not walk without a stick for support as his life neared its end, and he died on April 12, 1443. Before he did, however, he designed his tomb, and in it he remains. There, in Canterbury Cathedral, his emaciated, mostly naked corpse, hands limp, lay (still lies) underneath an effigy in pontificals, mitre, shoes, eyes open and hands actively pressed against one another in prayer. Chichele wanted his two bodies juxtaposed: one dead and decaying, and the other vital, resplendent; the former (a body natural) made by God, the creator, the latter (a body artificial) made by man, the created.[12] A contemporary of Chichele, lawyer and political theorist John Fortescue, who became Chief Justice of the King's Bench a year before Chichele died, on January 20, 1442, and would in 1459 be named an executor of

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[10] "The Letters Patent of King Henry Sixth; or the Royal Charter of the Foundation and Endowment of the College of All Souls," in Ward, *Statutes*, 158, 162, 159 (English); and "Patent Roll, 16 Hen. VI, membrane 24" in *Statutes of the Colleges of Oxford: with Royal Patents of Foundation, Injunctions of Visitors, and Catalogues of Documents relating to the University, preserved in the Public Record Office. All Souls College* (Oxford: J.H. Parker, 1853), 4-8 (Latin).

[11] Thomas Wenman History of the College in 7 volumes, Codrington Library, Warden's MS 22/1, 40-1.

[12] Ernst Kantorowicz describes the tomb in his magisterial, unforgettable, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton: Princeton University Press, 1957), 433-36 and photograph at Figure 30.

Henry VI's will, had an acute fascination with bodies, natural and otherwise. Indeed, his expression of the structure of the English kingdom as a body mystical bound together by law (*lex*) in the thirteenth chapter of his influential *In Praise of the Laws of England* (*De Laudibus Legum Angliae*), written between 1468 and 1471 while exiled in France, fleeing Henry VI's foe Edward IV, left little room for doubt on that score. His conceptualization of a kingdom that would never die, bound together by *lex*, would not be supplanted in England until *Calvin's Case* in 1608, when Edward Coke decided that it was allegiance to the natural person of the king, and not *lex*, that bound the kingdom together.

As preserved in the Bodleian's copy of the book (recorded in the eighteenth-century handlist as shelfmark 8^{o} F 20 Jur.), translated into English by Robert Mulcaster and published in London for the Companie of Stationers in 1616, Fortescue defined the word "people" (*populus*) by borrowing a line from *City of God*, which Augustine, bishop of a busy seaport called Hippo in present day Algeria, had composed between 413 and 426 CE using *On the Commonwealth*, a work Roman philosopher Cicero had composed between 54 and 51 BCE. "A people is a coming together of humans associated with one another through agreement on *ius* and community of interest," Fortescue wrote.[13] Put to print in 1616 in heavy letters of Latin and of English facing one another in parallel columns, unfolding underneath the running banner, "Fortescue, in commendation of the Lawes of England," that definition in the hands of the translator became, "A people is a multitude of men associated by the consent of law & communion of wealth."[14] Augustine, however, had reported the expression of the meaning of the word "people" in *On the Commonwealth* more accurately. Cicero had written that "a people" (*populus*) meant not "a

[13] "Populus est coetus hominum, iuris consensu & utilitatis communione sociatus." John Fortescue, *De Laudibus Angliae* (London, For the Companie of Stationers, 1616), 30 recto.

[14] Fortescue, *De Laudibus,* 30 recto.

coming together of humans" (*coetus hominum*), as Fortescue wrote, or "of men," as Mulcaster translated it, but "a coming together of a multitude" or "of a crowd" (*coetus multitudinis*), which conveyed a sense not only of plurality, but of chaos or disorder, and enriches an understanding of what Fortescue wrote next.[15] "Yet such a people being headless, that is to say, without a head," the English translation in 1616 explained, "is not worthy to bee called a bodie. For as in things natural, when the head is cut off, the residue is not called a bodie but a truncheon, so likewise in things politique, a communaltie without a head is in no wise corporate."[16]

In Praise of the Laws of England took the form of a dialogue in Latin between Prince Edward, Henry VI's teenage son, and himself, in which Fortescue tried to convince the fair prince to study the laws of England, and in the while defended kingship in England as integrated into a body politic whose heart lay not on the royal throne but with the people. A crowd of many individuals needed a head in order to achieve unity or oneness, Fortescue argued in that work, lest it lose its identity as a body, but the head needed the people, too. The following is what he wrote to flesh out that idea, as it were, as translated in the Bodleian's 1616 copy:

> As out of the embrion riseth a bodie natural [*corpus phisicum*], ruled by one head, even so of a multitude of people [*populo*] ariseth a kingdome, which is a bodie mystical [*corpus misticum*], grounded by one man [*uno homine*] as by an head And like as in a natural body, as saith the Philosopher, the heart is the first that liveth, having within it bloud, which it distributeth among al the other members, whereby they are quickened and doe live: semblably in a body politique [*corpore politico*], the intent of the people is the first lively thing, having within it bloud, that is to say, politique provision for the utilitie and wealth of the same people,

[15] Augustine, *The City of God against the Pagans*, trans. George E. McCracken, Loeb Classical Library 416 (Cambridge, Mass.: Harvard University Press, 1957), 1:206-7. Cicero, *De re publica De legibus*, trans. Clinton Walker Keyes, Loeb Classical Library 213 (Cambridge, Mass.: Harvard University Press, 1928), 64-5; and Cicero, *On the Commonwealth and On the Laws*, ed. James E.G. Zetzel (New York: Cambridge University Press, 1999), 18. For a discussion of the Latin noun *multitudo*, see Thomas Hobbes, *On the Citizen*, ed. and trans. Richard Tuck (New York: Cambridge University Press, 1998), xl-xli.

[16] Fortescue, *De Laudibus,* 30 recto.

> which it dealeth forth and imparteth aswell to the heade as to all the members of the same bodie, whereby the bodie is nourished & maintained.[17]

The English kingdom, political *and* royal, as Fortescue described it, arose from the people, whose intent, like the heart pumping blood, was the body's "first lively thing," and it was the law (*lex*) that held the body together, as if by sinews. "Like as by sinews the joyning of the body is made sound," the translation went, "so by the Law, which taketh the name from *ligando*, that is, to wit of binding, such a mystical body is knit & preserved together," obscuring what the original prose had explained: that the law (*lex*) bound (*ligatur*) and preserved (*servatur*) the body as one.[18] This meant, Fortescue concluded, that the king could no sooner "change the Lawes of that bodie,…[or] withdraw from the same people their proper substance against their wils and consentes," than a "head of the body natural" could "change his sinews…[or] deny or withhold from his inferior members their peculiar powers, & severall nourishments of blood."[19]

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[17] Fortescue, *De Laudibus,* 30verso-31recto. The next printed edition, edited and translated by Francis Gregor in 1737, translated *consensu iuris* as "Consent of Right," *corpus phisicum* as "Human Body," *corpus misticum* as "a Sort of a Mystical Body," and *uno homine* as "one Person." It also captured the implication of chaotic crowd in Augustine and Cicero's *multitudo* by translating the phrase, "so the kingdom issues from the people" (*sic ex populo erumpit regnum*), as, "so from a confused Multitude is formed a Regular Kingdom." Fortescue, *De Laudibus Legum Angliæ* (London, 1737), 21-2.

[18] The authoritative edition remains Fortescue, *De Laudibus*, ed. and trans. S.B. Chrimes (New York: Cambridge University Press, 1942), amended in Fortescue, *On the Laws and Governance of England*, ed. Shelley Lockwood (New York: Cambridge University Press, 1997). In 1737, Gregor wrote this translation: "The Law, under which the People is incorporated, may be compared to the Nerves or Sinews of the Body Natural; for, as by these the whole Frame is fitly joined together and compacted, so is the law that Ligament (to go back to the truest Derivation of the Word, *Lex a Ligando*) by which the Body Politic, and all its several Members are bound together and united in one entire body" (22). Deriving the word "law" from the verb "to bind" (*lex a ligando*) dates back to Alexander of Hales (c.1185-1245) in *Summa Universae Theologiae* IV.III.2. See Fortescue, *On the Laws*, ed. Lockwood, 21n79. Alexander of Hales wrote elsewhere that the concept of the person implied the concept of dignity, writing of a threefold being in Christ, each corresponding a different order of being: the individual, pertaining to the rational order; the subject, pertaining natural order; and the person, pertaining to the moral order. See Walter Principe, *Alexander of Hales' Theology of the Hypostatic Union* (Toronto: Pontifical Institute of Mediaeval Studies, 1967), 60-1. As Udo Thiel notes in the introduction to *The Early Modern Subject: Self-Consciousness and Personal Identity from Descartes to Hume* (New York: Oxford University Press, 2011), 28, philosopher Theo Kobusch has identified the medieval linkage between *persona* and morality as "the origin of the modern notion of a person." See Theo Kobusch, *Die Entdeckung der Person: Metaphysik der Freiheit und modernes Menschenbild* (Freiburg: Herder, 1993), 23-31.

[19] Fortescue, *De Laudibus Legum Angliæ* (London, 1616), 32recto and 31verso. Ernst Kantorowicz argues in *The King's Two Bodies* that by this time, "the doctrine of theology and canon law, teaching that the Church, and

Blackstone died on February 14, 1780, while the American Revolutionary War raged across the Atlantic Ocean, perhaps of congestive heart failure. He was fifty-six years old. On November 3, 1780, the Warden and fellows of All Souls agreed "that some mark of their respect should be shewn to the memory of Sir William Blackstone, late a member of this society," and they referred the matter to the Warden and officers "to determine in what manner it may be done with greatest propriety." In a meeting of the Warden and college in December, extant college records tell, "the order of the Warden and officers was read recommending to the society that a statue be erected to the memory of Sir William Blackstone deceased, and it was then agreed by the college that a statue should be ordered accordingly and that it should be considered by the Warden what artists should be employed for that purpose." The Warden selected sculptor John Bacon, and two years later, on November 4, 1782, "the letters of Mr. Bacon were read concerning the statue of Sir William Blackstone and the question was put whether the statue when finished should be placed in the Hall or in the Library. The majority agreed on the Hall and it was ordered accordingly."[20] Bacon fashioned a grim-faced, jowly man out of marble, and when given the choice, Blackstone's colleagues chose to put their man in the room reserved for meat and wine, fish and flesh, rumps of beef, rabbit and fry, Legg pork, Mutton eye, pidgeon, Calves head bacon.[21]

Christian society in general, was a '*corpus mysticum* the head of which is Christ,' has been transferred by the jurists from the theological sphere to that of the state and the head of which is the king" (16). The same would remain when James VI, King of Scotland, who was also James I, King of England, addressed the English Parliament on March 19, 1604, to say of the union of the two kingdoms, "What God hath conioyned then, let no man separate. I am the Husband, and all the whole Isle is my Wife; I am the Head, and it is my Body…I hope therefore no man will be so unreasonable as to thinke that…I being the Head, should have a divided and monstrous Body." King James VI and I, *Political Writings*, ed. Johann P. Sommerville (New York: Cambridge University Press, 1994), 136.

[20] Codrington Library, Acta in Capitulis, 1754-1800. On January 8, 1785, the Warden and college agreed "upon perusing the letter of Mr. Bacon that he should be paid the remaining charge on account of the execution of the statue of Sir William Blackstone four hundred and fifty guineas, the whole of the statue itself."

[21] Codrington Library, MS D.D. All Souls Coll. b. 118, Provisions Book, 1747-1753. In 1749, Blackstone selected the fellows whose likenesses John Cheere would capture in busts to adorn the pediment of the Codrington Library.

The *omnium* of All Souls College (*Collegium Animarum Omnium*) meant "all," but more besides. The adjective will figure later in this chapter because when clerks of what would become the King's Bench composed the treatise whose manuscripts Blackstone consulted—contemporaneously with King John and King Henry III issuing and re-issuing the Magna Carta—the word meant both the collective "all" and the individual "every" and "every last."[22] The distinction is a weighty one, not only for work to understand political bodies like universities or commonwealths more deeply, but for growing the eyes to more keenly see the heads and bellies and hearts of the individuals who gave those political bodies their shape.[23] When Blackstone dined in Hall, he, at least between Friday October 5th Week ye 1st 1753 to Friday March ye 29th week ye 26th 1754, brought along his "man." At the very end of the leaf recording names descending down from the Warden, the Buttery Book for that period acknowledged him: "Blackstones man," written alternatively as "Blackstone man," "Blacksman," "Blacks:Man," and "Black[e] :Man."[24] Blackstone's man ate too, but not at high table.[25] The man of Blackstone. Man

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He selected: Antony Sherley, William Petre, George Clarke, Daniel Dunn, Henry Coventry, William Trumbull, Robert Weston, Charles Talbot, Christopher Wren, Richard Steward, Thomas Tanner, James Goldwell, Gilbert Sheldon, Brian Dupper, David Pole, Jeremy Taylor, John Norris, Thomas Linacre, Clement Edmonds, William Byrde, Nathaniel Lloyd, Robert Hovendon, and John Mason. I am indebted to Norma Aubertin-Potter, Clerk to the Archives, for these names.

[22] The authorship of *Bracton* has been a point of scholarly debate. For a summation, see Paul Brand, "The Date and Authorship of *Bracton*: a Response," *Journal of Legal History* 31, no. 3 (2010): 217-244.

[23] Three frontispieces to Thomas Hobbes's *Leviathan, or The Matter, Forme, & Power of a Common-wealth Ecclesiasticall and Civill*, published in London in 1651 after the English Civil War, gave readers a remarkable, if frightful, literal pictorial rendering the political body, depicting a giant, sword-bearing king with a crown reaching into the sky and a torso and arms full of human bodies. For two of those frontispieces, see Thomas Hobbes, *Leviathan* (New York: Cambridge University Press, 1991), lxxiv, 2. British North America, to my knowledge, produced nothing similar, though it might be argued that the U.S. Constitution, drafted in 1787, fit the bill.

[24] Codrington Library MS D.D. All Souls Coll. a. 275.

[25] Chapter 9 of college statutes left no room for doubt. See Ward, *Statutes*: "Now while all and singular the Fellows and Chaplains and Scholars aforesaid are seated in quiet and silence at the inner side of the tables however, and are listening constantly and earnestly to the reading of the Holy Scriptures, Our pleasure is that they be competently and decently served and supplied with victuals (so however as two rations be put in a single dish) out of the common

of a man. Man of a gentleman. Without evidence about their relationship, their bond, the recoverable lies in the starkness, the baldness, and the seeming ease with which the entry was made. That, of course, and the namelessness of this man who served a fellow, which, together with the possessive confessed over Calves head bacon, lay uncomfortably proximate to the preservation, the spiritual liberty and salvation, promised at the Eucharist in the chapel next door.[26] Blackstone's man was a man who, too, was born on a day and died on a day and lived in between, but his life went differently, and he might have longed for prayers or preservation, or to count as the heart of the kingdom, or, as this chapter intends to make clear, to receive his *ius*.

II.

The man sitting at a desk in a public library on September 22, 1759, with three very old manuscripts at hand, had his nose in a treatise composed by Henry of Bratton, a judge on what would become the King's Bench, and plied by clerks and interpolators from the 1220s and 1230s through to the 1250s.[27] Blackstone owed an enormous debt to this chaotic and hybridized

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goods of the said College…so that all persons be supplied with the same kind of flesh and fish, unless on account of the dearth of provisions some other regulation must needs be made" (42-3).

[26] See a regulation dated January 12, 1592: "And furthermore, seeing that We have been given to understand, by the relation of persons worthy of credit, that a great number of boys and menial servants are, without any selection made, kept and constantly supported by very many Fellows and Scholars of the said College, to the great detriment and burden of the College, WE do enact, that no one of the Fellows or Scholars henceforth (excepting the Doctors alone) do retain, support, or keep any boy or menial servant in the said College, without the express consent of the Warden first had and obtained in writing for that purpose" (Ward, *Statutes*, 132-3).

[27] In 1758, John Adams, 23 years old, explained that when he was "desirous of seeking the law…in its fountain," he "obtained as much knowledge as I could of Bracton, Britton, Fleta and Glanville," but "suffered from much for want of books." *Works of John Adams*, ed. Charles Francis Adams (Boston: Charles Little and James Brown, 1850), 2:50n. The reading habits of John Adams, though, were unusual. For an interesting discussion, see Daniel Coquillette, "Justinian in Braintree: John Adams, Civilian Learning, and Legal Elitism, 1758-1775," in *Law in Colonial Massachusetts 1630-1800*, vol. 62, *Publications of the Colonial Society of Massachusetts* (Boston: Colonial Society of Massachusetts, 1984), 359-418. This chapter is not making an argument about the influence of *Bracton*, or of the Roman law generally, in British North America. The aim, instead, is much more modest: to study an old book that Blackstone consulted and followed in the footsteps of, in order to gain insights that might lead to a deeper understanding of the enduring division of persons into free and slave.

treatise, whose title more accurately was *On the Laws and Customs of England* (*De legibus et consuetudinibus Angliæ*), for it effected the importation into the English tradition of the Roman template Blackstone used to organize his course of lectures and subsequent four-book *Commentaries on the Laws of England*: that the whole of the law pertains either to persons or to things or to actions.[28] Justinian's *Institutes*, produced across the channel in 533 CE by a small committee of three working under the eponymous emperor, had said the same thing, and before that, so too had Gaius's *Institutes*, a work written around 161 CE by a man, perhaps a teacher, certainly a Roman citizen, of whom a modern academic once said "we know at the same time more and less than of any other."[29] But for Bracton's excision of the conjunction "now…" (*autem*…), which Gaius and Justinian had used, as well as Bracton's alternative placement of the verb "pertains" (*pertinet*) and his re-wording of the clause immediately after *ius* from "which we

[28]*Bracton On the Laws and Customs of England*, trans. Samuel Thorne (Cambridge, Mass.: Belknap Press of the Harvard University Press, 1968), 2:29: "omne ius…pertinet vel ad personas, vel ad res, vel ad actiones." In 1979, Duncan Kennedy wrote a scathing critique of *Commentaries* directing attention to what Kennedy called the oddness, or strangeness, of Blackstone's organizational scheme into rights and wrongs. Alan Watson followed in 1988 with a critique of Kennedy's critique, arguing that Kennedy overlooked Blackstone's institutionalist predecessors, a context, Watson argues, that made Blackstone organization, if not justifiable, then at least predictable. In *The Common Law and English Jurisprudence, 1760-1850* (1991), Michael Lobban agrees with Watson, developing the analysis to argue that Blackstone's attempt to squeeze English law into a Roman structure was unsuccessful. Duncan Kennedy, "The Structure of Blackstone's Commentaries," *Buffalo Law Review* 28, no. 2 (1979): 205-382; Alan Watson, "The Structure of Blackstone's Commentaries," *Yale Law Journal* 97, no. 5 (1988): 795-821; and Michael Lobban, *The Common Law and English Jurisprudence, 1760-1850* (New York: Oxford University Press, 1991). John Cairns discusses the historiographic heritage on this score in "Blackstone, An English Institutionalist: Legal Literature and the Rise of the Modern Nation State," *Oxford Journal of Legal Studies* 4 (1984): 318-360.

[29] A.M. Honore's paraphrase of an observation made by Jolowicz in the former's *Gaius* (Oxford: Clarendon, 1962), xi. Historian Barthold Georg Niebuhr found the fullest surviving manuscript historians have of Gaius underneath a palimpsest in a monastic library in Verona in 1816. Gaius's *Institutes* and Justinian's *Institutes* were certainly short textbooks for beginners. Bracton was a teaching book as well, but of a different sort. It was much bigger than the other two, and it was intended more for apprentices and practitioners than for beginners. For more, see Thorne's Introduction to his authoritative *Bracton* at 1:xliv and William S. Holdsworth's inaugural lecture for the Law School of University College of South West of England, Exeter, "Legal Education: Its Debt to Bracton," printed in December of 1923 at p. 15. Often, for simplicity's sake and for the sake of personification, which I selfishly delight in, I will leave off italicization and refer to each work as Gaius, Justinian, and Bracton. I will also slip between "Bracton" and *De Legibus* when discussing the book that mistakenly received the name *Bracton*. My work uses the following editions: *The Institutes of Gaius*, trans. Francis de Zulueta (Oxford: Clarendon Press, 1946), 4 [Latin-English facing]; *Imperatoris Iustiniani Institutionum*, comp. J.B. Moyle (Oxford: Clarendon Press, 1903), 109 [Latin only]; and *Bracton on the Laws and Customs of England*, trans. Samuel Thorne (Cambridge, Mass.: Harvard University Press), 2:29 [Latin-English facing].

observe" or "observed by us" (*quo utimur*[30]) to "with which we propose to deal" (*de quo tractare proponimus*[31]), the prose remained stable for over a thousand years. Justinian copied Gaius, and Bracton copied Justinian. The prose was hard, that is, it did not yield to the pressures of time. Blackstone scooped up that template but in his hands it yielded, if not in whole then in part, as he mediated its terms such that he altered how the "person" figured; those changes are the subject of this chapter. Blackstone isolated and prioritized a definition of *lex* he attributed to Cicero above the millennia-old division of the *ius* into persons, things, and actions; he translated the Latin word *ius* as the English word "right"; and whereas for Bracton, "persons," connected to an idea about heightened but not monopolized dignity, were the reason for all *iura*, for Blackstone, "the first and primary end of human laws is to maintain and regulate these absolute rights of individuals."[32] The differences made a difference, but it is impossible to appreciate the significance of his changes without pausing to look squarely at the bestial leaves—irregular pieces of parchment resembling oily, edible meat—Blackstone wished to see, and in so doing, begin at the beginning and pay attention to the hope expressed at the beginning of the treatise called *Bracton*, that it might, "by the support of writing, be committed to perpetual memory for protection," and in that way saved.[33]

When Blackstone studied and taught at Oxford, the Bodleian held the first 1569 publication of *Bracton*, shelfmark N 2.13 Jur., as well as the next 1640 publication of the same, AA 42 Jur.Seld. The first, bulkier than the second, published in Latin in London "Apud Richardum Tottellum," and subsequently marked with a large "13" painted above a smaller

[30] Zulueta, *Gaius*, 4; Moyle, *Imperatoris*, 6.

[31] Thorne, *Bracton*, 2:29.

[32] William Blackstone, *Commentaries on the Laws of England* (Chicago: University of Chicago Press, 1979), 1:120.

[33] Thorne, *Bracton*, 2:19: "scripturae suffragio perpetuae memoriae commendanda."

erased "10" on the vertically-oriented exterior leaves, admitted its former shelfmark: M.3.10.Jur.[34] The second, published in Latin in London by Miloni Flesher and Robert Young for John More, belonged to legal historian John Selden (1584-1654) before he died, and his executors presented it to the Bodleian in 1659. A large "42" stood vertically on its exterior leaves, and at some point before or after Blackstone was or was no longer, water dripped down into the topmost leaves to yellow a half-circle stain through the first thirty folios, and the topmost buckle of the case went missing, leaving two pin-sized holes behind. One year after Selden died, law-book publisher Daniel Pakeman wrote the following note on the back flyleaf:

> 28 November 1655
> At the return of this book I am to allow eleven shill:ings if within a fortnight
> Dan: Pakeman[,]

and in so doing fashioned the book into a thing inscribed, valued, lent and received.

Most *De Legibus* manuscripts included the obscure, "I so-and-so [*ego talis*]" to announce the author in an introductory clause: "I so-and-so, to instruct the lesser judges, if no one else, have aroused my mind (*animus*)…," but the editor in 1569 who referred to himself only as T.N. but was almost certainly Thomas Norton, took the authorial "I, H. de Bractone" or "I, H. de Brattone" committed to prose in only a few of the manuscripts, or he took the confused multiplicity of inscriptions and marginal notes with a name scribes spelled alternatively as "Brattone," "Bractone," and "Bracton," which he saw in the selection of manuscripts he consulted, and attributed the authorial phrase and the book itself to Henry of Bratton, a man born in Devon who became a justice of the king, cutting the first "t" and replacing it with "c," and

[34] A backmost page of prose ripped out today.

making it "Bracton."[35] It has happened that men wrote down words incorrectly sometimes, and that they sometimes misunderstood.

Each early modern edition cut the treatise into books and assigned the first book to "the division of things" (*de rerum divisione*) and the second book to "acquiring the dominion of things" (*de acquirendo rerum dominio*), successfully concealing what the manuscripts made clear as opening titles and paragraphs on foundational terms such as *lex*, custom, *ius*, justice, equity, and manumission, as well as "the first and briefest divisions of persons" (*prima divisio personarum…et brevissima*).[36] To repeat, both the 1569 and 1640 editions of *Bracton* buried all

[35] Thorne, *Bracton*, 19n12, where Thorne reports that scribes wrote the name in full in Gray's Inn Library, MS no. 21 (Brattone) and Bodleian Library, MS Bodley 170 (Bractone). For more insight, see Frederick William Maitland, ed., *Select Passages from the Works of Bracton and Azo*, vol. 8, *Publications of the Selden Society* (London, 1895), xn4, 5n4.

[36] The organization of the first book, covering folios 1 to 7, in 1569 ran this way:

> 1. The needs of a king. 2. England alone uses unwritten *ius* and custom. 3. For whom this treatise is invented. Cap. I.
> 1. The author's preamble. 2. The matter of this book. 3. The intention. 4. The utility. 5. The end. 6. *Quis effectus*. 7. He who judges ought to be wise. 8. What the punishment for evil judging is. Cap.2.
> 1. *De principali tractatu*, and first What is *lex*. 1. What is *custom*. Cap.3.
> 1. Of justice and *iure*. 2. What is justice. 3. What is *ius*, & that *ius* has various senses. 4. What is jurisprudence. 5. What is equity. 6. What are the precepts of *ius*. Cap.4.
> 1. How *ius* is divided. 2. What is public law. 3. What is private law. 4. What is natural law. 5. What is civil law. 6. What is the *ius gentium*. 7. What comes from and is introduced by the *ius gentium*. 8. What is manumission. Cap.5
> 1. Of the first division of persons. 2. What is liberty. 3. What is servitude. 4. How born *servi* & how made so. 5. Who may be called free and who freeborn. Who are called freed. 7. Who may not be called children nor reckoned among children. Ca.6
> 1. Of the second division of persons. 2. How hermaphrodites should be classed. Cap.7
> 1. Of the third division of persons. 2. The diverse names of dignity. 3. What are belts. 4. What the sword signifies. 5. On the dignity of the king & that the king has no equal. Cap.8
> 1. Of the fourth division of persons, that one is *sui iuris* or *alieni iuris* or doubtful. 2. Who are *sui iuris*. 3. Who are *alieni iuris*. 4. Who are in the *potestas* of fathers. Cap. 9.
> 1. How paternal *potestas* & seigniorial *potestas* are dissolved. 2. On the fifth subdivision of persons who are in the *potestas* of another. 3. How fugitive servants are released from seigniorial *potestas* Cap.10.
> 1. Of the diverse conditions of persons who are tenants of the demesne of the lord king. 2. Of *liberi* in the manor of the king. 3. *Liberi homines* under the *potestas* of lords. Cap.11.
> 1. Of things and the division of things. 2. The first division. 3. The second division. 4. The third division. 5. Some things are common according to the division of the interior. 6. Some public. 7. Some belong to the universities. 8. Some are sacred and holy which are consecrated to God. 9. Some belong to individuals. 10. Some belong to no one. Cap.12.

The 1640 publication erased the "Cap." designations from the tail of each pithy syllabus and moved it to a centered head: CAP. I, using Roman numerals instead of digits, and adopted slightly different orthography, but otherwise left the syllabus in tact.

of the introductory work to isolate and define foundational terms and then to discuss the "person" underneath the running banner, "the division of things," found on the recto and verso of folios 2, 3, 4, 5, and 7.[37] Intriguingly, then, readers of these early modern books learned about persons, as well as justice, under "things." This was an imposed organization not required by the manuscripts, which took the form of short, titled paragraphs, and not chapters within large books.[38] The organization the editors selected, however, disclosed the trouble anyone wishing to underscore "persons" would have faced. The manuscripts devoted, roughly, seven folios to "persons," ninety to "things," and three hundred and fifty to "actions."[39]

Suffering has not ripped and torn itself apart such that observers could see. Instead, women and men languished outside the city's walls covered in pustules like deep soup paste made of lentils, needing care, while the dogs went on with their doggy life and the torturer's horse scratched its innocent behind on a tree. It is an unexceptional, but at the same time not trivial, observation that books were just that: words on pages made by hands. In contrast to the paper on which *Bracton* appeared in 1569 and 1640, John Cotton's *GODS MERCIE MIXED WITH HIS IVSTICE* appeared in 1641, William Penn's *The Excellent Priviledge* appeared in 1687, and the first book of *Commentaries on the Laws of England* appeared in 1765, the parchment of the manuscripts in front of Blackstone on September 22, 1759, confessed the fearful and very physical symmetry between a creature used and the use to which she was put, and by extension, between death and life. Written on animal skins cut from the body of a sheep, goat, or calf (stillborn required for the finest parchment), bathed in water and lime, shorn of hair

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[37] The recto to folio 6 in both 1569 and 1640 received *De acquirendo rerum dominio*.

[38] For more, see "The Division of the Treatise into Parts," in Thorne, *Bracton*, 1:28-63, especially 49.

[39] Maitland, ed., *Select Passages from the Works of Bracton and Azo*, xiv.

and scraped of flesh, stretched, chalked and thinned, these manuscripts retained the imprint of arm pits and hip bones and hair follicles, as well as the errant cuts of the knife used for fleshing. Near the end of processing a skin, artisans would place it on a frame and stretch it taut so that the pressure modified the dermis's collagen and the skin could lie tight and flat to receive the ink of scribes. Once bound into a codex, the stack of parchment had to receive sufficient pressure in order for the collagen to remain in a modified state. Were the pieces of parchment to go a while without sufficient pressure (were the book to lose its clasps, for example) the collagen would respond and the parchment would slowly assume again the shape of the animal it once surrounded. It would not be inaccurate to say that at such a juncture, the page moved back toward life. Parchment also allowed for the effacement of prose. If someone soaked a piece in whey and scraped it of ink, she could make room for more writing. This is precisely what happened to the fullest extant text of Gaius. At some point in the early Middle Ages a scribe scraped away Gaius's *Institutes* in order to record the letters of St. Jerome and it was not until 1816 that a researcher applied nut-galls to the palimpsest in a monastic library in Verona and discovered what lay underneath.[40]

The following pages aim to do something very simple: read the paragraphs *Bracton* devoted to "the first and shortest division of persons" very carefully and in the original Latin, in order to see where the word "person" (*persona*) appeared and where the word "human" (*homo*) appeared and how the two danced with one another, to understand where *Bracton* departed from his sources, and to reveal a series of foreshortenings in standard renderings of the text.[41] All

[40] This paragraph owes a debt to the Bodleian's Medieval Manuscripts Curator, Bruce Barker-Benfield, and to Harvard's Senior Rare Book Conservator, Alan Puglia.

[41] A key source for Bracton was a *summa* of Justinian's *Institutes* written by an Italian law professor from Bologna called Azo. I use Maitland, ed., *Select Passages from the Works of Bracton and Azo*, vol. 8, *Publications of the Selden Society* (London, 1895). For all textual evidence from *Bracton*, I use Thorne's collated, authoritative edition cited above, and the translations are my own.

translations of *Bracton* are my own; indeed, one goal is to catch what otherwise accurate translations miss. Without question, the elucidation of a complex idea such the person requires more than historical lexicography, and more than a history of accreted words. This chapter's obsessive concern with the prose inked on the skins of dead beasts, then, is a beginning and not the means, and a long way from the end. It merely aims to identify what the words in the book called *Bracton* actually were. The men who worked under Justinian to compose the *Digest*—a mammoth collection of writings extracted from Roman jurists, organized according to the names of the men whose work it heaped together: Gaius, Hermogenian, Florentinus, Marcian, Papinian, Ulpian, Paul, and on—must have known that words, heavy but light enough to fly, mattered, for they chose to make the penultimate chapter of the work a collection a 246 extracts on their meaning: *De Verborum Significatione*. "In the appellation 'acorn,' every last fruit is enclosed," wrote Gaius (entry 236.1). "In the appellation 'woman' a virgin ready for a husband is enclosed," wrote Ulpian (entry 13). "In the appellation 'human' (*hominis*) female and male is enclosed without doubt" (entry 152). "In the appellation 'parent' is enclosed not only father but also grandfather, and a great-grandfather and so on; likewise, a mother and a grandmother and a great-grandmother" (entry 51). "The expression 'if anyone,' embraces both males and females" (entry 1). "In the appellation 'family' is enclosed also children. A single slave (*servus*) is not enclosed in the appellation 'family'" (entry 40.2-3).[42]

The first commitment of this dissertation, if it is true, is to better understand the creation of a normative order that permitted, even encouraged, what Frederick Douglass in 1845 would describe as "ineffable sadness."[43] It is eager, then, to pause over parchment and to read sources

[42] Mommsen and Krueger, *The Digest of Justinian*, 4:933a-56a.

[43] Frederick Douglass, *Narrative of the Life of Frederick Douglass, An American Slave Written by Himself*, ed. David Blight (Boston: Bedford/St. Martin's, 2003), 51.

in ways that reveal what learned men left unimagined. Perhaps taking a cue from the sixteenth chapter of the fiftieth book of the *Digest* is one way forward. Such a methodology might require holding words in our hands and opening them up, or finding out if words might serve as an interstice to drop down through to see the world differently, from a different perspective, yes, but more: to see from the bottom and then fly back up, up through the word and over, over to see if we might find the place where the *voluntas* of kings meets that of *servi* and we locate an emotive register that connects will to pleasure to happiness and ultimately, to something close to right. In all of this, the concern is much less to unearth the intentions of lawyers in Bracton's day, or in Blackstone's—this project cares not a mite about them—than to mine words to get at insights that might light a way to the place just mentioned. The intuition is that answers to serious and important questions are going to be found in obscure and forgotten and very old places. The authorial "I" of the book called *Bracton* expressed the intention of the book as this: "to handle of such matters and to instruct and teach all [*omnes*] who long to be taught thoroughly," but the prose adopted to define the *lex* of the title, copied directly from *Digest* 1.3.1, demonstrated that "all who long" did not mean "all who long." "*Lex* is a general command," the book expressed, "a thing deliberated by prudent *virorum*," that is males, that is men, that is adults who were not women.[44]

III.

The books of Gaius, Justinian, and Bracton, all, had it that "the whole of the law…pertains either to persons or to things or to actions" (*omne ius…pertinet vel ad personas, vel ad res, vel ad*

[44] Thorne, *Bracton*, 2:22; Mommsen and Krueger, *Digest*, 1:11a.

actiones).[45] All selected the word *ius* instead of *lex*. All selected the adjective *omnis*, a word that got at a full—no, glutted—idea about all of, the whole of, each single, every, every single, every available or possible, every kind of, any, any whatever, all collectively, the full number of, or every last, to modify the noun *ius*.[46] All selected the disjunctive conjunction "or" (*vel*) over the copulative conjunction "and" (*et*)—a choice that might, but might not, have signaled a clean and elegant division of *ius* into three heads—and finally, for each, the trichotomy was the principle upon which each work more or less proceeded organizationally.[47] The use of *vel*…*vel* instead of the exclusive, more dogmatic *aut*…*aut* (either…or…; can be…but not…) in all three suggests that the three categories drawn in these works were less mutually exclusive than translatable. That is to say, instead of a division of *ius* into three hermetically sealed categories, the contents of which were locked away, nothing going in, nothing going out, the triad perhaps spoke to a division unclearly cut whose boundaries were porous. It is possible that *aut*...*aut* indicated actual and positive alternatives, whereas *vel*…*vel* left the choice or choices, if any, to the mind of the reader.[48] The division of the whole of the *ius* into persons, things, and actions might have been neither clean nor intellectually necessary. Indeed, it is altogether possible that the reason for the

[45] Zulueta, *Gaius*, 4; Moyle, *Imperatoris*, 109; Thorne, *Bracton*, 2:29.

[46] See *omnis* at R.E. Latham, ed., *Dictionary of Medieval Latin from British Sources* (Oxford: Published for the British Academy by Oxford University Press, 1975-2013), Fascicule 8:2021; and R.E. Latham, ed., *Revised Medieval Latin Word-List From British and Irish Sources* (London: Oxford University Press, 1965), 322.

[47] It is possible that *vel*...*vel* introduced items in a list of alternatives that were not mutually exclusive. See Latham, *Dictionary*, Fasc 17:3609.

[48] Moyle would disagree with me on this score. He argues that understanding the division as a subjective one that allows the reader to "regard any given rule of law at pleasure from any of three different points of view" is attractive, but "will not bear examination" (*Imperatoris*, 92-3), reasoning that our authors did not have the "refined analytical power" it would have required to think that thought.

trichotomy in the first place was nothing but a wish to have books of roughly the same length for reproduction on rollers.[49]

Justinian may be instructive. There, the prose the committee of three used to explain the division of law into public and private—a line Gaius omitted and Bracton put differently—used the word *positiones*. "In this study there are two *positiones*: public and private," the three men wrote, and they used the word only once, narrowing their attention to the latter.[50] J.B. Moyle, editor of the authoritative modern edition of the *Institutes*, translates it as "branches," but that is not quite right, for the word's meaning bent closer to "situation."[51] Applying this sense to the persons, things, and actions trichotomy shifts focus to the structural and imbues the three objects of law with resonances not only of space and arrangement, but of posture. To corroborate, the *Digest* placed Gaius's trichotomy in the first clause of the first book's fifth chapter, which bore the title, *De Statu Hominum*, the noun *statu* deriving from the verb *sto*, to stand or be erect, and so its discussion of the division of the objects of law into persons, things, and actions unfolded, most literally, from a staring point "on human standing."[52]

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[49] Indebted to many discussions with Professor Charles Donahue for this insight.

[50] Moyle, *Imperatoris*, 99, who translates it differently in his English-language version of the same: "The study of law consists of two branches, law public, and law private. The former relates to the welfare of the Roman state; the latter to the advantage of the individual citizen." J.B. Moyle, trans., *The Institutes of Justinian* (Union, New Jersey: Lawbook Exchange, 2002), 3. Gaius omitted the line, and Bracton put it differently, writing, "There is public law, which pertains to the common welfare of the Roman *res publica* and deals with religion, priests, and public officers," and private law, "that which pertains primarily to the welfare of individuals and secondarily to the *res publica*" (Thorne, *Bracton*, 26). Blackstone did away with it altogether.

[51] See noun *positio* and verb *posito*, also *pono* (to put, place, set), in Latham, *Word-List*, 361.

[52] Mommsen and Krueger, *Digest*, 1:15a. This communes with Jeremy Waldron's argument that "dignity has resonances of something like noble bearing." See his *Dignity, Rank, & Rights*, ed. Meir Dan-Cohen (Oxford: Oxford University Press, 2012), 21-2. I remain grateful to Professor Waldron for sharing a copy of his Tanner Lectures, presented at Berkeley in April 2009 with me while I was working on my master's thesis at Oxford between Michaelmas 2008 and Trinity 2010.

After declaring that the whole of the law related to persons, things, or actions, each of the three teaching books then transitioned into a discussion of "persons." For Gaius, the transition was simple: "And first we perceive persons," or, "let us first consider persons."[53] Justinian introduced the same by the conjunction "and…" (*ac*…), and then added a rationale: "For it is insufficient to come to know *ius*, if persons, because of whom it is established, are not known," and Bracton went a step further, writing this: "and since persons, because of whom all rights [*iura*] are established, are more worthy [*digniores*], therefore we first see down [*videamus*] from persons and their position [*statu*], which is various and diverse, and after that way down from the law of persons [*de iure personarum*], which is directed toward them [*vertitur circa eas*]."[54] To proceed piece by piece, "persons" had a singular *statu* and it was various and diverse, and there were persons, on the one hand, and "the law [*ius*] of persons" on the other.[55] Most strikingly, *digniores* was the comparative and not the superlative form of the adjective *dignus*, which meant alternatively merited, due, appropriate, of great worth, precious, exalted in rank, or worthy, and was a hapax, a word recorded only once. To be clear, the comparative adjective *digniores*

[53] Zulueta, *Gaius*, 4: "et prius videamus de personis," which Zulueta translates: "Let us first consider persons" (5). The verb was *videamus*, from *videre*, *video*, to perceive through sight. For it, see Latham, *Dictionary*, Fasc 17:3670, and *Word-List* 512.

[54] Moyle, *Imperatoris*: "ac prius de personis videamus. nam parum est ius nosse, si personae, quarum causa statutum est, ignorentur" (109), which Moyle translates this way: "And first let us speak of persons: for it is useless to know the law without knowing the persons for whose sake it was established" (*Institutes*, 6); and Thorne, *Bracton*: "…et cum digniores sint personae, quarum causa statuta sunt omnia iura, ideo de personis primo videamus et earum statu, qui varius est et diversus, et postmodum de iure personarum quod vertitur circa eas" (2:29), which Thorne translates this way: "…and since persons, because of whom all rights are established, are of the greater dignity, therefore let us first look to them and their conditions, which are various and diverse, and then to the law of persons which is directed to them" (2:29).

[55] See Latham, *Word-List*, 451-2 for *stare*: to stay, sojourn, to stand, be valid, or to count for, be reckoned as; *sto*: to be or remain; *statio*: a station or stall in a market; and *stat/us*: standstill, equilibrium, station, post (in hunting), aspect, or point of view. Nouns *statio*, *statura*, and *status*, and the verb *statuere* can be found in Latham, *Dictionary*, Fasc 16:3185-6, 3187-8, 3188, and 3187. Azo put it differently. He wrote, "We first see down from persons, THAT IS, down from the law that is directed to persons OR down from the *statu* of persons, which is various and set apart [emphasis mine]." For it, see Maitland, *Bracton and Azo*, 42.

appeared only once in the work called Bracton: here.[56] Whether the adjective meant worth in relation to where the reader's attention should be put or rather to some kind of attribute of persons is a question, but the word meant more and not most worthy, and so suggested that the other objects of law: things and perhaps even actions, had *dignus* also, but in different degrees.[57] Azo of Bologna's summary treatise of Justinian's *Institutes*, a secondary source on which Bracton leaned heavily, had used *digniores* too; Bracton followed. Finally, Bracton, like Gaius and Justinian before him, used the verb *videre,* which was tied up with an idea about eyes to see, such that the words themselves—the word *videre* (to see), together with *statu* (position), together with *vertere* (to turn or direct), together with the spatial preposition *circa* (round about or toward)—created an evocative, dimensional world in which the idea of "persons" resonated with an idea about heightened but not monopolized dignity, and persons occupied a various and diverse *statu*.

Gaius, Justinian, and Bracton, all, placed human beings in one of two groups: free (*liberi*) or slave (*servi*), Gaius and Justinian both having it that "the principal division of persons is this, that all human beings are either free or slave" (*summa...divisio de iure personarum haec est, quod omnes homines aut liberi sunt aut servi*).[58] Both used the more dogmatic *aut…aut*

[56] For *dignus*, see Latham, *Dictionary*, Fasc 3:663. The word will figure in Thomas Jefferson's A *Summary View of the Rights of British America* (1774), to be discussed in the next chapter.

[57] I think of *The Politics*, written in the fourth century BCE, where Aristotle suggested that both human and nonhuman animals were political animals, that is, that they shared politics. This is what he wrote: "It is evident that the state is a creation of nature, and that man is by nature a political animal…man is more of a political animal than bees or any other gregarious animals." Aristotle, *The Politics*, ed. Stephen Everson (New York: Cambridge University Press, 1988), 3.

[58] Zulueta, *Gaius*: "Et quidem summa divisio de iure personarum haec est, quod omnes homines aut liberi sunt aut servi" (4), and Moyle, *Imperatoris*: "Summa itaque divisio de iure personarum haec est, quod omnes homines aut liberi sunt aut servi" (109). *Liber*, roughly, meant free, possessing the social and legal status of a free human. For it, see Latham, *Dictionary*, Fasc 5:1595-6. Zulueta translates *servi* as "slaves" (*Gaius*, 5), as does Moyle (*Institutes*, 6), but Thorne translates it as "bond" (*Bracton*, 2:29). According to Latham, *servus* could mean the following: held subject to obligation to provide some form of service, unfree, slave, one under the sentence of penal servitude, serf, servant, attendant, follower, apprentice, or assistant (*Dictionary*, Fasc 15:3055).

(either…or) as opposed to *vel…vel*; both used the adjective *summa* to modify "division"; the division was not of "persons" full stop but of "the law of persons"; both used the adjective *omnes* (the whole of, all, or every) to modify the plural noun *homines*; and the sentence slipped between "the law of persons" (*iure personarum*) and "humans" (*homines*), clearly expressing the thought that slaves counted as human beings, and persons, too.

Bracton transcribed, "that *omnes homines* are either *liberi* or *servi*," but departed from his predecessors in fascinating ways. By Bracton's account, "the first [*prima*] and briefest [*brevissima*] division of persons [*divisio personarum*] is this, that all humans beings are either *liberi* or *servi*, that is, every human being is either *liber* or *servus*, that the plural may so be opened up [*resolvatur*] into the singular."[59] Bracton exchanged the adjective *summa* for the adjectives *prima* and *brevissima*; for Bracton, the division had become one of "persons" rather than of "the law of persons," yet he retained the slippage between "persons" and "humans"; and finally, Bracton's use of the verb *resolvere* was absolutely unique to this sentence. It can be found nowhere else in the work.[60] It was another hapax, and, again, Bracton leaned on Azo, who had been reading a passage in the *Digest* on conditional provisions in wills, which had provided this: "What, then, of the provision, 'I give and bequeath Stichus and Pamphilus, if they be mine when I die?' The testator alienates one of them; can the legatee, nonetheless, claim the other? It is settled that he can; for, despite the plural, such formulation is to be taken as though the testator had said disjunctively: 'Stichus, if he be mine at the time of my death.'"[61] The "they" must be

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[59] Thorne reads it differently: "…that the plural number may so be reduced to the singular" (*Bracton*, 2:29).

[60] For *resolvere*: to unfasten, slacken, unlock, open (enclosed space), detach from, dislodge, free (from), separate into constituent parts or elements, break up, dissolve, resolve into constituent parts (to facilitate understanding), dispel (infection), soften (tumor), melt, dissolve into, or reduce to, see Latham, *Dictionary*, Fasc 14:2797.

[61] *Digest* 35.1.33.4 at Mommsen and Krueger, *Digest*, 3:186b.

opened up into each, the jurist Marcian suggested there, the two slaves disambiguated into one and one. Samuel Thorne, editor of the authoritative modern edition of *Bracton*, translates *resolvatur* as "reduced to," which is not inaccurate but misses the insight that might be gained if we read the verb as "open up," a definition that suggests, more provocatively, that inside of "all" lay "every last."

Bracton borrowed Justinian's definition of servitude or slavery (*servitus*), putting it down this way: "*Servitus* is an institution [*constitutio*] of the law of nations [*ius genitum*], by which someone is, against [*contra*[62]] nature, subjected [*subicitur*[63]] to the dominion of another [*dominio alieno*]. It is called from saving [*servando*[64]], not serving [*serviendo*[65]]."[66] The persons to whom *servi* referred in Justinian, however, were not the persons to whom *servi* referred in Bracton. While the history of slavery's demise in England has not yet been written, the buying and selling of the labor of the very poor women and men who worked the land in the late medieval period did not, arguably, take the shape of a full-fledged market in human chattel. Bracton translated the villeins he observed in his own day as *servi*, slaves, but to put it in simplest terms, the villein was not a slave, but an unfree peasant. Bracton wrote that the first and briefest division of persons was into those who were free and those who were enslaved, but he modified that Roman

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[62] See Latham, *Dictionary*, Fasc 2:469-70, for the adverb *contra*.

[63] See Latham, *Dictionary*, Fasc 16:3237, for the verb *subicere:* to place beneath, underlie, lay before (the eyes or mental vision), expose, lay open or subject to (hazard, treatment), subject to, put under, to be subject or obedient to, to submit to, or to subject oneself to.

[64] See Latham, *Dictionary*, Fasc. 15:3050-1, for the verb *servare*: to look at, examine, inspect, keep to, follow, watch over, keep under guard, protect or save from danger or death, defend, preserve from loss, keep safe, or preserve.

[65] See Latham, *Dictionary*, Fasc. 15:3052-5, for *servire*: to serve, attend or wait on, look after, offer divine service, worship, serve, benefit, be useful, be used, provide for, supply, serve, provide, provide a profit or financial benefit for, fulfill one's obligations to, provide service for, serve, carry out, fulfill, observe, obey, pay heed to, devote oneself to, serve the cause of, or to be subordinate (of person, of land, or grammatically to a case).

[66] Moyle, *Imperatoris*, 109-10; Thorne, *Bracton*, 2:30.

distinction to mean that one could be enslaved with respect to the law of nations (*ius gentium*), but, at the same time, free with respect to the law of nature, such that she was "free and slave but from different points of view [*respectibus*], and thus wholly free and wholly slave and not in part one and part the other."[67] This modification, legal historian Paul Hyams has argued, allowed accommodation of Bracton's theory of villeinage. There is not sufficient room to discuss that theory here, but, in brief, it maintained that the villein was a villein against his lord only and free against the world.[68] Crucially, then, according to *Bracton,* the escape hatch from the rigidity of the free-slave division was point of view, position from which to stand to see, and manumission, the giving of liberty as a gift, was not required.

Respectus meant, most literally, looking back or about, and Tertullian, an early Christian convert born at Carthage in the middle of the second century, had selected its verb form, *respicio*, in *Apology* in 197 CE, at a juncture in the work where he tried to explain why he would not call the emperor by the name of God. I know not to lie, for one thing, he said. I dare not mock him, for another. He gave one more reason besides, and it is the most interesting. "If he is a human, it is an interest of the human to yield place to God," he wrote. "He denies he is emperor, who says he is God; unless he is a human, he is not emperor." His thoughts then flew to the Roman triumph, and he described an emperor, glittering with cinnabar, riding to the capitol with a slave by his side. "Even in the triumph, as he rides in that most exalted chariot," Tertullian recorded, "it is whispered to him from behind: 'Look behind thee; remember thou art a man.'"[69]

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[67] Thorne, *Bracton*, 2:29-30. Later, the treatise provided this: "But no one is part *servus* ET part *liber*; he is either wholly *liber* OR wholly *servus*, which he may be in different *respectibus* [emphasis mine]." Thorne, *Bracton*, 3:101.

[68] Paul Hyams's discussion can be found in his *King, Lords, and Peasants in Medieval England: The Common Law of Villeinage in the Twelfth and Thirteenth Centuries* (Oxford: Clarendon, 1980), especially 82-124.

[69] Tertullian, *Apology*, trans. by T.R. Glover, Loeb Classical Library 250 (Cambridge, Mass.: Harvard University Press, 1931), 157.

Listen to the slave whispering in your ear. Turn around. Look with your eyes. Remember what you are. To be chastened in a blaze of glory made it all the more worthy of delight, Tertullian argued, for "he would be less, if he were at that moment called a god, because it would not be true. He is greater, who is called to look back, lest he think himself a god."[70] Look behind you; remember you are human. Look above you; remember you are a slave.

For both the free (*liberi*) and the slave (*servi*), and for Justinian and Bracton, a human being was either born such or made such.[71] Born *servus*, made *servus*; born *liber*, made *liber*. According to Justinian, "*servi* are born so [*nascuntur*] or made so [*fiunt*]." Bracton wrote exactly the same thing.[72] Justinian had it that "a freeborn [*ingenuus*] is one who immediately at birth is free," and Bracton hewed closely, but as usual, made some changes, putting it down this way: "In truth, he may be called free [*liber*] and freeborn [*ingenuus*] who immediately at birth is *liber*."[73] Justinian defined the freed (*libertini*) as "those who have been manumitted from just servitude [*iusta servitude*]," but Bracton spelled it out: "the free [*liberi*] are made such."[74] Fortescue would write that a multitude might erect a "bodie politique" by so fashioning themselves, and liberty, Bracton wrote here, yielded to human creativity, too, visiting those whom it was directed to visit.[75]

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[70] Tertullian, *Apology*, 157.

[71] Gaius left it at "*liberorum hominum* are either *ingenui* or *libertini*" (I.9) without broaching the making and unmaking of *servi*. See Zulueta, *Gaius*, 5.

[72] Moyle, *Imperatoris*, 110; Thorne, *Bracton*, 2:30.

[73] Moyle, *Imperatoris*, 113; Thorne, *Bracton*, 2:31.

[74] Cf. Moyle, *Imperatoris*, 113; Thorne, *Bracton*, 2:31, the latter of which had it: "Fiunt etiam liberi, qui dicuntur libertini, illi videlicet qui ex iusta servitute manumissi sunt."

[75] See *facere* at Latham, *Dictionary*, Fasc 4:886, entry 3 in particular: to create from nothing.

Neither Gaius nor Justinian devoted any space at all to the emperor in space allotted for the person. Bracton, quite to the contrary, wrote lengthily about the king at the very end of his discussion of the first division of persons, writing this:

> With God, no human whomsoever is esteemed, free or slave, since God is no respecter of persons…But with humans, in truth, is a difference between persons…There are *liberi homines* and *servi* under the king, subject to his power, and every last one is under him, and he himself below no one, except only God. The *rex* has no equal or like [*parem*] in his realm, since he would thereby lose his rule, since equal cannot have authority [*imperium*] over equal. Much less *a fortiori* a superior…since he would then be placed under a lower, and it is meet that a lower cannot be powerful. The king ought not be under humans but under God and under *lege*, since *lex* makes the *rex*.[76]

Bracton used no similarly rich, thick prose to describe the relative standing of the free and the slave. In stark contrast to slaves, then, among whom "whoever is *servus* is just as much *servus* as any other, neither more, nor less," the category of the free distinguished itself by remarkable unevenness, running the length from the subject at the bottom to the king at the top.[77] The king stood under *lex*, and every last one, both free and slave, stood under the king, as if the king-subject relation subsumed all the rest. Bracton's king occupied a high position but not the highest, however; he stood under God and under *lex* since *lex* made the *rex*. In his turn, Blackstone would devote fully half of the eighteen chapters in his first book of *Commentaries, Of the Rights of Persons*, to the king. "The supreme executive power of these kingdoms is vested by our laws in a single person," those six chapters, dealing with the king's title, family, councils, duties, prerogatives, and revenue, in that order, began. "Besides the attribute of sovereignty, the

[76] Thorne, *Bracton*, 2:32-3, taken from Romans 2:11, "For there is no respect of persons with God." I use the KJV.

[77] Thorne, Bracton, 2:31.

law also ascribes to the king, in his political capacity, absolute perfection. The king can do no wrong."[78]

Justinian had defined manumission as "the giving of liberty" (*datio libertatis*).[79] Bracton, however, following Azo, went further in the final paragraph of introductory material preceding the paragraphs on persons, explaining that it was the giving of liberty, yes, but

> the uncovering [*detectio*]…for *libertas*, which proceeds out from the law of nature, cannot be taken away by the *ius genitum*, although by the *ius genitum* it can be obscured. Natural rights [*iura naturalia*] are immutable. Say truly that he who manumits gives *libertas*, although not his own but another's [*non suam sed alienam*]. One gives who does not have…For natural *iura* are said to be immutable, because they cannot be abrogated or taken away completely, though they can be restricted or pulled down in kind or in part.[80]

Significantly, at this juncture, then, Bracton made it clear that manumission was the giving of *the recipient's* liberty. Four paragraphs later, in an expression of "what *servitus* is," Bracton would expand the thought yet further, explaining that manumission gave the recipient's liberty as a gift. In ancient times, when taken by the hand, captives were called *mancipia*, the work asserted, so, in turn, when "given *libertas* as a gift [*libertati donentur*], they are called *manumitti*, as if released from the *manu* [hand]."[81]

Ius, like *libertas*, admitted of the possessive adjective, too, and one could lose it, become bereaved of it. As the previous chapter of this dissertation discussed, the first sentence of the first title of the first book of Justinian's *Institutes* defined justice (*iustitia*) as "the constant and

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[78] Blackstone, *Commentaries*, 1:183, 238. As the next chapter of this dissertation will discuss, British North Americans by 1776 would beg to differ. On the fourth page of *The King's Two Bodies*, Kantorowicz identified what he called Blackstone's "at once fantastic and subtle description of the king's superbody or body politic" as the endpoint of his 568-page study. From Blackstone's pages, he argued, there rose "an abstract physiological fiction which in secular thought remains probably without parallel."

[79] Moyle, *Imperatoris*, 113: "manumissio autem est datio libertatis."

[80] Thorne, *Bracton*, 2:27-8.

[81] Thorne, *Bracton*, 29-30.

perpetual will [*voluntas*] to give [*tribuens*] to each *ius suum*," and *Bracton* copied it word for word.[82] Moyle translates it as, "Justice is the set and constant purpose which gives to every man his due," and Thorne as, "Justice is the constant and unfailing will to give to each his right," but neither got it perfectly correct because, among other reasons, it is impossible to translate *ius* into English with precision.[83] For Justinian as for Bracton, justice was will, the will to give or yield or grant or more specifically, divvy up—the will to give a possessed *ius* to every last one. Justinian left it at that, but Bracton carried on into a disquisition, a veritable mosaic of Azoian sentences. "This definition can be understood in two ways," the compilers of Bracton wrote, "one according as *iustitia* is in the Creator, another according as *iustitia* is in the created. And if understood according as in the Creator, that is in God, the matter is clear, since *iustitia* is the disposition of God…God assigns to everyone [not each one] according to his work [*opera*]." On the other hand, justice could lie

> in the created, that is in the just human [*iusto homine*; not man (*vir*), not person (*persona*)]. The just *homo* has the will [*voluntas*] to give everyone [not each one] *ius suum*, and thus in that way *voluntas* is called *iustitia*. And *voluntas* to give *ius suum* refers not so much to what is done [*actum*] as to the relation to a thing produced in one by some influence [*affectionem*]. Just as the emperor is called Augustus, not because he always augments the empire, but because his intent is that he augments it…Remove *voluntas* and every act will be neither good nor evil. Your relation to the thing [*affectio*] places a name upon your work.[84]

By these lights, justice inhered in the disposition of God (the creator) but not of the just human (the creature), who was, presumably, capable of wrong.

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[82] Moyle, *Imperatoris*, 97; Thorne, *Bracton*, 2:23. A subtle difference: *tribuo* meant give, yes, but also assign. For it, see *tribuere* in Latham, *Dictionary*, Fasc 17:3496-7: to grant, bestow, proffer, offer, present, pay (sum) in tax or tribute, ascribe, attribute, or assign. It was not the same verb as *dare*: to give, grant, bestow. Latham, *Dictionary*, Fasc 3:559.

[83] Moyle, *Institutes*, 3; Thorne, *Bracton*, 2:23.

[84] Thorne, *Bracton*, 2:23. O*pera* supposed free will, whereas *opus* spoke to mechanical or animal-like activity. See Latham, *Dictionary*, Fasc 8:2025 and 2040. For *affectio*, see Latham, *Dictionary*, Fasc. 1:47: feeling, emotion, affection, liking, volition, inclination, tendency.

Bracton offered two interpretations of *ius suum*. On the one hand, it could mean "the human's merited *ius*," the work had it, "for on account of delict or a pact not preserved, or the like, is some one bereaved of his *ius*."[85] Alternatively, *ius suum* could refer to *iustitia* herself and mean something like *iustitia*'s own. "*Ius* is derived from *iustitia*," Bracton recorded, "and has various meanings." Sometimes, for example, *ius* could mean "that which results from a judgment," and when so, "a magistrate charged with the administration of justice is said to give back [*reddere*] *ius*, even when he does it *inique* [unfairly or unjustly, or more literally, unequally], the word referring not to what the magistrate in fact did, but to what he ought to do."[86]

As seen just above, Bracton defined manumission as a giving of a singular *libertas* possessed not by the giver, but by the recipient, as a gift. "One gives who does not have," Bracton wrote. Now it is plain that Bracton defined justice in terms of giving, too, as the will to give to each a possessed *ius*: what accorded with her work, if from God, and merited *ius* or *iustitia*'s own, if from the just human. The *voluntas* of those who might receive *ius* did not figure. To repeat, the definition of justice, as copied from Justinian and torqued by Bracton on pages that looked like oily meat—what historians may fairly call the earliest expression of justice in the common law tradition—did not comprehend the persons who might hope or want or need or long to stand in justice's downstream, or to do what they pleased. The definition of justice in the book mistakenly called *Bracton*, which Blackstone studied on September 22, 1759, before committing his *Commentaries* to prose, focused exclusively on the will of the

[85] Thorne, *Bracton*, 2:23: "De hoc autem quod dicit 'ius suum,' id est hominis meritum, nam propter dilictum vel pactum non servatum, vel similia, privatur quis iure suo."

[86] Thorne, *Bracton*, 2:23-4. For *reddere*, see Latham, *Dictionary*, Fasc 13:2694: to give back, return, restore.

giver, a will inflected by an obscure, if not inscrutable, relation, disposition, or state of mind between that giver and a potentiality.

And so, there was perhaps no hard and fast distinction between "persons" and "things"; the "person" resonated with an idea about heightened but not monopolized dignity, but admitted of sorts and conditions; the free, like the enslaved, were made such, and what counted for the purpose of assessment was point of view and where and how one stood; *libertas* and *ius*, both, admitted of possessive adjectives; manumission was the giving of the recipient's liberty as a gift; justice was will, that is, the will to give, the will to give a possessed object to each—a will to give that was measured not by what the giver in fact gave but by what the giver intended to do; and to conclude, *libertas* was uneven in more ways than one.

IV.

The minutiae just labored over will, I hope, grow into a more significant and consequential shape over the course of this dissertation. The details of *Bracton* will abide with us, or us with them, and travelling from the beginning to the end of this story, we will see both continuity and change, strange meetings and stranger departures. With his lectures in the Hall of the College of the Souls that had begun as of September 22, 1759, and the *Commentaries* that would be, Blackstone summed up of decades of legal development that had begun with Fortescue's conceptualization of the kingdom as a mystic body with the king as its head and the people at its heart, when he broke from the millennia-old commonplace, altered by Bracton, that the "first and briefest division of the persons is this, that all humans are *liberi* or *servi*, that is, every last human is *liber* or *servus*," writing instead that "the first and most obvious division of the people is into aliens and natural-born subjects," yet also that "persons are also divided by the law into either

natural persons, or artificial."[87] As the next chapter will try to show, in British North America during the era of the American Revolution, that new division of persons into natural and artificial in the hands of lawyer and politician James Otis, which Blackstone had fashioned to set corporations apart from natural persons, would render lucid the difference between enjoying security in rights that emphatically disallowed gift or donation, and suffering vulnerability to a similitude of those rights *precisely as* gifts or donations, but that discussion must delay.[88]

Blackstone's mediation of *Bracton*'s terms manifested itself most conspicuously in the titles he selected for his first two books. Both the *Institutes* of Gaius and the *Institutes* of Justinian spoke in terms of the *iure personarum* (the *ius*, or law, of persons) and the *rerum divisione* (the division of things).[89] *Bracton* followed suit and at the juncture between the discussion of persons and things, wrote this: "We have spoken above of persons and the *statu* of humans and the *ius* of persons; we must now speak of things."[90] In his turn, Blackstone followed down the same path but mediated the terms such that he rendered his titles, if not illegible, then ridiculous.

The syntax of the title of Blackstone's second book, *Of the Rights of Things*, paralleled that of the first book, *Of the Rights of Persons*, and so a commonsense reading of the two titles

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[87] Blackstone, *Commentaries*, 1:354, 119. Only the natural-artificial division included the king.

[88] Blackstone wrote of England's rejection of "pure and property slavery…, whereby an absolute and unlimited power is given to the master over the life and fortune of the slave" in the fourteenth chapter of *Commentaries*, "Of Master and Servant," debunking each one of the paths to slavery Justinian had described in *Institutes*. The gift of life gave the slave her name, Justinian had written, but slavery arose also, according to that book, from sale of self and inheritance from enslaved parents. The first of Justinian's justifications, the right of slaughter, Blackstone wrote, was not good law. The second he torpedoed as impossible, writing that "every sale implies a price, a *quid pro quo*, an equivalent given to the seller in lieu of what he transfers to the buyer," and no "equivalent can be given for life, and liberty." The third justification, built on the former two, he wrote, collapsed on a rotten foundation. Blackstone, *Commentaries*, 1:411-2.

[89] Moyle, *Imperatoris*, 193; Zulueta, *Gaius*, 67.

[90] Thorne, *Bracton*, 2:39.

alongside one another would anticipate the content of each book to follow accordingly, to make good on what the matching syntax suggested: that the first book would take up rights annexed to persons and the second book would take up rights annexed to things. Such a reading, however, would grossly mislead. As Blackstone explained in the third paragraph of the first chapter of the first book, rights are "first, those which concern, and are annexed to the persons of men, and are then called *iura personarum* or the *rights of persons*; or they are, secondly, such as a man may acquire over external objects, or things unconnected with his person, which are stiled *iura rerum* or the *rights of things*."[91] Later, in the first paragraph of the second book, Blackstone would supplement that definition of the rights of things, writing that what he meant by the turn of phrase was "those rights which a man may acquire in and to such external things as are unconnected with his person."[92] That addendum suggested that rights were positioned within things with material extension, that is, within the limits or bounds of things. Thus understood, the thing encased the right, and the right lived inside the thing, like a parasite. If the right lay inside the thing, then it looked essential rather than accidental or arbitrary and it assumed a character similar to "the absolute rights of individuals" Blackstone spoke of in the first book, "such as

[91] By "things," Blackstone meant "property." Public notices announcing the private course of lectures on which Blackstone based his *Commentaries* make as much clear. According to a surviving notice dated June 18, 1759, the course consisted of sixty lectures, organized under five subheadings: Rights of Persons, Rights of Property Real, Rights of Property Personal, Private Wrongs, and Public Wrongs. By the time of a similar notice in 1764, the "rights of property real" and "rights of property personal" subheadings had been condensed into one: "rights of property." Blackstone owed a heavy debt to Matthew Hale's *The Analysis of the Law*, written in the 1650s and printed posthumously together with *The History of the Common Law* in 1713 as the second installment of *The History and Analysis of the Common Law of England. Written by a Learned Hand* (In the SAVOY: by J. Nutt for J. Walthoe, 1713). Hale had written this: "The Civil Rights of Persons are such as do either, 1. Immediately concern the Persons themselves; Or, 2. Such as relate to their Goods and Estate…As to the other Interest of Goods and Estate, though in Truth they have a Habitnte, and are under some Respect to the Person; yet because they are in their own Nature Things separate and distinct from the Person, they will more properly come in under the *Jura Rerum*" (1-3). Blackstone's phrasing in *Commentaries* departed from Hale's in a subtle way. For Hale, it was rights that concern "the Persons themselves" (1); for Blackstone, it was rights that concern "the persons of men" (I:118). For Hale it was rights that relate to things unconnected to "the Person" (3); for Blackstone, it was rights that relate to things unconnected with "his person" (I:118).

[92] Blackstone, *Commentaries*, 2:1.

would belong to their persons merely in a state of nature, and which every man is intitled to enjoy whether out of society or in it."[93] *Commentaries*, then, went a way toward making property rights look absolute, alienable only by violence, for what else but violence, war, could summon enough might to rip a right out from inside a thing?

Blackstone's use of "right" for *ius* was less inaccurate than incomplete and misleading. The word *ius* in the books of Gaius and Justinian was a capacious one with both subjective and objective valences, which neither had nor has a single English-language counterpart, indeed, was and remains impossible to translate perfectly, and enjoyed a prominence in the Roman tradition that was lost in the English.[94] Justinian began his book by carefully disambiguating terms: what is justice, what is jurisprudence, what is natural law, what is the law of nations, what is civil law, what is *lex*. Bracton imported this material, yet the title of the treatise, the same as the book known commonly as *Glanvill*, confessed the terms that really organized his work. It was *De Legibus et Consuetudinibus…* (*On the Laws and Customs*…), and not *De Iure*…. (*On the Ius*…).[95] Fortescue used *lex*, too, in *De Laudibus Legum Anglie* (*In Praise of the Laws of England*). Bracton clearly struggled to know what to do with the word *ius*, inserting the clause, "according to the *leges* and customs of England," immediately after the trichotomy: "the whole

[93] Blackstone, *Commentaries*, 1:119.

[94] Among the four books Blackstone assigned to the students attending his lectures (his own *Analysis of the Laws of England* (Oxford, 1756) and two-volume *Law Tracts* (Oxford, 1762), Thomas Wood's *An Institute of the Laws of England* (1720), and the following) was Giles Jacob's *New Law-Dictionary*, published for the first time in 1729 and reprinted in 10 editions through 1782, and all editions of that work defined *jus* as "Law or Right, Authority and Rule."

[95] *The Treatise on the Laws and Customs the Realm of England Commonly Called Glanvill*, ed. G.D.G. Hall (New York: Oxford University Press, 1993).

of the *ius* with which we propose to deal pertains either to persons or to things or to actions." Yet Blackstone scaled the conceptual divide and put "right" in the place of *ius*."[96]

Blackstone's closest predecessor trying to narratively describe the whole of English law, Thomas Wood, whose *An Institute of the Laws of England* (1720) Blackstone assigned to his students, had not done it that way. Wood began the first chapter of Book 1, *Of Persons*, with this sentence, "I have said, That the *Object* of the Laws of *England* are, 1. *Persons*. 2. *Estates*. 3. *Crimes* and *Misdemeanors*, or *Pleas of the Crown*. 4. The *Courts* of Justice."[97] Why, or at least, how? His organization permitted it. Matthew Hale's *The Analysis of the Law*, written in the 1650s and published posthumously together with *The History of the Common Law* in 1713, had, unlike Wood but like Blackstone, translated *ius* as "right":

> Now all Civil Rights or Interests are of Two Sorts:
> 1. *Jura Personarum*, or Rights of Persons.
> 2. *Jura Rerum*, or Rights of Things.

Why, or at least, how? Because his organization was this:

> The Civil Part of the Law concerns,
> 1. Civil Rights or Interests.
> 2. Wrongs or Injuries relative to those Rights.
> 3. Relief or Remedies applicable to those Wrongs.[98]

Rights and wrongs, then: that was the rub.

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[96] In *The Institutes of the Lawes of England…Useful for all Gentlemen who are Studious, and desire to understand the Customes of this Nation*, published 1651 as an English translation of his earlier *Institutiones Iuris Anglicani* (1605), which imitated Justinian's *Institutes* in content and form, yet affixed citations to Bracton and other English legal authorities to these Roman borrowings, John Cowell had consistently translated *ius* as "law," with two exceptions: *ius* as the direct object in the definition of justice became "due," and the title of his third chapter, *De Iure Persona*, became "Of the Rights of Persons" in 1651.

[97] Wood, *An Institute of the Laws of England* (London, 1720), 17.

[98] Hale, *The Analysis* in *The History and Analysis*, 1. Hale owned a *Bracton* manuscript, which he acquired through John Selden, for whom he was executor. The Library of Lincoln's Inn holds it as MS 135.

"*Lex* is a sacred sanction, commanding what is honest [*honesta*] and forbidding the contrary," Fortescue had written to a young prince in *In Praise of the Laws of England*.[99] Cicero had written something like it in the eleventh *Phillipic:* "*Lex* is nothing but a code of right conduct derived from the will of the gods, ordaining *honesta* and forbidding its opposite," and Bracton had written this: "And one is allowed to say that *lex* in the most abundant sense is the whole of what is read [*lego*, to read, and not *ligo*, to bind], nevertheless its special meaning is a just sanction, commanding *honesta* and forbidding the contrary."[100] Bracton, though, did not use "commanding what is honest" and "prohibiting the contrary" to organize his book. As this chapter has gone to pains to make clear, Bracton used the millennia-old Gaian persons-things-actions trichotomy. In his turn, Blackstone took *honesta* and *contraria*, translated them as "what is right" and "what is wrong," and prioritized them in his organizational scheme. In the second paragraph of Book the First, Chapter the First, he wrote this: "Now, as municipal law is a rule of civil conduct commanding what is right, and prohibiting what is wrong; or, as Cicero, and after him our Bracton, has expressed it, *sanctio justa, jubens honesta et prohibens contraria*; it follows, that the primary and principal objects of the law are RIGHTS and WRONGS."[101]

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[99] Fortescue, *De Laudibus Legum Anglie*, ed. Chrimes, 8-9. In the edition printed in London for the Companie of Stationers in 1616, the line appeared as this: "The law is a holy sanction or decree, commanding things that be honest, and forbidding the contraries" (8verso), and in the edition printed in the SAVOY by E. and R. Nutt, and R. Gosling in 1737, as this: "The Definition of a Law being thus, 'It is an Holy Sanction, commanding whatever is Honest, and forbidding the Contrary'" (4).

[100] Cicero, *Philippics 7-14*, ed. and trans. D.R. Shackleton Bailey and rev. John T. Ramsey and Gesine Manuwald, Loeb Classical Library 507 (Cambridge, Mass.: Harvard University Press, 2009), 166-7; Thorne, *Bracton*, 2:22. The sentence appeared in the 1569 and 1640 Bractons on the recto of folio 2 in the first section of the third chapter. Adverbial forms of *honesta* appeared elsewhere in Bracton, but Blackstone cited chapter 3 only. In the early modern imprints, the word appeared in chapter 4 on the recto of folio 3, immediately before the definition of jurisprudence, in the discussion of the definition of *ius*: "Or it is here used for all the *ius* that enjoins us to live *honeste*, to not harm anyone, and to give to each *ius suum*," and then repeated on the verso of the same folio, at the tail end of chapter 4, in the three precepts of *ius*: "to live *honeste*, to not harm anyone, and to give to each *ius suum*." See Latham, *Dictionary*, 4:1168, for *honestas*: title to respect, dignity, honor, good name, moral integrity, virtue, seemliness, decency, adornment, or beauty; and Fasc 4:1168-9 for *honeste*: with dignity or propriety, honorably, with integrity, becomingly, or decently.

[101] Blackstone, *Commentaries*, 1:118.

It did *not* follow. His editor, Edward Christian, who appended his own notes to the fourteenth edition of *Commentaries* in 1803, did not like it, neither did Blackstone's student, Jeremy Bentham.[102] In his notes of Blackstone's course of lectures, reduced to paper in a small notebook which he opened to the inside front cover and wrote, "Jeremy," Bentham recorded, "Municipal or civil law is a rule of civil conduct in a state, commanding what is right, and forbidding what is wrong." Having put this to paper, he went back and added a superscript "prescribed by the supreme power" between "conduct" and "in," and then decided to add a note in on the opposite verso, "D^{r} Bl^{ne} or rather commanding what shall be right & forbidding what shall be wrong: for what is naturally right & wrong, is already predetermined by the laws of God & nature. It [municipal law] is defined by Justin: *Jus civile, quod quisque sibi populus constituit* [that law which a people establishes for itself]."[103] Bentham knew his Justinian. Christian commented more harshly. "'Commanding what is right and prohibiting what is wrong' must either be superstitious, or convey a defective idea of a municipal law," he wrote, "for if right and wrong are referred to the municipal law itself, then, whatever it commands is right, and what it prohibits is wrong, and this clause would be insignificant tautology. But if right and wrong are to be referred to the law of nature, then the definition will become deficient or erroneous; for though the municipal law may seldom or never command what is wrong, yet in ten thousand

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[102] Bentham would expand this critique forcefully in *A Fragment on Government; Being An Examination of what is delivered, On the Subject of GOVERNMENT in General in the INTRODUCTION to Sir William Blackstone's COMMENTARIES*, published for the first time in London in April 1776, just a few months before unruly North Americans signed the Declaration of Independence. For the modern authoritative edition, see Jeremy Bentham, *A Fragment on Government*, eds. J.H. Burns and H.L.A. Hart (New York: Cambridge University Press, 1988). Bentham, by the way, was terrified of ghosts. See Philip Schofield's marvelous "Real and Fictitious Entities," in his *Utility and Democracy: The Political Thought of Jeremy Bentham* (New York: Oxford University Press, 2006), 1-27.

[103] Queen's College Library, MS 401. Bentham was reading a passage from Justinian's Institutes copied from Gaius's Institutes, which had it that the "law which a people establishes for itself is peculiar to it, and is called civil law as being the special law of that *civitas*." Moyle, *Imperatoris*, 100; Zulueta, Gaius, 3.

instances it forbids what is right."[104] He then quoted another line from Cicero, one from *On the Laws*, which, he argued, "will be found to be free from the objections here suggested": "*lex*…commands what must be done and prohibits the opposite."[105]

Commanding *what is right* was not the same phenomenon as commanding *what must be done*, and the confusion posed a fundamental problem for *Commentaries*. Blackstone translated *honesta* as "what is right," prioritized it, and then grafted on the "*ius* of persons," translating *ius* as "rights." Not only did he forget an entry from the final chapter of the final book of the *Digest*, clause 144: "Not everything which is lawful [*licet*] is *honestum*," but if, for him, "municipal law" tracked "what is right" and "what is wrong," then he changed what might be hazarded, as Bracton had done when it made free and slave a division of "persons" instead of "the law of persons."[106] A penultimate observation: those manuscripts in front of Blackstone, MS Tanner 189 excluded, announced that "persons, because whom all *iura* are established, are more worthy… ." The 1569 and 1650 printed books located the clause in the first section of chapter 6, on the verso of folio 4, but Blackstone did away with it. He spoke in terms of rights as ends of law instead of persons as the reason for every last *iura*. "The first and primary *end* of human laws is to maintain and regulate these absolute rights of individuals [emphasis mine]," he wrote down.

The longer passage from which Blackstone lifted the line to organize his lectures and his *Commentaries* appeared in chapter 3, recto of folio 2, in the 1569 and 1640 printed books:

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[104] William Blackstone, *Commentaries on the Laws of England*, 14th edition, with notes and additions by Edward Christian (London: Printed by A. Strahan, 1803), 43-4n5.

[105] Cicero, *De re publica De legibus*, trans. Clinton Walker Keyes, Loeb Classical Library 213 (Cambridge, Mass.: Harvard University Press, 1928), 316-7; and Cicero, *On the Commonwealth and On the Laws*, ed. James E.G. Zetzel (Cambridge: Cambridge University Press, 1999), 111.

[106] Mommsen and Krueger, *The Digest of Justinian,* 4:965a-b.

> Let us take care to see what *lex* is. *Lex* is a general command, a thing deliberated upon by prudent men [and not women]…the common solemn promise of the *res publica*. God is he who brings about the existence of justice or promotes the increase or prosperity of it, agreeably to justice is in the creator. And accordingly *ius* intimates *lex*. And one is allowed to say that *lex* in the most abundant sense is the whole of what is read [*lego*], nevertheless its special meaning is a just sanction, ordering *honesta*, prohibiting its opposite. Custom, in truth, whenever in regions where assented to by the practice of those who use it, is sometimes regarded the same as *lex* and reciprocally takes the place of *lex*. The authority of use of great age and custom is not of small price or value.[107]

It did not follow that *ius* and *lex* intimated one another. *Bracton* had failed to include a line from an obscure corner of Azo's *Summa* that explained the connection in a way that made sense. That obscure corner explained that since God authored *iustitia* and the human authored *ius* (*ius* deriving from *iustitia*), *ius* and *lex* intimated one another because the skill of some maker produced both: "Or it [*ius*] is called *ars*, that is, *artificium*, for the author of *ius* is the human [*homo*], the author of justice is God, and accordingly *ius* and *lex* intimate each other."[108] And so, this chapter that has flown between paper and parchment, heart and sinew, Henry Chichele and Henry VI and Henry of Bratton, kings and slaves, rights in things, and what is right as opposed to wrong, is going to end with one word: *artificium*, the occupation of an *artifex*, or, more literally, the occupation of one who makes art.

Ars had been one possible definition of *ius* since the *Digest*, which described *ius* as a subject of study and of knowledge. The 1569 and 1640 editions of *Bracton* dropped it to the bottom line of the verso of the second folio, in section 3 of chapter 4, but the *Digest* began its collection with it, lifting it to the first section of the first chapter of the first book: "*ius* is the *ars* of goodness [*boni*] and fairness [*aequi*]." Henry Finch's *Law, or, A Discourse Thereof,* published

[107] Thorne, *Bracton*, 2:22.

[108] Maitland, *Bracton and Azo*, 24: "Vel dicitur ars, id est, artificium, nam auctor iuris est homo, auctor iustitiae est deus, et secundum hoc ius et lex idem significant."

as *Nomotechnia* in law-French in 1613 and translated and published in English in 1627, which Blackstone owned and also recommended to his students, began the first chapter of the first book, "Of the Law of Nature," with these lines,

> Law is an Art of wel ordering a Civile society. In Greeke it is called…from *distribuendo*, because it gives and distributes right to everie one. In Latine it hath its name *Lex*, not from *ligando*, as some would have it [Fortescue]…, nor from *legendo*, which is, to reade; though I find that to please *Bracton* most; but as hee [Cicero] that best could tell derives it, from *legendo*, which is to choose, because of the choice & exquisite wisedome that is in it.[109]

Neither to read nor to bind, but to choose. Finch connected the general meaning of law to the terms Bracton used to define "justice" and then put them aside in favor of an alternative conceptualization taken from the book Edward Christian would use to criticize Blackstone's organizational scheme, that *lex* derived from *lego*, to choose.[110] Wood, in his turn, incorporated both "art" and "justice," shorn of their intellectual historical complexities, into his definition of the law particular to England, writing this: "As Law in General is an Art directing to the knowledge of Justice, and to the well ordering of Civil Society; so the Law of England in particular, is an Art to know what is Justice in England, and to preserve Order in that Kingdom."[111]

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[109] Henry Finch, *Law, or, A Discourse Thereof, in four Bookes* (London: Societie of Stationers, 1627), 1.

[110] The verb *lego* had alternative meanings. It could mean "to read", but it could also mean "to choose." See the full passage in Cicero, *On the Laws*, ed. Zetzel (Cambridge, 1999), 112. "*Lex* is the highest reason, rooted in nature, which commands things that must be done and prohibits the opposite," Cicero wrote. "When this same reason is secured and established in the human mind, it is *lex*. And therefore they think that *lex* is judgment, the effect of which is such as to order people to behave rightly and forbid them to do wrong; they think that its name in Greek is derived from giving to each his own [*nomos*, law, derived from *nemo*, to divide], while I think that in Latin it is derived from choosing [*legendo*]" (112). In the late tens and twenties of the seventh century, Isidore, Bishop of Seville, wrote that *lex* derived from *lego*, to read, at *Etymologies* v.iii.2. See *The Etymologies of Isidore of Seville*, eds. Stephen A. Barney, W.J. Lewis, J.A. Beach, and Oliver Berghof (New York: Cambridge University Press, 2006), 117. Fortescue dismissed *lex a legendo* in his *On the Nature of the Law of Nature* at I.30. For it, see Fortescue, *On the Laws and Governance of England*, ed. Lockwood, 21n79.

[111] Wood, *An Institute*, 6.

On September 22, 1759, William Blackstone—an artist turned lawyer (and, depending on one's perspective, perhaps back again)—having asked and received, perhaps stood up, satisfied, returned the three manuscripts into the hands of the librarian, and went off to do what he chose to do: to pray, to eat, or maybe even to find his man. The work Blackstone had read, its finest pages cut from the body of a stillborn calf, had it that "persons," connected to an idea about heightened but not monopolized dignity, were the reason for all rights (*iura*), but Blackstone's own work would make no space for that reason, and attenuate that connection. Bracton wrote, though, that persons were the reason for all rights in almost the same stroke as he wrote that the great division of persons was into free and slave, and this, in the final analysis, perhaps recorded the true measure of the "person" by exposing the wide and deep separation that yawned between the will of one person to give something to another person, be it a library book, pardon, a college, or liberty, and far on the other side of that jagged rupture, the will of every last differently-situated someone who might have yearned to receive it, or fashion it for herself, or to stand differently.

Chapter the Third

The Persons among Men in 1776

All Men are Men, and not Angells—Men and not Lyons—Men and not Whales Men and not Eagles—That is they are all of the same Species. And this is the most that the Equality of Nature amounts to But Man differs by Nature from Man, almost as much as Man from Beast.
John Adams to Abigail Adams, February 4, 1794

In Philadelphia, Pennsylvania on Tuesday, July 2, 1776, a group of men resolved, in words penned by Richard Henry Lee in accordance with the May 15th instructions sent by delegates from the counties and corporations in the colony of Virginia meeting at Williamsburg to the delegates appointed to represent that colony in General Congress, that "these United Colonies are, and of right ought to be, free and independent States."[1] The next day, the third day of July, John Adams, a delegate in the General Congress from Massachusetts, would make his own what that comet Thomas Paine had announced in January of the same year with the epochal, "the cause of America is in great measure the cause of all mankind," when he reported to his wife

[1] Lee moved for independence on Friday June 7, 1776, and John Adams (who had in August of 1774, en route from the city of New York to Philadelphia on the Delaware River for the first General Congress as a delegate from Massachusetts, recorded in his diary that he noticed the trees) seconded the motion. See Worthington Chauncey Ford, ed., *Journals of the Continental Congress 1774-1789* (Washington, D.C.: Government Printing Office, 1906), 4:507, 425. In his autobiography, Adams explained why the journals did not record Lee's and Adams's names as the "gentlemen who moved and seconded" the resolution. "I can give no answer than this," Adams wrote. "Mr. Hancock was President, Mr. Harrison, chairman of the committee of the whole house, Mr. Thomson, the secretary, was cousin to Mr. Dickinson, and Mr. R.H. Lee and Mr. John Adams were no favorites of either." *The Works of John Adams*, ed. Charles Francis Adams (Boston: Little and Brown, 1851), 3:51. The resolution with notes can also be found in *The Papers of Thomas Jefferson*, ed. Julian P. Boyd (Princeton: Princeton University Press, 1950), 1:298-9. On June 28, Joseph Hewes, a delegate from North Carolina, wrote James Iredell to report his expectation that the resolution would carry "by a great majority," which meant, he supposed, that "we shall take upon us a new name." Edmund C. Burnett, ed., *Letters of Members of the Continental Congress*, (Washington, D.C.: Carnegie Institution of Washington, 1921), 1:514.

Abigail, "Yesterday, the greatest Question was decided, which ever was debated in America, and a greater, perhaps, never was nor will be decided among Men."[2]

That prediction, though, was debatable, not the least because the superlative suffered a vulnerability to demotion to the comparative. Even the greatest questions changed with time, as time admitted of manipulation too.[3] In the middle of the eighteenth century, in 1750, half of the century gone and half to spare, the British Parliament had rent the year, enacting that "the new year shall accordingly commence and begin to be reckoned from the first day of every such month of January next preceding the twenty-fifth day of March on which such The days to be numbered as now until 2d Sept. 1752; and the day following to be accounted 14 Sept. omitting 11 days."[4] In 1752, Thursday September 14 arrived immediately after Wednesday September 2. Until that juncture, "all his Majesty's dominions and countries in Europe, Asia, Africa, and America, belonging or subject to the crown of Great Britain" had followed the Julian Calendar, established by Roman emperor Julius Caesar in 46 BCE, and had fixed the first day of the year at the Feast of the Annunciation on March 25th, a celebration of angel Gabriel's visit to Mary, a

[2] John Adams to Abigail Adams, July 3, 1776, in L.H. Butterfield, ed., *Adams Family Correspondence* (Cambridge, Massachusetts: Belknap Press of Harvard University Press, 1963), 2:27-8; Thomas Paine, *Rights of Man, Common Sense and Other Political Writings*, ed. Mark Philp (New York: Oxford University Press, 1995), 3.

[3] On a related note, the first General Congress on September 24, 1774, in deference to Virginians, resolved to confine its attention to grievances after 1763. "Resolved, That the congress do confine themselves, at present, to the consideration of such rights only as have been infringed by acts of the British parliament since the year 1763, postponing the further consideration of the general state of American rights to a future day." See Ford, *Journals*, 1:42. For opinions on the foreshortening, see Burnett, *Letters*, 1:53 and 1:85.

[4] *An Act for regulating the Commencement of the Year, and for correcting the Calendar now in use*, UK ST 1750 c. 23. The January 1st New Year had been in place in Scotland since December 1599 unfolded into January 1, 1600, by a decision of the Scottish Privy Council. For more on this confusing business see Robert Poole, *Time's Alteration: Calendar Reform in Early Modern England* (London: University College London Press, 1998). For a fascinating study of the idea of time together with the idea of slavery, see Mark M. Smith, *Mastered by the Clock: Time, Slavery, and Freedom in the American South* (Chapel Hill: University of North Carolina Press, 1997).

virgin girl, who, upon receiving news of the incarnation, which she would make real, replied, "Behold the handmaid of the Lord; be it unto me according to thy word."[5]

Adams graduated from Harvard College in 1755. Shortly afterward, when he was a teacher in Worcester, he confessed in his diary that he had witnessed a rape. As he remembered it (the only way he could remember it, that is, from the position from which he stood and saw), "a poor Girl in this neighbourhood walking by the meeting H[ouse] upon some occasion, in the evening, met a fine Gentleman with laced hat and wast coat. and a sword who solicited her to turn aside with him into the horse Stable. The Girl relucted a little, upon which he gave her 3 Guineas, and wished he might be damned if he did not have her in 3 months." Have her the gentleman did, and damn him God did not. The coercer took off his laced hat, or did not, and raped her in a stable meant for beasts. "Into the horse Stable they went," Adams wrote. The record *must* show that the sorrow of the unnamed woman, which Adams did not record, however momentous, did not make tangible and alter time—Parliament's enactment did. Were it recoverable and reducible to measure, the astonishing, awful, difference between the powers at hand for the woman raped and the powers at hand for a member of the British Parliament or the General Congress, or for George III or John Adams or Richard Henry Lee, would ably demonstrate that the words of men did not reflect the thoughts and doings of humanity, and it would also, at last, explain the regularity with which the scent of armpits has saturated prayer.[6]

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[5] For this story, see Luke 1:26-38 in the King James Version of the Bible, printed for the first time in 1611, quote at verse 38. The Geneva Bible, produced earlier, in 1560, by English Protestant refugees fleeing Mary Tudor, a Catholic, had translated Mary's response differently: "Beholde, the *servant* of the Lord: be it unto me according to thy worde [emphasis mine]." For it see*, The Geneva Bible: A facsimile of the 1560 edition* (Madison, Wisconsin: University of Wisconsin Press, 1969), 27.

[6] Frederick Douglass, "What to the Slave is the Fourth of July?" (1852), printed in *Narrative of the Life of Frederick Douglass An American Slave*, ed. David Blight (Boston: Bedford/St.Martin's, 2003), 156. "The scent of these arm-pits is aroma finer than prayer" in Walt Whitman, *Leaves of Grass*, ed. Malcolm Cowley (New York: Penguin, 1986), 49.

"Without a Friend upon Earth that will own her," Adams wrote as he closed his diary entry for March 15, 1756, "the Girl proves with Child." The insect flew his entrails, the dog its prey, and when Monday the 15th turned into Tuesday the 16th, Adams, with the memory alive in his head, or not, "sat out for Uxbridge, arrived about 12, dined."[7]

The "person" did not make it into the Declaration of Independence. Delegates in General Congress swept it away with the clause in Jefferson's rough draft specifying the Atlantic slave trade as a grievance against the king. This chapter uses that remarkable excision to argue that limiting security in unalienable rights to an elect in 1776 put at stake a fate more elemental than so-called freedom. It put at stake the permissibility of, and correspondent vulnerability to, gifts.

The central paradox of American history Edmund Morgan put to prose over four decades ago in the fourth paragraph of the first chapter of *American Slavery, American Freedom*—that "the rise of liberty and equality in America had been accompanied by the rise of slavery"—vexes still, as much today as yesterday, if not more so today after all the days have opened out to weeks, to months and to years, because no satisfying explanation has been found, were there one to be found.[8] Accommodation seems unsatisfying, as do deference and concession to contested

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[7] *Diary and Autobiography of John Adams*, ed. L.H. Butterfield (Cambridge: Belknap, 1961), 1:14 (Monday, March 15, 1756).

[8] Edmund S. Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia*, rev. ed. (1975; repr., New York: Norton, 2003), 4. "To a large degree it may be said that Americans bought their independence with slave labor" (5), he continued, and used "slavery as a flying buttress to freedom" (385). As for tension between liberty and slavery, and the former's debt to the latter, in the era of the American Revolution, my thinking has been most powerfully informed by David Brion Davis, *The Problem of Slavery in the Age of Revolution 1770-1823* (Ithaca: Cornell University Press, 1975), 255-342, published the same year as Morgan's *American Slavery, American Freedom*, and Winthrop Jordan, *White Over Black: American Attitudes Toward the Negro, 1550-1812* (New York: Norton, 1977), 269-311, published for the first time just a few years beforehand, in 1968. Jordan wrote that "it was perfectly clear that the principles for which Americans had fought [in the revolution] required the complete abolition of slavery," (342) while Davis pointed out that racial slavery lay at "the very foundations of liberty" (259). Later, in *The Radicalism of the American Revolution* (New York: Vintage, 1991), Gordon Wood, responding to historians prioritizing class or narrowly political aspects of the conflict, argued that the American Revolution, as measured by "transformations in the relations that bound people to each other," was "as radical and social as any revolution in history" (5), indeed "the greatest utopian movement in American history" (229). "The revolutionaries aimed at nothing less than a reconstitution of American society" founded on "new social bonds of love, respect, and consent" (229) he wrote; and their revolution "in effect set in motion ideological and social forces that doomed the institution

commitments as James Madison had it in 1819.[9] One step, of course, is to see that the twain were neither contradictory nor inconsistent, and so better counted one than two, that is, to see that "freedom for some is actively and violently produced through the service of others," like kindred rivers that fed and mothered each other because made from the same bone and blood.[10] Working from Samuel Adams's dictum that "nations were only as free as they deserved to be," intellectual historian Francois Furstenberg has identified another helpful step, following the great historian of slavery and abolition, David Brion Davis, in observing that political discourse during the American Revolution "tended to define liberty as the reward for righteous struggle," for those named free as for those named slave, such that there existed in the world those who deserved freedom and those who did not.[11]

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of slavery in the North and led inexorably to the Civil War" (187). As measured by actual liberation from personal subjection, however, it was the British, and not the Americans, who made strides toward human freedom. On November 7, 1775, Lord Dunmore issued a proclamation declaring "all indented Servants, Negroes, or Others (appertaining to Rebels) free, that are able and willing to bear Arms, they joining His Majesty's Troops, as soon as may be," and over the course of the revolution, approximately twenty thousand black slaves made haste to join the British ranks. In a very real sense, then, freedom required *flight from* America. For more on black freedom in relation to the American Revolution, see Sylvia Frey, *Water from the Rock: Black Resistance in a Revolutionary Age* (Princeton: Princeton University Press, 1991); Gary Nash, *Race and Revolution* (Madison: Madison House, 1990); and Benjamin Quarles, *The Negro in the American Revolution* (Chapel Hill: University of North Carolina Press, 1961), as well as Maya Jasanoff's wonderful discussion of the choices made by black slaves and black Loyalists in *Liberty's Exiles: American Loyalists in the Revolutionary World* (New York: Vintage, 2011).

[9] See James Madison to Robert Walsh, November 27, 1819, in *The Writings of James Madison*, ed. Gaillard Hunt (New York: G.P. Putnam's Sons, 1910), 9.

[10] Walter Johnson, "Slavery, Reparations, and the Mythic March of Freedom," *Raritan* 27, no. 2 (2007): 67; and Jill Lepore, *New York Burning: Liberty, Slavery, and Conspiracy in Eighteenth-Century Manhattan* (New York: Vintage, 2005), 219, both of whom write in a scholarly heritage marked by the following contribution of David Brion Davis: "The American colonies were not trapped in an accidental contradiction between slavery and freedom. Their unique social order had arisen from many choices. They had resolved some of mankind's deepest social dilemmas, but at a heavy price. Their rhetoric of freedom was functionally related to the existence—and in many areas to the continuation—of Negro slavery. In a sense, then, demands for consistency between principles and practice, no matter how sincere, were rather beside the point. Practice was what made the principles possible." Davis, *The Problem of Slavery in the Age of Revolution*, 262.

[11] Francois Furstenberg, "Beyond Freedom and Slavery: Autonomy, Virtue, and Resistance in Early American Political Discourse," *Journal of American History* (2003): 1295-1330, 1302, citing David Brion Davis, *The Problem of Slavery*, 257. By 1862, Lydia Maria Child, author and abolitionist, might have rewritten Adam's dictum into something like, "Nations survive, so long as they deserve to." See her letter to fellow abolitionist, John Greenleaf Whittier, on January 21, 1862, in Michael Vorenberg, ed., *The Emancipation Proclamation: A Brief History with Documents* (Boston: Bedford/St. Martin's, 2010), 54. "I fear greatly that there is not virtue enough left in the

American polemicists during the era of the war for independence argued not only that they deserved and so ought to vindicate "liberty" when antagonists compromised it, but that submission to "tyranny" was an active choice to not resist it and therefore a choice to consent to, even love, their bondage.[12] This placed the moral burden on the victim instead of the aggressor, and in so doing, this chapter adds, flatly undermined the line of argument that located the dependent's vital mechanism elsewhere from herself, well articulated by a passage from the first of *Four Letters on Interesting Subjects* printed anonymously in Philadelphia in 1776, that the "chiefest excellence" of men in servile stations "consists in a kind of magnetical obedience, which, having no choice of its own, is governed implicitly by the influence of some other."[13]

That subjection to external dominion, or slavery, was a capitulation construed as a choice that meant the victim loved rather than hated what befell her was an argument that had been appropriated by both kings and subjects in the service of a variety of ends in both England and British North America, including but not limited to support of both monarchy and the right to resist acts of Parliament.[14] "Let every man in his station study peace; and endeavor all meanes of pacification, abhorring the very thoughts of ever taking up Arms against either King or Parliament," Charles I declared to his subjects in 1642. "That wee should rise up like unnaturall Children, and cut the throate of our owne Mother Nation; That wee should love bondage rather then liberty, all Nations Countries and People will sport at our misery."[15] During the crisis over

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country to make salvation possible," she wrote. "Slavery seems to have poisoned the foundations of our national life. I do not know whether it is in the Providence of God to allow us to be an *example* to the nations, or whether He intends to use us as a *warning*. If we are saved, it will be better than we *deserve*."

[12] Furstenberg, "Beyond Freedom and Slavery,"1302-7.

[13] *Four Letters on Interesting Subjects* (Philadelphia: Styner and Cist, 1776), 2.

[14] Make no mistake, to say that the slave loved rather than hated her master was a perverse line of argument.

[15] Charles I, *A Declaration to the Subjects of England and Wales* (London, 1642).

the 1765 Stamp Act a century later, John Dickinson, in *An Address to the Committee of Correspondence in Barbados occasioned by the late letter from them to their agent in London* (1766), writing in the service of an end very different from that of Charles (that the liberty of the subject required a voice in government), ridiculed humble submission to the power of Parliament over internal taxes while "it should be in your power effectually to refuse." To suffer "something ten thousand times more dreadful…than oppression beyond measure grievous" would "exhibit the second instance since the creation of mankind, of a people chusing to be slaves," he wrote, and invoking loyalty and obedience in such a case would, Dickinson warned, result in "the miserable dilemma of making a choice between two of the meanest characters—of those who would be slaves from inclination, tho they pretend to love liberty—and of those who are dutiful from fear, tho they pretend to love submission."[16]

Counterparts on the other side of the ocean-traversing conflict situated in England had a very different idea about what the inhabitants of British North America deserved, if not only because of their different understanding of the British constitution, then because, as historian Christopher Leslie Brown has argued so well, as slave owners who cast their lot with personal subjection, British North Americans were moral inferiors in no position to impugn Britain and unworthy of the political liberty they clamored for.[17] As Edmund Burke explained to the House

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[16] [John Dickinson], *An Address to the Committee of Correspondence in Barbados. Occasioned by a later letter from them to their agent in London* (Philadelphia: William Bradford, 1776), 8 (internal quotation marks omitted), with its epigraph taken from Shakespeare's *Henry IV*: "This word REBELLION hath froze them up Like Fish in a pond." Notably, Dickinson would not support Lee's resolution for independence. In a speech on July 1, 1776, he warned, "To escape from the protection we have in British rule by declaring independence would be like Destroying a House before WE have got another, In Winter, with a small Family; Then asking a Neighbour to take us in and finding He is unprepared…Some of Us totally despair of any reasonable Terms of Confederation." His speech is reproduced in J.H. Powell, "Notes and Documents," *The Pennsylvania Magazine of History and Biography* 65, no. 4 (1941): 458-81, 478-9.

[17] Christopher Leslie Brown, *Moral Capital: Foundations of British Abolitionism* (Chapel Hill: University of North Carolina Press for the Omohundro Institute of Early American History and Culture, 2006), 124.

of Commons on March 22, 1775, on moving his resolutions for conciliation, Britain's "Southern Colonies" fought to vindicate freedom *because* it was not universal, not equally distributed, *because* it lay in the hands of an elect. This is what he said:

> In Virginia and the Carolinas they have a vast multitude of slaves. Where this is the case in any part of the world, those who are free are by far the most proud and jealous of their freedom. Freedom is to them not only an enjoyment, but a kind of rank and privilege. Not seeing there, that freedom, as in countries where it is a common blessing and as broad and general as the air, may be united with much abject toil, with great misery, with all the exterior of servitude, liberty looks, amongst them, like something that is more noble and liberal…In such a people that haughtiness of domination combines with the spirit of freedom, fortifies it, and renders it invincible.[18]

In the only official response to the Declaration of Independence commissioned by Lord North's ministry, John Lind's *An Answer to the Declaration of the American Congress* in August of 1776, Lind tapped the same objection when he eviscerated the article of the declaration submitting that the king had "excited domestic Insurrections amongst us," with a pointed question. "How did his Majesty's Governors excite domestic insurrections?" he asked. "Did they set father against son, or son against father, or brother against brother?" "No," he answered, "they offered *freedom* to the *slaves* of these assertors of liberty…Is it for *them* to complain *of the offer of freedom* held out to those wretched beings? of the offer of reinstating them in that *equality*, which, in this very paper, is declared to be the *gift of God to all*; in those *unalienable rights*, with which, in this very paper, God is declared to have *endowed all* mankind?"[19]

To be sure, political discourse during the era of the American Revolution laid bare an acute awareness that a great, if not the greatest, evil in life, individual or communal, was to find

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[18] Edmund Burke, *Speech on Conciliation with America*, ed. Daniel Thompson (New York: Holt and Company, 1901), 23.

[19] John Lind, *An Answer to the Declaration of the American Congress*, 3rd ed. (London: T. Cadell, J. Walter, and T. Sewall, 1776), 107.

oneself dependent on the will of a master: that is, to be a slave, to rise or fall, to obtain access to the resources for living one's life or no, as a function of grace, to live at the mercy of another.[20] "No Man cares to be at the intire mercy of another," James Franklin's *New-England Courant* imported from one of John Trenchard and Thomas Gordon's letters in the voice Cato in 1721.[21] At the nerve of the concern coursed a worry about living out one's days in a position in which every last want or need became, by perversion, an occasion for someone else to respond or no, and its origins lay in the old Roman distinction adopted by Bracton *On the Laws and Customs of England*, composed in the early decades of the thirteenth century, between being in one's own power (governed according to one's own will), or *sui iuris*, as opposed to being in the power of another (dependent on the will of another), or *alieni iuris*. Bracton identified that distinction as

[20] As began Jefferson's original rough draft of the declaration, "When in the course of human events it becomes necessary for a people to advance from that subordination in which they have hitherto remained…" For it, see *The Papers of Thomas Jefferson*, ed. Julian P. Boyd (Princeton: Princeton University Press, 1950), 1:423. With the publication of Bernard Bailyn, *The Ideological Origins of the American Revolution*, rev. ed. (1967; repr., Cambridge, Mass.: Harvard University Press, 1992); Gordon S. Wood, *The Creation of the American Republic 1776-1787* (1969; repr., Chapel Hill: University of North Carolina Press, 1998); and J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975), a scholarly focus on liberty as a contingent condition vulnerable to the oppressive misuse of power supplanted an older paradigm shaped by Louis Hartz, which had perceived a liberal consensus in British North America and colored the American Revolution "legalistic, moderate, nonregicidal, and largely nonterroristic," as Richard Hofstadter once wrote, in a word, Lockean. An ideology of republicanism cropped up from these works that in time distended itself out of analytical force. Daniel Rodgers discusses this historiography in "Republicanism: the Career of a Concept," *Journal of American History* 79 (1992): 11-38. This chapter, however, digs down to a deeper place to see that liberty and self-government could not be imagined out of relation to slavery, long conceived as subordination to an alien will or, in another interpretation, as chains, that is, impediment to physical motion. This history has been ably explored by Quentin Skinner in *Liberty before Liberalism* (New York: Cambridge University Press, 1998) and *Hobbes and Republican Liberty* (New York: Cambridge University Press, 2008), as well as by Eric Nelson in his reinterpretation of the American Revolution as a "Royalist Revolution" in *The Royalist Revolution: Monarchy and the American Founding* (Cambridge, Mass.: Harvard University Press, 2014), 71-2, 114-7, 125-6. I see vulnerability to mercy, or grace, at the nerve of the experience of slavery, yes, but I want to take a step forward to suggest that insofar as that lesson ordered decisions about to fashion government, the effort failed on its own terms, as the evil of living at the mercy of another, I argue, obtained wherever and whenever it was possible for the law to deem "persons" either free or slave, and liberty, in turn, assumed the shape of a delivery, or even a gift, to an elect.

[21] "Abstract of a Letter in the *London Journal*" in *New-England Courant* from Monday October 16 to Monday October 23, 1721, no. 12, first column, first page. Trenchard and Gordon did not recoil from the superlative. See "I cannot enjoy Life at the Mercy of another… [I] prefer every Evil to Chains and Infamy, which to a Roman are the highest of all Evils" in *The Fourth Collection of Cato's Letters in the London Journal* (London: Printed for J. Peele, at Locke's Head in Pater-Noster-Row, 1721), 7-8.

the second division of persons after the first, that "all human beings are either free or slave, that is, every last human being is either free or slave."[22]

In order to be ruled without suffering subjection to the will of another, or becoming a slave, this line of argument went, one had to be a participant in or sharer of the authority by which she was ruled. "The first grand right is, that of the people having a share in their own government, by their representatives, chosen by themselves, and in consequence of being ruled by *laws* which they themselves approve, not by *edicts* of *men* over whom they have no control," the General Congress observed in its letter to the inhabitants of Quebec in 1774.[23] Consent turned an edict into a law. "There are but two sorts of men in the world, freemen and slaves," Adams wrote in the second of twelve essays signed NOVANGLUS (New England), printed in the *Boston Gazette* between January 23 and April 17, 1775. "The very definition of a freeman is one who is bound by no law to which he has not consented."[24] Paine partook of the same intellectual heritage in January of 1776. His *Common Sense; Addressed to the Inhabitants of America*—a pamphlet that was not an inch, not a half of an inch, not a half of a half of an inch thick yet managed to torpedo "the English constitution," so long and well loved by British North Americans as the world's last and only bastion of liberty, as tyrannical, incurably diseased all the way down, taking down with it the possibility of kingship as a licit political institution—defined independency very simply: it "means no more, than, whether we shall make our own laws, or,

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[22] Samuel E. Thorne, trans., *Bracton on the Laws and Customs of England* (Cambridge: Belknap Press of Harvard University Press, 1968), 2:33-4. See that some free men were not *sui iuris*. "Sons begotten in rightful and lawful wedlock," for example, were "under the authority of fathers." Thorne, *Bracton*, 2:34.

[23] James H. Hutson, ed., *A Decent Respect to the Opinions of Mankind: Congressional State Papers 1774-1776* (Washington D.C.: Library of Congress, 1975), 62.

[24] *The Works of John Adams*, ed. Charles Francis Adams (Boston: Little, Brown, and Company, 1850-56), 4:28. In the first essay he had written that "death is better than slavery." *Works* 4:17. "The battle of Lexington, on the 19th of April, changed the instruments of warfare from the pen to the sword," Adams wrote in his diary. *Works* 2:405.

whether the king, the greatest enemy this continent hath, or can have, shall tell us '*there shall be no laws but such as I like*.'"[25] About the problem, about which "a long habit of not thinking…*wrong*, gives it a superficial appearance of being *right*," Paine left no room for doubt.[26] "The *will* of the king is as much the law of the land in Britain as in France," he wrote. This was the context for his exclamation, "In America THE LAW IS KING."[27]

Subjection to an external power, vulnerability to mercy, was a political, but also a moral reflection. As the first chapter of this dissertation discussed, in its earliest formulation in British North America, enslavement arose not from violence of the hand, destruction, or from a desire of one for the service or labor of another, but fascinatingly and perversely, from mercy, a merciful saving from death—slavery was the obligation exacted for the gift of life.[28] Any theory built on this lineage stood on the shoulders of slaves, very much alive, and sufficient consensus had metastasized around it for the angry, cross Atlantic polemic to make good sense, that is to say, without consensus on the point, the men who sat down to write what they wrote would not have been legible to one another. When the General Congress ended the first sentence of its first state

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[25] Paine, *Common Sense,* 29. For the metaphor of bodily disease see, "Why is the constitution of England sickly, but because monarchy hath poisoned the republic, the crown hath engrossed the commons?" (19).

[26] Paine, *Common Sense*, 3.

[27] Paine, *Common Sense*, 34. Adams offered a rejoinder to the policy proposals Paine had composed in development of the argument that "the straggling thoughts of individuals" if collected, "would frequently form materials for wise and able men to improve to useful matter" (32) in *Thoughts on Government*, published in Philadelphia by John Dunlap in the same year.

[28] As recounted in the first chapter, the earliest attempts in British North America to statutorily define who could be enslaved (that is, who could be made a slave) arrived not in Virginia, but in Massachusetts Bay. Its Bodie of Liberties in 1641, under the heading "Liberties of Forreiners and Strangers" (between "Liberties of Servants" and "Off the Bruite Creature"), had it that:

> there shall never be any bond slaverie, villinage, or Captivitie amongst us unles it be lawfull Captives taken in just warres, and such strangers as willingly selle themselves or are sold to us. And these shall have all the liberties and Christian usages which the law of god established in Israell concerning such persons doeth morally require. This exempts none from servitude who shall be Judged thereto by Authoritie.

For a facsimile and line-by-line printed transcription, see "A Coppie of the Liberties of the Massachusets Colonie in New England," in William Whitmore, *The Colonial Laws of Massachusetts Reprinted from the Edition of 1672, with the supplements through 1686* (Boston: Rockwell and Churchill, 1890), 32-61, 53.

paper to hit the press with, "…inslaving these Colonies, and, with them, the British Empire," readers on both side of the ocean knew what was at stake.[29] As historian Christopher Leslie Brown argues in *Moral Capital*: *Foundations of British Abolitionism*, in the back and forth during the crisis, each side worked on the assumption that human slavery was a human error.[30] It followed, then, that one side could attribute moral responsibility to the other side, and moreover, that change to the status quo was not impossible.

Implicit in the reflection about slavery lay the question, who gave what to whom and why? To find oneself vulnerable to the mercy of a master was to find oneself pressed into a nightmare in which merit or desert counted for less than the will of the master, if at all, and the questions, "what is due to me?" and "what do I deserve?" lost sense. At stake in 1776 was not only who deserved freedom, as Samuel Adams had it, but for whom gifts or donations of certain treasured things were permissible. Time and again, and emphatically, American writers from James Otis in 1764 to John Adams to John Dickinson to Thomas Jefferson, rejected the noun gift, except only God's, and accepted the verb *to give* and its corollary *to receive* only if it meant a restoration deserved. They wanted to keep what was theirs, what they were entitled to by virtue of, in the words of the Congress's "Bill of Rights" in 1774, "the immutable laws of nature, the principles of the English constitution, and the several charters or compacts."[31] Guarantees and not grants; rights which were theirs to begin with and not favors.[32] "Whenever a person

[29] *The Association* (Philadelphia: William and Thomas Bradford, 1774).

[30] Brown, *Moral Capital*, 122-34; cf. enslavement was the error of the victim who loved what befell her.

[31] *Extracts from the Votes and Proceedings of the American Continental Congress, held at Philadelphia on the 5th of September 1774* (Philadelphia: William and Thomas Bradford, October 27, 1774), 3.

[32] John Phillip Reid, the most prolific legal historian of the American Revolution, has argued that to a surprising degree in the eighteenth century, there was "general agreement among British and North American constitutional lawyers…as to what rights people possessed." The point of disagreement between the two groups, he argues, "was the way they defined the constitutionality or the authority for the claim that rights were inherent." Unlike their

undertakes to grant a thing," the author of the third of *Four Letters* wrote in 1776, "it implies that the thing which he grants was once his own…Liberty and liberty of conscience both would have a poor foundation indeed, were they to be received as privileges granted to us."[33] In his "Dissertation on the Canon and Feudal Law," an essay Adams began in February of 1765, and one of the first pieces of prose he ever saw published, for the first time in the *Boston Gazette* in August 1765, Adams wrote, "Let it be known, that British liberties are not the grants of princes or parliaments, but original rights, conditions of original contracts, coequal with prerogative, and coeval with government; that many of our rights are inherent and essential, agreed on as maxims, and established as preliminaries, even before parliament existed."[34] Jefferson said the same over a decade later in instructions to be given to the delegates sent to Congress from Virginia, published as *A Summary View of the Rights of British America* in 1774, when he called for "the said deputies, when assembled in general congress with the deputies from the other states of British America," to pen an address laying out grievances "with the freedom of language and sentiment which becomes a free people claiming their rights, as derived from the laws of nature, and not as the gift of their chief magistrate: let those flatter who fear; it is not an American art."[35]

British counterparts, he writes, Americans thought that "civil rights protected citizens from the exercise of arbitrary power of any origin," and that distinction, in turn, "caused Americans to put greater emphasis than did the British on the question of how rights existed and from what authority a person could claim them against the government." Reid continues on to say that "the authority upon which rights were based was the most discussed issue, until the establishment of American independence, in colonial constitutional jurisprudence." John Phillip Reid, "The Authority of Rights at the American Founding," in *The Nature of Rights at the American Founding and Beyond*, ed. Barry Alan Shain (Charlottesville: University of Virginia Press, 2007), 68; and the more extensive John Phillip Reid, *Constitutional History of the American Revolution: The Authority of Rights* (Madison: University of Wisconsin Press, 1986).

[33] *Four Letters*, 15. Hugo Grotius, a Dutch jurist, got at a similar idea in *De Iure Praedae*, written in 1607 but not discovered until 1864. "No one is able to transfer a thing that he never possessed," he wrote. See Hugo Grotius, *De Iure Praedae Commentarius*, trans. Gwladys L. Williams (Oxford: Clarendon Press, 1950), 92.

[34] *Works of John Adams*, 3:463.

[35] Thomas Jefferson, *A Summary View of the Rights of British America* (Williamsburg: Clementa Rind, 1774), 5, 22; in the same he wrote, "In the language of truth, and divested of those expressions of servility which would persuade his majesty that we are asking favours, and not rights" (5). Reprinted in Philadelphia and London. As Jefferson

Dickinson (whom Adams called "a shadow" upon meeting for the first time on August 31, 1774, "tall, but slender as a reed; pale as ashes") perhaps put it most movingly in his 1766 address to the Committee of Correspondence in Barbados, the slaving powerhouse that Jamaica had just in the 1740s eclipsed as the premier English sugar producer.[36] "Kings or parliaments could not give the rights essential to happiness," he wrote.

> We claim them from a higher source----from the King of kings, and Lord of all the earth. They are not annexed to us by parchments and seals. They are created in us by the decrees of Providence, which establish the laws of our nature. They are born with us; exist with us; and cannot be taken from us by any human power, without taking our lives. In short, they are founded on the immutable maxims of reason and justice. It would be an insult on the divine Majesty to say, that he has given or allowed any man or body of men a right to make me miserable. If no man or body of men has such a right, I have a right to be happy. If there can be no happiness without freedom, I have a right to be free.[37]

Calling attention to this simple but not unimportant nerve at the core of the political and moral concern about slavery helps us locate the gap that abided at *every* juncture where someone needed or yearned for something, and that longing was an occasion for someone else to give or withhold the object at her pleasure, for the gap would have obtained in relation to manifold objects: when one sought and could not herself alone obtain food, say, or money, an opportunity

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remembered it in his autobiography, "I prepared a draught of instructions to be given to the delegates whom we should send to the Congress, which I meant to propose at our meeting…I set out for Williamsburg some days before that appointed time for our meeting, but was taken ill of a dysentery on the road, and was unable to proceed. I sent on, therefore, to Williamsburgh, two copies of my draught, the one under cover to Peyton Randolph, who I knew would be in the chair of the convention, the other to Patrick Henry." *The Writings of Thomas Jefferson*, ed. H.A. Washington (Washington D.C.: Taylor & Maury, 1853), 1:8.

[36] "…one would think at first sight that he could not live a month; yet, upon a more attentive inspection, he looks as if the springs of life were strong enough to last many years" (*Works of John Adams*, 2:360). Since its *Act for the Better Ordering and Governing of Negroes* in 1661, Barbados had been of originary significance for the statutory regulation of slaves in British America, and John Winthrop's son Henry had been one of its earliest colonizers. For the Winthrops, see Wendy Warren, "'Cause of her Grief': The Rape of a Slave in Early New England," *Journal of American History* 93, no. 4 (2007): 1038. For Jamaica supplanting Barbados, see Herbert S. Klein and Ben Vinson III, *African Slavery in Latin America and the Caribbean*, 2nd ed. (New York: Oxford University Press, 2007), 55.

[37] [Dickinson], *An Address*, 4-5.

to learn to read or to abstain from having children, safety from abuse, a friend's support, or even, a chance to live in one's own power.

In his *Vindication of the British Colonies*, published in Boston in 1765, written in response to Martin Howard Jr.'s *A Letter From a Gentleman at Halifax*, published in Newport the same year, James Otis, a lawyer born in West Barnstable, Massachusetts whose parents named his sister Mercy, argued that the Halifax gentleman misunderstood the distinction between rights of "natural persons" and "artificial persons," and so committed "a common mistake with those who cannot see any difference between power & right."[38] "See Mr. Blackstone's accurate and elegant analysis of the laws of England," Otis wrote. "The gentleman seems to have taken this and some other of his distinctions from that excellent treatise very ill understood." In his *An Analysis of the Laws of England*, first published in 1756, and then again in the first volume of *Commentaries on the Laws of England*, first published in November of 1765, Blackstone had indeed divided "persons" into "either NATURAL…or ARTIFICIAL," and in so doing made a definitive break with the millennia old division of persons into free and slave.[39] As expressed in *An Analysis*, Blackstone divided the "Rights of NATURAL Persons"

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[38] James Otis, *A Vindication of the British Colonies, against the aspersions of the Halifax Gentleman, in His letter to a Rhode-Island Friend* (Boston: Edes and Gill, 1765), 9, 8.

[39] Scholars have misunderstood this, taking the watershed to be Blackstone's division of the people into aliens and natural-born subjects instead of, as I understand it, the division of persons into natural and artificial. Blackstone, *An Analysis of the Laws of England* (Oxford: Clarendon, 1756), 7. In *Commentaries*, the line read, "Persons…are divided by the law into either natural persons, or artificial. Natural persons are such as the God of nature formed us: artificial are such as created and devised by human laws for the purposes of society and government; which are called corporations or bodies politic." For it, see William Blackstone, *Commentaries on the Laws of England* (Chicago: Chicago University Press, 1979): I:119. According to Blackstone's most recent biographer, the *Gazetteer and New Public Advertiser* first advertised the first book of *Commentaries* as "This Day" published on November 18, 1765. See Wilfrid Prest, *William Blackstone: Law and Letters in the Eighteenth Century* (Oxford: Oxford University Press, 2008), 219n38. Bernard Bailyn assumed in *Pamphlets of the American Revolution 1750-1776* (Cambridge: Belknap Press for Harvard University Press, 1965), that Otis used *Commentaries*, but Gerald Stourzh in "William Blackstone: Teacher of Revolution," *Jahrbuch fur Amerikastudien* 15 (1970), disagrees, observing that it was not available to Otis at the time of his writing in March 1765 and that he had to have used *Analysis* instead. See 199n42.

into "ABSOLUTE" and "RELATIVE," absolute "such as belong to Individuals," and relative "such as regard Members of Society."[40] The most universal public relation, Blackstone wrote there, was that between "MAGISTRATES and PEOPLE."[41] ALIENS and NATIVES constituted the first division of "the People," and "MASTER and SERVANT," "HUSBAND and WIFE," and "PARENT and CHILD"—a triad at least as old as Aristotle—made the three great "PRIVATE, oeconomical, RELATIONS of Persons."[42] Artificial persons, Blackstone explained in the sixteenth chapter of the first book of *An Analysis*—the bridge between the first book on persons and the second book on things—were the product of necessity, conceived as a response to the problem of time: "Bodies politic, or CORPORATIONS, which are ARTIFICIAL Persons, are established for preserving in perpetual Succession certain Rights, which, being conferred on NATURAL Persons only, would fail in Process of Time."[43] Artificial persons owed their existence, moreover, directly to the king: "CORPORATIONS can only be ERECTED, and

[40] Blackstone, *Analysis*, 7. As elaborated in *Commentaries*, Blackstone divided the rights of "natural persons" into absolute and relative, absolute "those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is intitled to enjoy whether out of society or in it," and relative those "which are incident to them as members of society, and standing in various relations to each other" (I:119).

[41] Blackstone, *Analysis*, 9. In *Commentaries* it became, "The most universal public relation, by which men are connected together, is that of government; namely, as governors and governed, or, in other words, as magistrates and people" (I:142).

[42] Blackstone, *Analysis*, 21, 24. In *Commentaries*, "aliens" and "natives" became "aliens and natural-born subjects" and received the mark of "the first and most obvious division of the people" (I:354). Master and servant, husband and wife, and parent and child were also explicitly set apart as "the three great relations in private life," the last pair the point of derivation for "that of guardian and ward, which is a kind of artificial parentage" (I:410).

[43] Blackstone, *Analysis*, 28. The sixteenth chapter became the eighteenth chapter in *Commentaries*, retaining its status as the bridge between the first book on persons and the second book on things, and there Blackstone discussed the origins of the artificial person this way: "as all personal rights die with the person; and, as the necessary forms of investing a series of individuals, one after another, with the same identical rights, would be very inconvenient, if not impracticable; it has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality" (I:455).

NAMED, by virtue of the king's royal Charter."[44] Historians have not yet noticed it, but evidence suggests that Blackstone was the first common lawyer writing by the lights of Justinian's *Institutes* to call the corporation an "artificial person." The word "artificial," remember, derived from the Latin roots *ars* (art) and *facio* (to make), and *ars* had been one possible definition of *ius* since Justinian's *Digest*, which introduced the first chapter of its first book with the definition: "*ius* is the *ars* of the good (*boni*) and the equitable (*aequi*)."[45]

In his pamphlet, *A Letter From a Gentleman at Halifax*, Howard contrasted "personal rights," which in his view pertained to individuals, with "political rights," which in his view pertained to corporations created by the crown, and he insisted that "the colonies," as corporations, had "no rights independent of their charters" and could therefore "claim no greater than those [charters] give them." Yes, "our personal rights, comprehending those of life, liberty, and estate, are secured to us by the common law, which is every subject's birthright, whether born in Great Britain, on the ocean, or in the colonies; and it is in this sense we are said to enjoy all the rights and privileges of Englishmen," Howard comforted, but "the several New England charters ascertain, define, and limit the respective rights and privileges of each colony, and I cannot conceive how it has come to pass that the colonies now claim any other or greater rights than are therein expressly granted to them."

Howard wanted to show that the colonists had no rights beyond the control of Parliament's authority, and to do that while at the same time preserving the idea of birthrights, he

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[44] Blackstone, *Analysis*, 28. About the creator of "these artificial persons…called bodies politic, bodies corporate, (*corpora corporata*) or corporations: of which there is a great variety subsisting, for the advancement of religion, of learning, and of commerce; in order to preserve entire and for ever those rights and immunities, which, if they were granted only to those individuals of which the body corporate is composed, would upon their death be utterly lost and extinct" (I:455), he put it this way in *Commentaries*: "with us in England, the king's consent is absolutely necessary to the erection of any corporation, either impliedly or expressly given" (I:460).

[45] *The Digest of Justinian*, eds. Theodor Mommsen and Paul Krueger, trans. Alan Watson (Philadelphia: University of Pennsylvania Press, 1985), 1:1a.

argued that because both birthrights and acts of Parliament "have grown out of the same stock," one could not avail herself of one while refusing to submit to and acknowledge the other. "Permit me to say that inherent and indefeasible as these [personal] rights may be, the jurisdiction of Parliament over every English subject is equally as inherent and indefeasible," he wrote. "In a word, the force of an act of Parliament over the colonies is predicated upon the common law, the origin and basis of all those inherent rights and privileges which constitute the boast and felicity of a Briton. Can we claim the common law as an inheritance, and at the same time be at liberty to adopt one part of it and reject the other? Indeed we cannot."[46] Otis responded by pointing his knife at Howard's move to make the force of an act of Parliament coeval with the birthright, and by charging Howard with failing to understand the Blackstonian distinction between the relative rights of charted collectives and the absolute rights of individuals. Howard got it the wrong way round. "The natural absolute personal rights of individuals," he pushed back, "are so far from being opposed to political or civil rights, that they are the very basis of all municipal laws of any great value," Parliament's included.[47] The absolute rights of natural persons were the reason for political rights, he suggested. Rights that were "matters of meer favor and grace of the donor or founder" were exemplary of the rights of artificial persons, and they neither limited nor curtailed the absolute rights of natural persons, "those rights which all Britons, and all British subjects are intituled to by the laws of God and nature, as well as by the common law and the constitution of their country, so admirably built on the principles of the former."[48] He hoped Howard would answer "what is this birthright worth, if

[46] Martin Howard Jr., *A Letter From a Gentleman at Halifax to his Friend in Rhode-Island* (Newport: S. Hall, 1765), reproduced in Bailyn, *Pamphlets*, 532-44, 536-7.

[47] Otis, *Vindication*, 8.

[48] Otis, *Vindication*, 9.

it depends merely upon a colony charter, that, as he says, rightly enough may be taken away by the parliament?"[49] Were the absolute rights of "natural persons" to "depend on the meer good will, grace and pleasure of the supreme power," he argued, then "all their rights, even to life, liberty and property, may be taken away at pleasure."[50] What man gave, man might take away, and for Otis, that concern cut to the quick of the difference between the rights available to natural and to artificial persons. As he had written earlier in the widely-known *The Rights of the British Colonies Asserted and proved* the year before, a "gift of God cannot be annihilated," and such was "not lost to those who are born in or voluntarily enter into society." Indeed, a page earlier in *Rights*, the printer in Edes and Gill's press on Queen-Street in Boston had recorded this, that "the colonists are by the law of nature free born, as indeed all men are, white or black."[51] In the end, Otis (of whom Adams once said, "in the history, the common law, and statute laws of England he had no superior") went mad, and lightening struck him dead in Andover in 1783.[52]

The permissibility of gift or donation captured a concern alive in the discourse on natural rights, but more. That hinge, so basic as to be overlooked, swung more than one way, capturing also whether the holders of natural rights could give them away. In 1822, Adams would charge that the essence of the Declaration of Independence could be found in Otis's 1764 *Rights,* but

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[49] Otis, *Vindication*, 9.

[50] Otis, *Vindication*, 10.

[51] Otis, *Rights of the British Colonies Asserted and proved* (Boston: Edes and Gill, 1764), 30, 29.

[52] Otis's thinking was complicated, as demonstrated by what he also wrote in *Rights*: "Let the parliament lay what burthens they please on us, we must, 'tis our duty to submit and patiently bear them, till they will be pleased to relieve us" (40); and, "If I have one ambitious wish, 'tis to see Great-Britain at the head of the world, and to see my King, under god, the father of mankind" (40). For the relationship between James and his sister Mercy, a poet and historian, see Lepore, *The Whites of their Eyes: The Tea Party's Revolution and the Battle over American History* (Princeton: Princeton University Press, 2010).

Jefferson refuted it.[53] "Otis's pamphlet I never saw," he wrote James Madison the following year.[54] In *Rights*, Otis made it clear to his readers that the freedom of "men" was not total because "no man or society of men" had the power to enslave themselves, that is, to subject themselves "to the absolute will and arbitrary dominion of another." He wrote, "Whenever any one shall go about to bring them into such a slavish condition, they will always have a right to preserve what they have not a power to part with."[55] A memorial by the City of Boston to its representatives in its General Assembly, written in response to instructions to and from the same in May 1764, and appended to Otis's pamphlet, put it succinctly:

> Should the parliament of Great Britain follow the example of some other foreign states, and vote the King absolute and despotic; would such an act of parliament make him so? Would any minister in his senses advise a Prince to accept of such an offer of power? It would be unsafe to accept of such a donation, because the parliament or donors would grant more than was ever in their power lawfully to give. The law of nature never invested them with a power of surrendering their own liberty; and the people certainly never intrusted any body of men with a power to surrender theirs in exchange for slavery.[56]

Samuel Adams would get at the same prohibition in 1772, writing, "If men through fear, fraud or mistake, should in terms renounce and give up any essential natural right, the eternal law of reason and the great end of society, would absolutely vacate such renunciation; the right to freedom being the gift of God Almighty, it is not in the power of Man to alienate this gift, and voluntarily become a slave."[57] According to these, neither a man nor a people had the power

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[53] Adams to Thomas Pickering, August 6, 1822, the final sentence of the letter, reproduced in *Works of John Adams*, 2:514 and Burnet, *Letters*, I:516.

[54] Jefferson to James Madison, August 30, 1823, reproduced in *Writings of Thomas Jefferson*, ed. Paul Leicester Ford (New York: G.P. Putnam's Sons, 1899), 10:268.

[55] Otis, *Rights*, 23.

[56] "Substance of a Memorial presented the Assembly, in Pursuance of the above Instructions," in Otis, *Rights*, 73-4.

[57] Samuel Adams, "The Rights of the Colonies" in *The Writings of Samuel Adams*, ed. Harry Alonzo Cushing (New York: G.P. Putnam's Sons, 1906), 2:355.

under any circumstances to renounce or forfeit preservation from subjection. The prohibition against this donation would register in the Declaration of Independence as "certain unalienable Rights," the fruit of a radical natural rights theory whose long back origins demonstrate that it had not always been a self-evident truth.[58] Otis equated the Stamp Act with an invasion of the untransferrable prohibition against subjection because it lacked the consent of the taxed, which moved him to warn that "this barrier of liberty being once broken down, all is lost. If a shilling in the pound may be taken form me against my will, why may not twenty shillings; and if so, why not my liberty or my life."[59]

The permissibility of donation or gift—what was given to and by whom, what could never be given to, what one kept, what another might take away, and what I might give away—captured concerns alive in debates over natural rights and the meaning of slavery, yes, but also over theories of contract (what those who united into a community gave up in order to meet the ends for which they united), the location of sovereignty (where the unlimited and absolute power superior to all other constituted forms of public authority lay), and theories of representation and of resistance (whether in the act of voting, voters gave the elected power in order to make the elected a legitimate authority, yet retained the power to alter or abolish the government they themselves created).[60] I will discuss all of those rich implications in the next chapter. To repeat, in *Vindication* in 1765, James Otis, following William Blackstone, wrote that "natural persons"

[58] For an exhaustive discussion of the history I only gesture toward here, see Richard Tuck, *Natural Rights Theories: Their origin and development* (Cambridge: Cambridge University Press, 1981), especially 143.

[59] Otis, *Rights*, 54.

[60] For the elegant expression of sovereignty, I am indebted to Daniel Lee, *Popular Sovereignty in Early Modern Constitutional Thought* (New York: Oxford University Press, 2016), 2. In *The Ideological Origins of American Federalism* (Cambridge, Mass.: Harvard University Press, 2010), 83, Alison LaCroix describes the idea of sovereignty in the 1770s "as an ill-defined concept relating to the legitimate source of 'right,' as opposed to mere 'power,' within a given polity."

had some rights (absolute rights) that could never be given by men, and that dependence on "the meer favor and grace of the donor" was precisely the point of difference between the rights available to "natural persons" and those available to "artificial persons." In Otis's understanding, the rights of artificial persons were exhausted by those given to them by a donor, whereas natural persons had some birthrights that emphatically disallowed donation. This insight is crucial to understanding the persons among men in 1776 because as we will see, the vulnerability obtained for those outside, rather than inside, society.[61]

II.

The word "person" did not appear in the Declaration of Independence. It did not appear in the Declaration of Independence because it did not make it into the Declaration of Independence. It went missing because it was cut out. "All men are created equal," the Congress agreed after the war had begun, not "persons."[62] Man was the fundamental proposition, the first self-evident

[61] In at least one way, Blackstone's *Commentaries* bore a striking resemblance to another famous book, Thomas Hobbes's *Leviathan*, published for the first time in 1651. Blackstone's eighteenth chapter "On Corporations," which dealt with "these artificial persons…called bodies politic, bodies corporate, (*corpora corporata*) or corporations," served as the bridge between his first book on persons and his second book on things. In *Leviathan*, the sixteenth chapter "Of Persons, Authors, and things Personated," served a similar function; it bridged the first book Of Man and the second book Of Common-wealth. Person was to thing, as man was to commonwealth, and the artificial person helped pave the route from one to the other in each book. "A Person, is he, whose words or actions are considered, either as his own, or as representing the words or actions of an other man, or of any other thing to whom they are attributed, whether Truly or by Fiction," Hobbes wrote. A thing inanimate (like a church, hospital, or bridge) could still be represented, but as it could never own its words and actions and authorize an actor to speak and act on its behalf, "owners, or governors of those things" stepped in to so authorize. "There are few things, that are uncapable of being represented by Fiction," Hobbes thought. His list of those who "may be personated" included children, fooles, mad-men, an idol, the true God, and a Multitude of men. For the authoritative edition of *Leviathan*, see Thomas Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge: Cambridge University Press, 1991), 111-15.

[62] Ford, *Journals*, 5:510. That was an idea with a history, and one that did not necessitate a rejection of political subordination. What, indeed, could be grounded on the premise of natural equality is a fascinating historical question. The book of Genesis in the Hebrew Bible, composed between the tenth and sixth centuries BCE, had it that God created humankind in a certain way and with a certain permission. According to Genesis 1:26 in the King James Bible, "And God said, 'Let us make man in our image, after our likeness: and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth.'" The word the KJV translated as "man" was *adam* in the original Hebrew, and Jerome translated the word as *hominem* in the Vulgate. Interestingly and importantly, all of humanity shared in

Truth, as it had been for delegates in the Virginia Assembly, who agreed to "all men are…equally free and independent" for the first sentence of the first article of its Declaration of Rights in June, prose Jefferson would have had access to as he composed his draft for the General Congress in Philadelphia.[63] Of the eight other rights declarations agreed to by self-regarded states before deputies convened to revise the federal system of government in May of 1787, four (Maryland,[64] Delaware,[65] North Carolina,[66] and Connecticut[67] in 1776) did not

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God's nature. In a very different vein, Roman philosopher Cicero, who wrote of gods and not God in *On the Laws (De Legibus)* in the first century BCE, argued that justice (denoted by *ius*) was universal among all humans, and by extension, that everyone owed an obligation of justice to everyone else. This is what he wrote: "We have been made by nature to receive the knowledge of *ius* one from another and share it among all (*omnes*)…Those who have been given (*datio*) reason (*ratio*) by nature have also been given right reason (*recta ratio*), and therefore law (*lex*) too, which is right reason (*recta ratio*) in commands and prohibitions; and if they have been given *lex*, than *ius* too. All have reason and therefore *ius* has been given to all." Reason not only bound humankind together, but it bound humankind to the gods too. "Reason forms the first bond (*societas*) between human and god," he wrote. For the English translation, see Cicero, *On the Commonwealth and On the Laws*, ed. James E.G. Zetzel (Cambridge: Cambridge University Press, 1999), 117 and 113. For the Latin, see *On the Republic On the Laws*, trans. Clinton Walker Keyes, Loeb Classical Library 213 (Cambridge: Harvard University Press, 1928), 332, 320. In the early modern world, during the era of the English Civil War, among the ideas expressed about what influence the footing of common individuals might have on the organization of government, Richard Overton in *An Arrow Against All Tyrants and Tyrany, shot from the prison of New-gate into the Prerogative bowels of the Arbitrary House of Lords, and all other Usurpers and Tyrants whatsoever* (1646) wrote, "For by naturall birth, all men are equally and alike borne to like propriety, liberty, and freedome, and as we are delivered of God by the hand of nature into this world, every one with a naturall, innate freedome and propriety (as it were writ in the table of every mans heart, never to be obliterated) even so are we to live, every one equally and alike to enjoy his Birthright and priviledge; even all whereof God by nature hath made him free" (3); and John Milton in *The Tenure of Kings and Magistrates* (1649), wrote, "No man who knows ought, can be so stupid to deny that all men naturally were borne free, being in the image and resemblance of God himselfe, and were by privilege above all the creatures, borne to command and not to obey" (8). In the contractual theories of government by Thomas Hobbes and John Locke written in the shadow of that war, which appeared for the first time in 1651 and 1689 respectively, Hobbes's *Leviathan* had this: "all men equally, are by nature Free" (*Leviathan*, ed. Tuck, 150), and Locke's *Second Treatise* had this: "We must consider what State all Men are naturally in, and that is, a State of perfect Freedom…A State also of Equality" (John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), 269). Hobbes had questioned the self-evidence of "man" in *Elements of Law* (1650). "Upon the occasion of some strange and deformed birth," he had written, "it shall not be decided by Aristotle, or the philosophers, whether the same be a man or no, but by the laws," quoted by Richard Tuck in "The Dangers of Natural Rights," *Harvard Journal of Law and Public Policy* 20, no. 3 (1997): 688.

[63] For the thought as fixed in the final draft of the Virginia Declaration of Rights, see *The Papers of George Mason*, ed. Robert A. Rutland (Chapel Hill: University of North Carolina Press, 1970), 1:287.

[64] A Declaration of Rights "assented to, and passed, in the Convention of the Delegates of the freemen of Maryland, begun and held at Annapolis, the 14th day of August, A.D. 1776," article I: "That all government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole," in William F. Swindler, ed., *Sources and Documents of United States Constitutions* (Dobbs Ferry, New York: Oceana, 1975), 4:372.

include the equality of men at all, instead choosing People for their premises; Pennsylvania,[68] Vermont,[69] and New Hampshire[70] agreed to "all men are born equally free and independent" in 1776, 1777, and 1784, respectively; Massachusetts[71] to "all men are born free and equal" in

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[65] On August 27, 1776, delegates from the counties of New-Castle, Kent, and Sussex in Pennsylvania convened to draft "A Declaration of Rights and Fundamental Rules of the Delaware State, formerly stiled, the Government of the Counties of New-Castle, Kent and Sussex, upon Delaware," and also "The constitution, or system of government, agreed to and resolved upon by the representatives in full convention of the Delaware State, formerly styled 'The government of the counties of New Castle, Kent, and Sussex, upon Delaware,' the said representatives being chosen by the freemen of the said State for that express purpose." The first article of its Declaration of Rights confirmed, "That all Government of Right originates from the People, is founded in Compact only, and instituted solely for the Good of the Whole." Swindler, *Sources and Documents*, 2:197. The twenty-sixth article of that constitution prohibited the enslavement of Africans imported into the state prospectively, but did not prohibit slavery outright. It said this: "No person hereafter imported into this state from Africa ought to be held in slavery under any pretense whatever, and no negro, indian, or mulatto slave, ought to be brought into this state for sale from any part of the world." Francis Newton Thorpe, *The Federal and State Constitutions* (Buffalo: William S Hein & Co., 2002), 1:567.

[66] A Declaration of Rights (December 18, 1776) article I: "That all political power is vested in and derived from the people only," in Swindler, *Sources and Documents*, 7:402.

[67] The preamble to An Act containing an Abstract and Declaration of the Rights and Privileges of the People of this State, and securing the same: "The People of this State, being by the Providence of God, free and independent, have the sole and exclusive Right of governing themselves as a free, sovereign, and independent State." Swindler, *Sources and Documents*, 2:143.

[68] A Declaration of the Rights of the Inhabitants of the State of Pennsylvania, "Passed in Convention the 28th day of September, 1776, and signed by their order. Benj. Franklin," article I: "That all men are born equally free and independent, and have certain natural, inherent and unalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety," in Swindler, *Sources and Documents*, 8:278.

[69] The first article of A Declaration of the Rights of the Inhabitants of the State of Vermont (July 8, 1777) in Swindler, *Sources and Documents,* 9:489, which served as Chapter I of the Constitution of Vermont, began: "That all men are born equally free and independent,…" Swindler, *Sources and Documents*, 9:489. For an illuminating discussion of Vermont's status, see David Armitage, *The Declaration of Independence: A Global History* (Cambridge: Harvard University Press, 2007), 90-92, and Peter Onuf, "State-Making in Revolutionary America: Independent Vermont as a Case Study," *Journal of American History* 67 (1981): 797-815. Representatives from the place "comprehending and usually known by the name and description of the New Hampshire Grants," which became Vermont on June 4, 1777, had declared independence from Great Britain, New York, and "the several other governments claiming jurisdiction of this territory" on January 15, 1777, citing the May 15th resolve of the General Congress of the previous year, but Vermont did not become a state of the United States until March 4, 1791. For its declaration of independence, see E.P. Walton, ed., *Records of the Governor and Council of the State of Vermont* (Montpelier, VT, 1873), 1:40-4.

[70] Bill of Rights, article I, preamble: "All men are born equally free and independent; therefore, all government of right originates from the people, is founded in consent, and instituted for the general good," in Swindler, *Sources and Documents*, 6:344. The Bill of Rights served as Part I of the Constitution of 1784.

[71] Constitution of Massachusetts, Part the First, A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts, article I: "All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring,

1780; and in only one of those places, Vermont, did that premise demand a logically consistent endpoint.[72] "That all men are born equally free and independent, and have certain natural, inherent and unalienable rights," its Declaration of the Rights of the Inhabitants of the State of Vermont read, "amongst which are the enjoying and defending life and liberty; acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety." It continued directly:

> Therefore, no male person, born in this country, or brought from over sea, ought to be holden by law, to serve any person, as a servant, slave or apprentice, after he arrives to the age of twenty-one years, nor female, in like manner, after she arrives to the age of eighteen years, unless they are bound by their own consent, after they arrive to such age, or bound by law, for the payment of debts, damages, fines, costs, or the like.[73]

Vermont was the first self-regarded state in British North America to abolish slavery, albeit age bound, and it did it by travelling a course from "men" to "person," using the latter and not the former as the door from one world to the next. All men are born equally free and independent and have certain rights, its argument went, so no male person, older than twenty-one, nor female person, older than eighteen, ought to be a slave, while one or more males older than twenty-one and one or more females older than eighteen did not live as slaves.

Along with Jefferson's instructions to his colleagues setting out for General Congress in the summer of 1774, printed in Williamsburg without his permission, printer CLEMENTINA RIND included a misleadingly-translated epigraph taken from Cicero's *De Officiis*, giving it an entire page immediately after the title page and before the preface. The Latin above and the English below, the epigraph provided this:

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possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness," in Swindler, *Sources and Documents*, 5:93.

[72] Davis concurs in *The Problem of Slavery in the Age of Revolution,* 77-8.

[73] Swindler, *Sources and Documents*, 9:489.

> Est [igitur] proprium munus magistratus intellegere se gerere personam civitatis debereque eius dignitatem et decus sustinere, servare leges, iura discribere, ea fidei suae commissa meminisse.
>
> CICERO DE OF. L. I, C. 34.
>
> It is the indispensable duty of the supreme magistrate to consider himself as acting for the whole community, and obliged to support its dignity, and assign to the people, with justice, their various rights, as he would be faithful to the great trust reposed in him.

The translation's imprecision obscured a rich detail. The original passage read more accurately, "It is peculiarly the duty of a magistrate to understand that he bears the person of the *civitas* [*se gerere personam civitatis*] and that it is his duty to sustain its *dignitas* and *decus*, to preserve the law [*lex*], to assign rights [*iura discribere*], and to remember that this has been committed to him as a trust." The idea that someone subjected to external dominion, or slavery, chose her bondage intimated that the so subjected could have selected otherwise and by that alternative decision saved herself, but *A Summary View*'s epigraph, reduced to the space between the title and author on the title page in the London edition of the same year, and to English only, anticipated something else entirely, cutting another way. The individual, in theory, was to share in the authority by which she was ruled, but the *civitas*, the body politic, had the *dignitas*, and the bearer of *its* person would preserve the law and assign the rights. These lines laid bare a diminution, a kind of essential helplessness, not dissimilar to that between the sinner and God. "What must you do, that you may Do Good, and come to Good?" asked Cotton Mather's "a LARGER CATECHISM for the Negroes of a bigger Capacity" appended to his *The Negro Christianized. An ESSAY to EXCITE and ASSIST that GOOD WORK, the INSTRUCTION of*

Negro-Servants in Christianity, published in Boston at the beginning of the century in 1706. "A. I can of myself do nothing that is good; but I will cry unto the good spirit of God to help me."[74]

On Wednesday May 15, 1776, the Virginia Convention meeting in Williamsburg resolved unanimously that its delegates in General Congress in Philadelphia be instructed "to propose to that respectable body to declare the United Colonies free and independent states, absolved from all allegiance to, or dependence upon, the crown or parliament of Great Britain," and "that a committee be appointed to prepare a DECLARATION OF RIGHTS, and such a plan of government as will be most likely to maintain peace and order in this colony, and secure substantial and equal liberty to the people." [75] The convention named the committee's members and then added James Madison the following day, on May 16, and George Mason on May 18.[76] George Mason, who had in April of the previous year said in remarks on the annual elections for the Fairfax Independent Militia Company:

> We came equals into this world, and equals shall we go out of it. All men are by nature born equally free and independent. To protect the weaker from the

[74] Cotton Mather, *The Negro Christianized* (Boston: B. Green, 1706), 36, 40. To his paraphrase of the Lord's Prayer "brought down unto some of their Capacities," Mather replaced "Forgive us our debts, as we forgive our debtors" with "Do Good to them that have done Evil to me," asking God, in effect, to do good to torturers (34-5).

[75] *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* (Richmond: Ritchie, Trueheart & Duval, 1816), 16. Edmund Pendleton, president of the convention, composed the resolutions and signed the clerk's copy. He had on May 12 written to Carter Braxton, "a democracy, considered as referring determinations, either legislative or executive, TO THE PEOPLE AT LARGE is the worst form (of government) imaginable." See *The Letters and Papers of Edmund Pendleton*, ed. David John Mays (Charlottesville: University Press of Virginia, 1967), I:177 and 179.

[76] *Proceedings of the Convention of Delegates held at the Capitol, in the City of Williamsburg in the Colony of Virginia*, 17, 19. As the meeting unfolded, Madison would attempt to alter Mason's draft provision on religious toleration with a stronger clause that would have disestablished the Anglican Church, but this proposal, introduced by Patrick Henry on Madison's behalf, failed. Language Madison crafted in a revised proposal did, however, make it into the final declaration adopted by the convention. Mason's "that all Men shou'd enjoy the fullest Toleration in the Exercise of Religion," became "all men are equally entitled to enjoy the free exercise of religion" in Madison's hands, and delegates fixed this as "all men are equally entitled to the free exercise of religion" on June 12. For Mason's original prose, see *Papers of George Mason,* I:278, and for Madison's two amendments, see *Papers of James Madison*, I:174-5. Mason was no older than ten when his father drowned in an accident, and his mother, Ann, raised him with the help of his uncle, John Mercer. Mason's wife, named Anne too, died in 1773, after three of their nine children had already died in infancy.

> injuries and insults of the stronger were societies first formed; when men entered into compacts to give up some of their natural rights, that by union and mutual assistance they might secure the rest; but they gave up no more than the nature of the thing required. Every society, all government, and every kind of civil compact therefore, is or ought to be, calculated for the general good and safety of the community. Every power, every authority vested in particular men is, or ought to be, ultimately directed to this sole end; and whenever any power or authority whatever extends further, or is of longer duration than is in its nature necessary for these purposes, it may be called government, but it is in fact oppression[,][77]

began his ten-provision draft, written around May 20 to 24, with this:

> That all Men are born equally free and independent, and have certain inherent natural Rights, of which they can not by any Compact, deprive or divest their Posterity; among which are the Enjoyment of Life and Liberty, with the Means of acquiring and possessing Property, and pursueing and obtaining Happiness and Safety.
>
> That Power is, by God and Nature, vested in, and consequently derived from the People; that Magistrates are their Trustees and Servants, and at all times amenable to them.
>
> That Government is, or ought to be, instituted for the common Benefit and Security of Society of the People, Nation, or Community. Of all the various Modes and Forms of Government, that is best, which is capable of producing the greatest Degree of Happiness and Safety, and is most effectually secured against the Danger of mal-administration. And that whenever any Government shall be found inadequate, or contrary to these Purposes, a Majority of the Community had an indubitable, inalienable and indefeasible Right to reform, alter or abolish it, in such Manner as shall be judged most conducive to the Public Weal.[78]

At some point before May 25 (the day the last post before June 1st left Williamsburg), Thomas Ludwell Lee, a member of the drafting committee, made his contribution to the draft and then sent it to his brother, Richard Henry Lee, a delegate from Virginia at Congress in Philadelphia.[79] Among other changes, the drafting committee inserted "all" between "that" and "power" in the second provision and "protection" between "benefit" and "and security" in the third, and on Monday May 27, Virginia's Archibald Cary read the revised draft before the

[77] *Papers of George Mason*, I:229-30.

[78] *Papers of George Mason,* I:277.

[79] *Papers of George Mason*, I:279.

convention after which it was ordered to be committed to a committee of the whole. The convention resolved on the same day that it would, on Wednesday next (the 29th), consider the said declaration and "in the meantime, the same be printed." The convention resolved itself into a committee on the declaration of rights on Wednesday May 29, and on Saturday June 1, the *Virginia Gazette* printed the revised eighteen provisions between a petition to the king from the town of Belfast, above, and below, a notice that Lord Dunmore had on the previous Monday landed on Gwin's Island and "thrown up an entrenchment on the land side, which is guarded chiefly by the black regiment." On the same day, June 1, Thomas Ludwell Lee sat down to write his brother again, complaining that while the declaration of rights had been reported, "we have ever since been stumbling at the threshold…I will tell you plainly that a certain set of aristocrats, for we have such monsters here, finding that their execrable system cannot be reared on such foundations, have to this time kept us at bay on the first line, which declares all men to be born equally free and independent."[80] The *Pennsylvania Evening Post* printed the committee's draft on Thursday June 6, in the second column of the first page (price only two coppers); the *Pennsylvania Ledger* did so on June 8, in the first column of the second page, and the *Pennsylvania Gazette* followed on June 12, likewise in the first column of the second page.[81]

The first provision of the final draft, passed on Wednesday, June 12, edited to accommodate the different foundation, had it "that all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and

[80] Provided in Kate Mason Rowland, *The Life of George Mason 1725-1792* (New York: G.P. Putnam's Sons, 1892), 240.

[81] *The Papers of James Madison*, eds. William T. Hutchinson and William M.E. Rachal (Chicago: University of Chicago Press, 1962), 1:171, and *Papers of George Mason*, 1:275.

liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." Delegates cut "born" in preference for "by nature"; they cut "natural" from "certain inherent natural rights"; and they inserted "when they enter into a state of society" in order to qualify "any compact" as an antecedent condition. About the changes Edmund Randolph remembered, "The declaration in the first article in the bill of rights, that all men are by nature equally free and independent, was opposed by Robert Carter Nicholas, as being the forerunner of pretext or civil convulsion. It was answered, perhaps with too great an indifference to futurity, and not without inconsistency, that with arms in our hands, asserting the general rights of man, we ought not to be too nice and too much restricted in the delineation of them; but that slaves not being constituent members of our society could never pretend to any benefit from such a maxim."[82]

According to Virginia's Declaration of Rights, as approved, all men were not born equally free and independent; rather, all men were by nature equally free and independent. Travelling down the line of this thought, when men entered into a state of society they were thereafter prohibited from depriving or divesting (that is, alienating) their posterity of their "certain inherent rights." They could not give them away, and the terms of the compact could not take them away. Neither birth, nor nature, nor manhood equality sufficed to ensure protection from deprivation or divesture of inherent rights; only those men who had entered "a state of

[82] "Edmund Randolph's Essay on the Revolutionary History of Virginia 1774-1782," in *The Virginia Magazine of History and Biography* 44, no. 1 (1936), 45. On May 19, 1789, Randolph would write Madison to report that he feared his wife was suffering from a cancer in the mouth, and that since no "real aid" was attainable in Virginia, he had the idea to carry her to Europe or Philadelphia. If the latter, "I should be obliged almost to become a resident there," he wrote. "Indeed I have sometimes seriously thought of attempting something professional, should I be compelled to visit Philadelphia without being able to raise money from my estate. In that case, a new revolution would take place with me. For if I found that I could live there, I should emancipate my slaves, and thus end my days, without undergoing any anxiety about the injustice of holding them." His letter is reproduced in Philip B. Kurland and Ralph Lerner, eds., *The Founders' Constitution*, (Chicago: University of Chicago Press, 1987), 1:551-2. In *Commentaries*, Blackstone defined absolute rights of natural persons as those that "every man is intitled to enjoy whether out of society or in it" (1:119).

society" could enjoy such protection. All of this conceded the following: that there were men inside *and* outside society.[83] "Did the slave have rights?" and "Was she a participant in the authority by which she was ruled?" are two different questions to ask about the past. What mattered in identifying who counted and why in the first clause of Virginia's Declaration of Rights was not that the slave was not a man, or even that she was altogether rightless. It was that she stood outside society, and so, could enjoy the security of neither. The "person," one of the three great objects of law in *Bracton*, altered by Blackstone into the rights of persons and of things, did not figure. Neither equality nor freedom, nor independence nor manhood, but society pulsed as the bane.

In Virginia, the formalization of the distinction between white migrant servants imported under indenture and black slaves imported for sale, which effectively eradicated any overlap between "servant" and "slave," as legal historian Christopher Tomlins has shown, had come in 1748 when Virginia's General Assembly evacuated some "persons" from "servants."[84] The General Assembly had fashioned "slaves" out of "servants" since its first attempt to generally define who were to be slaves in October of 1670:

> Whereas some dispute have arisen whither Indians taken in warr by any other nation, and by that nation that taketh them sold to the English, are servants for life or terme of yeares, *It is resolved and enacted* that all servants not being christians imported into this colony by shipping shalbe slaves for their lives; but what shall come by land shall serve, if boyes or girles, until thirty yeares of age, if men or women twelve yeares and no longer.[85]

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[83] Bracton defined natural law as the *ius* that "nature, that is God himself, taught all animals [*animalia*]." See Thorne, *Bracton*, 2:26. And before that, even longer ago, Aristotle wrote that someone outside the *polis* by nature and not by accident was either "a bad men or above humanity," cited at Jeremy Waldron, "The Wisdom of the Multitude: Some Reflections on Book III, Chapter 11 of Aristotle's *Politics*," in *Aristotle's Politics: Critical Essays*, eds., Richard Kraut and Steven Skultety (Lanham: Rowman & Littlefield, 2005), 161.

[84] Tomlins, *Freedom Bound*, 473.

[85] Hening, *Statutes at Large*, 2:283.

But in *An Act concerning Servants, and Slaves* in 1748, the most recent incarnation of that definition, that "all servants imported and brought into this country, by sea or land, who were not christians in their native country…shall be accounted and be slaves, and as such be here bought and sold notwithstanding a conversion to christianity afterwards" of October 1705, became "all persons who have been, or shall be imported into this colony, by sea or land, and were not christians in their native country…shall be accounted and be slaves, and as such be here bought and sold, notwithstanding a conversion to christianity after their importation," in contradistinction to "servants, by act of parliament, indenture, or custom."[86] By 1776, according to the Virginia statute books, there lived in Virginia "persons…accounted…slaves," perhaps Christian, bought and sold, who were also accounted real estate. Indeed, in 1705 the General Assembly had enacted that "all negro, mulatto, and Indian slaves, in all courts of judicature, and other places, within this dominion, shall be held, taken, and adjudged, to be real estate (and not chattels;) and shall descend unto the heirs and widows of persons departing this life, according to the manner and custom of land of inheritance, held in fee simple."[87] Persons accounted slaves,

[86] Hening, *Statutes at Large*, 3:447-8 and 5:547-8. On October 31, 1751, the king repealed this 1748 provision, entitled *An Act concerning Servants, and Slaves*, along with other statutes, including *An act declaring slaves to be personal estate, and for other purposes therein mentioned*, to be discussed below, but the General Assembly reenacted the former in 1753. See Hening, *Statutes at Large*, 6:356-7.

[87] Hening, *Statutes at Large*, 3:333. This would prove convulsive. A statute in 1727 would "explain and amend" the 1705 provision. Blaming the "many mischiefs [that] have arisen" on "the various constructions, and contrary judgments and opinions, which have been made and given thereupon, whereby many people have been involved in law suits and controversies, which are still like to increase," the 1727 statute provided that "whenever any person shall, by bargain and sale, or gift, either with or without deed, or by his last will and testament in writing, or by any nuncupative will, bargain, sell, give, dispose or bequeath, any slave or slaves; such bargain, sale, gift, or bequest, shall transfer the absolute property of such slave or slaves to such person or persons to whom the same shall be so sold, given, or bequeathed, in the same manner, as if such slave or slaves were a chattel," adding that it was possible for slaves to be annexed to and pass with lands by following statutorily outlined means, and allowing the following exception: that any slave or slave who "shall be annexed, as aforesaid, to any lands and tenements settled, conveied, or devised, in fee tail in possession or remainder, as aforesaid, such slave, or slaves, or their increase, shall be liable to be taken in execution, and sold for the satisfying and paying the just debts of the tenant in tail, for the time being." The 1727 act also explained that the "true design" and "policy" of the 1705 act was "to *preserve* slaves for the use and benefit of such persons to whom lands and tenements shall descend, be given, or devised, for the better improvement of the same; which cannot be done, according to the custom and method of improving estates in this colony, without slaves [emphasis mine]." In 1748, the General Assembly repealed the 1705 and 1727 acts, putting in

were slaves accounted real estate, were men denied constitutive membership in society who might alienate their posterity of—logically, all—their inherent rights, and therefore, by implication, receive a similitude of those rights as gifts, opening a space to assume the character of Otis's artificial person.

The "delegates chosen and appointed by the Several Colonies and Provinces in North America to meet and hold a Congress at Philadelphia" had convened for the first time two years before, on Monday September 5, 1774, at a tavern (variously remembered by delegates as Smith's, New, and City) and there decided, as James Duane remembered it, by "a great majority," to meet thereafter in a room in a private hall, Carpenter's Hall, instead of in the Pennsylvania state house, which the speaker of the Pennsylvania Assembly had offered to them.[88] On Tuesday the 6th Duane recorded that "the first question debated was whether the congress should vote by colonies and what weight each colony should have in the determination," and that Patrick Henry, a delegate from Virginia, gave his opinion in favor of weighted votes by colony, saying, in Duane's paraphrase, "that it was time to form such a System as woud give each Colony a Just Weight in our deliberations in proportion to its opulence and number of inhabitants its Exports and Imports."[89] Adams's notes recorded the same proceedings, but he remembered Henry, whom Jefferson had once admired as an American Homer, suggesting something else at the very end of his contribution to the debate on the

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their place this: "that for the future, all slaves whatsoever shall be held, deemed, and taken, to be chattels personal," but the king disallowed it by an order in the Privy Council on October 31, 1751, not communicated to the General Assembly until April 8, 1752. For the 1727 act, see Hening, *Statutes at Large*, 4:222, 223, 225, and 224. For the 1748 act and its repeal see, Hening, *Statutes at Large*, 5:439 and extended footnote from 432-43. For a helpful discussion of the 1705 and 1727 acts, see David Thomas Konig, "Legal Fictions and the Rule(s) of Law: The Jeffersonian Critique of Common-Law Adjudication in *The Many Legalities of Early America*, eds. Christopher Tomlins and Bruce Mann (Chapel Hill: University of North Carolina Press, 2001), 111-2.

[88] Ford, *Journals*, 1:13; James Duane's notes at Burnett, *Letters*, 8.

[89] Burnett, *Letters*, 12.

question: that "slaves are to be thrown out of the equation, and if the freemen can be represented according to their numbers, I am satisfied."[90] Henry did not win, Congress resolving the same day "that in determining questions in this Congress, each Colony or Province shall have one Vote," but his sentiment auguring the predation of war proved prescient.[91] At 9 o'clock in the morning on Wednesday the 7th the Anglican Reverend Jacob Duché, in full pontificals, led the delegates in prayer and the psalter for the day, Psalm 35, which began, "Plead thou my cause, O Lord, with them that strive with me: and fight thou against them, that fight against me."[92]

In 1776, on the same day the Virginia Convention in Williamsburg voted to instruct its delegates in General Congress to propose independence and to appoint a committee to prepare a declaration of rights and plan of government, Wednesday May 15, the Congress in Philadelphia had already put its finger on what Jefferson told his friend Thomas Nelson was "the whole object of the present controversy": the creation of new governments.[93] On the 15th Congress agreed to a preamble drawn up by Adams to a resolution passed five days earlier, on May 10, "that it be recommended to the respective assemblies and conventions of the United Colonies, where no government sufficient to the exigencies of their affairs have been hitherto established, to adopt

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[90] John Adam's notes at Burnett, *Letters*, 14. In his autobiography, Jefferson remembered standing at the door of the lobby of the House of Burgesses in Williamsburg to listen to the debate on the Resolutions of 1765 against the Stamp Act. Standing there, he "heard the splendid display of Mr. Henry's talents as a popular orator. They were great indeed; such as I have never heard form any other man. He appeared to me to speak as Homer wrote." See Jefferson, *Writing*s, ed. Washington, 4. In *A History of the American Bar* (Boston: Little, Brown, and Company, 1911), Charles Warren reports that Henry was an autodidact who "was admitted to the Bar in September, 1760, at the age of twenty-four, after six weeks' solitary study of *Coke upon Littleton* and the Virginia statutes, although one of the three examiners, George Wythe, refused to sign his license, leaving it to Peyton and John Randolph to admit him" (165).

[91] Ford, *Journals*, 1:25.

[92] Ford, *Journals*, 1:431; The Psalms of David, Day 7, Morning Prayer, Psalm 35, at Brian Cummings, ed., *Book of Common Prayer* (New York: Oxford University Press, 2011), 495. Adams reported in his diary on September 7, 1774, that he thought "this was accidental, or rather providential." See *Works of John Adams*, 2:368.

[93] Thomas Jefferson to Thomas Nelson, May 16, 1776, in *The Papers of Thomas Jefferson*, ed. Julian P. Boyd (Princeton: Princeton University Press, 1950), 1:292.

such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general."[94] Into this preamble, Adams, chair of the three-delegate drafting committee (with Edward Rutledge and Lee), had written the following: "Whereas his Britannic Majesty, in conjunction with the lords and commons of Great Britain, has, by a late act of parliament, excluded the inhabitants of these United Colonies from the protection of his crown…it is necessary that the exercise of every kind of authority under the said crown should be totally suppressed, and all the powers of government exerted, under the authority of the people of the colonies."[95] In his autobiography, Adams remembered that when Duane called his preamble "a machine for the fabrication of independence," he had responded smilingly, "I thought it was independence itself, but we must have it with more formality yet."[96]

Lee moved that "these United Colonies are, and of right ought to be, free and independent States…absolved from all allegiance to the British Crown" on June 7, but before a yes or no on that question had come to pass, the Congress on June 11 created three committees, one "to prepare the declaration," one "to prepare and digest the form of a confederation," and one "to prepare a plan of treatises to be proposed to foreign powers."[97] In the seventeen days

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[94] Ford, *Journals*, 4:342.

[95] Ford, *Journals*, 4:357-8.

[96] Autobiography at *Works of John Adams*, 3:46 and Debates at *Works* 2:490. The resolution itself, he said, "I considered as an epocha, a decisive event," at *Works* 3:45.

[97] Ford, *Journals*, 5:431. For a full account of these proceedings, see Pauline Maier, *American Scripture: Making the Declaration of Independence* (New York: Vintage, 1997), 97-153, which joined a long line of scholarship on the Declaration of Independence including John Hazelton, *The Declaration of Independence: Its History* (New York Dodd, Mead, and Company, 1906); Carl Becker, *The Declaration of Independence: A Study in the History of Political Ideas*, rev. ed. (1922; repr., New York: Knopf, 1948); Julian P. Boyd, *The Declaration of Independence: The Evolution of the Text* (Princeton: Princeton University Press, 1945); Garry Wills, *Inventing America: Jefferson's Declaration of Independence* (Garden City: Doubleday, 1978); and Jay Fliegelman, *Declaring Independence: Jefferson, Natural Language, and the Culture of Performance* (Stanford: Stanford University Press, 1993). Recently, it has been followed by David Armitage, *The Declaration of Independence: A Global History*; and Daniel Allen,

between Tuesday, June 11, and Friday, June 28, the latter the day "the committee appointed to prepare a declaration, &c. brought in a draught, which was read," Jefferson (his counterparts on the committee Adams, Benjamin Franklin, Roger Sherman, and Robert R. Livingston), wrote down this,

> We hold these truths to be sacred & undeniable; that all men are created equal & independent, that from that equal creation they derive rights inherent & inalienable, among which are the preservation of life, & liberty, & the pursuit of happiness; that to secure these ends, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government shall become destructive of these ends, it is the right of the people to alter or to abolish it, & to institute new government, laying it's foundation on such principles & organising it's powers in such form, as to them shall seem most likely to effect their safety & happiness.[98]

No birth and no nature here; "all men are created" in a certain way, Jefferson wrote. As compared to the committee draft of Virginia's Declaration of Rights, published in three Philadelphia newspapers in June, equality was no longer an adverbial modification of "free and independent." In Jefferson's hands it became one of two adjectives: "created equal & independent," eliminating "free," and he made "that equal creation" the premise or point of derivation from which "rights inherent & inalienable" flowed. [99] Instead of saying that men could not, by any compact, deprive or divest their posterity of these rights, he said they were "inalienable," and he, unlike the final decision in the Virginia Convention, did not make society the precondition for their enjoyment. All of these, he wrote, were "sacred & undeniable" truths.[100]

Our Declaration: A Reading of the Declaration of Independence in Defense of Equality (New York: Liverlight, 2014).

[98] *Papers of Thomas Jefferson*, ed. Boyd, 1:423-4.

[99] See editorial note at *Papers of George Mason*, 279.

[100] *Papers of Thomas Jefferson*, ed. Boyd, I:423.

Jefferson shared his rough draft with both Adams and Franklin, who made their own contributions, and as amended by them and then by Congress on July 2nd, 3rd, and 4th, the truths lost their sacredness, and men suffered a stripping down bare to an equality that by itself required neither freedom nor independence, nor rights. (In his *Rights of the British Colonies* Otis had written, "What man is or ever was born free, if every man is not?"[101]) After the changes, the "Creator" endowed men, equally created, with "unalienable rights," but they were certain rights, and they no longer explicitly flowed from the premise of equal creation, "unalienable rights" becoming instead an elaboration of the preceding. Late in the day on Thursday July 4, Benjamin Harrison reported that the committee of the whole Congress agreed to a Declaration, and that night a worker in John Dunlap's printing press made haste to print this:[102]

> We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.[103]

As Jefferson remembered it, "the Declaration thus signed on the 4th, on paper, was engrossed on parchment, and signed again on the 2d of August."[104] Those who signed inscribed their names, beside the truths, on the skin of a beast butchered in order to be used.

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[101] Otis, *Rights*, 4.

[102] Boyd, *The Declaration of Independence,* 17 and 46.

[103] *A Declaration By the Representatives of the United States of America, In General Congress Assembled* (Philadelphia, 1776).

[104] Jefferson, *Writings*, ed. Washington, 1:26; and editorial note at *Papers of Thomas Jefferson*, ed. Boyd, 1:433.

More besides went missing. The king "has waged cruel war against human nature itself, violating it's most sacred rights of life & liberty in the persons of a distant people who never offended him," Jefferson wrote in his rough draft, "captivating & carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither."[105] (If rights were internalized within persons, as the line suggested, then the placement looked essential rather than accidental or arbitrary.) In notes he stuck inside the manuscript of the autobiography he began when he was 77 years old, Jefferson would explain what had happened. As has been retold by historians time and again since, "the clause too, reprobating the enslaving the inhabitants of Africa, was struck out in complaisance to South Carolina & Georgia, who had never attempted to restrain the importation of slaves, and who on the contrary still wished to continue it. Our Northern brethren also I believe felt a little tender under those censures; for tho' their people have very few slaves themselves yet they had been pretty considerable carriers of them to others."[106] He wished to transcribe "the declaration as originally reported" for posterity because "the sentiments of men are known not only by what they receive but what they reject also." Liberty had been continuous with slavery since (at the latest) a man named Gaius wrote his elementary text book in 161 CE, and in 1776, when Jefferson suggested that slaves were human beings with persons in whom sacred rights (their own and not their master's) lay and that trade in them, "a market where MEN should be bought & sold," was a grievance against the king,

[105] In *The Declaration of Independence: A Global History*, Armitage finds striking not what this chapter finds striking: a recognition of rights in the persons of slaves, but an equivalence between "the free inhabitants of British North America and the enslaved," which Jefferson rendered "by calling each a 'people.'" See Armitage, *Declaration of Independence*, 59-60.

[106] Jefferson, *Writings*, ed. Washington, 1:19. Of the excision Adams remembered the following in his letter to Pickering on August 6, 1822, "Congress cut off about a quarter of it, as I expected they would; but they obliterated some of the best of it, and left all that was exceptionable, if any thing in it was. I have long wondered that the original draught has not been published. I suppose the reason is, the vehement philippic against slavery." *Works of John Adams*, 2:514.

delegates considering it condemned it to the bottom of the sea almost as soon as the Virginian put it to prose. The Declaration's missing person, then, was the slave.

Jefferson knew very well that the statute record in Virginia held, took, and adjudged slaves as property, things, as did George Mason and Edmund Pendleton and Thomas Ludwell Lee, and Madison too.[107] Jefferson had personally reported two cases struggling over the thingness of slaves, their "intimacy of connection" to lands, as one Attorney General put it, in his own reports of cases decided at the General Court of Virginia in 1768 and 1772, *Blackwell v. Wilkinson* and *Herndon et al. v. Carr*.[108] Whether slaves counted as "persons" or "things," and what shape of each, had plagued case law in Jefferson's day, as it has vexed historians afterward.[109] This chapter hopes to reorder that historical and historiographical question by suggesting that vulnerability to expressions not required by claims on one's part goes a long way toward reducing puzzlement about, if not better understanding, the normative order in which those decisions of consequence were embedded. In any event, the law's preoccupation with the distribution of the rights of persons and of things stood distinct from the discourse on the natural life of a man, as likewise from the discourse on men, Christians, subjects, and citizens as

[107] While sitting as a delegate in the Virginia Convention in early June, Madison wrote to his father, James Madison, Sr., who had asked his son to get advice from Pendleton about some intestate matters for which Madison's father was the administrator's security. Unable to catch Pendleton "at leasure," Madison asked Patrick Henry instead, who counseled "that [ne]gros was [*sic*] to be considered as Chattels, as the Intestate died with. I suppose the law is plain enough in that instance." The word editors Hutchinson and Rachal guess was "negros" has eroded away in the manuscript letter, and the restoration is a conjecture. For a transcript of this battered letter with editorial notes, see *Papers of James Madison*, I:181-4.

[108] Jefferson, *Reports of Cases Determined in the General Court of Virginia, from 1730 to 1740, and from 1768 to 1772* (Charlottesville: F. Carr and Co., 1829), 73 and 132, with "intimacy of connection" a question posed by Attorney General John Randolph in *Blackwell* at 73. For a discussion of these cases see Malick W. Ghachem's marvelous "The Slaves Two Bodies: The Life of an American Legal Fiction," *William and Mary Quarterly* LX, no. 4 (2003).

[109] For historiography on the manipulable character of slavery, see my Introduction.

participants in (sharers of) the authority by which they were ruled.[110] If every last one had a share of the authority by which she was ruled, then equality, on at least that criterion, was an imperative that defied distribution, but in America in 1776, as Burke and Lind and others understood, it was abundantly clear that every last one *did not* have a share of the authority by which she was ruled, and that to every last one *did not* go the entirety of liberty. Liberty was the privilege of some, and, at least for delegates attending the Virginia Convention on June 12, the determinative precondition for its enjoyment was not so-called personhood or manhood, but membership in society, which obliged its members to defer to one another.

Immense puzzlement, as heavy as the sea, and as dangerous and lasting, has seeped up and out from the thought that "all Men are created equal…endowed by their Creator with certain unalienable Rights." This line, Abraham Lincoln would say in a speech at Springfield, Illinois on June 26, 1857, "was of no practical use in effecting our separation from Great Britain;…it was placed in the Declaration not for that, but for future use."[111] Adams wrote his son Charles from Philadelphia on February 24, 1794—after the revolution and the confederation and improved governments had ostensibly all been realized—that the "equality of human Nature…really means little more than that We are all of the same Species: made by the same God: possessed of Minds and Bodies alike in Essence: having all the same Reason, Passions, Affections and appetites." He continued writing to his son, "The Infant in the Womb is a Man, and not a Lyon. The Idiot even is a man and not an Eagle—the Dwarf himself is a man and not a Whale. The blind are Men, and not Insects, the deaf are Men and not reptiles, the dumb are Men and not Trees. All these are

[110] For this insight, see J.G.A. Pocock, "Virtues, Rights, and Manners: A Model for Historians of Political Thought" *Political Theory* 9, no. 3 (1984): 353-68.

[111] Abraham Lincoln, *The Collected Works of Abraham Lincoln*, ed. Roy Basler (New Brunswick, New Jersey, Rutgers University Press, 1953), 2:406.

Men and not Angells: men and not Vegetables &c. The difficulty of inventing a definition of Man has been seen by all Learned Men and there is Scarcely a Satisfactory one to be found to this day."[112]

In the series of papers signed Novanglus back in 1775, Adams had written that "the very definition of a freeman is one who is bound by no law to which he has not consented," and in the debate in the Congress on "the form of a confederation to be entered into between these colonies," as the *Journals* phrased it, begun on July 22, soon after approval of the declaration, Adams said something else.[113] In the debate over the eleventh article of confederation, which proposed deciding each state's tax bill on the basis of "the number of Inhabitants of every Age, Sex and Quality, except Indians not paying taxes, in each Colony," Adams answered Samuel Chase, a delegate from Maryland, who had "observed that negroes are property" and "in fact should not be considered as members of the state more than cattle," by rejoining that "as to this matter it was of no consequence by what name you called your people, whether by that of freemen or of slaves…what matters is whether a landlord employing ten laborers in his farm, gives them annually as much money as will buy them the necessaries of life, or gives them those necessaries at short hand," gives them shoes directly, say, instead of the wage to buy shoes. All laborers should count as such, and should add to the quota of its tax, Adams insisted, adding a flight of imagination that required his listeners to summon the creativity to "suppose by any extraordinary operation of nature or of law one half the labourers of a state could in the course of one night be transformed into slaves," asking, in turn, "Would the state be made the poorer or the

[112] John Adams to Charles Adams, February 24, 1794, in *Adams Family Correspondence*, eds. Margaret Hogan et al. (Cambridge: Harvard University Press, 2011), 10:27.

[113] *Works of John Adams*, 4:28; Ford, *Journals*, 5:431. "The committee appointed to prepare the articles of Confederation brought in a draught, which was read on July 12." See Ford, *Journals*, 5:546-55.

less able to pay taxes?" and answering, "It is the use of the word 'property' here, & and it's application to some of the people of the state, which produces the fallacy."[114]

In that speech at Springfield, Lincoln argued that the equality intended in the Declaration of Independence covered "ALL men, black as well as white" but not "all men…in all respects."

> Now I protest against that counterfeit logic which concludes that, because I do not want a black woman for a slave I must necessarily want her for a wife. I need not have her or either, I can just leave her alone. In some respects she certainly is not my equal; but in her natural right to eat the bread she earns with her own hands without asking leave of any one else, she is my equal, and the equal of all others.[115]

By the lights of this transparently offensive thought, which whittled equality down to a notion small and low, respecting the equality of men required this: that certain things—the necessary things perhaps, like eating bread, derived from the common experience of birth and not lost upon entering a horse Stable at the coercion of "a fine Gentleman with laced hat and wast coat"—never became gifts, or, to put it in terms of James Otis's reading of William Blackstone: that all men remained natural, and did not become artificial, persons. It was vulnerability to the similitude of rights as gifts that told the story of the missing person in 1776, and the story of the missing person in 1776, which filled a hole the size of independence itself, perhaps told the story this dissertation is trying to tell, too.

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[114] *Papers of Thomas Jefferson*, ed. Boyd, I:320-1, to which Boyd attaches a footnote explaining that the "suppose" question in Jefferson's manuscript notes of proceedings "is written in minuscule hand and interlined." Adams did not include his speech is his own notes of debates. For the hole, see *Works of John Adams,* 2:496-7.

[115] *Collected Works of Abraham Lincoln*, ed. Basler, 2:405.

Chapter the Fourth

The Persons among People in 1787

The idea of a national government involves in it, not only an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government.

James Madison, Federalist No. 39, January 16, 1788

One route forward from the self-evident Truth inscribed in the Declaration of Independence that "all Men are created equal" and "endowed by their Creator with certain unalienable Rights" would have been an egalitarian leveling up such that certain rights, whatever they were, among them, at least, "Life, Liberty, and the Pursuit of Happiness," secured by government, came, over the course of time, to reach all men, or perhaps even all men and women, as guarantees. That did not come to pass. Nor did it come to pass that these certain rights, whatever they were, came to reach all men whose number contributed toward the authority by which they were ruled. In one of the curiosities of the paper drawn up by the delegates who met to revise the federal system of government on Monday, May 14, 1787 (not with a quorum of seven states until Friday, May 25), and there agreed, without the express authority to do so, to a new plan of government about four months later, on Monday, September 17, the Constitution of the U. States (engrossed on four sheets of parchment) awarded political representation in the first branch of the national legislature to "free Persons" for slaves deemed "other Persons."[1] To say the same differently, delegates to the convention in Philadelphia in 1787 drew up a paper according to which the first

[1] According to the rules to be observed as the standing Orders of the Convention, "A House, to do business, shall consist of the Deputies of not less than seven States; and all questions shall be decided by the greater number of these which shall be fully represented; but a less number than seven may adjourn from day to day." Max Farrand, ed., *The Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1966), 1:8. The descriptive history I narrate in this chapter relies heavily on Farrand's collected records of convention proceedings, but does so in full recognition that it is a profoundly imperfect source. For an important and careful interrogation of extant records, see Mary Sarah Bilder, "How Bad Were the Official Records of the Federal Convention?" *George Washington Law Review* 80, no. 6 (2012): 1620-82; and Mary Sarah Bilder, *Madison's Hands: Revising the Constitutional Convention* (Cambridge, Mass.: Harvard University Press, 2015).

branch of the national legislature, the House of Representatives, would represent "the *people*" and not "the *States*," but admitted of political representation for "free persons" *as slave owners*.[2] They drew up a paper that counted the heads of slaves for the purpose of deciding how many Representatives from each state were to serve in the Congress, while it denied the so-counted the opportunity to live in their own power and, in other corners, opened wide the way for their importation into the next century and secured to their owners a property in them against escape. In short, they drew up a paper that counted inhabitants whom the paper was not written *for*.[3] As Martin Luther, Maryland's attorney general and delegate to the convention from the same until his early departure, wrote in *Genuine Information*, delivered to the Maryland legislature on November 29, 1787, and printed in the *Maryland Gazette and Baltimore Advertiser* between December 28, 1787, and February 8, 1788, "taking slaves into computation in apportioning the number of representatives a state should have in the government…involved the absurdity of increasing the power of a state…in proportion as that state violated the rights of freedom."[4] During the convention, on July 12, Charles Cotesworth Pinckney (whom Madison called General), a delegate from South Carolina with his cousin also named Charles, had reminded his colleagues that in the new national government, "property in slaves should not be exposed to danger."[5]

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[2] George Mason on June 6 at Farrand, *Records*, 1:133 (hereafter cited as *Records*).

[3] Not on their account, not out of regard for them, not on account of their interests, not out of consideration for them.

[4] Luther Martin, *The Genuine Information* printed in *Records*, 3:197. (Luther took his seat on June 9.) Gouverneur Morris said on August 8, "The admission of slaves into the Representation when fairly explained comes to this: that the inhabitant of Georgia and S.C. who goes to the coast of Africa, and in defiance of the most sacred laws of humanity tears away his fellow creatures from their dearest connections & dam[n]s them to the most cruel bondages, shall have more votes in a Govt. instituted for protection of the rights of mankind than the Citizen of Pa. or N. Jersey who view with a laudable horror, so nefarious a practice." *Records*, 2:222.

[5] *Records*, 1:594. See the same on July 23. As Madison recorded it, Pinckney "reminded the Convention that if the Committee should fail to insert some security to the Sout[h]ern States against an emancipation of slaves, and taxes on exports, he should be bound by duty to his state to vote against their report." *Records*, 2:95. See him again on

The number of representatives who ended up in the House of Representatives did not exhaust the significance of apportionment of this peculiar kind. On the contrary, apportionment of this peculiar kind raised a question about the very nature of sovereignty (authorization of the actions of government by the people) and of governmental rule and protection, for this mode of counting, and of assigning, laid the groundwork, according to James Madison, for the new government of the United States, and this groundwork tore back to the possibility of exception, which exposed the heart of election, which was choice and not what was due.[6]

August 28. Expressing his dissatisfaction for Article 14 of the plan, which had it that "the Citizens of each state shall be entitled to all privileges and immunities of citizens of in the several states," he "wish[ed] some provision should be included in favor of property in slaves." *Records*, 2:443.

[6] This chapter, focusing primarily on the infamous three-fifths clause, responds to, and builds upon, a long heritage of scholarship investigating how the idea and practice of slavery figured at the framing of the U.S. Constitution in 1787, most proximately, Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Vintage, 1996), 57-93; and David Waldstreicher, *Slavery's Constitution: From Revolution to Ratification* (New York: Hill and Wang, 2009). Rakove argues that the three-fifths clause was "the closest approximation in the Constitution to the principle of one person, one vote," "neither a coefficient of racialist hierarchy nor a portent of racialist thinking of the next century" (74), and he concludes that the Constitution accommodated slavery, making it "a fundamental element in the structure of American politics and law" (93). Waldstreicher studies the same to argue forcefully that the constitution was proslavery "in intention and effect" (9). Waldstreicher includes an extensive historiographical essay at the end of that work, from pages 161 to 168, and I recommend it to my own readers. "Slavery was an important to the making of the Constitution as the Constitution was to the survival of slavery" (17), Waldstreicher writes. "From the beginning of the convention, the great issues of representation and state sovereignty became entwined with the question of slaves as taxable wealth and as persons in, but seemingly not of, the polity. From there, the story of the Constitutional Convention became one of working not only around slavery but through it, to re-create republican government in a national union" (73). I agree, as I agree with his explanation of what he means when he writes, "proslavery." He puts it this way, explaining that the document

> enacted mechanisms that empowered slaveholders politically, which would prevent the national government from becoming an immediate or likely impediment to the institution. The most clear 'low level' principle resolved was that the issue ought to be avoided in the normal course of national political debate and action--that is, silence itself--and that the Constitution itself embodied a legitimate, reasoned, fairly determined compromise. The 'result' agreed to was slavery's continuance and protection in the present and near future. This made the Constitution nominally neutral but operationally proslavery. (114)

In understanding the plan of government drawn up in 1787 as enshrining and sustaining human bondage, Waldstreicher joins Wendell Phillips, William Lloyd Garrison, and Justice Thurgood Marshall, the last of whom confessed the following on the 200th anniversary of the drafting of the Constitution: "Nor do I find the wisdom, foresight, and sense of justice exhibited by the Framers as particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, we hold as fundamental today." Thurgood Marshall, "The Constitution's Bicentennial: Commemorating the Wrong Document?" *Vanderbilt Law Review* 40 (1987): 1337-42, 1338. Other scholars belonging to this heritage include William Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848* (Ithaca: Cornell University Press, 1977); John Hope Franklin, "The Moral Legacy of the Founding Fathers," in his *Race and History: Selected Essays*, 1938-1988 (Baton Rouge: Louisiana State University Press, 1989); George

The third clause of the second section of the first article of the Constitution of the United States, penned in the summer of 1787 (with enormous difficulty) and submitted to the people of the states for ratification on September 17, awarded political representation in the first branch of the national legislature according to a formula that added "the whole number of free Persons" in each state to "three fifths of all other Persons" in each state. Were the practice of slavery ever to end, or pass into disuse, then the liberation of freedom would mean counting each former slave differently, each as one toward a whole, instead of one in a fraction of an ulterior part.[7] In

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Van Cleve, *A Slaveholders' Union: Slavery, Politics, and the Constitution in the Early American Republic* (Chicago: Chicago University Press, 2010); and Paul Finkelman, whose work on this topic is extensive, ever incisive, and includes but is not limited to: *Slavery and the Founders: Race and Liberty in the Age of Jefferson,* 3rd ed. (Armonk, NY: M.E. Sharpe, 2014), and most recently: "Frederick Douglass's Constitution: From Garrisonian Abolitionist to Lincoln Republican," *Missouri Law Review* 81 (2016): 1-74; "Lincoln v. The Proslavery Constitution: How a Railroad Lawyer's Constitutional Theory Made him the Great Emancipator," *St. Mary's Law Journal* 47 (2005): 63-134; "How the Proslavery Constitution Led to the Civil War," *Rutgers Law Journal* 43 (2013): 405-38; "Defining Slavery under a 'Government instituted for protection of the rights of mankind,'" *Hamline Law Review* 35 (2012): 551-90; "The Cost of Compromise and the Covenant with Death," *Pepperdine Law Review* 38 (2011): 845-88; "The Root of the Problem: How the Proslavery Constitution Shaped American Race Relations," *Barry Law Review* 4 (2003): 1-20; "The Proslavery Origins of the Electoral College," *Cardozo Law Review* (2002): 1145-58; and "The Founders and Slavery: Little Ventured, Little Gained," *Yale Journal of Law and the Humanities* 13 (2001): 413-50. Howard Ohline opened up the three-fifths clause as a topic of study in "Republicanism and Slavery: Origins of the Three-Fifths Clause in the United States Constitution," *William and Mary Quarterly* 28 (1971): 563-84; and Christopher Tomlins gets it perfectly correct in his astonishing *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580-1865* (New York: Cambridge University Press, 2010), 397-8, when he calls that clause the Constitution's "pay dirt," writing perceptively and powerfully that "the primal American statement of enlightened autonomy sat atop an enacted political and legal economy of alterity and subjection." This chapter is also in conversation with revisionist works like Brooke E. Newborn, "Correcting the Common Misreading of the Three-Fifths Clause of the U.S. Constitution: Clarifying the Hostile Fraction," *Pennsylvania Bar Association Quarterly* 80, no. 3 (2009): 93-8, which try to make it clear that the three-fifths clause did not count each enslaved woman or man as "three fifths of a person."

The above scholars, among whose work I include my own, stand in opposition to students who, like Gordon S. Wood in *The Creation of the American Republic 1776-1787* (1969; repr., Chapel Hill: University of North Carolina Press, 1998), have understood slaving and the paper drawn up in 1787 as anomalous, or who have, like the late Frederick Douglass or Lysander Spooner, read the Constitution's ostensible silence about slavery as innocuous or even meaningful for "presume[ing] all men to be free" and "positively den[ying] the right of property in man." Lysander Spooner, *The Unconstitutionality of Slavery* (Boston, 1845), 67.

[7] If representation in the first branch of the national legislature remained a function of "the whole number of free persons" when "other Persons" were no more, then after the 13th Amendment in 1865, which had it that "neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction," emancipated slaves would increase representation in formerly rebel states exponentially. The second section of the 14th Amendment in 1868 would address this. The first section made "all persons born or naturalized in the United States, and subject to the jurisdiction thereof,…citizens," but the second section permitted and accounted for the disenfranchisement of the newly freed. This is what it said: "But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State,

Genuine Information, Luther spied the critical issue when he bore witness to the observation of "an honorable member from Massachusetts" who spoke during the convention, Luther remembered, to say that he "considered it as dishonorable and humiliating to enter into compact with the slaves of the Southern States, as it would with the horses and mules of the Eastern," expressing the fear that the rule of representation tracked sovereignty.[8]

In Federalist No. 10, published on November 22, James Madison—member with George Mason on the committee that had drafted the Virginia Declaration of Rights in May and June of 1776, and a delegate from Orange County to the General Congress before the revisory proceedings in Philadelphia, which he attended from beginning to end, got going—wrote that the delegation of power to elected rulers from "the people" was the difference, descriptively, between a pure democracy, understood as the administration of government by "citizens…in person," and a republic, understood as the administration of government by "citizens elected by the rest." By "republic," he explained, "I mean a government in which the scheme of representation takes place."[9] Later, in Federalist No. 39, published on January 16 of the next year, he elaborated, writing that "a republic is a government which derives all its power directly

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or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." The Constitution would not secure the right to vote without denial or abridgement on the basis of "race, color, or previous condition of servitude" until 1870, and it would not secure the right to vote without denial or abridgement on the basis of "sex" until 1920.

[8] He remembered Elbridge Gerry on June 11, whose speech Madison failed to record. As Yates remembered it, Gerry said, "The idea of property ought not to be the rule of representation. Blacks are property, and are used to the southward as horses and cattle to the northward; and why should their representation be increased to the southward on account of the number of slaves, than horses or oxen to the north?" Paterson heard the same, and wrote it down this way, "Slaves not to be put upon the Footing with the Slaves of other States—Horses and Cattle ought to have the Right of Representn. Negroes—Mules--." *Records*, 1:205-6, 208. See also Gouverneur Morris at *Records*, 1:583 and Wilson at *Records*, 1:587, both from Pennsylvania.

[9] Alexander Hamilton, John Jay, and James Madison, *The Federalist: A Commentary on the Constitution of the United States*, ed. Robert Scigliano, (New York: Modern Library, 2001), 58.

or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior."[10] So far from violating the principle of "self-government" (on mankind's capacity for which, Madison wrote in the same essay, rested "all our political experiments"), giving power to elected rulers who, in turn, depended on those who elected them for the power they enjoyed *was* self-government in 1787. To give power was to authorize it and in effect, to make the actions of a ruler one's own.[11]

The marvel—yes, the marvel—of democratic sovereignty by the eighteenth century was that it removed individuals from the rule of anyone other than themselves: individuals agreed, each one with the other, to form a unitary "people," the theory went, each "agree[ing] with the others that on any issue anyone brings forward in the group, the wish of the majority shall be taken as the will of all," and the wish of that majority, then, would determine the rulers, who saw to the business of actual governance.[12] The author of the thought just quoted was Thomas Hobbes, an English political philosopher who wrote through England's civil war in the middle of the seventeenth century, and wanted to defend the sovereignty of kings. Even a king could count

[10] That thought continued: "…It is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it." *Federalist*, 240.

[11] On June 16, James Wilson said, "With regard to the power of the Convention, he conceived himself authorized to conclude nothing, but to be at liberty to propose any thing." Conceiving the output of the convention as proposals not only cleared a way for Wilson and his colleagues to suggest whatever they wanted to suggest, but assigned the ultimate task of drawing conclusions to the sovereign people. *Records*, 1:253. John Marshall would agree. See the following in *McCulloch v. Maryland* (1819): "The Convention which framed the constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to them." 17 U.S. 403. Moreover, the institution that appointed, also created. See Gov Morris on July 24: "If the Legislature is to appoint, and to impeach or to influence the impeachment, the Executive will be the mere creature of it." *Records*, 1:103. See Morris again on July 2, in a speech urging an independent, aristocratic Senate, free from "a servile complaisance to the democratic." "In Religion the Creature is apt to forget the Creator," he said. "That it is otherwise in political affairs. The late debates here are an unhappy proof." *Records*, 1:512.

[12] Thomas Hobbes, *De Cive*, quoted in Richard Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (New York: Cambridge University Press, 2016), 97. By 1787, it was not feasible for all the citizens of the several states to physically meet together in a single, bounded place to deliberate, decide, and legislate matters about their communal life. Modern democracy, Tuck argues, required two theoretical innovations, which he traces in his book: prying apart sovereignty and government, and confining democracy to the former, saved exclusively for fundamental (and not day-to-day) legislation.

as "the people," he once wrote, and the sovereign power was, as historian of political thought Richard Tuck has explained of Hobbes's work, above all an epistemic power. The choice of the sovereign—whoever she was, "man, or men"—Hobbes thought, would serve as "a common measure of all things that might fall in controversy; as for example: of what is to be called right, what good, what virtue, what much, what little, what *meum* [mine] and *tuum* [thine], what a pound, what a quart, &c."[13] On this provocative view, "the will of all" would determine what was just and unjust in a political community (what Tuck has beautifully called "the canon of moral as well as political rectitude"), and the rearing of a people, conveniently, then, would circumvent the immense challenge posed by trying to agree on objective right by replacing objective right with general will as the measure.[14]

William Blackstone in his eighteenth-century day did not describe the sovereign power as an epistemic power, but he did write the following in his first book of *Commentaries*: that however governments began, "or by what right soever they subsist, there is and must be in all of them a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside." "This authority is placed in those hands," he explained, in which "the qualities requisite for supremacy, wisdom, goodness, and power, are the most likely to be found," and "the British constitution," he said, lodged that authority in the tripartite British parliament, composed of king, lords, and commons. "So long as therefore as the English constitution lasts," he wrote sternly, "the power of parliament is absolute and without control."[15]

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[13] Hobbes, *De Cive*, quoted in Tuck, *The Sleeping Sovereign*, 99 ("in a monarchy the subjects are a multitude, and (paradoxically) the King is the people"); and Hobbes, *Elements of Law*, quoted in Richard Tuck, "The Dangers of Natural Rights," *Harvard Journal of Law and Public Policy* (1997): 687.

[14] Tuck, *The Sleeping Sovereign*, 128. Tuck makes the point that "citizens could all be the true legislators in fundamental matters but leave less fundamental ones to their agents" (141).

[15] William Blackstone, *Commentaries on the Laws of England* (Chicago: Chicago University Press, 1979), 1:48-51, 157.

That is precisely the vision of sovereignty that signatories to the Declaration of Independence roundly rejected in 1776, and as historian Alison LaCroix has shown of theoretical developments in British North America in the 1770s, revesting sovereignty in the people happened alongside, or even after, a recalibration of sovereignty itself, which succeeded in supplanting its old, unitary and sole, character with a new, divisible and multilayered, one.[16]

Historian Edmund Morgan has called sovereignty in the people a "fiction," but that pejorative risks, as he himself observed, evacuating the idea of its implications both "mind-bending," to borrow the phraseology of legal scholar Akhil Reed Amar, and "deadly earnest," in the words of intellectual historian Daniel Rodgers, who considers the people's sovereignty also "a verbal riddle."[17] The episodes investigated in this dissertation have so far attended to the statutory tethers that bound suffrage and enslavement to an inscrutable gift of life in Massachusetts Bay in 1641, rendering both slavery and a voice in government products not of desert, but of human discernment, in a word, choice; to three manuscripts studied by William Blackstone in Oxford's Bodleian Library in 1759, which expressed the meaning of a justice in a way that admitted of nonobligatory condescension toward an elect; to Blackstone's own *Commentaries*, which made rights the end of law instead of persons as the reason for rights; and to the missing persons in the Declaration of Independence in 1776, who movingly demonstrated that limiting security in rights to an elect in 1776 put at stake the permissibility of, and attendant

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[16] Alison LaCroix, *The Ideological Origins of American Federalism* (Cambridge, Mass.: Harvard University Press, 2010), 96. See also Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2014); and Morton Horwitz, "A Historiography of The People Themselves and Popular Constitutionalism," *Chicago-Kent Law Review* 81 (2006): 817.

[17] Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York: Norton, 1988), 13-5, 263-87; Akhil Reed Amar, *America's Constitution: A Biography* (New York: Random House, 2005), 292; Daniel T. Rodgers, *Contested Truths: Keywords in American Politics since Independence* (Cambridge, Mass.: Harvard University Press, 1998), 80.

vulnerability to, a similitude of those rights as gifts. The oldest definition of justice in the common law tradition (that justice is the constant perpetual will to give to each his *ius*) presupposed a division of "persons" into free and slave, and the task of the present chapter is to see the "Justice" that "We the People" ordained and established in the engrossed Constitution of the United States as presupposing the same.

The letter delegates to the convention attached to the proposed constitution submitted to the General Congress, sitting in New York, on September 17 explained what the new paper had the potential to accomplish ("promote the lasting welfare of that country so dear to us all, and secure her freedom and happiness"), but also what it required the loss of. "It is obviously impracticable in the federal government of these States, to secure all rights of independent sovereignty to each," the letter signed by George Washington, president of the convention, confessed, "and yet provide for the interest and safety of all—Individuals entering into society must give up a share of liberty to preserve the rest."[18] Virginia's Declaration of Rights, as approved on June 12, 1776, had made the prohibition against deprivation or divesture of "certain inherent rights" conditional on entry into society, leaving those deemed slaves vulnerable to gifts by grace, and now, war finished, peace declared, eleven years later, delegates to the meeting to revise the federal system of government identified "a share of liberty" as a licit sacrifice or surrender on the part of "individuals," who gave for a reason, or toward an expressed end: "to preserve the rest." Entry into society required the surrender of a share of something, the convention told General Congress, for the sake, or safety, of all the rest who likewise entered. "The magnitude of the sacrifice must depend as well on situation and circumstance, as on the object to be obtained," the letter explained. "It is at all times difficult to draw with precision the

[18] *Records*, 2:666. Wilson went further on June 8 in his full-throated support of the legislative veto. "In the establishment of society every man yields his life, his liberty, property, & character to the society," he said. "There is no reservation…" *Records*, 1:172.

line between those rights which must be surrendered, and those which may be reserved," an ever present difficulty exacerbated, the letter admitted, "by a difference among the several states as to their situation, extent, habits, and particular interests."[19]

Questions about what might be surrendered or transferred to the new national government and by whom, what could never be given to it, what individuals and states reserved, and the obligations that each party might exact in return, created something of a bog on the floor of the Pennsylvania State House that summer in 1787, a soft, muddy pallet so far from able to bear any considerable weight on its surface that wandering feet sank deep each time someone attempted to stand cleanly.[20] On Saturday, June 30, just over a month after a quorum convened to revise the Articles of Confederation and report back "such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal constitution adequate to the exigencies of government and the preservation of the Union," as the call from General Congress on February 21, 1787 had it, Madison stood up to identify the rock against which the interests of the states cracked in two, as he saw it.[21] "Every peculiar interest whether in any class of citizens, or any description of states, ought to be secured as far as possible," he counseled. "Wherever there is a danger of attack there ought to be given a constitutional power of defence," but "the States were divided into different interests not by their difference of size, but by other

[19] *Records*, 2:666-7.

[20] On obtaining and losing, and retaining and giving up, power, see King at *Records*, 1:123 and Wilson citing him at *Records*, 1:133; Paterson on June 16 at *Records*, 1:250-1; Lansing on June 20 at *Records*, 1:336-7; and Mason on the same at *Records*, 1:339. Also see Mason's statement on July 23 about whom to give the responsibility of ratification. As recorded by Madison, "Col. Mason considered a reference of the plan to the authority of the people as one of the most important and essential of the Resolutions. The Legislatures have no power to ratify it. They are the mere creatures of the State Constitution, and cannot be greater than their creators. And he knew of no power in any of the Constitutions, he knew there was no power in some of them, that could be competent to this object. Whither then must we resort? To the people with whom all power remains that has not been given up in the Constitutions derived from them. It was of great moment he observed that this doctrine should be cherished as the basis of free Government." *Records*, 2:88.

[21] Merill Jensen, ed., *Documentary History of the Ratification of the Constitution*, vol. 1, *Constitutional Documents and Records, 1776-1787* (Madison: State Historical Society of Wisconsin, 1976), 187.

circumstances; the most material of which resulted partly from climate, but principally from their having or not having slaves." The "great division of interests in the U. States," he said, "did not lie between the large & small States: it lay between the Northern & Southern."[22] He understood this as "an important truth," he admitted, so strongly that "he had been casting about in his mind for some expedient that would answer the purpose." Let us jettison the five-to-three ratio for apportioning representation in the first branch of the legislature, moved for by James Wilson and agreed to for the first time on June 11, he proposed, and say instead that representation should be assigned in that branch "according to the number of free inhabitants only," and "in the other according to the whole no. counting the slaves as [if] free."[23] The convention itself was nearing fracture at that juncture, delegates unable to decide if the new plan of government should adopt what had been the exhaustive rule in the Articles of Confederation for the single General Congress and allow an equality of votes in either branch of the legislature. Indeed, by the time Madison spoke on June 30, he and his colleagues understood that the convention might collapse and disperse without a completed paper.[24] The day before, Rufus King of Massachusetts had heard Oliver Ellsworth of Connecticut say that without some compromise, "we shall separate; the political body must be cut asunder at the Delaware."[25]

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[22] Madison was not alone in this assessment. See Hugh Williamson of North Carolina on July 24. "There is an essential difference of interests between the N. & S. states," he said. *Records*, 2:100.

[23] *Records*, 1:486.

[24] Hamilton spoke of the dissolution of the union and the establishment of partial confederacies at *Records*, 1:466.

[25] *Records*, 1:478. Hamilton marveled on the same day at the "miracle that we were now here exercising our tranquil & free deliberations," advising that "it would be madness to trust future miracles" because "a thousand causes must obstruct a reproduction of them. *Records*, 1:467. Charles Pinckney said something similar at the very end of the convention, on September 15, but he put it in the normative. Randolph had just moved to allow state conventions to offer amendments, "which should be submitted to and finally decided on by another general Convention," and Pinckney disagreed saying, "Conventions are serious things, and ought not to be repeated." *Records*, 2:632.

On November 24, 1787, just over a month after signers of the completed paper signed, Wilson, a delegate to the convention from Pennsylvania, said in a speech to the delegates chosen by the people of his state for their assent and ratification of the proposed constitution submitted to them, that vesting "the supreme power…in the people, is in my judgment the great panacea of human politics." Arguing that "it is a power paramount to every constitution, inalienable in its nature, and indefinite in its extent," he added that "under the operation of that right, the citizens of the United States can never be wretched beyond retrieve, unless they are wanting to themselves." The power of government derived from, and depended on, "the people," Wilson observed in that speech, as the fault for any irredeemable wretchedness on the part of "citizens," in turn, must belong to the "citizens" themselves. "When we take an extensive and accurate view of the streams of power that appear through this great and comprehensive plan," he concluded of the proposed constitution, "however diversified and remote the blessings they diffuse, we shall be able to trace them all to one great and noble source, THE PEOPLE."[26] Earlier, on July 26, during a debate at the convention about whether the executive should be ineligible for the office after completing his service, Benjamin Franklin, another delegate from Pennsylvania, went further, saying that "in free governments the rulers are the servants, and the people their superiors & sovereigns. For the former therefore to return among the latter was not to *degrade* but to *promote* them—and it would be imposing an unreasonable burden on them, to keep them always in a state of servitude, and not allow them to become again one of the masters."[27]

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[26] "James Wilson in the Pennsylvania Convention" printed in *Records*, 3:142-3. See also the editorial note at John Kaminski and Gaspare Galadino eds., *Documentary History of the Ratification of the Constitution*, vol. 14, *Commentaries on the Constitution: Public and Private,* vol. 2*, 8 November to 17 December 1787* (Madison: State Historical Society of Wisconsin, 1983), 206-7. Wilson was the first delegate to the convention to deliver a speech at a state ratifying convention.

[27] *Records*, 2:120. In General Congress on May 10, 1776, Wilson had said, "We are the servants of the people, sent here to act under a delegated authority." *The Works of John Adams*, ed. Charles Francis Adams (Boston: Little, 1850), 2:490-1.

The panacea Wilson cited, however, the salvation that in Franklin's luminous phrasing regarded the ruled as masters and the rulers as servants, suffered from an ambiguity in America that would expose to hazard the very union the new form of political association wished to preserve, indeed make "more perfect."[28] While the rules of the national rulers-as-servants were to be "the supreme Law of the Land," according to the completed paper, and operate directly on the people-as-masters, the alternative to which would risk, as Madison wrote Thomas Jefferson on October 24, "civil war," the rules operated not only on those who had, in theory, voluntarily committed to the new government by agreeing to it through delegates in state ratifying conventions chosen for that purpose, in the first instance, and by electing their servants, thereafter (in brief, on Wilson's "people" turned "citizens"), but as Madison put it in Federalist No. 39, on "all persons and things, so far as they are objects of lawful government," in stark violation of the "clear principle that in a free government those who are to be the objects of a government ought to influence the operations of it," as expressed by King on July 14.[29] That principle, that "the objects of a government ought to influence the operations of it," returned to the line of argument live in the era of the American Revolution that in order to be ruled without becoming vulnerable to the mercy of another (that is, without becoming a slave), one had to be a participant in or sharer of the authority by which she was ruled, but the political and moral reflection faced a different direction this time, over a decade later, because the new form of government, drawn up "in the mild season of peace," as John Jay put it in Federalist No. 2, internalized the violence delegates explicitly fashioned the new form of government to provide

[28] Preamble reported on September 12, 1787. *Records*, 2:590. The report also converted "We the People of the States of…" to "We the People of the United States" for the first time. Cf. *Records*, 2:565.

[29] *Records*, 2:663. Luther Martin proposed the supremacy clause as a substitute for the rejected legislative negative on July 17 at *Records*, 2:28-9. "Civil war" in Madison's letter to Jefferson on October 24, 1787. For it see *The Papers of James Madison*, ed. Robert A. Rutland (Chicago: University of Chicago Press, 1977), 10:207 (hereafter *Madison Papers*). "All persons and things" from Federalist No. 39 printed in *Federalist*, 244-5. King at *Records*, 2:6.

an alternative to.[30] It presupposed, and responded to, to borrow again the words of Madison in Federalist No. 43, "an unhappy species of population abounding in some of the states, who, during the calm of regular government, are sunk below the level of men; but who, in the tempestuous scenes of civil violence, may emerge into the human character, and give a superiority of strength to any party with which they may associate themselves."[31]

Madison was referring in that essay to women, men, and children deemed slaves, excluded not only from democratic sovereignty, in his estimation, but from humanity, too, and if extra-governmental, perhaps even revolutionary, violence was a route to human character, as Madison wrote, then members of the convention from South Carolina had a response: count them in order to keep them, obtaining representation "for our property," as Charles Cotesworth Pinckney boasted in retrospect to the South Carolina House in January 1788 of the convention's accomplishments.[32] The worry of the honorable member from Massachusetts, which Luther remembered, then, was not sound because the rule of representation delegates agreed to *did not* track sovereignty. Not all of those whose number counted toward the sum of political representatives in the first branch of the national legislature stood on the same footing, nor did each one of them agree to cede a share of her power to the new national government (disclosing

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[30] *Federalist*, 10. Madison wrote Thomas Jefferson on October 24, "A recurrence to force, which in the event of the disobedience would be necessary, is an evil which the new Constitution meant to exclude as far as possible." *Madison Papers*, 10:211.

[31] *Federalist*, 280. Madison had referred to this idea in a speech on June 19 (*Records*, 1:318) and, before that, in "Vices of the Political System of the U. States (*Madison Papers*, 9:350), written before the convention, at both junctures using precisely the same prose: "where slavery exists, the republican theory becomes still more fallacious."

[32] *Records*, 3:253. In *Notes on the States of Virginia*, written on and off between the fall of 1780 and the time of its first printing in May of 1785 in Paris, Thomas Jefferson wrote of constitutional arrangements in his own state that one of the reasons for "a convention to fix the constitution" was "to render unnecessary an appeal to the people, or in other words a rebellion, on every infraction of their rights, on the peril that their acquiescence shall be construed into an intention to surrender those rights." Thomas Jefferson, *Notes on the State of Virginia*, ed. William Peden (Chapel Hill: University of North Carolina Press for the Institute of Early American History and Culture, 1955), 129.

in that choice her share of sovereignty and of government's subsequent authority). If anything, the constitution of the U. States contained within itself the convulsive energy of authorization by owners instead of authors, the lie of which lay in giving owners of slaves representation on the reason of the slavish character of their possessions.

In one of the most powerful indictments of the U.S. Constitution committed to record, abolitionist William Lloyd Garrison on July 4, 1854, described the paper as "a covenant with death, and an agreement with hell," and decimated a copy in flames.[33] The precise wrong of the document, however, the source of shame, remains a historical question sure, and this chapter suggests that the wrong lay not (or not only) in the purposeful preservation of the condition of slavery, as historian David Waldstreicher has ably argued in *Slavery's Constitution*, but in laying the *groundwork* for a nation in a scheme of *political representation* whose rule counted those it kept at a mercy sufficiently profound to conflate "jealousy" and "violent love," as Alexander Hamilton wrote in Federalist No. 1 of over-scrupulous attention to rights of the people, and in constitutionally establishing, to its lasting embarrassment, that the rights of slaveholders may lodge inside "persons" and look essential rather than arbitrary, a phenomenon Blackstone had written was licit only for "rights…in…things."[34] As the following pages will try to show, Madison conceptualized the U.S. Constitution as an alternative to civil war wrought by the monster of *imperium in imperio* (a state within a state) for transgressions of national rules by individual states, but if national rules operated on all persons and things, irrespective of consent, and slaves could rise to human and *effective political* character through civil violence, driving a wedge between subjective right and power, two ideas mistakenly "synonimous," Madison thought, "according to the Republican theory," then the new plan of government had a weak

[33] "The Meeting at Framingham," *The Liberator* (July 7, 1854).

[34] *Federalist*, 5 (No. 1); Blackstone, *Commentaries*, 2:1.

spot, stinking and raw, rotten though new, vulnerable to those whom it refused a share of sovereign power and of government's authority, as likewise the choice to escape a condition exhausted by expressions neither required nor invited by claims on their part.[35]

Before the meeting convened in May, Madison thought he had hit upon insights that would pave the way to framing a government rid of the evils (he called them vices) suffered by political communities in ages past. He realized that in America, effective political power and the subjective right of majority rule (will of the majority) were *not* synonymous, and that indeed, a minority could league, say, with a portion of the population denied suffrage, like slaves, to best opponents. As he wrote in notes he called "Vices of the Political system of the U. States" just before the convention, probably between February and April, prose he would use again in a speech at the convention on June 19, "One third of those who participate in the choice of the rulers, may be rendered a majority by the accession of those whose poverty excludes them from a right of suffrage, and who for obvious reasons will be more likely to join the standard of sedition than that of the established government. Where slavery exists the Republican Theory becomes still more fallacious."[36] He would circle this thought again in the passage discussed above, when he wrote in Federalist No. 43 in January of the next year that slaves might "emerge into the human character" and give a competitive edge to any group with which they associated, thereby moving "a minority of CITIZENS" to become "a majority of PERSONS, by the accession…of those whom the constitution of the State has not admitted to the rights of suffrage."[37] Madison here treated "persons" as a liminal political category, as he had done in Federalist No. 39, where he explained that "the idea of a national government involves in it, not

[35] *Records*, 1:318.

[36] *Madison Papers*, 9:351.

[37] *Federalist*, 280.

only an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government." The same had proven true at the convention too. "Persons" set up a category that captured the sovereign people and citizens, yes, but also those who were simultaneously *outside* genuine political participation and *under* the authority of the national government (susceptible to its touch), and made political by sedition.

Before the convention, besides, Madison had come to see the sovereign people *themselves* as a source of wrong, and as such, a potential danger to the viability of any conceivable form of government. As he wrote in "Vices":

> All civilized societies are divided into different interests and factions, as they happen to be creditors or debtors—Rich or poor—husbandmen, merchants or manufacturers—members of different religious sects—followings of different districts—owners of different kinds of property &c &c…Whenever therefore an apparent interest or common passion unites a majority what is to restrain them from unjust violations of the rights and interests of the minority, or of individuals?[38]

Newly fashioned constitutional arrangements, he thought, might manage to prevent combinations of oppressive interests and passions among "the people themselves" by widening, and not narrowing, the sphere of national governance such that the magnitude of diverse interests and passions would render oppressive strains less competitive and less able to concert.[39] Both insights—that effective political power and the subjective right of majority rule were not the same, and that the people *themselves* threw up a source of wrong—acknowledged the reality of societal inequality, subordination, and of grievance, yet subjection's reach gave the lie to the

[38] *Madison Papers*, 9:355.

[39] On this topic, see Federalists No. 10 and 51. In the latter Madison wrote, "If men were angels, no government would be necessary." *Federalist*, 331.

dilation of the people's interests because, as Madison himself confessed on June 30, slavery was the line along which all the other interests fell.[40]

Puzzling over the possibilities of a new government on March 19, imagining from his desk in New York what shape it might take, Madison wrote Jefferson to express what he saw as a necessity: to "change the principle of Representation" (according to the Articles of Confederation, states member to the unitary General Congress enjoyed equal and not proportional votes) in order to achieve "an augmentation of the federal power as will render it efficient without the intervention of the legislatures."[41] He wrote with the same thought to Edmund Randolph, governor of Virginia since November of the previous year who would serve as a delegate to the convention from the same, on April 8. Eschewing "the idea of an aggregate sovereignty" or "one simple republic," he wondered to the governor of his state if "any middle ground can be taken which will at once support a due supremacy of the national authority, and leave in force the local authorities so far as they can be subordinately useful," calling attention to the idea of "a system which would operate without the intervention of states." Toward this new direction, "the first step to be taken," he wrote, was "a change in the principle of representation."[42] Madison wrote with the same again to Washington on April 16, but there he referred to the change in the principle of representation as "the ground-work," a word he would use again in his letter, a debriefing really, to Jefferson after the convention, on October 24.[43] "It appeared to be the sincere and unanimous wish of the Convention to cherish and preserve the

[40] Jack Rakove agrees, writing in *Original Meanings*, 77, that "the recognition that there was one overriding issue that threatened to establish a great 'division of interests' between slave and free states could not be easily rendered compatible with the pluralist imagery of the diverse sources of faction."

[41] *Madison Papers*, 9:318.

[42] *Madison Papers*, 9:368.

[43] *Madison Papers*, 9:383.

Union of the States," he wrote Jefferson after the fact, but "a voluntary observance of the federal law by all the members, could never be hoped for." Explaining that "a compulsive one could evidently never be reduced to practice, and if it could, involved equal calamities to the innocent and to the guilty, the necessity of a military force both obnoxious and dangerous, and in general, a scene resembling much more a civil war, than the administration of regular government," he reported to his friend, "Hence was embraced the alternative of a Government which instead of operating, on the States, should operate without their intervention on the individuals composing them: and hence the change in the principle and proportion of representation."[44]

A government operating on individuals without the intermediation of the states was an alternative to civil war, Madison reported to Jefferson of the convention's first decision, and a solution to the problem of *imperium in imperio*, the solecism of a state within a state, manifested in the Articles of Confederation as a reliance on the states for the execution and efficacy of any general act. It was a solution whose necessary groundwork was proportional representation in the legislature, among the crucial overlays of which, he explained to Jefferson in the same October letter (ruefully, surely, as the idea had failed to win sufficient support), would be "a negative" in the hands of the national legislature on the legislative acts of the states, as a means to national supremacy.[45] Madison thought that proportional representation set down the groundwork for a

[44] *Madison Papers*, 10:207. On June 9, Paterson said that providing "for the use of coercion…was the great point." *Records*, 1:179.

[45] Before, during, and after the convention, Madison was convinced that without the legislative negative on state laws, a proposal that failed on July 17, "a continual struggle between the head and the inferior members" would ensue "until a final victory has been gained in some instances by one, in others, by the other of them," and the whole succumbed to "evil of imperia in imperio." *Madison Papers*, 10: 209-10. See also Federalist No. 21 on the confederation's lack of power "to exact obedience, or punish disobedience" at *Federalist*, 124. In *The Ideological Origins of American Federalism*, LaCroix argues that "the central constitutional question of the late-eighteenth century Anglo-American world was whether more than one source of governmental authority could legitimately exist within a single state—the *imperium in imperio* question." The demise of Madison's negative, she argues, "heralded the emergence not just of an idea but also of an ideology of multilayered authority." Thereafter, so far from an embarrassment or pathological or dysfunctional solecism at variance from political theory, "multiplicity had

government operating directly on individuals, required to prevent civil war, because it fed on reciprocity: individuals would transfer power to the rulers, and those representatives, so authorized, would operate on the individuals in turn. This would provide the pivot from the confederacy, whose "essential characteristic," Hamilton wrote in Federalist No. 9, lay in "the restriction of its authority to the members in their collective capacities, without reaching to the individuals of whom they are composed."[46]

In short, some members of the sovereign people in 1787 owned slaves who contributed toward, but were denied a share of, government's authority.[47] Slavery was the line around which the other interests and passions fell, Madison knew by June, and power, effective political power (that is, a power to affect politics) was not the same as the will of a majority who enjoyed a share of the authority by which they were ruled. Inhabitants who *did not* have a share of the authority by which they were ruled and *did not* voluntarily delegate some of their power to the new government—those who were vulnerable to gifts by grace—yet *were* counted for the purpose of representation and *were* objects of national governance, made-up one-half of every master-slave relation the country over. Madison understood that he and his colleagues in convention had to overcome the confederation's "fatal" reliance on the states, but the solution, a government that did not require the intervention on the states for its efficacy and could instead operate on the population directly, worked no cure, secured no lasting peace, because those objects of national governance who had no authority, and no choice, posed an ever-present taunt to a union whose drafters wanted it to spin centripetally instead of centrifugally (unite or die, Wilson said in his

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become the defining concept of the new republic, a new normative vision distinct from past Anglo-American practice and ideology" (172-4).

[46] *Federalist*, 51.

[47] On the sovereign people as the source of all of government's power, see *Records*, 1:122-3; Mason on July 23 at *Records*, 2:88-9; and Madison at *Records*, 2:92-3.

speech on November 24).[48] Every woman and man and child deemed a slave, this chapter cautiously suggests, together with her master, perhaps formed a *state within a state* that lived off of the blood and bile and fear required to keep one-half of the dyad in an estate of mercy, and off of government's acquiescence. Were the enslaved sunk "below the level of men," as Madison wrote, beyond a share of sovereign power because locked in a despotic community that subjected them so comprehensively to the will of another, then that fate perhaps obtained for owners, too, and in grappling with the challenges and possibilities of a general government coexisting with multiple state governments, then, Madison perhaps misidentified the ablest eccentric power: it was not the many states, it was the many slaves, so deemed, at daily war with their owners. Human beings ("persons" according to the U.S Constitution) deemed slaves were excluded from the choice (the government-legitimizing necessity manifested in ratification and in suffrage) that created claims on government, yet they proved, by living their lives (a marvelous feat, nothing small) that they shaped what they were ostensibly denied.

II.

From the first day the federal-Convention "for revising the federal system of Government" began meeting in earnest, on Friday, May 25, the deputies assumed work toward the creation of a national instead of merely federal government "founded on different principles," as Charles Cotesworth Pinckney said, than the confederation—the difference turning on whom the government may licitly punish, or operate on.[49] The following pages consider the fissure between the objects of government and the objects of representation. Ultimately, the numbers of

[48] *Records*, 3:140.

[49] *Federalist*, 244 (No. 39).

the former would outweigh those of the latter, which is to say that the objects of representation did not match the objects of governance. As the meeting unfolded, a question about the objects of licit punishment merged with a question about the appropriate objects of governance, encountered a question about whom political representation was of and by and for. When "bodies politic, or communities, or States," to borrow the words of Hamilton in Federalist No. 15, published on December 1, lost as an answer to those questions, the phenomenon of slavery, alive and thriving even when not acknowledged to be so, threw up a fascinating puzzle, for slaves with their masters (note the possessive) formed communities too, though despotic, and it was *those* lives, and not the histories of confederated systems antient & modern, which Madison was so fond of, that built the schools of greatest possible learning for delegates to seek lessons about good governance, had they the eyes to see it.[50] In convention on July 6, Franklin reminded his fellows that "those who feel, can best judge," advice whose humane depth the delegates, Franklin included, failed to perceive.[51]

"We have seen the mere distinction of colour made in the most enlightened period of time, a ground of the most oppressive dominion ever exercised by man over man," Madison said on June 6.[52] "Every master of slaves is born a petty tyrant," Mason said on August 22.[53] There could be no masters without slaves, and no slaves without masters. Each idea lost meaning without the other, and one without the other never sufficed intellectually, that is, neither enjoyed outright wholeness. Madison acknowledged the same in Federalist No. 54, published on

[50] Federalist, 91 (No. 15). Madison's "Notes on Ancient and Modern Confederacies," written perhaps between April and June 1786, in *Madison Papers*, 9:3-24.

[51] *Records*, 1:546.

[52] *Records*, 1:135.

[53] *Records*, 2:370.

February 12, 1788. "It is only under the pretext that the laws have transformed the negroes into subjects of property, that a place is denied to them in the computation of numbers" he wrote in that essay, "and it is admitted, that if the laws were to *restore* the rights which have been *taken away*, the negroes could no longer be refused an equal share of representation with the other inhabitants [emphasis mine]."[54] As historian Jack Rakove has explained, the three-fifths ratio originated in a rule of taxation developed in 1783 before the war of independence had ended, and only reached the constitution as an extension of that rule, on the suggestion of Wilson on June 11.[55] The extension built a "bridge to assist us over a certain gulph," Morris explained on July 24, and a consequential one at that.[56]

The Articles of Confederation and Perpetual Union between the states of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, [and] Georgia, agreed to on November 15, 1777, and in effect since March 1, 1781, had instructed that "in determining questions in the United States, in Congress assembled, each State shall have one vote."[57] Significantly, that rule disregarded differences in population and wealth: each state got one vote in a single-branch legislature. In Philadelphia, on Tuesday, May 29, Governor Randolph of Virginia presented fifteen propositions "concerning the American confederation, and the establishment of a national government," as the Secretary of the Convention, William Jackson, recorded it, and its second and third resolutions moved to upturn the confederation's voting rule, proposing instead "that the National Legislature ought to consist

[54] *Federalist*, 349.

[55] *Records*, 1:201; Rakove, *Original Meanings*, 74.

[56] *Records*, 2:106.

[57] Worthington Chauncey Ford, ed., *Journals of the Continental Congress 1774-1789* (Washington, D.C.: Government Printing Office, 1906), 9:907, 910 (hereafter JCC).

of two branches" instead of one, and that "the rights of suffrage" in both of those branches "ought to be proportioned to the Quotas of contribution, or to the number of free inhabitants, as the one or the other rule may seem best in different cases."[58] The confederation "was not even paramount to the state constitutions," Randolph observed in his introductory remarks, and it enjoyed neither ratification by a "special appointment from the people," nor power "to compel delinquent states to do what is Right."[59] The confederation "cannot prevent a war," James McHenry of Maryland heard Randolph say, and it was "incapable to produce certain blessings."[60]

The next day, Wednesday May 30, in a committee of the whole, Randolph moved that his first resolution, "that the articles of confederation ought to be so corrected & enlarged as to accomplish the objects proposed by their institution; namely, 'common defence, security of liberty and general welfare,'" give way to this: "that a Union of the States merely federal ~~was insufficient for the purpose of securing the liberty and happiness &c~~ will not accomplish the objects proposed by the articles of confederation, namely common defence, security of liberty, and general welfare," and then Pierce Butler of South Carolina moved to postpone the proposed

[58] Written by the delegation from Virginia between May 17 and May 28, the plan, as Jack Rakove has argued in *Original Meanings*, bore Madison's mark. The plan also proposed "that the members of the first branch of the National Legislature ought to be elected by the people of the several States"; "that the members of the second branch of the National Legislature ought to be elected by those of the first, out of a proper number of persons nominated by the individual Legislatures"; "that the National Legislature ought to be impowered…to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union; and to call forth the force of the Union against any member of the Union failing to fulfill its duty under the articles thereof"; "that a National Executive be instituted; to be chosen by the National Legislature"; "that the Executive and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate"; and "that the amendments which shall be offered to the Confederation, by the Convention ought…after the approbation of Congress to be submitted to an assembly or assemblies of Representatives, recommended by the several Legislatures to be expressly chosen by the people, to consider & decide thereon." *Records*, 1:20-3.

[59] *Records*, 1:19, 26.

[60] *Records*, 1:25.

substitution in order to consider this: "that a national government ought to be established consisting of a supreme legislative, executive, and judiciary."[61] In the discussion about establishing a "national government" that followed, Charles Pinckney "wished to know of Mr. Randolph whether he meant to abolish the State governments altogether," and Charles Cotesworth Pinckney "expressed doubt whether the act of Congress recommending the convention, or the commissions of the deputies to it, could authorize a discussion of a system founded on different principles from the federal constitution." Elbridge Gerry of Massachusetts shared that worry. "A distinction has been made between a federal and national government," he noted. "We ought not to determine that there is this distinction for if we do, it is questionable not only whether this convention can propose an government totally different or whether Congress itself would have a right to pass such a resolution as that before the house," worrying at the end of his comments that "if we have a right to pass this resolution we have a right to annihilate the confederation."[62]

Gouverneur Morris of Pennsylvania (no relation to Robert Morris, superintendent of finance between 1781 and November 1784, to whom he had been assistant) responded to those

[61] *Records*, 1:30, 33. The phrase, "common defence, security of liberty and general welfare," was a paraphrase of Article 3 of the Articles of Confederation, which read: "The said states hereby severally enter into a firm league of friendship with each other for their common defence, the security of their liberties and their mutual and general welfare; binding themselves to assist each other against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty trade, or any other pretence whatever." JCC 9:908.

[62] The creation of a national government really did stray far outside the purview of both Congress's brief of February 21 and the delegates' separate commissions from their states. Gerry's commission from Massachusetts of February 22, for example, had authorized him "to consider, how far it may be necessary to alter any of the articles of the present Confederation, so as to render the Constitution of the federal Government, more adequate to the exigencies of the Union; & what further powers may be necessary to be vested in Congress for the common welfare & security, & with them to form a report for that purpose;--Such alterations & additions as may be made, to be however consistent with the true republican spirit & genius of the present articles of Confederation." The Pinckneys' commission from South Carolina of March 8 had authorized them to see to "devising and discussing all such alterations, clauses, articles and provisions as may be thought necessary to render the federal constitution entirely adequate to the actual situation and future god government of the confederated states." For all of the commissions, see Jensen, *Documentary History*, 1:192-229, 205, 214. Wilson, as noted above, had a scathingly brilliant answer to this problem on June 16. Delegates may conclude nothing, but may propose anything, he said. *Records*, 1:253. Also compelling, Mason on June 20, who said that "the fiat is not to be here, but in the people." *Records*, 1:338.

concerns by trying to make plain the necessity of "one supreme power, and one only" in any political community, to that end explaining that the difference between a federal and national government lay in the difference between relying on "good faith" and enjoying "compleat and compulsive operation." McHenry heard him say, "We had better take a supreme government now, than a despot twenty years hence—for come he must."[63] Mason followed in the same vein by observing that since "punishment could not [in the nature of things be executed on] the States collectively,…such a government was necessary as could directly operate on individuals, and would punish those only whose guilt required it."[64] At this, George Read of Delaware moved to postpone the resolution in favor of alternative prose to establish "a more effective Government" instead of a "national government," but the motion failed, and when the question was put and the vote had, the resolution passed, Connecticut voting no and New York divided.[65] King perceived "the object of the motion from Virginia" as this: "an establishment of a government that is to act upon the whole people of the U.S."[66]

Debate in the committee of the whole on the 30th then shifted to consider "the rights of suffrage in the National Legislature," and at the sound, Madison stood up to suggest that if "the words 'or to the number of free inhabitants' might occasion debates which would divert the Committee from the general question whether the principle of representation should be changed," then they should be struck out and replaced with this: "that the equality of suffrage established by the articles of Confederation ought not to prevail in the national Legislature, and

[63] *Records*, 1:34, 43.

[64] *Records*, 1:34.

[65] *Records*, 1:35.

[66] *Records*, 1:43. Mason said on Monday, "I consider the federal government as in some measure dissolved by the meeting of this Convention." *Records*, 1:113.

that an equitable ratio of representation ought to be substituted."[67] Read objected and moved for a postponement of the question, which succeeded, on the ground of an express direction in his commission to not meddle with "that Part of the Fifth Article of the Confederation of the said States, finally ratified on the first day of March, in the year One Thousand Seven Hundred and Eighty-one, which declares, that 'in determining Questions in the United States in Congress assembled, each State shall have one Vote,'" and Madison responded to his threat-laced check by trying to impugn its basis.[68] "Whatever reason might have existed for the equal suffrage when the Union was a federal one among sovereign States, it must cease when a national government should be put into the place," he countered, because when "the acts of the general government would take effect without the intervention of the state legislatures, a vote from a small state would have the same efficacy and importance as [a vote] from a large one."[69] According to Madison, a government that operated without the intervention of state legislatures meant a government that operated directly on individuals as individuals and not as collectives, which made the integrity of states immaterial come time to cast votes in the general legislature, and he applied the same language the next day, May 31, when opposing the final clause of Randolph's sixth resolution, which permitted the two-branch national legislature "to call forth the force of the Union against any member of the Union failing to fulfill its duty under the articles themselves." Madison "doubted the practicability, and justice and the efficacy of it when applied to people collectively and not individually," he recorded of his own speech. "A Union of the

[67] *Records*, 1:35-6.

[68] *Records*, 1:37. "Appointment of Delegates to the Constitutional Convention," Delaware, February 3, 1787, in Jensen, *Documentary History*, 1:203.

[69] *Records*, 1:37.

States [containing such an ingredient] seemed to provide for its own destruction. The use of force against a State, would look more like a declaration of war, than an infliction of punishment."[70]

An insight into punishment as war visited the convention at the very beginning of its proceedings when revision of the Articles of Confederation was the goal, and it would appear again after the meeting disbanded and the goal became "deliberat[ion] upon a new Constitution for the United States of America" among "the people," as the first Federalist paper signed PUBLIUS had it. In Federalist No. 15 published in December, Hamilton would describe the character of the national government just as Madison and Mason had on May 30. "The evils we experience do not precede from minute or partial imperfections, but from fundamental errors in the structure of the building, which cannot be amended otherwise than by an alteration in the very elements and main pillars of the fabric," he wrote. "The great and radical vice in the construction of the existing Confederation is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of whom they consist." He continued,

> It is essential to the idea of a law, that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation. This penalty, whatever it may be, can only be inflicted in two ways: by the agency of the courts and minister of justice, or by military force; by the COERCION of the magistracy, or by the COERCION of arms. The first kind can evidently apply only to men; the last kind must of necessity, be employed against bodies politic, or communities, or States.

Hamilton wanted to convince his readers that if "the general authority is confined to the collective bodies of the communities that compose it, every breach of the laws must involve a state of war; and military execution must become the only instrument of civil disobedience. Such a state of things can certainly not deserve the name of government, nor would any prudent man

[70] *Records*, 1:54.

choose to commit his happiness to it."[71] Breaches by states were likely, he advised, because "in every political association which is formed upon the principle of uniting in a common interest a number of lesser sovereignties, there will be found a kind of eccentric tendency in the subordinate or inferior orbs, by the operation of which there will be perpetual effort in each to fly off from the common centre." If our hope is preservation, he suggested, "we must extend the authority of the union to the persons of citizens,--the only proper objects of government."[72]

In 1765, James Otis wrote in *A Vindication of the British Colonies* that while "natural persons" had some rights that emphatically disallowed donation, the rights of "artificial persons" were exhausted by those granted to them by a donor. In December 1787, Hamilton summoned a distinction between individuals and bodies politic, too, but in his turn he wrote that the difference between them lay in what punishment meant: punishment for the natural individual became war when directed toward the artificial community. So far from despising "a state of war," though, delegates to the convention to revise the system of government wrote up a plan that internalized it because the enslaved were locked inside despotic, superlatively violent, communities with their owners, and "the persons of citizens" did not exhaust the objects of governance, not hardly. Enslaved women and men *were* objects of governance, as the constitution's Fugitive Slave Clause would make clear, but direct action on them would prove, in time, not to merit a prudent man's trust. If this assessment is correct, then the battle lines the Civil War drew in the middle of the nineteenth century fell squarely along those the U.S. Constitution had preserved, or made safe, in 1787 between the enslaved and her slaveholder.

[71] *Federalist*, 90-1.

[72] *Federalist*, 92, 90.

Back in Philadelphia on June 6, Charles Cotesworth Pinckney moved "that the first branch of the national legislature be elected by the state legislatures, and not by the people." He did this after the committee of the whole had already agreed to election by the people to the same branch on May 31 in the face of hard objections from Roger Sherman of Connecticut that the people "want information and are constantly liable to be misled," and from Gerry of Massachusetts, who "had been taught by experience the danger of the levilling spirit" and thought that "the evils we experience flow from the excess of democracy."[73] Wilson, who had on May 31 proposed that "*both* branches of the national legislature ought to be chosen by the people [emphasis mine]" (and would do so again on June 7), opposed the motion, pressing the complementary points that the authority of the government ought to "flow immediately from the legitimate source of all authority," for one, and that "the government ought to possess not only 1st. the force but 2ndly. the mind or sense of the people at large," for another.[74] Wilson conceptualized the legislature as "the most exact transcript of the whole society," and in this formulation he worked from the premise of representation as a derivative of human failure: the

[73] *Records*, 1:48. Gerry would repeat this at the very end of things, on September 17, while explaining why he would not sign the completed paper. "He hoped he should not violate that respect in declaring on this occasion his fears that a Civil War may result from the present crisis of the U.S," Madison recorded of his speech that day. "In Massachusetts, particularly he saw the danger of this calamitous event—In that State there are two parties, one devoted to Democracy, the worst he thought of all political evils, the other as violent in the opposite extreme…He had thought it necessary for this & other reasons that the plan should have been proposed in a more mediating shape, in order to abate the heat and opposition of parties—As it had been passed by the Convention, he was persuaded it would have a contrary effect." *Records*, 2:647. George Mason and Edmund Randolph also refused to sign the completed paper.

[74] *Records*, 1:52, 151, 132-3. On the May 31, Sherman had opposed election of the first branch by the people and had suggested election by the state legislatures instead. In response, "Mr. Mason argued strongly for an election of the larger branch by the people," Madison recorded. "It was to be the grand depository of the democratic principle of the government." For Madison's part, he said "that if the first branch of the general legislature should be elected by the State Legislatures, and the second branch elected by the first…the people would be lost sight of altogether; and the necessary sympathy between them and their rulers and officers, too little felt," adding this: "that the great fabric to be raised would be more stable and durable if it should rest on the solid foundation of the people themselves, than if it should stand merely on the pillars of the Legislatures." *Records*, 1:48-50. Pierce heard Wilson say that "one branch of the Legislature ought to be drawn from the people, because on the great foundation of the people all Government ought to rest." *Records*, 1:57.

impossibility of the people acting collectively ("pure democracy" as Madison had it in Federalist No. 10). Mason opposed Pinckney's motion too, but for a different reason. "Under the existing Confederacy, Congress represent the *States* not the *people* of the States," he said, "their acts operate on the *States* not on the individuals. The case will be changed in the new plan of Government. The people will be represented; they ought therefore to choose the Representatives."[75] Whereas Wilson saw the legislature as a reflection of a sovereign society, Mason saw synonymy between whom the legislature represented and whom it acted on, and thought that the selection of representatives should track that.[76] The two drew a subtle but not unimportant distinction. If the people are the ones acted upon, Mason's thought went, then they should be the ones to choose the actors who touch them; sovereignty was beside the point. Representation should conform to, and capture, those whom the government acted upon, and this was necessary, indeed, good governance depended on it.[77] "Now it is proposed to form a government for men & not for societies of men or states," King heard Mason say, "therefore you should draw the representatives immediately from the people. It should be so much so, that even the Diseases of the people should be represented—if not, how are they to be cured--?"[78] William Pierce of Georgia understood, and stood up to say, that election by the people was to election by the states, as representation of "the citizens…individually" was to representation of them

[75] *Records*, 1:133.

[76] Madison concurred with Mason. See July 14, "In all cases where the General Government is to act on the people, let the people be represented and the votes be proportional." *Records*, 2:8.

[77] William Paterson of New Jersey disagreed on June 9, saying, "It has been said that if a National Government is to be formed so as to operate on the people and not on the States, the representatives ought to be drawn from the people. But why so? May not a Legislature filled by the State Legislatures operate on the people who chuse the State Legislatures?" *Records*, 1:179.

[78] *Records*, 1:142.

"collectively."[79] To make the issue plain: even were it conceded that the enslaved had no share of sovereign power, Mason's thought could have led a way toward including them in the body of the represented by hooking representation to the objects of governance. His was a path not chosen.

Pinckney's motion failed, but the difference between individuals and communities, men and societies of men, would figure again, in the tumult over whether each state should have the same or a proportional number of votes in the branches of the legislature, a question that convulsed the convention until a compromise at last succeeded on July 16. Wilson's thought about the legislature pointing back to, and reflecting, the sovereign people, Madison's thought about the immateriality of state lines in the context of voting in the first branch of the legislature, and Mason's about the possibility of a representation of and for those variably called individuals, people, men, and "the persons of citizens," circulated alongside other reflections anticipating the eradication of states altogether. "We must look beyond their continuance," Delaware's Read said on June 6.[80] "A national Government must soon of necessity swallow all of them up," an augury Wilson answered by turning inside out. "In all confederated systems antient & modern the reverse had happened; the Generality being destroyed gradually by the usurpations of the parts composing it," he responded.[81] Back on June 2, John Dickinson, delegate from Delaware, had called the division of the country into states an "accidental lucky division," and on June 7, in debate over Randolph's fifth resolution "that the members of the second branch of the National

[79] *Records*, 1:137.

[80] *Records*, 1:136. See Nathaniel Ghorum's comment on August 8, in response to Madison's worry that the 1 for every 40,000 rule in the House "will render the number of Representatives excessive." He said, "It is not to be supposed that the government will last so long as to produce this effect. Can it be supposed that this vast country including the western territory will 150 years hence remain one nation?" *Records*, 2:221.

[81] *Records*, 1:137.

Legislature ought to be elected by those of the first," Dickinson moved for replacement of the by-clause with "by the individual legislatures," describing "the preservation of the states in a certain degree of agency" as "indispensible," and likening "the proposed national system to the solar system, in which the states were the planets, and ought to be left to move freely in their proper orbits."[82] "If the state governments were excluded from all agency in the national one," he explained, "The reform would only unite the 13 small streams into one great current pursuing the same course without any opposition whatever."

Where Dickinson saw healthy opposition, "mutual checks" as Robert Yates of New York recorded, Wilson saw a hazard to the whole.[83] On Friday June 8, the committee of the whole took up Randolph's resolution on the legislative negative, which it had expanded on May 31 at the behest of Franklin to include a negative on state laws contravening the articles of union, yes, but treaties under the authority of the union, too, and Charles Pinckney moved that the reach of the negative should stretch again to include "all laws which they should judge improper."[84] Madison seconded it, putting to prose his hope that "the negative would render the use of force unnecessary"; Gerry worried that "the national legislature with such a power may enslave the states"; Sherman asked if "the cases in which the negative ought to be exercised might be defined"; and Wilson, who aimed to dismiss as "impracticable" the attempt to enumerate cases in

[82] *Records*, 1:87, 152-3. Dickinson's motion for election of the Senate by the state legislatures passed 10-0 at *Records*, 1:156. Richard Dobbs Spaight of North Carolina had suggested the same on May 31, and in his response, Randolph identified the object of their proceedings as this: "to provide a cure for the evils under which the U.S. labored." Favoring election of the Senate by the House, Randolph asserted "that in tracing these evils to their origin every man had found it in the turbulence and follies of democracy." *Records*, 1:51. Pierce heard him say "the fury of democracy." *Records*, 1:58. Pierce recorded of his own opinion: "It appeared clear to me that unless we established a Government that should carry at least some of its principles into the mass of the people, we might as well depend upon the present confederation. If the influence of the States is not lost in some part of the new Government we never shall have any thing like a national institution." *Records*, 1:59. Election of the Senate by the House "out of a proper number of persons nominated by the individual Legislatures" failed on May 31 at *Records*, 1:52.

[83] *Records*, 1:156.

[84] *Records*, 1:54.

which the legislature might exercise a negative, cut down deep to a correspondence between states and those who made them up.[85] "Federal liberty is to States, what civil liberty, is to private individuals," he said as if to teach. "And States are not more unwilling to purchase it, by the necessary concession of their political sovereignty, that the savage is to purchase Civil liberty by the surrender of the personal sovereignty which he enjoys in a State of nature." We *purchase* liberty by surrendering something of our own, he explained, and "the want of an effectual control in the whole over its parts" was one of the "vices" of the Articles of Confederation, whose correction was precisely the business of the convention. "What danger is there that the whole will unnecessarily sacrifice a part?" he asked his colleagues. "But reverse the case, and leave the whole at the mercy of each part, and will not the general interest by continually sacrificed to local interests?"[86] Rufus King heard the same differently. "In the Establishment of society every man yields his life, his liberty, property & Character to the society," he wrote down of Wilson's speech. "If we mean to establish a national government the states must submit themselves as individuals—the lawful government must be supreme."[87] For Wilson, political subjection was the key to liberty, for states as for private individuals. The letter to General Congress at the end of things, on September 17, would echo this of course. "Individuals entering into society, must give up a share of liberty to preserve the rest," that letter directed.[88] Civil society perhaps meant salvation at a cost.

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[85] Resurfaced in Hamilton's speech on June 29. *Records*, 1:477.

[86] *Records*, 1:167.

[87] *Records*, 1:172. On June 9, Yates heard him say, "So each man is naturally a sovereign over himself, and all men are therefore naturally equal. Can he retain this equality when he becomes a member of civil government? He can not." *Records*, 1:180.

[88] *Records*, 2:666.

On June 9, William Paterson of New Jersey moved to consider Randolph's second provision on proportional votes in the national legislature again, and David Brearley, from New Jersey as well, spoke first to suggest redrawing the map of the U.S. "Lay the map of the confederation on the table," Yates heard him propose, and remake it such that "all the existing boundaries be erased, and that a new partition of the whole be made into 13 equal parts."[89] Paterson afterward registered his opposition to proportional representation by pointing to the commissions that brought each of the delegates to Philadelphia in the first place and observing that none of them comprehended "the idea of a national government as contradistinguished from a federal one." "The Amendment of the confederacy was the object of all the laws and commissions on the subject," he insisted. "We have no power to go beyond the federal scheme, and if we had the people are not ripe for any other."[90] Paterson answered a question about a proposed change to the way the number of representatives in the national legislature would be decided (Randolph's resolution applied to both branches), in terms of the difference between a federal and national government. This deserves attention. At this juncture in the convention, on June 9, Paterson, who would a few days later, on June 15, propose a thoroughgoing alternative to Randolph's plan, felt moved to respond to a certain current of argument gaining speed, approaching swell. The argument went something like this: "national government" meant a government operating directly on individuals without the intermediation of states, and it depended not only on the election of representatives by the sovereign people, but on a proportional apportionment scheme among those representatives; achieved, this would prevent civil war (the whole falling prey to its parts, head to its members), as it would fashion a national

[89] *Records*, 1:177, 182. Franklin did not oppose this idea. See *Records*, 1:199.

[90] *Records*, 1:178.

supremacy out of each object of governance surrendering something of her own and submitting to punishment by the national head.[91] The idea of a national government was indeed something different from "the present system," as King heard Paterson say.[92] Perhaps, then, Mr. Brearley showed discernment and prescience both. Perhaps delegates *did* put a map of the U.S. on a table and erase old lines, putting down new, straight this time, running between the objects of governance and a yet obscure national head. Seen this way, the intellectual dishonesty and moral failing of political representation in America becomes clearer because not all objects of governance whose bodies counted toward it enjoyed it.[93]

In June of 1787, it was possible to agree that all power derived from "the people" (that is, that the people authorized the actions of the government) without agreeing about whom (or what) political representation was of and for, a disagreement that crystallized at the convention in a debate about whether each state could count as an equal voting bloc in the legislature. "If, however, we depart from the principle of representation in proportion to numbers, we will lose the object of our meeting," Wilson warned on Saturday June 9.[94] "Proportional representation…strik[es] at the existence of the lesser states," Paterson, very much at odds, said

[91] In Federalist No. 44, published on January 25, 1788, Madison wrote that without the constitution's supremacy clause, which replaced his legislative negative, the world "would have seen the authority of the whole society everywhere subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members." *Federalist*, 292.

[92] *Records*, 3:473, 474-5, 571, 529.

[93] In *American Taxation, American Slavery* (Chicago: University of Chicago Press, 2006), 7, Robin Einhorn finds that "from the beginning of the colonial era, American governments were more democratic, stronger, and more competent where slavery was a marginal institution," and "more aristocratic, weaker, and less competent where slavery was a major institution in the economy and society." "From the moment the colonies banded together to create the United States," she writes, "slaveholders realized that strong, competent, and democratic governments were the only institutions in American life that posed credible threats to slavery." This leads her to the important conclusion that "the antigovernment rhetoric that continues to saturate our political life is rooted in slavery rather than liberty." My findings and conclusions are somewhat different, as I see the new, national government erected in 1787 as a ballast for the perpetuation of the division of persons into free and slave, a perpetuation that the U.S. Constitution made possible by including slavery in its measure of what was right.

[94] *Records*, 1:183.

on the same.[95] Members on one side of the debate insisted that the cords tying the yet obscure national head to each object of governance, or to each member of the sovereign people (a subtle distinction not always perceived), required each of those cords to count toward the number of representatives (of votes in the legislature), while those on the other side said, no, we should treat states as equal units, else some states fall into the "mercy" of other states.[96] The former raised a question about whether the enslaved population ought to count, whereas the latter, which saw a state as a state as a state, did not.

By Monday June 11, the report of the committee of the whole had it that "the members of the first branch of the national legislature ought to be elected by the People of the several States," and "members of the second Branch…by the individual legislatures." To this, Wilson the same day moved that "the right of suffrage in the first branch of the national legislature" should be measured "in proportion to the whole number of white & other free Citizens and inhabitants of every age, sex & condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, except Indians, not paying taxes in each State," which passed 9-2, but only after Gerry asked why "the blacks, who were property in the South, [should] be in the rule of representation more than the cattle & horses of the North."[97] Sherman then moved for a vote on whether "each state shall have ~~an equal~~ one vote in the 2d branch," admitting that "the small states would never agree to the plan on any other principle," which barely failed 5-6, and Wilson proposed something else in response, "that the right of suffrage in the 2d branch ought to be according to the same rule as in the 1st branch,"

[95] *Records*, 1:177.

[96] *Records*, 1:437. For explicit references to "mercy," see Madison's footnote on May 28 at 1:11; Paterson on June 9 at 1:178; Martin on June 19 at 1:324; Madison on June 22 at 1:378; and Gorham on June 29 at 1:462.

[97] *Records*, 1:201, 205-6, and 208; Gerry's was the question Luther Martin heard, and reported on, in *Genuine Information*.

which passed by the same bare margin, 6-5.[98] As of June 13, then, the state of the plan for the United States government was this: members of the first branch ought to be elected by the people, members of the second branch ought to be chosen by the individual legislatures, and the number of votes in both branches ought to be in proportion to whole number of white and other free citizens and inhabitants and three-fifths of all other persons.[99] Thus stood the plan when Paterson on Friday submitted a comprehensive alternative to Randolph's, "one purely federal," he said, that aimed only to "revise, correct, and enlarge" the Articles of Confederation, keeping in tact the single-house legislature "appointed, in such manner as the legislature of each State shall direct," with one vote per state. "You see the consequence of pushing things too far," Dickinson told Madison afterward. "We would sooner submit to foreign power than submit to be deprived of an equality of suffrage, in both branches of the leg, and thereby be thrown under the domination of the large states."[100]

III.

Madison had been the one to devise the 3/5 ratio in the first place, during congressional proceedings back in 1783, and he introduced it not in the context of representation, but of taxation. Its origins, then, lay not in peace, but war; not in persons, but things; not in wealth, but poverty, vulnerability, and want—its origins lay in a "state which we are told will make a wise

[98] *Records*, 1:201-2, 228-9.

[99] *Records*, 1:225, 227.

[100] *Records*, 1:240, 242, 242n.

man mad," as a petition from the army lamenting their destitution phrased it.[101] In 1776, Article 11 of the draft of the Articles of Confederation read in Congress on July 12, had provided this:

> All charges of wars and all other expenses that shall be incurred for the common Defence, or general Welfare, and allowed by the United States ~~in General Congress~~ assembled, shall be defrayed out of a common Treasury, which shall be supplied by the several Colonies in proportion to the Number of Inhabitants of every Age, Sex and Quality, except Indians not paying Taxes, in each Colony, a true account of which, distinguishing the [white] Inhabitants ~~who are not slaves,~~ shall be triennially taken and transmitted to ~~Congress~~ the Assembly of the United States.[102]

During the debate over that provision at the end of the month, Samuel Chase of Maryland moved that only white inhabitants should count as inhabitants since slaves were "property," excluded "in fact" from the state, having no more interest in it "than cattle"; John Adams disagreed, arguing that slaves should count equally with free laborers; and Benjamin Harrison of Virginia "proposed a compromise, that two slaves should be counted as one freeman." After Thomas Lynch of South Carolina confessed that "if it is debated, whether their slaves are their property, there is an end of the confederation," and Franklin exposed a deep truth, that they could understand the difference between slaves and sheep by a very simple observation: that "sheep will never make any insurrections," Chase's amendment failed, and by November of the next

[101] On the evening of January 13, 1783, a committee of the General Congress met with deputies from the army, who, when asked "what particular steps they supposed would be taken by the army in case no pay could be immediately advanced," answered "that there was sufficient reason to dread that at least a mutiny would ensue," as "the army were verging to that state which we are told will make a wise man mad." *Madison Papers*, 6:32. Report on the memorial on January 24 at *Madison Papers*, 6:121. JM to Edmund Randolph, January 28, 1783, "Yesterday was imployed in agitating the expediency of a proposition declaring it to be the 'opinion of Congress that the establishment of general funds is essential….' The subject was brought on by the Memorial from the army." *Madison Papers*, 6:156.

[102] JCC 5:548. According to the editorial note, "white" inserted upon striking out "who are not slaves."

year the General Congress had changed the basis for deciding each state's tax bill, moving from the number of inhabitants to the value of land.[103]

As ultimately agreed to on November 15, 1777, Article 8 of the Articles of Confederation provided this:

> All charges of war and all other expenses, that shall be incurred for the common defence or general welfare, and allowed by the united states, in congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states, in proportion to the value of all land within each state, granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the united states, in congress assembled, shall, from time to time, direct and appoint.

As 1782 faded into 1783, though, Congress tried, and struggled, to figure out how land should be valued conformably to this rule, and on January 14, 1783, a committee appointed to consider the issue confessed that they "were in general strongly impressed with the extreme difficulty & inequality if not impracticability of fulfilling the article of Confederation relative to this point."[104] John Rutledge of South Carolina spoke up, too. "If the valuation of lands had not been

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[103] *The Papers of Thomas Jefferson*, ed. Julian P. Boyd (Princeton: Princeton University Press, 1950), 1:320-2; *Works of John Adams*, 2:496-8; and JCC 6:1079-80. Land substituted for heads on October 14, 1777 at JCC 9:801. For more, see *Madison Papers* 6:404n25.

[104] Madison called it "the rule of confederation…chimerical" because it required states to value their land and return that information to Congress, and states' interests, he thought, "would give a biass to their judgments." *Madison Papers*, 6:23; Hamilton shared the view.

On January 6, 1783, Congress received a memorial from Washington's army petitioning that body to send money "as soon as possible," warning that "the uneasiness of the Soldiers, for want of pay, is great and dangerous" and urging its members to understand that "any further experiment on their patience, may have fatal effects." The "address and petition," dated December 1782, is described at *Madison Papers*, 5:474-5n8. Memorial laid before Congress and referred to a grand committee at *Madison Papers*, 6:15. Madison wrote Randolph on January 7, "The deputation from the army which arrived here a few days ago has laid their grievances before Congress. They consist of sundry articles the capital of which are a defect of an immediate payment, and of satisfactory provision for completing the work hereafter. How either of these objects can be accomplished, and what will be the consequence of failure, I must leave to your own surmises." *Madison Papers*, 6:22. The committee met with the superintendent of finance, Pennsylvanian Robert Morris, on the evening of January 7, when Morris "informed them explicitly that it was impossible to make any advance of pay in the present State of the finances to the army and imprudent to give any assurances with respect to future pay until certain fund should be previously established." He also reported that "the situation of our affairs within his department was so alarming that he had thoughts of asking Congress to appoint a Confidential Committee to receive communications on that subject and to sanctify by their advice such steps as ought to be taken." *Madison Papers*, 6:18-9.

prescribed by the federal articles, the Committee would certainly have preferred some other rule of apportionment," he admitted, "particularly that of numbers under certain qualifications as to Slaves."[105] By the end of the month, after the superintendent of finance, Pennsylvanian Robert Morris, had resigned, and Wilson had moved for "the establishment of *general* funds to be collected by Congress," Congress had two possible paths to travel for raising revenue: land valuation in accordance with Article 8, which redounded to periodic, irregular, requisitions with no means of coercion in the hands of Congress for enforcement, and the creation of a general revenue uncontrolled by state governments and collectable by Congress or its direct agents. Only the former of had a specified object, and only the latter escaped hazarding revenue on

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In the grim light of news from Robert Morris (who, alongside Dickinson, had abstained from the July 2 vote in 1776 agreeing "that these United Colonies are, and, of right, ought to be, Free and Independent States,") that the confederation was basically insolvent, a special committee of Congress drawn from each state on January 10 moved "under an injunction of secrecy" to authorize the superintendent "to draw bills as the public service might require on the credit of applications for loans in Europe," which passed unanimously. "The last account of our money affairs in Europe shewed that contrary to his expectation and estimates there was 3.5 million of livres short of the bills actually drawn," Madison recorded of Morris's report, and "further draughts were indispensible to prevent a stop to the public service." See JCC 5:507; *Madison Papers*, 6:24-5, 26n2.

As Madison remembered of the decision, "however mortifying it might be to commit our credit, our faith & our honor to the mercy of a foreign nation, it was a mortification whc cd not be avoided without endangering our very existence." Some lamented "the necessity of giving so decisive a proof of our dependence upon her [France]," while others, in private conversation, regretted "the great unhappiness that during negociations for peace, when an appearance of vigor & resource were so desirable, such a proof of our poverty & imbecility could not be avoided." *Madison Papers*, 6:25; for secrecy, see 6:27n13. Solutions developed in this lowdown place, then, developed in a moment when the U. States suffered vulnerability to what another nation might grant or withhold, for she could not procure sufficient resources herself. Thus the embarrassment, and thus the longing for secrecy.

[105] *Madison Papers* 6:35, and 26n2.

Hamilton then stood up to propose that "in lieu of a reference to the valuation to the States," Congress should "class the lands throughout the States under distinctive descriptions, viz arable, pasture, wood &c. and…annex a uniform rate to the several classes according [to] their different comparative values," an idea Wilson responded to with an alternative. Obtain "returns of the quantity of land & of the number of inhabitants in the respective States," he suggested, and deduce a rule "from the combination of these data." The "So. States," however, as Madison recorded in his notes, would have none of this, registering the objection "that besides its being at variance with the text of the Confederation it would work great injustice, as would every mode which admitted the quantity of lands within the States, into the measure of comparative wealth and abilities." *Madison Papers*, 6:36. Editors note that with the exception of New York, "the ratio of land to inhabitants was measurably higher in the southern states than in those north of Chesapeake Bay," and "much land, especially the enormous acreages west of the Appalachians held by Georgia, North Carolina, and Virginia, had not been surveyed." The war-ravaged southern states were not compact. See *Madison Papers*, 6:38n9.

noncompulsory grants by states.[106] Congress needed three million dollars a year, Wilson estimated on January 29.[107]

Back in February of 1782, Robert Morris, in letters to Congress, had recommended "a land tax of one dollar for every hundred acres of land, a poll tax of one dollar on all freemen, and all male slaves between 16 and 60 (excepting such as are in the federal army, and such as are by wounds or otherwise rendered unfit for service) and an excise of one eight of dollar per gallon, on all distilled spirituous liquors," which failed to gain traction, and the day after Wilson moved for general funds, on Tuesday, January 28, 1783, Madison took up but altered Morris's template, suggesting an impost on trade, a land tax, and "a poll tax to be qualified by rating blacks some what lower than whites."[108] The two tracks—(1) valuation of land in conformably to the Articles

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[106] See *Madison Papers*, 6:150n3, 151n10.

[107] *Madison Papers*, 6:160.

On Friday, January 24, Morris had resigned, effective May 31, submitting a letter "acquaintg Congress," as Madison recorded it in his personal notes, "that as the danger from the Enemy which led him into the Department was disappearing & he saw little prospect of provision being made," he would not be the minister of "injustice." Wilson moved to assign a day for considering Morris's letter in Congress, but Madison overrode him. "Congress supposing that a knowledge of Mr. Morris' intentions wd. anticipate the ills likely to attend his actual resignation," Madison wrote, "ordered his letter to be kept secret," and then considered a report on the army's memorial. *Madison Papers*, 6:120-1. The second article of that report provided for "a settlement of account of the arrearages of pay and security for what is due," and in response, Congress the same day generated and passed this resolve:

> that the troops of the United States in common with all the creditors of the same, have an undoubted right to expect such security; and that ~~it is the duty of Congress, both from motives of justice and policy to~~ Congress will make every effort in their power to obtain from the respective states substantial funds, adequate to the object of funding the whole debt of the United States, and will enter upon an immediate and full consideration of the nature of such funds, and the most likely mode of obtaining them. (JCC 24:94-5 and *Madison Papers*, 6:121)

Wilson on Saturday moved that Congress consider the resolution at the next possible opportunity, on Monday, in order to prevent the matter "from being like many others—vox et preterea nihil [a voice and nothing more]," and on the appointed day, Monday the 27th, he expressed a grave concern about a "deficien[cy]" in the U States regarding the "cheerful payment of taxes," and suggested that it should be otherwise, "the people [in free Govts.] considering themselves as the sovereign as well as the subject; & as receiving with one hand what they paid with the other." *Madison Papers*, 6:130, 134.

[108] Morris retrospectively at JCC 22:439, and Madison at *Madison Papers*, 6:148-9. "What has been the fate of these propositions I know not," Morris wrote in August. *Madison Papers*, 6:149. The Declaration of Rights of the Constitution of Maryland had it that "the levying taxes by the poll is grievous and oppressive, and ought to be abolished." *Madison Papers*, 167n16. On January 28, Madison wrote Randolph to report that the proposition for general funds "was brought on by the memorial from the army," and that "such of the Virga. Delegates as concur in this opinion are put in a delicate situation by the preamble to the late repeal of the impost." *Madison Papers*, 6:156.

of Confederation and (2) general funds—came to a head on the last day of the calendar year, January 31, when Madison suggested that the two ideas were "in some degree connected as means of restoring public credit," and moved that Congress should turn its attention to land valuation in case, were such valuation found impractical and futile, in Hamilton's phrasing, not "efficacious," they might replace it with alternative means to ends.[109] His colleagues agreed.

Back in December of 1782, the Virginia Assembly had repealed its ratification of an amendment to the Articles of Confederation, adopted by Congress February 3, 1781, laying a five percent impost on imports, and on February 7, 1783, Edmund Randolph, then Virginia's attorney general, had written Madison from Richmond to explain the motives behind the decision.[110] "Some said, that congress ought not to raise a revenue by other means, than those, prescribed in the confederation," he reported, "that the sufferance of a deviation from that mode will ultimately lead to an assessment of the quota of Virginia, according to the poll, that a fund, thus independent of her annual grant, will capacitate the U.S. to execute schemes of territorial injury against her." The concern, to express it differently, was that a departure from periodic grants based on the value of land might give way to taxes based on a census, and if each slave in Virginia were counted as one toward that number, Virginia would have the largest bill.[111] Those dissidents did not want to count inhabitants, and any revenue plan fashioned in General Congress would fail to answer those concerns to its own detriment.[112]

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[109] *Madison Papers*, 6:174.

[110] *Madison Papers*, 6:9n2, 30nn1-3, 226n3.

[111] *Madison Papers*, 6:207, with note 3.

[112] On February 10, the committee of the whole reported on what it had managed to agree to: that the valuation of lands, buildings, and improvements should be "immediately attempted" as directed by the eighth Article of the Confederation; that "each state should be called on to return to the United States in Congress assembled, on or before the first day of Jany. next the number of acres within it granted to or surveyed for any person, and also number of buildings within it, distinguishing the dwelling houses from others and the number of its inhabitants

Madison had other measures in mind, namely "rescind[ing] the rule of apportioning pecuniary burdens according to the value of land, & to substitute that of numbers, reckoning two slaves as equal to one free man," which he entered into a footnote for notes on debates for February 26. The Report on Public Credit delivered on March 6, then, ordered to be printed for members' use, which Madison largely drafted, proposed repealing Article 8 of the Articles in favor of this, which counted slaves of a certain yet undetermined age:

> that all charges of war & other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled shall be Defrayed out of a common treasury, which shall be supplied by the several states in proportion to the number of inhabitants of every age, sex and condition, except Indians not paying taxes in each States; which number shall be triennially taken & transmitted to the U.S. Congress assd. in such mode as they shall direct and appoint; provided always, that in such numeration no persons shall be included who are ~~deemed slaves~~ bound to servitude for life according to the laws of the State to which they belong, other than such as may be between the ages of_____.[113]

When debated on March 27, Wilson assented to the repeal by remembering that "he was in Congress when the article of Confederation directing a value of land was agreed to." The decision, he said, was "the effect of the impossibility of compromising the different ideas of the

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distinguishing whites and blacks"; and that before this request for information, Congress should decide how it would use the information, that is, figure out a formula for deciding each state's individual tax bill. JCC 24:124; *Madison Papers*, 6:216n2. The next day, the 11th, Oliver Wolcott of Connecticut spoke out against it, perhaps fulfilling Madison's hopes when he questioned the validity of land valuation altogether and unearthed some numbers proposed by Morris the previous year, "declar[ing] his opinion that the confederation ought to be amended by substituting numbers of inhabitants as the rule…including in the numeration such blacks only as were within 16 and 60 years of age." *Madison Papers*, 6:215. Madison wrote to Randolph that evening to report that "after all the projects & discussions which have taken place, we seem only to have gone round in a circle to the point at which we set out." *Madison Papers*, 6:223. The committee's recommendation failed on February 17, in favor of a close substitute pushing the deadline for information back to March 1 and assigning the work to adjust quotas in a grand committee of Congress instead of a commission appointed by Congress, nominated by the states. *Madison Papers*, 6:247, first paragraph, and 258n3. JCC 24:124, 129-37. "Who could have supposed that such a measure could ever have been the offspring of a zealous and scrupulous respect for the Confederation?" Madison asked Randolph on February 18, 1783. *Madison Papers*, 6:256. As Madison wrote it up in his notes, "The whole report was agreed to with great reluctance by almost all, by many from a spirit of accommodation only, & the necessity of doing something on the subject." *Madison Papers*, 6:247.

[113] *Madison Papers*, 6:292, 313-4. See JCC 24:174 for printing.

Eastern & Southern States as to the value of Slaves compared with the Whites, the alternative in question."[114] Abraham Clark of New Jersey followed with the same. He, too, was "in Congress when this article was decided," he claimed, and he recalled that "the Southern States would have agreed to numbers, in preference to the value of land if ½ their slaves only should be included: but that the Eastern States would not concur in that proportion."[115] The men then recommitted the clause without the blank, Madison recording that "it was agreed on all sides that instead of fixing the proportion by ages…it would be best to fix the proportion in absolute numbers."[116]

On March 28, the Journal received this amendment:

> All charges of war, and all other expences that have been or shall be incurred for the common defense or general welfare, & allowed by the U.S. in Congress assembled except so far as shall be otherwise provided for shall be defrayed out of a common Treasury, which shall be supplied by the several States in proportion to the whole number of free ~~white~~ inhabitants & one half of the number of all other inhabitants of every age sex and condition except Indians not paying Taxes in each state; which number shall be triennially taken & transmitted to the U.S. in Congress assembled, in such mode as they shall direct & appoint [;]

and beginning with Madison's idea that "two blacks be rated as equal to one freeman," the following discussion unfolded, as Madison recorded it:

> Mr. Wolcot was for rating them as 4 to 3.
> Mr. Carrol as 4 to 1.
> Mr. Williamson said he was principled against slavery, & that he thought slaves an incumbrance to Society instead of increasing its ability to pay taxes.
> Mr. Higginson as 4 to 3.
> Mr. Rutlidge said for the sake of the objects he would agree to rate Slaves, as 2 to 1, but he sincerely thought 3 to 1 would be a juster proportion.
> Mr. Holten—as 4 to 3.
> Mr. Osgood said he could not go beyond 4 to 3.[117]

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[114] Actually, Wilson had left Congress about a month before. See *Madison Papers*, 404n25.

[115] Clark did not attend Congress on October 14, 1777. The Journal did not record his vote. See JCC 9:801 and *Madison Papers* 405n26.

[116] *Madison Papers*, 6:402, 405n27.

[117] *Madison Papers*, 6:406-7; JCC 24:215.

After the mathematical exercise, Madison proposed a new ratio, neither suggested nor applied before: 5 to 3, which he suggested, he recorded afterward, "in order to give a proof of the sincerity of his professions of liberality."[118] That ratio stuck, making it into the final revenue plan passed on April 18, which repealed Article 8 of the Articles and replaced the proportion clause with this: "…in proportion to the whole number of white and other free citizens and inhabitants, of every age, sex and condition…and three fifths of all other persons not comprehended in the foregoing description."[119] About the change from the value of land to the number of inhabitants as the basis for taxation, Madison wrote Randolph with the following reflection on April 8: "Deducting 2/5 of the slaves, has received a tacit sanction and unless hereafter expunged will go forth in the general recommendation, as material to future harmony and justice among the members of the confederacy. The deduction of 2/5 was a compromise between the wide opinions and demands of the Southern and other States."[120]

In the end, members to General Congress agreed to the 3/5 ratio as a rule for how free men, including slave owners, ought to pay taxes during a fitful time of financial crisis. Yet, the ratio found its way into the new plan of government penned in Philadelphia 1787 in the context of taxation *and representation*, and when it did, delegates to the convention from North Carolina who stayed until the end, William Blount, Richard Dobbs Spaight, and Hugh Williamson, wrote

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[118] See *Madison Papers*, 6:408, for Madison's record of "the arguments used by those who were for rating slaves high."

[119] *Madison Papers*, 6:425, 471; JCC 24:260. The replacement of one-half with three-fifths had failed on March 28. See *Madison Papers*, 6:427n10. Come April 1, "those who voted differently from their former votes were influenced by the conviction of the necessity of the change & despair on both sides of a more favorable rate of the Slaves," Madison wrote. "The rate of 3/5 was agreed to without opposition." *Madison Papers*, 6:425.

[120] *Madison Papers*, 6:440.

their governor. "No exertions have been wanting on our part to guard and promote the particular interest of North Carolina," they wrote Governor Caswell on September 18:

> We had many things to hope from a National Government and the chief thing we had to fear from such a Government was the Risque of unequal or heavy Taxation, but we hope you will believe as we do that the Southern States in general and North Carolina in particular are well secured on that head by the proposed system. It is provided in the 9th Section of Article the first that no Capitation or other direct Tax shall be laid except in proportion to the number of Inhabitants, in which number five blacks are only Counted as three.[121]

They thought the supple 3/5 ratio had more to do with subtraction than addition, as Madison had likewise thought in 1783.

IV.

When James Wilson spoke on June 11, 1787, he extracted the three-fifths ratio from its original home to address two kindred questions: who ought to elect representatives in the branches of the legislature, and would they elect those representatives in proportion to some measure, or should each state receive an equal number of slots (the question, "who?" tethered to the question, "how?" and vice versa). On Tuesday June 19, after Hamilton had on Monday presented his own ideas for amendments to Randolph's plan in the form of a sketch grounded in the principles that "two sovereignties cannot co-exist" and "the people are turbulent and changing; they seldom judge or determine right," Madison, with Paterson's plan before the committee, rose to his feet.[122] You want equal instead of proportional votes among the states in

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[121] North Carolina Delegates to Governor Caswell, *Records*, 3:83.

[122] *Records*, 1:287, 299. See Mason on July 17 speaking on a question about who should elect the chief magistrate. As Madison recorded it, "he conceived it would be as unnatural to refer the choice of a proper character for chief Magistrate to the people, as it would, to refer a trial of colours to a blind man." *Records*, 2:31. On the 19th, a committee of the whole also repealed a motion by Dickinson, agreed to on the 18th, to replace Paterson's first resolution: "Resolved that the articles of Confederation ought to be so revised, corrected, & enlarged, as to render the federal Constitution adequate to the exigencies of Government, & the preservation of the Union" (1:242), with: "that the articles of confederation ought to be revised and amended so as to render the Government of the U.S.

the national legislature, but either way, the subjective right of majority rule and power are not the same, he urged.[123] States can balk at paying taxes, and slaves can join forces with poor laborers in insurrection. You think the supporters of Randolph's plan are trying to put some states at the mercy of other states, or eradicate states entirely, but we are not. We are trying to create a national supremacy whose most immediate debt is to individuals and not to states.[124] The final point, as an assessment of Madison's view, is an argument of this chapter. Making government was an exercise in making debts in 1787 because the sovereign people, the source of every last drop of government's power, authorized the actions of the government, and did not do it for nothing. At the very least, the giving, or transfer, foreclosed, conceptually, the possibility of the giver thereafter living at the mercy of the ruler-servant she herself created, which in turn foreclosed the possibility of suffering government action without a share of the authority that so touched her.[125] "What is done by my order is done by myself," Rutledge said on June 21.[126]

After members of the committee of the whole decided to leave Paterson's plan behind in favor of re-reporting Randolph's on the 19th, Wilson wanted to read the Declaration of Independence aloud, and read it he did, using it as an opportunity to voice his refusal to "admit the doctrine that when the Colonies became independent of G. Britain, they became independent

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adequate to the exigencies, the preservation and the prosperity of the union." 1:282, 313. Dickinson had prepared his own plan, but he never got the opportunity to present it. See Rakove, *Original Meanings*, 63-4. Two versions of his plan can be found in James Hutson, ed., *Supplement to Max Farrand's The Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1987), 84-91.

[123] See Paterson at *Records*, 1:251, 259: "Representatives must be drawn immediately from the states, not from the people," he said. "When independent societies confederate for mutual defence, they do so in their collective capacity."

[124] *Records*, 1:314-22.

[125] Hamilton spoke of "creatures" on June 18 at *Records*, 1:290.

[126] See exchange between Rutledge and Wilson on June 21 at *Records*, 1:364-5.

also of each other."[127] King heard him say that "we are declared to be free and independent" not in the name of the states, but "in the name of the people of these states," and King himself understood a similar idea.[128] "A Union of the States is a union of the men composing them, from whence a national character results to the whole," he said the same day.

On June 25, Wilson well expressed what the accretion of questions about votes in the national legislature turned on, observing that "the general government is not an assemblage of states but of individuals for certain political purposes—it is not meant for the states, but for the individuals composing them: the individuals therefore not the states ought to be represented in it."[129] Those of whom the government is made are both those whom the government is for and those whom it ought to represent, was the argument. To say that a state *was* its individuals, was to say that individuals *made* the state, and the admission of nameability differed subtly from arguments that hooked representation to democratic sovereignty and to the objects of governance. Martin registered his opposition to this view in a three-hour disquisition on the 27th, which, according to Madison's notes, began at the opposite end. "The General Government was meant merely to preserve the State Governments: not to govern individuals," he argued. Martin told a contentious origin story that day, one that attended to Paterson's speech of June 16, which understood the derivation of proportional representation from popular sovereignty as "right in principle, but…wrong in application." "When independent societies confederate for mutual defence," Paterson had said, "they do so in their collective capacity; and then each state for those

[127] *Records*, 1:324.

[128] *Records*, 1:329.

[129] *Records*, 1:406.

purposes must be considered as one of the contracting parties."[130] Madison strongly disagreed, asserting with confidence on June 19, "We are not to consider the federal Union as analogous to the social compact of individuals," its fallacy lying in its failure to comprehend the creation of a paramount authority.[131] What Madison rejected, Paterson and Martin burrowed down into with certainty: an identity between states and the natural life of individuals, a correspondence Wilson had used on June 8 to explain why the legislative negative should suffer no bounds.[132] "States like individuals were in a state of nature equally sovereign & free," Martin said, "through their tongue only they ["the people"] can speak, through their ears, only, can hear." Anything other than an equality of votes in the legislature, therefore, would be "a system of slavery for 10 states," he believed: "that as Virginia, Massachusetts, and Pennsylvania have 42/90 of the votes they can do as they please without a miraculous Union of the other ten: that they will have nothing to do, but to gain over one of the ten to make them compleat masters of the rest."[133] Martin's was a plea for safety.[134] He concluded pithily the next day, "The General Government ought to be formed for the States, not for individuals."[135]

Commitments to "the natural rights of individuals, in perfect equality," as Yates recorded of Martin's speech, and to a sovereign people, careened in different directions in Philadelphia, and the fork in the road rose at the point where one looked out over the U.S. and chose to see, as

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[130] *Records*, 1:259. In the same vein, Martin on June 27 concluded that "citizens at large" had no right to "sanction…a new government" without "the consent of those to whom they have delegated their power for State purposes." *Records*, 1:437.

[131] *Records*, 1:315, 446.

[132] *Records*, 1:166.

[133] *Records*, 1:438.

[134] William Samuel Johnson recorded by Yates on June 29: "to preserve their existence." *Records*, 1:470. Elsworth: "The power of self-defence was essential to the small states. Nature had given it to the smallest insect of the creation. He could never admit that there was no danger of combinations among the large States." *Records*, 1:469.

[135] *Records*, 1:444. "The General Government is to Govern Sovereignties," Paterson heard him say. *Records*, 1:459.

William Samuel Johnson of Connecticut perceptively explained it on June 29, "districts of people composing one political Society" or "so many political societies."[136] If the former, respecting some kind of equality (natural equality not determinative of political liberty, Wilson knew) or popular sovereignty meant counting the heads of human beings, and if the latter, respecting some kind of equality or popular sovereignty meant counting states as states. Hamilton introduced a new tool to think with on June 29. Beginning with the observation that suffrage was not universal ("in all of them [states] some individuals are deprived of the right altogether, not having the requisite qualification of property"), he said this:

> But as States are a collection of individual men which ought we to respect most, the rights of the people composing them, or of the artificial beings resulting from the composition. Nothing could be more preposterous or absurd than to sacrifice the former to the latter. It has been said that if the smaller States renounce their equality, they renounce at the same time their liberty. The truth is it is a contest for power, not for liberty.[137]

Yates heard the speech differently, recording of Hamilton, "The question, after all is, is it our interest in modifying this general government to sacrifice individual rights to the preservation of the rights of an artificial being, called states? There can be no truer principle than this—that every individual of the community at large has an equal right to the protection of government." Because of the small states' "love of power," Hamilton charged, "inhabitants…are to surrender their rights…for the preservation of an artificial being."[138] Wilson saw the same unnatural being the next day, June 30, asking, as Yates recorded: "For whom do we form a constitution, for men, or for *imaginary beings* called states, a mere metaphysical distinction? Will a regard to *state* rights justify the sacrifice of the rights of *men*? If we proceed on any other foundation than the

[136] *Records*, 1:461.

[137] *Records*, 1:466.

[138] *Records*, 1:473.

last, our building will neither be solid nor lasting. Weight and numbers is the only true principle—every other is local, confined or imaginary."[139] Madison recorded of Wilson's conclusion, "We talk of states, till we forget what they are composed of."[140]

This point of fracture found a fascinating corollary in the difference against which the "interests in the U. States" broke in two, which Madison identified on Saturday June 30, for delegates intimated what subversive beings proportional representation would incorporate. Hamilton, a proponent of proportional votes, charged the small states with loving power, but Gunning Bedford, Jr. of Delaware, a proponent of an equality, impugned his opponents on other grounds: "her wealth and negroes." "They insist that alto' the powers of the general government will be increased, yet it will be for the good for the whole," Yates heard Bedford say, "and although the three great states form nearly a majority of the people of America, they never will hurt or injure the lesser states. *I do not, gentlemen, trust you*."[141] The convention voted on the question for allowing each state one vote in the second branch of the national legislatures on Monday July 2, and it failed 5-5, one divided, in response to which Charles Cotesworth Pinckney "proposed that a Committee consisting of a member from each State should be appointed to devise & report some compromise," which passed. The prognosis for success looked grim. "I shall not oppose the appointment, but I expect no good from it," said John Lansing, Jr. of New York. "It seems we have got to a point, that we cannot move one way or the other," said Sherman. "The world at large expect something from us," said Gerry. "If we do nothing, it

[139] *Records*, 1:482-3, 494. King referred to "the phantom of State sovereignty." *Records*, 1:489.

[140] *Records*, 1:483.

[141] *Records*, 1:500. Emphasis in original.

appears to me we must have war and confusion—for the old confederation would be at an end."[142]

The eleven-member committee met on July 3, the day before the July 4 holiday, and there they decided, at the motion of Franklin, to apply Wilson's scheme of June 11, reported in the seventh resolution of the committee of the whole on June 13, with the change that "each of the states now in the union, be allowed one member for every 40,000 inhabitants, of the description" so reported, and "that each state, not containing that number, shall be allowed one member." Moreover and crucially, the committee decided, "in the second branch of the legislature, each state shall have one vote."[143] The compromise ostensibly prioritized inhabitants as inhabitants over artificial collectives in the first branch, yet paradoxically, delegates only came to terms with the 3/5 ratio, born in war and financial paralysis, on the argument that representation *tracked not popular sovereignty, but taxation*, and that slaves therefore might count in the calculus as property instead of inhabitants. That decision, these final pages hope to show, bent knees to faith not in sovereignty or population, but in something closer to punishment, as it vested the groundwork for the new national government in a practice that lived or died by an elect's vulnerability to mercy.

Gerry reported to the convention on July 5, and on July 6, King said that he did not think the "number of inhabitants was…the proper index of ability & wealth." Butler "contended strenuously that property was the only just measure of representation," but Charles Pinckney disagreed. "The number of inhabitants appeared to him the only just & practicable rule,"

[142] *Records*, 1:519, 517, 519.

[143] *Records*, 1:523, 229.

Madison wrote in his notes of him, but "he thought the blacks ought to stand on an equality with whites."[144]

A report delivered on the 9th of July projected how many representatives each state would be allocated in the first branch, with the qualification that "the Legislature be authorized from time to time to augment ye number of Representatives…upon the principle of their wealth and number of inhabitants," and when Sherman asked to "know on what principles or calculations the Report was founded," Gorham answered, "The number of blacks & whites with some regard to supposed wealth was the general guide. Fractions could not be observed."[145] Gouverneur Morris assumed a more frank stance, confessing that "the report is little more than a guess," and when Paterson spoke up (with the rebuff of his own plan in his memory), he opened the space of a peach pit, as an American poet to be born in 1819 might describe it years later, and provided an occasion for "all things [to] enter with electric swiftness softly."[146] This is what Madison recorded of Paterson's speech, which merits reproduction in full:

> Mr. Patterson [*sic*] considered the proposed estimate for the future according to the Combined rule of numbers and wealth, too vague. For this reason N. Jersey was agst. it. He could regard negroes slaves in no light but as property. They are no free agents, have no personal liberty, no faculty of acquiring property, but on the contrary are themselves property, & like other property entirely at the will of the Master. Has a man in Virga. a number of votes in proportion to the number of his slaves? And if Negroes are not represented in the States to which they belong, why should they be represented in the General Government. What is the true principle of Representation? It is an expedient by which an assembly of certain individls. chosen by the people is substituted in place of the inconvenient meeting of the people themselves. If such a meeting of the people was actually to take place, would the slaves vote? they would not. Why then shd. they be represented. He was also agst. such an indirect encouragmt. of the slave trade; observing that

[144] *Records*, 1:541-2.

[145] *Records*, 1:559.

[146] *Records*, 1:560. Preface to Walt Whitman's *Leaves of Grass*, published for the first time in Brooklyn, New York in 1855. My edition is Walt Whitman, *Leaves of Grass: The First (1855) Edition*, ed. Malcolm Cowley (New York: Penguin, 1986), 10.

> Congs. in their act relating to the change of the 8 art: of Confedn. had been ashamed to use the term 'Slaves' & had substituted a description.[147]

Paterson's concession, that representation derived from the *impossibility* of pure democracy and was the best less-robust alternative to it, torpedoed his earlier argument about the necessity of an equality of votes in the legislature, but it did something else besides. By asserting the *impossibility* of suffrage for "negroes slaves" who "are themselves property," subjected "entirely" to "the will of the Master," he laid bare the intellectual dishonesty, indeed the ethical mistake, of counting the bodies of slaves toward the number of representatives in the first branch of the national legislature by making it plain that the phenomenon of political representation was not by them or of them or for their sakes.[148] One deemed a slave looked like property when viewed under a certain "light," Paterson said, but he failed to recognize the accidental, as opposed to essential, character of its glow.

Paterson also returned, in a circuitous way, to Mason's and Madison's talk of punishment at the very beginning of the convention, on May 30 and 31, which Madison had anticipated in his pre-convention letters to friends. Back on the 31st, Madison had "doubted the practicability, and justice and the efficacy" of force "when applied to people collectively and not individually," and had argued that "a Union of the States [containing such an ingredient] seemed to provide for its own destruction. The use of force against a State, would look more like a declaration of war, than

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[147] *Records*, 1:561. Rakove discusses the speech in *Original Meanings*, 75.

[148] Govr. Morris corroborated on July 1 at *Records*, 1:588. See King's skeletal outline of Elsworth's comment on August 7: "Why confine Elections to Freeholders—the rule is this—he who pays and is governed ought to have a right to vote—there is no justice in supposing that Virtue & Talents, are confined to Freeholders." *Records*, 2:207. See also Madison's account of Govr. Morris on the same day: "The man who does not give his vote freely is not represented. It is the man who dictates the vote. Children do not vote. Why? Because they want prudence. Because they have no will of their own. The ignorant & the dependent can be as little trusted with the public interest." *Records*, 2:203. Franklin on the same: "One British Statute excluded a number of subjects from a suffrage—These immediately became slaves—" *Records*, 2:210.

an infliction of punishment."[149] Now, Paterson suggested that war *was* the rule for the new form of government, for the groundwork (proportional representation) was going to assume, and incorporate into itself, the violence required to keep "negroes slaves" underfoot, deprived of personal and political liberty, as a share of democratic sovereignty. They would be acted upon, but not made safe—counted, while counted on to be out.

In response, Madison repeated his suggestion of June 30 about counting the number of free inhabitants, only, in the first branch and the number of free *and* slave inhabitants, both, in the second, and then King procured the key that would allow slaves to enter the formula not as inhabitants, but as property, by explicitly invoking the revenue plan of April 18, 1783. "Eleven out of 13 of the States had agreed to consider Slaves in the apportionment of taxation," he said, "and taxation and representation ought to go together."[150] The question "for agreeing to include 3/5 of the blacks," as Madison recorded it, failed on July 11 ("Are they ["blacks"] admitted as Citizens?" or "Are they admitted as property?" Wilson asked), and on July 12, Gouverneur Morris moved to amend the provision giving the legislature power to alter the number of representatives in the first branch at future junctures "upon the principle of their wealth and number of inhabitants," so that it included a "proviso that taxation shall be in proportion to representation." He quickly adjusted this by inserting "direct" before "taxation," and the motion passed unanimously, though the same day he confessed that "he verily believed the people of Pena. will never agree to a representation of Negroes."[151]

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[149] *Records*, 1:34, 54.

[150] *Records*, 1:562.

[151] 4-6 vote on July 11. *Records*, 1:591-3.

Wilson, then, the one who had introduced the 3/5 ratio into debate in the first place on June 11, and now, indebted to King and Morris, wrote the prose whose content would reach the final paper on September 17, observing "that less umbrage would perhaps be taken against an admission of the slaves into the Rule of representation, if it should be so expressed as to make them indirectly only an ingredient in the rule, by saying that they should enter into the rule of taxation: and as representation was to be according to taxation, the end would be equally attained."[152] When his motion passed on the 12th, the report on representation in the first branch of the national legislature became "proportioned according to direct taxation," with the added provision that "a census be taken within two years from the first meeting of the Legislature of the U. States, and once within the term of every __ years afterwards of all the inhabitants of the U.S. in the manner and according to the ratio recommended by Congress in their Resolution of April 18, 1783; and that the Legislature of the U.S. shall proportion the direct taxation accordingly."[153] Making the rule of representation an extension of the rule of taxation cleared away the intellectual space for delegates to feel comfortable counting slaves, but when Randolph on the 13th moved to erase the word "wealth" from the language reported on the 9th to guide the legislature in altering the number of representatives in the future, leaving only "upon the principle of their number of inhabitants," Morris balked, perceiving that "if Negroes were to be viewed…as property, the word wealth was right, and striking it out would produce the very inconsistency which it was meant to get rid of." Randolph's motion passed anyway, nine ayes, zero noes, and one divided.[154]

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[152] *Records*, 1:595.

[153] *Records*, 1:591-597.

[154] *Records*, 1:606.

On July 16, the report of July 5, as amended, succeeded, but a week later, on Tuesday, July 24, Daniel Carroll of Maryland "took occasion to observe that he considered the clause declaring that direct taxation on the States should be in proportion to representation, previous to obtaining an actual census, as very objectionable, and he reserved to himself the right of opposing it, if the Report of the Committee of detail should leave it in the plan," a concern to which Morris responded with an admission of regret. He, too, Madison recorded, "hoped the committee would strike out the whole of the clause proportioning direct taxation to representation. He had only meant it as a bridge to assist us over a certain gulph; having passed the gulph the bridge may be removed." To his record of Morris's comment, Madison attached a footnote at "a bridge": "The object was to lessen the eagerness on one side, & the opposition on the other, to the share of Representation claimed by the S. States on account of the Negroes."[155] Morris's confession did not move, and the bridge stayed in place, reaching the report of the committee of detail in section 4 of Article 4 and section 3 of Article 7, reported on Monday August 6. The prose of the report provided this:

> [Art. 4. Sect. I. The members of the House of Representatives shall be chosen every second year, by the people of the several States comprehended within this Union…] Sect. 4. As the proportions of numbers in [the] different states will alter from time to time…the Legislature shall, in each of these cases, regulate the number of representatives by the numbers of inhabitants, according to the provisions herein after made, at the rate of one for every forty thousand.
>
> [Art. 7.] Sect. 3. The proportions of direct taxation shall be regulated by the whole number of white and other free citizens and inhabitants, of every age, sex and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, (except Indians not paying taxes) which number shall, within six years after the first meeting of the Legislature, and within the term of every ten years afterwards, be taken in such manner as the said Legislature shall direct.

[155] *Records*, 2:106.

> [Art. 7.] Sect. 4. No tax or duty shall be laid by the Legislature on articles exported from any State; nor on the migration or importation of such persons as the several states shall think proper to admit; nor shall such migration or importation be prohibited." [156]

An equality of votes in the second branch remained firm too, the first section of the Article 5 providing, "The Senate of the United States shall be chosen by the Legislature of the several States. Each Legislature shall chuse two members…Each member shall have one vote."[157]

The convention took up the fourth section of Article 4 on Wednesday of the same week, and when it did, Hugh Williamson of North Carolina moved, for the sake of clarity, to replace "according to the provisions herein after made" with "according to the rule hereafter to be provided for direct taxation."[158] At this, King stood up to say that "the admission of slaves into the rule of representation…was a most grating circumstance in his mind, & he believed would be so to a great part of the people of America." In it, together with section 4 of Article 7, he said, "there is so much inequality & unreasonableness…that the people of the N[orthern] States could never be reconciled [to it]." Raising the specter of "internal sedition" and referring to the Atlantic slave trade as "introduce[ing] a weakness which will render defence more difficult," King announced that "he never could agree to let them [slaves] be imported without limitation & then be represented in the National Legislature…either slaves should not be represented, or exports should be taxable."[159] King was mistaken on at least one count, however, as Paterson and Gouverneur Morris had likewise been before: the bridge connecting representation to taxation ensured that representatives in the first branch of the legislature did not represent slaves, but

[156] *Records*, 2:178, 182-3.

[157] *Records*, 2:179.

[158] *Records*, 2:219.

[159] *Records*, 2:220.

slave owners, as Sherman understood, correcting him, "It was the freemen of the Southern States who were in fact to be represented according to the taxes paid by them, and the Negroes are only included in the Estimate of the taxes."[160] Morris then spoke up, renouncing again the sidelong bridge he had helped build and asking again for its elimination. "Let it not be said that direct taxation is to be proportioned to representation," he pleaded, and let us insert the word "free" before the word "inhabitants" in Article 4, section 4. "Much," he said, "would depend on this point," continuing, "What is the proposed compensation to the Northern States for a sacrifice of every principle of right, of every impulse of humanity. They are to bind themselves to march their militia for the defence of the S. States; for their defence against those very slaves of whom they complain." Madison recorded of Morris's conclusion, "He would sooner submit himself to a tax for paying for all the Negroes in the U. States than saddle posterity with such a Constitution."[161] Morris's motion failed by an overwhelming margin: 1-10.

On August 20, the convention unanimously struck "white & other" from "the proportions of direct taxation shall be regulated by the whole number of white and other free citizens and inhabitants…" in Article 7, section 3, "as superfluous" ("free" assuming "white" to exclusion of "black"), and after the convention agreed to Article 7, section 3, 10 to 1, on August 21, Martin moved to alter section 4 of the same "so as to allow a prohibition or tax on the importation of slaves," explaining his view that "as five slaves are to be counted as 3 free men in the apportionment of Representatives…2 slaves weakened one part of the Union which the other parts were bound to protect."[162] Considering this on the 22nd, Sherman asserted that the

[160] *Records*, 2:223.

[161] *Records*, 2:223.

[162] *Records*, 2:364.

importation of slaves was a "right" that "the states were now possessed of," which "the public good did not require it to be taken from them."[163] Charles Pinckney understood the importation of persons the same way, warning that "an attempt to take away the right as proposed will produce serious objections to the Constitution which he wished to see adopted."[164] Rutledge did too, explaining, "If the Convention thinks that N.C; S.C. & Georgia will ever agree to the plan, unless their right to import slaves be untouched, the expectation is vain. The people of those States will never be such fools as to give up so important an interest."[165] Charles Cotesworth Pinckney then conceded "that slaves might be made liable to an equal tax with other imports" and moved to commit the clause that way, which succeeded, and on the 24th William Livingston of New Jersey reported from committee a replacement for "nor on the migration or importation of such persons as the several states shall think proper to admit; nor shall such migration or importation be prohibited," which had it that:

> The migration or importation of such persons as the several States now existing shall think proper to admit, shall not be prohibited by the Legislature prior to the year 1800, but a tax or duty may be imposed on such migration or importation at a rate not exceeding the average of the duties laid on imports.[166]

Charles Cotesworth Pinckney moved to replace 1800 with 1808 on the 25th, which passed, and Morris on the same day moved to replace "importation of such persons as the several States now existing shall think proper to admit" with "importation of slaves into N. Carolina, S—Carolina & Georgia." In response, Mason expressed that he "was not against using the term 'slaves,'" and Sherman disclosed that he "liked the description better than the terms proposed, which had been

[163] *Records*, 2:369.

[164] *Records*, 2:371.

[165] *Records*, 2:373.

[166] *Records*, 2:373, 400.

declined by the old Congress & were not pleasing to some people," but Morris promptly withdrew the motion.[167]

For some, the "tax or duty" had disturbing implications. Sherman had expressed opposition to the tax on imported slaves on August 22 "because it implied they were property," precisely what the bridge in the representation clause had been designed to obscure, and he said the same on the 25th.[168] Sherman "was against this 2d part," Madison recorded, "as acknowledging men to be property, by taxing them as such under the character of slaves." Madison shared the concern, thinking "it wrong to admit in the Constitution the idea that there could be property in men. The reason of duties did not hold, as slaves are not like merchandise, consumed. &c." Nathaniel Gorham of Massachusetts responded to all of this cannily. "Consider the duty, not as implying that slaves are property, but as a discouragement to the importation of them," he counseled.[169] After "but a tax or duty may be imposed on such migration or importation at a rate not exceeding the average of the duties laid on imports" gave way to "but a tax or duty may be imposed on such importation not exceeding ten dollars for each person," the clause, as amended, passed.[170]

The report of the plan, nearing completion now, counted slaves for the purpose of representing their owners, taxed slaves as imported goods, and would soon authorize their capture too, in effect deputizing lay agents the country over. On August 28, the convention agreed to Article 15 from the report, which had it that "any person charged with treason, felony, or high misdemeanor in any state, who shall flee from justice, and shall be found in any other

[167] *Records*, 2:415-6.

[168] *Records*, 2:374.

[169] *Records*, 2:416.

[170] *Records*, 2:409.

state, shall, on demand of the executive power of the state from which he fled, be delivered up and removed to the state having jurisdiction of the offence."[171] They did so after a brief debate in which Butler put forward a motion "to require fugitive slaves and servants to be delivered up like criminals," too, which Sherman said he "saw no more propriety in" than "the public seizing and surrendering…a horse," and Butler withdrew "in order that some particular provision might be made apart from this article."[172] Butler moved for and won a change on the 29th, when he moved to insert the following after Article 15:

> If any person bound to service or labor in any of the U--States shall escape into another state, he or she shall not be discharged from such service or labor in consequence of any regulations subsisting in the state to which they escape; but shall be delivered up to the person justly claiming their service or labor.

The convention agreed to it unanimously, and the committee of style reported it this way on September 12 in its digest of the entire plan:[173]

> No person legally held to service or labour in one state, escaping into another, shall in consequence of regulations subsisting therein be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labour may be due [;][174]

On the 15th Madison recorded, in the passive, that "legally" gave way to "under the laws thereof," receiving a place after the word "state." This change, he wrote, made "in compliance with the wish of some who thought the term [legal] equivocal, and favoring the idea that slavery was legal in a moral view—."[175]

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[171] *Records*, 2:187-8.

[172] *Records*, 2:443.

[173] *Records*, 2:453-4.

[174] *Records*, 2:601-2. Final at 2:662.

[175] *Records*, 2:628.

The committee of style reported the representation clause this way on the 12th, folding what had been section 3 of Article 7 (on the powers of congress) into Article I for the first time, and changing "the whole number of free citizens and inhabitants" into "the whole number of free persons":[176]

> Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to servitude for a term of years, and excluding Indians not taxed, three fifths of all other persons…[177]

Randolph did not like "servitude," thinking it "to express the condition of slaves," and suggested replacing it with "service" instead, which meant, he said, "the obligations of free persons."[178] His motion passed. Dickenson and Wilson then put forward a final motion to tear down the bridge between direct taxes and representation, and Morris (to whom the final report was largely indebted: "that instrument was written by the fingers, which write this letter," he wrote Timothy Pickering on December 22, 1814) answered with the truth about which he had already confessed sore regret.[179] "The insertion here was in consequence of what had passed on this point," he said, "in order to exclude the appearance of counting the Negroes in the Representation—The including of them may now be referred to the object of direct taxes, and incidentally only to that of Representation." Their motion failed 3-8, and the section, together with all the provisions it had influenced, departed Philadelphia on September 17, under a preamble claiming the paper's ordainment and establishment by "THE PEOPLE of the United States."[180]

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[176] Compare *Records* 2:183 to 571 to 590.

[177] *Records*, 2:590.

[178] *Records*, 2:607.

[179] Gouverneur Morris to Timothy Pickering, *Records*, 3:419.

[180] *Records*, 2:607-8, 651.

V.

In 1787, men guessed that government's most immediate, and most profound, debt went to the sovereign people, its author. This, some said, would be its salvation. The men who fashioned constitutional arrangements in 1787, however, divined authors out of the owners of slaves, and the federal government became a national government on the backs of, to borrow Madison's phrasing, "all persons and things, so far as they are objects of lawful government," in a tempest in which those diverse objects—slave, as free—supplanted sovereignty and citizenry as the solid base. The national government constituted in 1787 operated on those it denied a share of its authority, internalizing the violence required to keep ownership safe. If one of the goals of the paper finished on September 17 was to "insure domestic Tranquility," then it failed on its own terms. The hope of a good, enduring scheme of government was lost at the moment delegates chose to count slaves as persons in whom the rights of others lay.

The United States Constitution, America's fundamental expression of what would count as right and what wrong in its jurisdiction, adopted the ancient idea, expressed on the parchment of *Bracton* in the thirteenth century, that all "persons" were either free or slave, confirming this division as perfectly licit. Sure that the enslaved objects of governance and of law had no share of sovereign power whatsoever, framers abandoned them to the caprice of the free, but in this they were mistaken.

A while before Philadelphia, between 56 and 64 CE, a philosopher named Seneca, raised and educated in Rome, asked if a slave could do his master a favor since a favor was "something done by someone in a position not to do it" and a slave, to all appearances, "just obeys orders." Yes, Seneca answered, a slave could do his master a favor because "what matters is the state of

mind, and not the status, of whoever bestows it." He then continued in prose so glittering, it rivaled Franklin's:

> No one is barred from being good. Virtue is open to everyone, admits everyone, invites everyone…What safety could there be against sudden changes, what grandeur could the mind promise itself, if its sure virtue were transformed by a change of fortune? A slave can be just, he can be brave, he can have greatness of mind. So he can also do a favor. For that, too, belongs to virtue. Slaves can indeed do their masters a favor—so much so that often the very existence of their masters has depended on their favor.[181]

Seneca understood that slavery was an unnatural condition that did not affect the victim's mind, which remained, in his view, high and grand and inviolable. If the men who met in Philadelphia to revise the Articles of Confederation inherited any fragment of this wisdom, they perceived that the survival of masters depended on the choice of their human slaves not to slaughter them. So construed, the slave held the master who held the slave, and ultimate power lay elsewhere than has been supposed.

[181] *On Favors* in Seneca, *Moral and Political Essays*, ed. and trans. John M. Cooper and J.F. Procope (New York: Cambridge University Press, 1995), 256.

Chapter the Fifth

The Sovereign Slave

Canst thou draw out Leviathan with an hooke? or his tongue with a cord which thou lettest downe? Canst thou put an hook into his nose? or bore his jaw through with a thorne? Will he make many supplications unto thee? Will he speake soft words unto thee? Will hee make a covenant with thee? Wilt thou take him for a servant forever?

Job 41:1-4

We began as slaves, St. George Tucker, a judge and law teacher in Virginia, born in Bermuda in 1752, suggested of the American people in 1796, just before the eighteenth century gave way to the nineteenth. It sounded something like the insight an American novelist, born in New York City in 1819, would derive from observing commonplace, workaday indignities half a century later, in 1851, when he put the following into the mouth of a sailor called Ishmael: "Who ain't a slave? Tell me that."[1] Printed as *A Dissertation on Slavery: With a Proposal for the Gradual Abolition of It, in the State of Virginia* (1796), a pamphlet that Philadelphia printers William Young Birch and Abraham Small would reproduce as "Note H" in the second volume of Tucker's annotated and appended edition of William Blackstone's *Commentaries* in 1803, the essay intended, Tucker explained to his readers, "to demonstrate the incompatibility of a state of slavery with the principles of our government, and of that revolution upon which it is founded."

In it he recited "the first general division of persons, in respect to their rights,…into freemen and slaves" as wisdom from Justinian (a misunderstanding), and then summoned a thought from *The Spirit of the Laws* (1748), written by French political philosopher Montesquieu, that it could happen over the course of the human events "that the constitution of a state may be free, and the subject not so," or the "subject free, and not the constitution of the

[1] Herman Melville, *Moby Dick; or, The Whale*, published in New York on November 14, 1851, and earlier, in London, on October 18, 1851, as simply *The Whale*.

state."[2] Allowing that the constitution of a state, like a subject, could be free or not, the essay unfolded by distinguishing "the nature of slavery," as he put it, into "a threefold aspect": political, civil, and domestic. Deprivation of "the right of being governed by it's own laws," or political slavery, "was the state of united America before the revolution," he asserted, while "that condition in which one man is subject to be directed by another in all his actions" made domestic slavery what it was, but the third aspect, civil slavery, he wrote, defined as the restraint of natural liberty by the laws of a state "further…than is necessary and expedient for the general advantage," found a home not only "in all governments, however constituted, or by what description soever denominated, wherever the distinction of rank prevails, or is admitted by the constitution," but "in the persons of our *free* negroes and mulattoes."[3] It was possible, then, for free women and men, in a free state, to suffer slavery *as free women and men*, Tucker thought, because some women and men, though free, carried the condition inside of them. On the eve of the dissolution of a young commonwealth fifty-four years later, the Supreme Court of the United States would perceive the same.

Slavery, in one or more of its tripartite aspects, was a possibility that lay in wait for, and could affect, anyone and everyone in that essay—incorporated into the first law book in America to rival Blackstone's in ambition and stature, Tucker's *Blackstone's Commentaries: With Notes*

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[2] St. George Tucker, *Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* (Philadelphia: William Young Birch and Abraham Small, 1803; Union, New Jersey: Lawbook Exchange, 1996), 2: Appendix, 32, 35. Citations refer to the modern reprint. That ancient division captured all persons broadly and not narrowly in respect only to rights. Tucker had his eye on the first chapter of Montesquieu's twelfth book, "On the laws that form political liberty in relation to the citizen," where Montesquieu had written this: "It can happen that the constitution is free and the citizen is not. The citizen can be free and the constitution not. In these instances, the constitution will be free by right and not in fact; the citizen will be free in fact and not by right. Only the disposition of the laws, and especially of the fundamental laws, forms liberty in its relation to the constitution. But, in the relation to the citizen, mores, manners, and received examples can give rise to it and certain civil laws can favor it, as we shall see in the present book." Montesquieu, *The Spirit of the Laws*, trans. and ed. Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone (New York: Cambridge University Press, 1989), 187. For more on the free commonwealth, see David Armitage, *Civil Wars: A History in Ideas* (New York: Knopf, 2017), 47.

[3] Tucker, *Blackstone's Commentaries*, 2: Appendix, 35, 38, 36.

and Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia, published for the first time in Philadelphia in 1803—but slavery's progression, shrewd and discreet, had yielded in America for the relief of all but an elect.[4]

Independence from Great Britain had eliminated political slavery, Tucker wrote, and the writing of state constitutions that did not admit "the distinction of rank" had eliminated civil slavery, but domestic slavery tortured the "the wretched sons of Africa" to the exclusion of "Europeans, and their descendants," he admitted, leaving a civil trace "in the persons of" the free.[5] Printed as an appendix to Tucker's commentaries on Blackstone's first book on the rights of persons, the essay took "a view of such laws, only, as regard slaves, as a distinct class of *persons*," as opposed to that "merely of *property*," he explained, and he pointed to Virginia's Declaration of Rights of 1776 to try to demonstrate that "a state of slavery" was "perfectly irreconcilable" and "diametrically opposite" to "the principles of a democracy" and "maxims of government," but he wrote down the declaration's prose incorrectly.[6] The final draft of that declaration, which had been agreed to on June 12, 1776, and incorporated into the Constitution of Virginia as the Bill of Rights in the same year, had specified that among all that pertained to

[4] Civil slavery "may affect the whole society," Tucker wrote, look at Europe before the French Revolution, and look at the American colonies before they became independent states. It may crop up "whenever there is an inequality of rights, or privileges, between the subjects or citizens of the same state, except as necessarily results from the exercise of public office," and it may be found in any government, "however constituted, or by what description soever denominated, wherever the distinction of rank prevails, or is admitted by the constitution." Tucker, *Blackstone's Commentaries*, 2: Appendix, 36. "The first introduction of negroes into Virginia happened in the year 1620," he stated, and "we have now 300,000 [292,427] slaves among us…Milo acquired strength enough to carry an ox, by beginning with the ox while he was yet a calf. If we complain that the calf is too heavy for our shoulders, what will the ox-be?" Tucker, *Blackstone's Commentaries*, 2: Appendix, 80-1.

[5] Tucker, *Blackstone's Commentaries*, 2: Appendix, 36, 31, 36.

[6] Tucker, *Blackstone's Commentaries*, 2: Appendix, 54, 34. "My intention, at present is, therefore, to take a view of such laws, only, as regard slaves, as a distinct class of *persons*," he wrote, "whose rights (if indeed they possess any), are reduced to a much narrower compass, than those, of which we have been speaking before" (2: Appendix, 54).

the good people of Virginia and their posterity as the "basis and foundation of government" was the principle "that all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity…," but Tucker wrote that the principle was something else: "that all men are, by nature equally free, and independent, and have certain rights of which they cannot deprive or divest their posterity…," which looked more like George Mason's first draft of the declaration from May 1776, which had not yet received the entry into society qualification.[7]

The visitation of certain inviolable rights on naturally free and independent men Tucker distilled into the terms of the Golden Rule. In the face of unequal advantages and endowments of body and mind, Tucker wrote, a man ought "to practise the precepts of the law of nature to those who are in these respects his inferiors, no less than…his inferiors…practice them towards him[,] [s]ince he has no more right to insult them, then they have to injure him." "It would be hard to reconcile reducing the negroes to a state of slavery to these principles," he concluded, "unless we first degrade them below the rank of human beings, not only politically, but also physically and morally."[8] Learning "to regard them as our fellow men, and equals, except in those particulars

[7] Tucker, *Blackstone's Commentaries*, 2: Appendix, 54. Mason's first draft provided this: "That all Men are born equally free and independent, and have certain inherent natural Rights, of which they can not by any Compact, deprive or divest their Posterity; among which are the Enjoyment of Life and Liberty, with the Means of acquiring and possessing Property, and pursueing and obtaining Happiness and Safety." *The Papers of George Mason*, ed. Robert A. Rutland (Chapel Hill: University of North Carolina Press, 1970), 1: 277. For the final draft, see *Papers of George Mason*, 1:287, and Francis Newton Thorpe, *The Federal and State Constitutions* (Buffalo: William S Hein & Co., 2002), 7:3813. In *Aldridge v. Commonwealth* (1824), the General Court of Virginia held that a state statute of 1823 making grand larceny punishable by enslavement when committed by "any free negro or mulatto" did not abrogate the state's Declaration [Bill] of Rights. About it, Judge Dade wrote, "it is undeniable that it never was contemplated, or considered, to extend to the whole population of the State. Can it be doubted, that it not only was not intended to apply to our slave population, but that the free blacks and mulattoes were also not comprehended in it?" 2 Va. Cas. 447, 449 (1824).

[8] Tucker, *Blackstone's Commentaries*, 2: Appendix, 54-5. The Golden Rule, discussed in the first chapter of this dissertation, derived from Matthew 7:12 of the New Testament, which the King James Version of the Bible, published for the first time in 1611, translated as, "Therefore all things whatsoever ye would that men should do to you, do ye even so to them: for this is the law and the prophets."

where accident, or possibly nature, may have given us some advantage," Tucker wrote, was simply to "admit the evidence of moral truth."[9]

Tucker's transcription error of Virginia's Declaration of Rights, though, disclosed that he misunderstood, or chose to avoid, a subtlety in the course of human events in America, for it was the case in the United States that denying someone's position as "fellow men, and equals" was not necessary for denying someone security in life, liberty, property, happiness, and safety.[10] Indeed, Tucker's discussion of the remnant of slavery in "our free negroes and mulattoes" confessed that obtaining liberty was insufficient for enjoying liberty: the United States Constitution called it perfectly licit to divide "persons" into free and slave, and in so doing, that paper unambiguously confirmed that in America, liberty and slavery, both, were human conditions.

Emancipation, Tucker took care to write in the same essay, awarded the liberty of loco-motion only, remove "from personal restraint, or corporal punishment, by a master," but did not succeed in "confer[ring] the rights of citizenship on the person emancipated," or "admitting them to a full participation of all our civil and social rights."[11] If once a slave, then presumptively denied the privilege of claim-making, was the idea. "Many persons who regret domestic slavery, contend that in abolishing it, we must also abolish that scion from it, which I have denominated civil slavery," he observed. "But have not men when they enter into the state of society, a right to admit, or exclude any description of persons, as they think proper?"[12] Natural freedom and

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[9] Tucker, *Blackstone's Commentaries*, 2: Appendix, 55.

[10] The "gift of God," Thomas Jefferson had once recorded. Thomas Jefferson, *Notes on the State of Virginia*, ed. William Peden (Chapel Hill: University of North Carolina Press for the Institute of Early American History and Culture, 1955), 163 (Query 18), cited at Tucker, *Blackstone's Commentaries*, 2: Appendix, 69n.

[11] Tucker, *Blackstone's Commentaries*, 2: Appendix, 68, 76.

[12] Tucker, *Blackstone's Commentaries*, 2: Appendix, 75.

natural equality were absolutely incompatible with possession of "a property in an unborn child," he wrote, arguing, by way of reason, that "no man can in reality be *deprived* of what he doth not possess," but the yawning chasm between what might have been true in nature, on the one hand, and the fact of property in unborn children in the commonwealth of Virginia, on the other, did not require, for Tucker, an elimination of slavery civil because it was also true that free negroes carried the condition of slavery inside of them.[13] If it was correct that personal subjection had force enough to change the nature of freedom in this way, then Tucker's insight pried open the provocative possibility that the root of the root of communal life, born in human likeness, took the form not of a free man, but of a woman or man enslaved.[14]

In a speech in Springfield, Illinois, on June 16, 1858, just seventy years after New Hampshire returned an answer to become the requisite ninth state convention to ratify the U.S. Constitution on June 21, 1788, Abraham Lincoln, a forty-nine year old lawyer, born in Kentucky in 1809, found a line from the Gospel of Matthew when he spoke at the close of the Republican state convention that had nominated him as the party's candidate for the United States Senate to oppose incumbent Democrat Stephen A. Douglas. "'A house divided against itself cannot stand,'" he said to a crowd gathered tightly into the Representatives' Hall of the Illinois State House. "I believe this government cannot endure, permanently half slave and half free…it will

[13] Tucker, *Blackstone's Commentaries*, 2: Appendix, 80.

[14] I allude to Paul's Letter to the church at Philippi, committed to the King James Bible in Philippians 2:5-8: "Let this mind be in you, which was also in Christ Jesus: Who, Being in the form of God, thought it not robbery to be equal with God: But made himself of no reputation, and took upon him the form of a servant, and was made in the likeness of men: And being found in fashion as a man, he humbled himself, and became obedient unto death, even the death of the cross." St. Jerome captured the thought more accurately in the Vulgate. Paul did not write that Jesus assumed the shape of a servant. He wrote that Jesus assumed the shape of a slave, *servus* in the Latin. See here: "hoc enim sentite in vobis quod et in Christo Iesu / qui cum in forma Dei esset non rapinam arbitratus est esse se aequalem Deo / sed semet ipsum exinanivit formam servi accipiens in similitudinem hominum factus et habitu inventus ut homo / humiliavit semet ipsum factus oboediens usque ad mortem mortem autem crucis."

become all one thing, or all the other."[15] The universalization of licit slaveholding, he feared, was the "the logical conclusion" of the United States Supreme Court's decision in *Dred Scott v. Sandford*, announced in March of the previous year, which had, in his analysis, taken a menacing step toward an outright constitutional prohibition against outlawing slavery in any of the states, declaring, in his words, "the perfect freedom of the people, to be no freedom at all."[16]

Authors of the canonized books of Matthew, Mark, and Luke in the New Testament of the Christian tradition's Holy Bible, composed between 70 and 85 CE, had recorded the story from which Lincoln extracted the line, a thought, and they had captured it as an expression Jesus used to chastise some Pharisees for identifying him as Beelzebul, the ruler of the demons, for casting out unclean spirits from a blind and mute demoniac on the Sabbath. "How can Satan cast out Satan?" Jesus had replied in the narrative accounts. "If a kingdom be divided against itself, that kingdom cannot stand. And if a house be divided against itself, that house cannot stand. And if Satan rise up against himself, and be divided, he cannot stand, but hath an end." One cannot attack oneself without destroying oneself, was the lesson, and indifference to the choice between God, through whom Jesus claimed to exorcise, and Satan, was impossible. "He that is not with me is against me," Jesus said, "and he that gathereth not with me scattereth."[17] As the slender New Testament accounts told it, Pontius Pilate, the governor under Tiberius Caesar of Judea, a Roman province, from 26 to 36 CE, would later charge Jesus, a Jew, with "perverting the

[15] *The Collected Works of Abraham Lincoln*, ed. Roy P. Basler (New Brunswick, New Jersey: Rutgers University Press, 1953), 2: 461.

[16] *Works of Abraham Lincoln*, 2: 464-5.

[17] For the story, see Matthew 12:22-30; Mark 3:22-27; and Luke 11:14-23. See also the *Book of Common Prayer* (1662), gospel lesson for the third Sunday in Lent. Brian Cummings, ed., *The Book of Common Prayer: The Texts of 1549, 1559, and 1662* (New York: Oxford University Press, 2011), 298.

people" in insurrection against the Roman order, and Jesus would, at a crowd's behest, be hung on a tree at Golgotha, the place of the skull, outside Jerusalem's walls, as a slave crowned king.[18]

Concern about the opening of a wide and easy way to a government over all free, or all slave, states and territories was a thought Lincoln would go on to express time and again in his oratory, as this chapter will discuss below, but the concern did not begin and end with him, for it had stoked the fire of debate about the extraterritorial reach of slavery for both sides of that controversy for some time. "Bear in mind that the first battle is to be fought in this District [of Columbia] and in the Territories," United States Senator John C. Calhoun of South Carolina said on January 10, 1838, in debate over six resolutions he had introduced to "test the feelings and opinion" of the Senate on the subject of domestic slavery.[19] As Calhoun had confessed the previous day, "Attacking slavery in this District and the Territories, was to attack and destroy it in the States; and is as much a direct attack as firing a train to blow up a magazine would be an attack on the magazine itself."[20] For now, though, it serves to say that one part of Lincoln's many-part fear about the specter of such a leveling-out was his understanding that a half-slave and half-free Union was a violation of framers' intentions in 1787, a point on which he and his opponent for the Senate in the election of 1858 disagreed. In the first of seven peripatetic debates between Lincoln and Douglas between August 21 and October 15, 1858, which would convene all over Illinois, from Ottawa to Freeport to Alton, Douglas took aim at Lincoln's aversion to a government "divided into free and slave states" by arguing that it was the same as saying "that

[18] Christ was a descendant of King David. "The kingdom of the Jews was due to him [Christ] by hereditary right derived from David," Hobbes wrote in *On the Citizen*. See Thomas Hobbes, *On the Citizen*, ed. and trans., Richard Tuck and Michael Silverthorne (New York: Cambridge University Press, 1998), 129. Executioners placed a crown of thorns on Jesus's head in order to mock him.

[19] Resolutions introduced on December 27, 1837.

[20] *The Papers of John C. Calhoun*, eds. Shirley Bright Cook and Alexander Moore (Columbia, S.C.: University of South Carolina Press for the South Carolina Society, 1981), 14: 83, 73.

this Government cannot endure permanently in the same condition in which it was made by its framers," since "the American Republic," Douglas observed, had been divided from the moment of its conception.[21] Douglas believed that the primary intent of the framers on the question of slavery in 1787 lay in leaving to each state a perfect freedom "to do as it pleased on the subject" within its own limits, while Lincoln understood the past differently, arguing that the primary intent of framers, instead, lay in arresting slavery's spread and placing it "in the course of ultimate extinction."[22] "It is precisely all I ask of him in relation to the institution of slavery," Lincoln said in the penultimate debate in Quincy on October 13, 1858, "that it shall be placed upon the basis that our fathers placed it upon."[23]

Much more significantly than that, though, Lincoln perceived that any question about slavery's extension was, at its core, an *ethical* question that asked whether slavery was a phenomenon whose spread *should* be arrested, and one that depended, in turn, on whether slavery was, in the end, "right or wrong"—the two foundation stones of legal study Blackstone had misinterpreted in 1765 to great consequence for everyone who studied the common law in his wake, Lincoln included.[24] As the second chapter of this dissertation discussed, Blackstone in his *Commentaries* had confused *what is right*, on the one hand, with *what shall be right*, and *what must be done,* on the other, and he had placed RIGHTS and WRONGS in the place of the millennia-old persons, things, and actions trichotomy as the division of the whole of the law, in due course maintaining that rights were the ends of law instead of what Justinian and after him

[21] *Works of Lincoln*, 3:9. Later, on October 7, Douglas would ridicule Lincoln very astutely, saying this: "Suppose Mr. Lincoln himself had been a member of the convention which framed the constitution, and that he had risen in that august body, and addressing the father of his country, had said as he did in Springfield: 'A house divided against itself cannot stand…' What do you thing would have been the result?" *Works of Lincoln*, 3: 218-9.

[22] *Works of Lincoln*, 3: 8, 117.

[23] *Works of Lincoln*, 3:276.

[24] *Works of Lincoln*, 2:281.

Bracton had understood, that persons were the reason for all rights. Only in a world where rights were the ends of law, but there was no expressed reason for the rights, was it intellectually possible for Blackstone, in perfect seriousness, to write two books of precisely the same size, one on *The Rights of Persons*, and the other on *The Rights of Things*.

If choices at the level of national governance did not attend to whether the practice of slavery was right or wrong, Lincoln advised, "the precise fact upon which depends the whole controversy," as he would identify it on February 27, 1860, then slavery's "advocates will push it forward until it shall become alike lawful in all the states," on the theory that if any man wanted slaves, no observer could look at that choice and call it wrong.[25] "What is necessary to make the institution national?" he asked in the first exchange with Douglas in Ottawa on August 21, 1858. "Not war." Rather, he answered, "it is simply the next Dred Scott decision. It is merely for the Supreme Court to decide that no *State* under the Constitution can exclude it, just as they have already decided that under the Constitution neither Congress nor the Territorial Legislature can do it. When that is decided and acquiesced in, the whole thing is done."[26] *Dred Scott*, Lincoln said jocularly in the penultimate debate on October 13 to great laughter and applause, "has squatted" Douglas's "Squatter Sovereignty out," leaving it "as thin as the homeopathic soup that was made by boiling the shadow of a pigeon that had starved to death[,]…impossible in the domain of thought."[27] Were "this Dred Scott decision…correct," he warned in the final debate on

[25] *Works of Lincoln*, 3:550, 19.

[26] *Works of Lincoln*, 3:27.

[27] *Works of Lincoln*, 3:279. In the same speech he argued that if the right to take slaves into territory where slavery had never enjoyed a home before was a constitutional right, as Taney determined it was, then it would be perjury for a member of a territorial legislature to "withhold that necessary legislation for the support of the Constitution and constitutional rights."

October 15, "I defy any man to make an argument that will justify unfriendly legislation to deprive a slaveholder of his right to hold his slave."[28]

Invoking a house divided was a brilliant stroke, for it illustrated that liberty and slavery were not, as Lincoln would phrase it in the second debate in Freeport on August 27, "precisely equal" quantities to be weighed with cool indifference.[29] Satan could not rise up against himself to cast out demons without fracturing and coming to an end, but because slavery did not exist homogeneously with liberty in the American household (because they were not the same), one could root out the other. But, with which side of the exorcism did the Union identify in June of 1858? Lincoln at Springfield had said that the Union "will become *all* one thing, or *all* the other," so, one question for historical reflection, in the terms of Lincoln's gospel lesson, is: who was casting out whom, or, to put it another way, was the demon lodged inside the United States of America by 1858 the phenomenon of slavery or that of liberty? Could the Union cast out liberty without fracturing and coming to an end? Could it cast out slavery without doing the same?

To begin to answer that, we need go back a little over a decade, to two suits for freedom (in fact, actions of trespass for assault and false imprisonment) filed on April 6, 1846, at St. Louis, a city with a royal name, by Harriet Robinson Scott (28 years old), a wife and a mother, and Etheldred Scott (at least 50 years old), a father and Harriet's husband, in the circuit court of Missouri (a slave state whose entry into the union in 1821 had brokered the 1820 compromise

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[28] *Works of Lincoln*, 3:318. Clinging to his argument that "if the people of a Territory want slavery they have a right to have it, and if they do not want it that no power on earth can force it upon them" (3:295) like a dog to its bone, Douglas had argued that unfriendly legislation toward slavery was not inconsistent with *Dred Scott*. See *Works of Lincoln*, 3:143, 217, 269, and 295. For more on Lincoln's analysis of the constitutional obligation Taney expressed, see *Works of Lincoln*, 3:316-8. "I say that no man can deny his obligation to give the necessary legislation to support slavery in the Territory, who believes it is a constitutional right to have it there," Lincoln observed on October 15.

[29] *Works of Lincoln*, 3:47.

that Taney would ultimately strike down), both of whom separately averred that she was, as he was, "a free person."[30] The Scott family's lawyer joined the two suits into one on February 12, 1850, submerging hers underneath his.[31]

II.

The majority opinion by Chief Justice Roger Brooke Taney in the case of *Dred Scott v. Sandford* (1857), initiated in the suits named above as *Harriet Scott v. Irene Emerson* and *Dred Scott v. Irene Emerson*, but not resolved for almost eleven years, rested on the idea that government was created by the governed. It was a remarkable opinion, perhaps even, as measured by depth of witness to the inception of the body politic and clarity of vision about what the future of the United States of America could be, the ablest penned by a justice of the highest

[30] "Declaration of Harriet Scott" and "Declaration of Dred Scott" transcribed in Appendix D in Walter Ehrlich, "History of the Dred Scott Case through the Decision of 1857" (PhD diss., Washington University in St. Louis, 1950), 387-8. Provided also in "Summons in False Imprisonment" and "Action in False Imprisonment," in the Revised Dred Scott Case Collection created by Digital Library Services at Washington University in St. Louis, http://digital.wustl.edu/dredscott/circuit1.html. Lea VanderVelde and Sandya Subramanian estimate that in 1846, the family's older daughter, Eliza, would have been between 8 and 10, and their younger daughter, Lizzie, would have been no older than 7. See VanderVelde and Subramanian, "Mrs. Dred Scott," *Yale Law Journal* 106 (1997): 1063n126, 1076. Vincent Hopkins calls St. Louis "an outpost with a royal name," in his *Dred Scott's Case* (New York: Fordham University Press, 1951), 2. The Constitution of Missouri of 1820 in Article 3, section 26, stipulated the following, that "the general assembly shall not have power to pass laws for the emancipation of slaves without the consent of their owners; or without paying them, before such emancipation, a full equivalent for such slaves so emancipated," but that "it shall be their duty, as soon as may be, to pass such laws as may be necessary to prevent free negroes and mulattos from coming to and settling in this State, under any pretext whatsoever; and, to oblige the owners of slaves to treat them with humanity, and to abstain from all injuries to them extending to life or limb." Thorpe, *Federal and State Constitutions*, 4:2154.

[31] Historians believe that the Peter Blow family, Dred Scott's previous owners, secured this lawyer after the Scott's first lawyer, Francis B. Murdoch (obtained in all probability at the instigation, and through the efforts, of Harriet, supported by her congregation, the Second African Baptist Church of St. Louis) had moved away. VanderVelde and Subramanian, "Mrs. Dred Scott," 1084, 1088; Walter Erhlich, *They Have No Rights: Dred Scott's Struggle for Freedom* (Westport, Connecticut: Greenwood Press, 1979), 38. In "Mrs. Dred Scott," VanderVelde and Subramanian argue that the erasure of Harriet Robinson Scott's suit by her husband's was a decision with consequences. "In focusing only on Dred, the Scotts' lawyers actually made it easier for the Taney Court to resolve the case against the Scott family," they argue. "Had the Court been predisposed to draw a line between free and enslaved individuals, Harriet's history of residence would have presented a stronger case for freedom than Dred's. Thus, even within the terms of standard legal analysis, Harriet would have been a better plaintiff than Dred" (1040-1).

court to that day.[32] Its significance, besides, far outstripped its footing in the highest court of the land because it gave unequivocal witness to the wedge that had long ago, in 1642 at the latest, shouldered through the loam between commitments to justice and objective right, as likewise to the profoundest possible refusal of the national government, by constitutional design, to protect

[32] So far from wanting to rehabilitate Taney's opinion in *Dred Scott* in the eyes of contemporary historians, and readers in general, who rightly abhor it, I want to make it plain that Taney's decision was an obscenity to the superlative degree, a racist screed that deserved, and still deserves, its readers' most emphatic possible disgust, embarrassment, shame, and denunciation. The suggestion of this chapter is that in 1857, Taney well understood a constitutional order that today merits the same: greatest possible disgust, embarrassment, shame, and denunciation. The essayist Joan Didion once wrote that we tell ourselves stories in order to live, and Americans have long told themselves the story that Taney misread history and misread the U.S. Constitution when he determined the case in *Dred Scott*. I want to argue that Taney did not misread, and rather understood American history and the U.S. Constitution very well. When I turn to the great Frederick Douglass, a visionary, at the end of this chapter, I will be turning to a radical black tradition that offers a counter-narrative to the story, noxious, my own dissertation has told. Instead of documenting the colossal scholarship on *Dred Scott* in this note, then, I will situate my chapter in scholarship that has likewise begun to read *Dred Scott* as faithful to the course of human events in British North America and the antebellum United States. My thinking has been most powerfully shaped by Christopher Tomlins, *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580-1865* (New York: Cambridge University Press, 2010), a magisterial work that every chapter of this dissertation, I think, has pointed back to. Tomlins locates *Dred Scott* as the endpoint of the story he tells, explaining his choice this way:

> The *Dred Scott* decision stands as the convulsive climax and endpoint to the constellation of colonizing, work, and civil identity with which this books has been concerned. The decision itself did not fashion the constellation's end. Far from it. What *Dred Scott* offered was a recurrence—the indefinite continuation of what had been. The decision stands as my endpoint because its recommended resolution of the bitter sectional dispute over slavery's right to grow with the republic was rejected; and because what followed, as a necessary consequence of rejection, was not more of the same at all, but a jagged interruption—the Civil War. (510)

Tomlins describes the American Civil War as an "'epistemological break' in state form and function," a climactic end to the "political-legal order" that had been, and "an instantiation of sacred violence prosecuted in religious time; in a moment of time 'out of joint'" (526). I end my own investigation into the division of persons into free and slave with *Dred Scott* for the same reasons, and I agree with his assessment that the case was "consistent with mid-nineteenth century constitutionalism and with the intent of the Philadelphia convention" (523). Scholarship that shares this assessment includes Paul Finkelman's "Was Dred Scott Correctly Decided? An 'Expert Report' for the Defendant," *Lewis and Clark Law Review* 12, no. 4 (2008): 1219-52; "Coming to Terms with Dred Scott: A Response to Daniel A. Farber," *Pepperdine Law Review* 39, no. 1 (2011): 49-74; and "*Scott v. Sanford*: The Court's Most Dreadful Case and How it Changed History," *Chicago Kent Law Review* 82, no. 1 (2007): 3-48; as well as Jack M. Balkin and Sanford Levinson, "Thirteen Ways of Looking at *Dred Scott*," and Austin Allen, "Rethinking *Dred Scott*: New Context for an Old Case," both in *Chicago Kent Law Review* 82, no. 1 (2007): 76-81, 144-68, respectively; and Mark Graber, *Dred Scott and the Problem of Constitutional Evil* (New York: Cambridge University Press, 2006), which argues that "Taney's constitutional claims in *Dred Scott* were well within the mainstream of antebellum constitutional thought." Gerald Leonard discusses Graber's work as a significant historiographical intervention in his "Law and Politics Reconsidered: A New Constitutional History of Dred Scott," *Law & Social Inquiry* 34, no. 3 (2009): 747-85. No scholar, to my knowledge, has yet argued that *Dred Scott* was by any measure the ablest decision by the U.S. Supreme Court to its day, and I am indebted to my advisor, Walter Johnson, for thinking that provocative thought, and then sharing it with me.

In the spirit of Robert Cover's magnificent *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University press, 1975), Tomlins in *Freedom Bound* argues that Taney sacrificed justice for law, and that when Lincoln opposed the decision, he was choosing "justice over law" (522). My findings on this score are different, as this chapter hopes to show.

(preserve or make safe) an elect whom it ruled, and counted, without sharing authority. Through the while, however, Taney unwittingly (indeed, despite himself) disclosed the identity of America's sovereign to be someone other than he supposed.

Taney's opinion, which he had revised after oral delivery on March 6, 1857, in order to respond to Justice Benjamin Curtis's dissent, took the form of fifty-six pages of thick, dense prose. He prepared a supplement afterward, in September of 1858, "in order to prove the truth of the historical fact stated in the opinion…, and the principle decided by the Court," and in both the opinion and the supplement, Taney answered a suit for freedom by responding that whether freedom obtained for the Scott family depended not on *who was free*, but on *who counted as "the people,"* and he hung said answer on the position of slaves, and black non-slaves, at what he considered time zero: the drafting and ratification of the U.S. Constitution in the last two decades of the eighteenth century.[33] The latter was crucial in the determination of the case.

Seven pages into his opinion, commenting on what had come to pass in America to place Scott and his family in "a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority," Taney wrote, "It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question *belonged* to the political or law-making power; to those who formed the sovereignty and framed the Constitution."[34] It is of the greatest possible importance to remember *that point of Taney's exactly*: that the knowledge of "justice or injustice" in the Supreme Court of the United States in 1857, according to the chief justice,

[33] Roger Taney, "Supplement to the Dred Scott Opinion," printed in the appendix to Samuel Tyler, *Memoir of Roger Brooke Taney* (Baltimore: John Murphy, 1872), 578. For Taney's delay in delivering his opinion to the clerk of the court for recording, see Benjamin Robbins Curtis, *A Memoir*, ed. by his son, Benjamin R. Curtis (Boston: Little, Brown, 1879), 229-30, and Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in Law and Politics* (New York: Oxford University Press, 1978), 316-21.

[34] *Dred Scott v. Sandford*, 60 U.S. 393, 404-5 (1857). Emphasis mine.

"belonged...to those who formed the sovereignty" in 1787, and that the U.S. Constitution memorialized their choices. Until those choices received amendment by the "mode prescribed in the instrument itself," he continued, the Constitution "speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted," and so, in turn, "must be construed now as it was understood at the time of its adoption"—sounding the same, meaning the same, "delegate[ing] the same powers to the Government, and reserv[ing] and secur[ing] the same rights and privileges to the citizen."[35]

That paper written in Philadelphia those years ago, Taney ultimately concluded, prohibited the national government from disturbing the persons or property of the sovereign people, as likewise from abandoning any of the paper's terms, and since "a negro, whose ancestors were imported into this country, and sold as slaves," had never been, and could never, under any circumstances (including the obtainment of state citizenship), "become a member of the political community formed and brought into existence by the Constitution of the United States, and as such, become entitled to all the rights, privileges, and immunities, guaranteed by that instrument to the citizen[,] [o]ne of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution," she remained vulnerable, in her freedom, to the mercy of the community's members to receive what they, the "dominant race," gave her.[36] By the strict letter of the opinion, reversing the judgment of the Circuit Court, against Scott no less, and remanding for dismissal for want of jurisdiction, Taney made two points: one,

[35] 60 U.S. 426.

[36] 60 U.S. 406. "A successful maintenance of this claim would have altered the basis of the Constitution," Campbell wrote in a concurring opinion. "A proscription, therefore, of the Constitution and laws of one or more States, determining property, on the part of the Federal Government, by which the stability of its social system may be endangered, is plainly repugnant to the conditions on which the Federal Constitution was adopted, or which that Government was designed to accomplish." 60 U.S. 509, 516.

that black descendants of imported captives, sold as slaves in what became the United States, could never become U.S. citizens because U.S. citizenship required membership in the sovereign people, but the sovereign people rejected and excluded blackness; and two, that the Missouri Compromise of 1820, which prohibited the practice of slavery and involuntary servitude, except for the punishment of crimes, "in all that territory ceded by France to the United States, under the name of Louisiana, which lies north of thirty-six degrees and thirty minutes north latitude, not included within the limits of the state," was unconstitutional because it illicitly destroyed (or preemptively denied) the right of slaveholders, or potential slaveholders, to property in the persons of their choosing.[37]

Synonymy between citizenship and sovereignty, as well as the insistence that suing in federal court required national, as opposed to state, citizenship, and that national citizenship secured "all" rights evenly, instead of some degree or quantity of rights unevenly (the insistence that citizenship would not admit of ranks or grades), were certainly not universally accepted views in Taney's day among lower benches and U.S. Attorneys General, but Taney's interest in "the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives," at the expense of citizenship narrowly, got down to the fatal flaw in the groundwork laid in 1787, which abandoned an elect among the objects of national governance to the caprice of both slaveholders

[37] The lower court had given judgment for Sanford, and refused Dred Scott's motion for a new trial. "The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty," Taney wrote. 60 U.S. 404. For his discussion of the Missouri Compromise, see 60 U.S. 448-52. For the Missouri Compromise, approved March 6, 1820, see *Public Statutes at Large of the United States of America* (Boston, 1850), 3: 545-8 (ch. 22, section 8). Not all descendants of black captives sold as slaves would be visibly black, and not all visibly black people would have had enslaved ancestors. With the latter point in mind, Taney clarified his position in the supplement, writing this: "My opinion authorizes no distinction between persons of the negro race, whether their ancestors were held in slavery or not." Tyler, *Memoir*, 579.

and the officers of said government, and thus well positioned him to capture the ongoing state of violence, call it war, that the Constitution made elemental.

This chapter argues that Taney's opinion in *Dred Scott v. Sandford* ably conformed to the constitutional order of his day. So long as the U.S. Constitution memorialized the choices of the sovereign people, it memorialized the choice to divide "persons" into free and slave, and so long as this was the case, the justice the Constitution established at its ratification admitted of an old homology with mercy in which liberty and a voice in government depended not on what was due, but on an inscrutable gift from a condescending superior. Criticizing Taney's opinion, then, does not require a distinction between justice and law as the scholarly consensus maintains; it requires a transformed conception of where the knowledge of justice lay.

Condescension, a stench in the middle of a prayer as old as the common law tradition itself, which adopted as its own the expression compilers under the emperor Justinian gathered into the *Digest* in 533 CE (that justice was the constant and perpetual will to give to each his *ius*), was anathema to the impulse that drove the Revolution, yes, that natural persons had some birthrights that emphatically disallowed donation, as well as the marvel of democratic sovereignty prevailing in 1787, that individuals could be spared the rule of anyone other than themselves such that equality, on at least that criterion, was an imperative that defied distribution, yet the homology between justice and mercy remained, no, was promoted, at last, enshrined, in the new plan of government drafted in 1787, as the previous chapter of this dissertation tried to show. According to Taney, Dred Scott, who understood he was "a free person" by virtue of Dr. Emerson's residence on free soil at two military outposts, Fort Armstrong in the free state of Illinois, and Fort Snelling, located "north of thirty-six degrees and

thirty minutes north latitude," very simply, stepped into the place the drafters of the Constitution left for the enslaved.

In his supplement, Taney confessed that "Negro slaves,…were *persons* as well as *property*, and are so regarded in every nation or State in which slavery exists."[38] He would reproduce the same thought when sitting as a circuit justice in *United States v. Amy* in the Circuit Court of Virginia in 1859, upholding the conviction of an enslaved woman for stealing a letter from the Union Furnace post-office in Patrick County, Virginia, under an 1825 federal act sentencing "any person" so offending to "not less than two nor more than ten years" of prison. The statute embraced slaves, Taney wrote, no less than those who were free, for "in expounding this law, we must not lose sight of the twofold character which belongs to the slave. He is a person, and also property." It followed, then, in that case, that "the slave, as a person, may commit offences which society has a right to punish for its own safety, although the punishment may render the property of the master of little or no value."[39] While Taney obscured that confession elsewhere in *Dred Scott* (indeed, striking down the Missouri Compromise as an unconstitutional violation of the right to property in slaves required it), on the score of a rich, manipulable slave character he agreed with dissenter Benjamin Curtis, who argued that "the *status* of slavery" accomplished the same extraordinary-made-ordinary feat, "embrac[ing] every condition, from that in which the slave is known to the law simply as a chattel, with no civil rights, to that in which he is recognized as a person for all purposes, save the compulsory power of directing and receiving the fruits of his labor."[40] Free or slave "persons who are not citizens,

[38] Tyler, *Memoir*, 604.

[39] *United States v. Amy*, 24 F.Cas. 792, 810 (1859).

[40] 60 U.S. 624-5.

not members of the sovereignty," Taney wrote in the supplement, "may yet owe it allegiance, may be subject to it," yet not be "elevated to the rank of citizen, and permitted to share in the sovereignty."[41]

President Abraham Lincoln's Attorney General, Missourian Edward Bates, would deny the possibility of allegiance without protection almost six years later, after *Dred Scott*, in an opinion for Salmon P. Chase, Secretary of the Treasury, on November 29, 1862. Written to respond to "whether or not *colored men* can be citizens of the United States," in the while, intriguingly, refusing to hazard an opinion about "whether or no it is legally possible for *a slave* to be a citizen," Bates would argue that citizenship meant "membership in the body politic," but, contra Taney, a membership that admitted of degradation and want of political power.[42] Citizenship expressed merely "the political quality of the individual in his relations to the nation," Bates wrote, and its test and sufficient proof lay not, as Taney thought, in a share of sovereignty and the possession of a full store of privileges and immunities, but in birth in the country. "Every person born in the country is, at the moment of his birth, prima facie a citizen," Bates argued, no less so "in the case of a negro than in case of a white woman or child."[43] The indivisible, reciprocal obligation of allegiance on the part of the individual and protection on the part of the country—"the one the price of the other," Bates observed—served as "the all sufficient bond of union" between them, and an unequal number and degree of rights, privileges, and immunities among the population did not determine who was, and who was not, a citizen.

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[41] Tyler, *Memoir*, 605-6.

[42] Edward Bates, *Opinion of Attorney General Bates on Citizenship* (Washington, D.C.: Government Printing Office, 1862), 3, 14, 4. Emphasis mine.

[43] Bates, *Opinion*, 7, 12.

Rather, inequality on that score was perfectly licit and determined merely "grades and classes" *among* citizens.[44]

"A free, white, natural born female infant is certainly a citizen, and I suppose it would be but reasonable to place her in the lowest class," Bates guessed, assessing the foreshortened range of possibilities for her life. "If eligibility to the presidency be a privilege in the lawful candidate—a peculiar right belonging to him, and not to the mass of citizens, then there *is* some difference; she is not entitled to *all* his privileges."[45]

Edward Coke, centuries before, had identified the reciprocal relationship of obedience from the natural-born subject and protection from the natural person of the king as the meaning of ligeance in Calvin's Case long ago, for the combined King's Bench, Common Pleas, Exchequer, and Chancery, in 1608. There, Coke had written that birth into allegiance of the natural person of the king was the all sufficient proof of membership in the body politic and of "capacity or ability to all benefits whatsoever," as Lord Bacon had said as counsel for the child Calvin—a change of paradigm that displaced the division into free and slave as the greatest division of persons, fixed since at least 161 CE, making political subjection, instead of removal of personal subjection, the necessary criterion for liberty.[46] Drafters of the U.S. Constitution in the summer of 1787 had exploited that thought when they followed the advice of James Madison, and had it both ways: keeping political subjection as the standard for protection and belonging and benefits, but ensuring that protection and belonging and benefits would not follow necessarily from political subjection; and in more besides, establishing a debt of protection *to* the

[44] Bates, *Opinion*, 12, 7. During the Civil War, one of Bates's sons fought for the Union and another for the Confederacy. When Taney died on October 12, 1864, Bates hoped Lincoln would appoint him to succeed Taney as chief justice, but Lincoln appointed Salmon Chase instead.

[45] Bates, *Opinion*, 23.

[46] William Cobbett, ed., *Complete Collection of State Trials*, vol. 2 (London, 1809), col. 583.

owners of slaves in the Three-Fifths Clause and the Fugitive Slave Clause. According to the paper written in Philadelphia, as the previous chapter of this dissertation discussed, national rules operated on, and had an indefinite supremacy over, not just "individual citizens," but "all persons and things, so far as they are objects of lawful government," slaves, of course, included. Madison anticipated that such a plan would prevent a bloody civil war. About this he was sorely mistaken.

In "Note B" of his commentaries, before "Note H," Tucker had quoted, in a footnote on the ninth page, a beautiful passage from the first volume of James Burgh's *Political Disquisitions*, published back in London in 1774-5 and Philadelphia in 1775, where he sunk it below a paragraph identifying the people, and not officers of government, as the locus of sovereignty. "Power in the people," Burgh had written, "is like the light in the sun, native, original, inherent, and unlimited, by any thing human. In government it may be compared to the reflected light in the moon; for it is only borrowed, delegated and limited by the intention of the people, whose it is."[47] The American Revolution, Tucker said, had ushered in a new, purposefully erected, political community, and for him, this juncture was unique, indeed dearly exceptional, in the course of human events for instantiating a voluntary choice by "individuals…to unite in the same social bonds."[48] Tucker understood sovereignty as empirical, the foundations of government as traceable, and the written compact as legible and extant.

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[47] Tucker, *Blackstone's Commentaries*, 1: Note B, 9. Both the London and Philadelphia printings of *Political Disquisitions* appeared with the same epigraph from Stoic philosopher, Hierocles: "After treating of our duty to the Gods, it is proper to teach that which we owe to our Country. For our Country is, as it were, a secondary God, and the first and greatest Parent.—It is to be preferred to Parents, Wives, Children, Friends, and all things, the Gods only excepted.—And if our Country perishes, it is as impossible to save an Individual, as to preserve one of the fingers of a mortified hand."

[48] Tucker, *Blackstone's Commentaries*, 1: Note A, 4. As Christian G. Fritz explains in the prologue to *American Sovereigns: The People and America's Constitutional Tradition before the Civil War* (Cambridge: Cambridge University Press, 2008), 1, "When New Yorkers pulled down the statue of George III in Battery Park shortly after Congress declared independence, they did more than reject British authority over America. Their action symbolized the replacement of the person of the king as the sovereign by the collective body of the people as America's new sovereign."

Joseph Story, however, nominated to the Supreme Court by President James Madison in 1811 to replace William Cushing, serving with Taney from 1835 to Story's death in 1845, would emphatically not, as he explained in *Commentaries on the Constitution of the United States*, published for the first time in 1833, at the beginning of his career as a professor at Harvard Law School.[49] Tucker believed that the American Revolution "formed a new epoch in the history of civil institutions, by reducing to practice, what, before, had been supposed to exist only in the visionary speculations of theoretical writers," and he saw the U.S. Constitution as a "solemn and original compact" that "fundamentally, and unequivocally" established the sovereignty of the people, whose servants enjoyed powers that were derivative of, limited by, and accountable to them.[50] About this origin story Story would disagree, writing in lectures that became his treatise that "it is a matter of fact…in the history of our own forms of government, that they have been formed without the consent, express or implied, of the whole people; and that, although firmly established, they owe their existence and authority to the simple will of the majority of qualified voters."[51]

For Story, sovereignty inhering in a compacting people was not empirical. *Its purposeful want* was empirical. This is what he wrote:

> Every state, however organized, embraces many persons in it, who have never assented to its form of government; and many, who are deemed incapable of such assent, and yet who are held bound by its fundamental institutions and laws. Infants, minors, married women, persons insane, and many others, are deemed subjects of a country, and bound by its laws; although they have never assented thereto, and may by those very laws be disabled from such an act.

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[49] Story accepted the Dane Professorship at Harvard Law School in 1829. President Andrew Jackson nominated Taney to the Supreme Court in January 1835, but the Senate refused to confirm him. Chief Justice John Marshall died that summer, and when Jackson nominated Taney to take Marshall's place, the Senate yielded and confirmed him.

[50] Tucker, *Blackstone's Commentaries*, 1: Appendix, 3-5.

[51] Joseph Story, *Commentaries on the Constitution* (Boston: Hilliard, Gray, and Company, 1833), 1:297 sec. 328. Two questions here: 1) Consent? and 2) If so, who consented?

Yet those whose assent "has never been asked or allowed" (a "majority of the whole population," he confessed) nevertheless endured a fastening down to the will of the voting majority, he thought, "for the plain reason, that opposite wills in the same society, on the same subjects, cannot prevail at the same time." Nor did the majority of the population have any claim whatsoever on the voting majority that the voting majority was obligated to respect. "The majority may, indeed, decide, how far they will respect the rights and claims of the minority [voting minority, that is, and, one must suppose, "the whole of that society," too]," he wrote, "and how far they will, from policy or principle, insist upon or absolve them from obedience. But this is a matter, on which it decides for itself, according to its own notions of justice or convenience."[52] The people's will was not the sovereign will; rather, "the will of the majority of the people of the state, (who are entitled to prescribe it,) for the government and regulation of the whole people" was "absolute and sovereign."[53] Story and Tucker agreed that government's power derived from a sovereign's, but they disagreed about where (with whom) that original power lay, as well about whether the states ever, "in fact, did in their political capacity, as contradistinguished from the people thereof, ratify the constitution," as Story put it, and at stake in both contested questions in the forum of the Supreme Court of the United States by 1857 was to whom the national government owed a debt of protection, and to whom belonged the knowledge of justice—two questions consequential in the extreme.[54]

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[52] Story, *Commentaries on the Constitution*: 1: 299 sec. 330.

[53] Story, *Commentaries on the Constitution*, 1: 317 sec. 349, and 299 sec. 330. "A state constitution," he defined it, "is no farther to be deemed a compact, than that it is a matter of consent by the people…its proper character is that of a fundamental law" (sec. 349).

[54] Story, *Commentaries on the Constitution*, 330 sec. 362. Cf. Tucker, *Blackstone's Commentaries*, 1:140-1, 151, 168.

Tucker, in his day, had answered affirmatively when he wondered whether the states ever, "in fact, did in their political capacity, as contradistinguished from the people thereof, ratify the constitution," while Story, in his, had answered negatively, a difference of opinion proslavery constitutional doctrine, which located an indivisible sovereignty in each of the several states and deprived Congress of the discretionary power to legislate for the whole, would take pains to exploit after 1846, rising to a crescendo in *Dred Scott*, and then, after secession began in 1860, and with it, the Civil War, baldly abandon, handing to the Congress of the Confederate States what Taney had in 1857 expressly denied to the Congress of the United States, the "power to legislate and provide governments for the inhabitants of all territory…, lying without the limits of the several States."[55]

The previous chapter of this dissertation argued that if, by constitutional design, national rules were to operate on all persons and things, irrespective of consent, and slaves could rise to effective political character through civil unrest, ripping political power and the subjective right

[55] Constitution of the Confederate States of America printed in parallel to the Constitution of the United States of America in Jefferson Davis, *Rise and Fall of the Confederate Government* (New York: Appleton and Company, 1881) I: 670. For a helpful discussion of this point, see Arthur Bestor, "State Sovereignty and Slavery: A Reinterpretation of Proslavery Constitutional Doctrine 1846-1860," *Journal of the Illinois State Historical Society* 54, no. 2 (1961): 174-8. In a speech on the portico of the White House on July 9, 1860, President James Buchanan explained why he supported candidate John C. Breckinridge over Stephen Douglas for the Democratic party's nominee for the presidency. This is what he said: "Property—this Government was framed for the protection of life, liberty, and property…But it is sought now to place the property of the citizen, under what is called the principle of squatter sovereignty, in the power of the Territorial legislature to confiscate it at their will and pleasure. That is the principle sought to be established at present; and there seems to be an entire mistake and misunderstanding among a portion of the public upon this subject. When was property ever submitted to the will of the majority? [editorial record of crowd response, "Never."] If you hold property as an individual, you hold it independent of Congress or of the state legislature, or of the territorial legislature—it is yours, and your Constitution was made to protect your private property against the assaults of legislative power…There is but one mode, and one alone, to abolish slavery in the Territories. That mode is…that a majority of the actual residents in a Territory, whenever their number is sufficient to entitle them to admission as a State, possess the power to 'form a constitution with or without domestic slavery, to be admitted into the Union upon terms of perfect equality with other States,'" quoting the platform adopted by the party at Cincinnati in 1856. Speech printed in George Ticknor Curtis, *Life of James Buchanan* (New York: Harper & Brothers, 1883), 292. He had said the same in his inaugural address on March 4, 1857, a few days before Taney read the opinion in *Dred Scott*: "A difference of opinion has arisen in regard to the point of time when the people of a Territory shall decide this question [whether slavery shall find a home among them or no] for themselves…the appropriate period will be when the number of actual residents in the territory shall justify the formation of a constitution with a view to its admission as a state into the union." *Works of James Buchanan*, ed. John Bassett Moore (Philadelphia: Lippincott, 1908), 106-7.

of majority rule apart (two ideas mistakenly "synonimous," Madison thought, "according to the Republican theory"), then the new plan of government internalized the violence required to act upon, but not keep safe, "negroes slaves," depriving these persons of personal liberty and political power, a share of democratic sovereignty, and most significantly of all, the choice to escape a condition exhausted by expressions not required by claims on their part. That spot was precisely the spot where *Dred Scott* unfolded, as Justice Peter Daniel, narrowing to nothing the distance between slaves and black freewomen and freemen, described powerfully in his concurring opinion, writing this:

> In the establishment of the several communities now the States of this Union, and in the formation of the Federal Government, the African was not deemed politically a person. He was regarded and owned in every State in the Union as property merely, and as such was not and could not be a party or an actor, much less a peer in any compact or form of government established by the States or the United States.[56]

A few pages earlier, he got at the same point this way:

> It may be assumed as a postulate, that to a slave, as such, there appertains and can appertain no relation, civil or political, with the State or the Government. He is himself strictly property, to be used in subserviency to the interests, the convenience, or the will, of his owner; and to suppose with respect to the former, the existence of any privilege or discretion, or of any obligation to others incompatible with the magisterial rights just defined, would be by implication, if not directly, to deny the relation of master and slave, since *none can possess and enjoy, as his own, that which another has a paramount right and power to withhold*. (emphasis mine)[57]

Taney disagreed with Daniel about whether "in the establishment of the several communities now the States of this Union, and in the formation of the Federal Government, the African was not deemed politically a person," or, to put it another way, Taney knew that he did not need to exclude the "the African" from the condition of "person" in order to enslave her, or to exclude

[56] 60 U.S. 481.

[57] 60 U.S. 475-6.

her from political power. As disclosed in both his opinion and his supplement, he thought it possible for free and slave "persons" to owe allegiance and suffer subjection to "the political body called the State" without belonging in said community, or possessing any share of its power.[58] Taney and Daniel did, however, agree about a great deal, not least that a slaveholder could licitly withhold the world, and every last thing in it, from his slave, and that membership in the sovereign people, as formal electoral politics, required a relation to someone other than to him. The slave (property merely, Daniel wrote, contra Taney; Dred Scott's supposed ancestor) "could form no part of the design, no constituent ingredient or portion of a society based upon common, that is, upon equal interests and powers. He could not at the same time be the sovereign and the slave."[59] Without question, Taney agreed with Daniel about that.

A decision in *Dred Scott*, contested in oral argument before the Supreme Court in a "wretched room," as one report described it, on the bottommost floor of the Capitol between February 11 and 14, 1856, and again in re-argument from December 15 and 18 of the same year, experienced delay, in part, because Daniel's second wife, Elizabeth Harris Daniel, horrifically and tragically, burned to death in their home in Washington, D.C. on the night of January 3, 1857, after a candle dropped onto her clothes as she was readying for bed.[60] She suffered from nearsightedness, *The Daily Dispatch* reported, and needed the flame to see, from a low table where she sat in her chamber, or from the hearth she was walking toward—the accounts of the accident differed. In his study below, Daniel responded when he heard her cries above, but by

[58] Tyler, *Memoir*, 604-5. See also 60 U.S. 420, where Taney referred to the militia law passed by the second U.S. Congress, directing every "free able-bodied white male citizen" to be enrolled in the militia. "The African race, however, born in the country," Taney wrote, "did owe allegiance to the government, whether they were slave or free; but it is repudiated, and rejected from the duties an obligations of citizenship in marked language."

[59] 60 U.S. 477.

[60] Note that the room was "wretched" can be found in Ehrlich, *They Have No Rights*, 229n2.

the time he reached the scene, the flames had already engulfed her. She was about 30 years old, the papers guessed, and had two children, the youngest no older than six months. *The Sun* reported that the members of the court attended her funeral at noon on January 6, exactly two months before Taney announced the decision of the court in *Dred Scott* with Daniel's lengthy concurrence.[61]

The seats of America's most profound and incisive learning by 1857, surely, lay not in the ruminations of St. George Tucker or Joseph Story, or the justices of the United States Supreme Court. They lay elsewhere: in a piece of parchment assuming again the shape of the stillborn calf it once surrounded; in *Bracton*'s hollow promise to "teach all who long to be taught thoroughly," and its twinned observations that an equal could not have dominion over an equal, and whether one enjoyed freedom or suffered slavery depended on perspective, the position from which one stood to see; alongside a man carrying shit on his back, and ineffable sadness; in a division of the whole of the law into persons, things, and actions in order to have books of roughly the same length for reproduction on rollers, and beside William Blackstone's man; in the delicate, dreadful symmetry between grace and meat, and gift and life; beside a young woman raped by a fine gentleman in a stable in Worcester, Massachusetts, and Elizabeth Harris Daniel's untimely death above her husband's office; in the shuffle of a slave running up behind two men to say, "Polemarchus says you are to wait"; and with Harriet Robinson Scott as she went into labor in an untidy corner of a steamboat floating just north of "that magic line that transmutes persons into things," and her infant daughter (named for Harriet's enslaved friend, Eliza) born in

[61] *The Daily Dispatch*, January 5, 1857, and *The Sun*, January 6, 1857. Taney's wife, Anne Phebe Charlton Key Taney (Francis Scott Key's sister), and daughter, Alice, both died of yellow fever on a holiday to escape the Baltimore heat between September 29 and the morning of September 30, 1855. For this tragedy, see Carl Brent Swisher*, Roger B. Taney* (New York: Macmillan, 1935) 468-9, and Fehrenbacher, *The Dred Scott Case*, 558.

these United States.[62] These sites of profoundest learning, moreover, suggest where the sovereign power with its knowledge of justice, lay, too, but that is an endpoint it will still take some time yet for this chapter to reach.

Now, describing a slaveholder's rights as "magisterial rights," as Daniel did, was serious and important. In *Chisholm v. Georgia*, decided by the Supreme Court in 1793, a case in which four of five justices held, writing seriatim, that a state was suable by a private citizen of another state (superseded by the eleventh amendment whose ratification was completed in 1795), John Jay, appointed as the first chief justice of the court by President George Washington, drew a distinction between how sovereignty was imagined in England and America. In England, he wrote, where the Prince was the sovereign and his person the object of all allegiance, "suability became incompatible with such sovereignty," and an action against the king would proceed as a matter of grace and not compulsion, the subject having no way to obligate her Prince to give her what was due her when the Prince refused it. Those conditions, though, did not obtain in America, where, he wrote confidently of subjects, "there are none." In 1776, his story went, "the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects (unless the African slaves among us may be so called) and have none to govern but themselves." A "joint tenant in the sovereignty," then, may sue an entity in whose power he partook, indeed, brought to be. The people left African slaves behind in this

[62] John Lawson, editor of *American State Trials* (St. Louis: Thomas Law Book Company, 1921), found the anonymous notation in a pamphlet issued after the federal trial ("the plaintiff's pamphlet," he called it) to correct Eliza's age, which the agreed statement of facts put at 14. "There is an actual though unimportant error here," the annotator wrote. "This daughter is sixteen years old and was born just before the master took the family across that magic line that transforms persons into things." See Lawson, *American State Trials*, 250, and Hopkins, *Dred Scott's Case*, 8n22. The annotator mistook the direction of the boat. Eliza was born on a northward, and not southward, journey.

narrative, (one Taney would adopt later), and assumed the mantle and august trappings of sovereign while leaving an elect behind as subjects.[63]

Whether Jay thought African slaves were subjects of the American people, or of their individual owners solely, however, he did not make clear, and that distinction exposed something Scottish political economist Adam Smith perceived the year the representatives of the United States of America, in General Congress assembled, declared the colonies free and independent states in 1776: the distinction between a slave subject to a slaveholder in a tyranny, as opposed to a slave subject to a slaveholder in a free government, and the different levels of protection magistrates could provide for slaves in those free verses arbitrary environments. "In every country where the unfortunate law of slavery is established," Smith wrote in the seventh chapter of the fourth book of *An Inquiry into the Nature and Causes of the Wealth of Nations*, and the slave fell under the authority of a magistrate "in a free country," "the magistrate, when he protects the slave, intermeddles in some measure in the management of the private property of the master."[64] Wherever "the master is perfectly free and secure," perhaps even "a member of the colony assembly, or an elector of such a member," Smith theorized, the respect due to the free man compromised the magistrate's ability to preserve the safety of the slave, and to hold the free-man-master accountable for his behavior. The magistrate "dare not" do so, Smith wrote, "but with the greatest caution and circumspection." In arbitrary governments, however, "where it is usual for the magistrate to intermeddle even in the management of the private property of individuals…it is much easier for him to give some protection to the slave, and common humanity naturally disposes him to do so." Concluding that "the condition of a slave is better

[63] *Chisholm v. Georgia*, 2 U.S. 471-2 (1793).

[64] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (London: for Strahan and Cadell, 1776), 2: 186.

under an arbitrary than under a free government," Smith offered an example from Roman history as evidence for his argument that the insight obtained across time and space:

> The first time we read of the magistrate interposing to protect the slave from the violence of his master is under the emperors. When Vedius Pollio, in the presence of Augustus, ordered one of his slaves, who had committed a slight fault, to be cut into pieces and thrown into his fish pond in order to feed his fishes, the emperor commanded him, with indignation, to emancipate immediately, not only that slave, but all the others that belonged to him. Under the republic no magistrate could have had authority enough to protect the slave, much less to punish the master.[65]

Subjection to a slaveholder and a tyrannical emperor, then, in this view, was preferable to subjection to a slaveholder and a magistrate in a free state. Slaves in the American republic, under a free constitution, as Tucker would have said, were subjects of slaveholders whom magistrates might easily yield and defer to, so indebted the magistrates were to slaveholders for the position and power they enjoyed. This raises the difficult question of whether, in those conditions, a union of states, or of an aggregate people, could really have been formed at all, and rather, if sovereignty (to whom belonged the knowledge of justice, as Taney had it) more accurately lay roundabout each master and slave, or on one side or the other of that pair.

Story suggested something just like that in *Prigg v. Pennsylvania*, decided by the U.S. Supreme Court in 1842, where Story, writing for the court with a concurring opinion by Taney, struck as unconstitutional an 1826 Pennsylvania statute making it a felony to seize and carry away a "negro or mulatto" to the end of "keeping and detaining" the captive "as a slave or servant for life," because it violated a right the U.S. Constitution "was designed to justify and uphold."[66] The Constitution embraced "a positive and unqualified recognition of the right of the owner in the slave" in the third clause of the second section of Article 4 (the Fugitive Slave

[65] Smith, *Wealth of Nations*, 186-7.

[66] *Prigg v. Commonwealth of Pennsylvania*, 41 U.S. 550 (1842).

Clause), Story concluded, which not only "secure[d] to the citizens of the slave-holding states the complete right and title of ownership in their slaves, as property, in every state in the Union into which they might escape from the state where they were held in servitude," but placed a positive "constitutional duty" on the government of the United States to assist in the return of fugitive slaves to their respective owners.[67] To tighten the grip of the general government's hand on fugitives from labor, a congressional statute approved on September 18, 1850, to amend and supplement the 1793 *Act respecting fugitives from justice, and persons escaping from the service of their masters,* would authorize commissioners, appointed by a Circuit Court of the United States or a superior court of an organized territory, to summarily hear and determine cases brought by slaveholder claimants to the financial gain of ten dollars if "the person so arrested does in fact owe service or labor to the person or persons claiming him or her," and five dollars if not.[68]

In *Dred Scott*, Taney wrote that the general government served "the people of the several states who created it" as their "representative and trustee."[69] By this he meant that the general government served slaveholders, who enjoyed a share of sovereign power, and while the constitutional order by 1857 well supported Taney's view, this chapter tries to turn it inside out

[67] 41 U.S. 611, 621. Story spoke very clearly: "The [fugitive slave] clause is found in the national constitution, and not in that of any state. It does not point out any state functionaries, or any state action, to carry its provisions into effect. The states cannot, therefore, be compelled to enforce them; and it might well be deemed an unconstitutional exercise of the power of interpretation, to insist, that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted to them by the constitution. The national government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, judicial and executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the constitution" (615-6). Taney in a concurring opinion disagreed that the power to provide a remedy for the right the fugitive slave clause established was vested exclusively in Congress and wrote as much. Of the states he wrote, "it is enjoined upon them as a duty, to protect and support the owner, when he is endeavoring to obtain possession of his property found within their respective territories" (627).

[68] *Statutes at Large of the United States of America* (Boston, 1848) 1:302-5; *Statutes at Large of the United States of America* (Boston, 1851) 9: 462-5.

[69] 60 U.S. 448.

and go a modest way toward the argument that sovereign power with its knowledge of justice more accurately belonged to the enslaved, at whose feet the life and happiness of their owners fell prostrate.[70]

III.

Both Harriet Robinson and the man who assumed the name Etheldred (Dred) Scott were born in Virginia, and in the spring of 1835 their paths crossed when the steamboat on which Harriet, in the service of Major Lawrence Taliaferro, the U.S. Indian Agent to the Sioux nation, banked at Fort Armstrong, situated on Rock Island on the Illinois side of the Mississippi River.[71] Harriet's boat was travelling from Pennsylvania to St. Peter's Indian Agency and the adjacent Fort Snelling, situated on the west bank of the Mississippi River in unorganized territory north of the Missouri Compromise line, and there at Fort Armstrong, Scott was in the service of the fort's doctor, John Emerson, an assistant surgeon in the U.S. Army. Harriet and Dred did not meet, though, until sometime after Dr. Emerson and Scott arrived at Fort Snelling to take up Emerson's new assignment there on May 8, 1836. Dr. Emerson and Scott were roundabout the same age, and had been together for about five years upon their arrival at Fort Snelling, since Emerson had acquired Scott from the Peter Blow family in St. Louis with the support of an army stipend given him to help officers keep slaves.[72] Dr. Emerson was very tall, six feet four, and wore but one shoe, and the two moved into the hospital by the fort's gate, while Robinson lived in the

[70] I am influenced here by Walter Johnson, *Soul by Soul: Life Inside the Antebellum Slave Market* (Cambridge; Mass.: Harvard University press, 1999), 92, a paradigm-shifting work that argued not only that slaveholders "could not do without" their slaves," but that they "could not *be* without" them either.

[71] Lea VanderVelde, *Mrs. Dred Scott: A Life on Slavery's Frontier* (New York: Oxford University Press, 2009), 13-4; VanderVelde and Subramanian, "Mrs. Dred Scott," 1091.

[72] VanderVelde, *Mrs. Dred Scott*, 74-5; Fehrenbacher, *The Dred Scott Case*, 242.

underground kitchen of Taliaferro's agency house.[73] Taliaferro married Robinson and Scott at some point between Emerson's arrival and the fall of 1837 (Robinson he "gave" Dred, Taliaferro once recorded), when Robinson was 17 and Scott 40, and the two lived in the hospital's basement, sharing a wall with the hospital's stable.[74] Dred Scott had been married before, but he and his first wife suffered separation when she was sold away from him back in St. Louis.[75]

Responding to Dr. Emerson's many assignments and reassignments, the Scotts travelled from Fort Snelling to St. Louis and perhaps down to Fort Jesup in western Louisiana in the spring of 1838, and then began an upriver journey back to Fort Snelling, in the company of Dr. Emerson and his new wife Eliza Irene Sanford Emerson (known as Irene), onboard the *Gypsey* on September 26, on which trip their first daughter, Eliza, was born, north of the Missouri Compromise line, before the steamboat's arrival at the fort on October 21. The Scott family departed Fort Snelling again and returned to St. Louis with the Emersons in late May or early June of 1840, and then their lives took many sharp turns: a season hired out to Irene's brother-in-law, Captain Henry Bainbridge, at Jefferson Barracks south of St. Louis from March of 1843 to perhaps March of 1844; Dr. Emerson's death on December 29, 1843; the birth of the Scott's second daughter, Lizzie, at some point in 1844, after the death of two sons ("two boys, dead," Dred Scott once said of the losses); and Dred Scott's service to Bainbridge in Texas during the War with Mexico from July 7, 1845, to early in the new year. Together again, back in St. Louis

[73] VanderVelde, *Mrs. Dred Scott*, 24, 74, 76. Dr. Emerson's diseased foot is reported at Fehrenbacher, *The Dred Scott Case*, 242; and VanderVelde, *Mrs. Dred Scott*, 74.

[74] Ages at marriage at VanderVelde, *Mrs. Dred Scott*, 115. In *They Have No Rights*, 21, Ehrlich puts the latest possible date of the marriage at September 14, 1837, when Lt. James Thompson hired Harriet Robinson Scott *from* Emerson, and VanderVelde and Subramanian concur at "Mrs. Dred Scott," 1050. For Taliaferro's observation that he "gave" Harriet to Dred, see VanderVelde and Subramanian, "Mrs. Dred Scott," 1054, and for the home that shared a wall with the stable, see VanderVelde, *Mrs. Dred Scott*, 140.

[75] VanderVelde, *Mrs. Dred Scott*, 115.

in 1846, Harriet Robinson Scott and Dred Scott, come spring, sued Dr. Emerson's widow, Irene Emerson, for their freedom, on the ground of Dr. Emerson's residence with them at Fort Armstrong, in the free state of Illinois, and Fort Snelling, north of the Missouri Compromise line.[76] It was a courageous move that required the choice to face down not only the gross housing insecurity that would likely result from suing their owner, but the possibility of retaliation from those who depended on their labor and support.[77]

Originally two actions of trespass *vi et armis* (trespass with force and arms, a medieval form of action that had, over time, assumed fictional shape in order to litigate stinky fish and sour wine) and lodged in accordance with Missouri statute law laying out procedures for "persons held in slavery to sue for their freedom," the Scotts' case, as it wended its way from state trial to state retrial to Missouri Supreme Court to U.S. Circuit Court to U.S. Supreme Court, became, in the end, a contest first, over ingress into, and egress from, the sovereign people, and

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[76] According to the Constitution of Illinois of 1818, Article 6, section 2, "No person bound to labor in any other State shall be hired to labor in this State, except within the tract reserved for the saltworks near Shawneetown; nor even at that place for a longer period than one year at any one time; nor shall it be allowed there after the year 1825. Any violation of this article shall effect the emancipation of such person from his obligation to service." Thorpe, *Federal and State Constitutions*, 2:980. Before the fifteenth Congress admitted Illinois into the Union, the territory fell under the Northwest Ordinance of 1787, whose sixth article provided that "there shall be neither slavery nor involuntary servitude in the said territory, otherwise than in punishment of crimes, whereof the party shall have been duly convicted: Provided always, That any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service as aforesaid." Thorpe, *Federal and State Constitutions*, 2:962.

[77] VanderVelde, *Mrs. Dred Scott*, 204-5, 211, 216-7, 200-1, 384n30; VanderVelde and Subramanian, "Mrs. Dred Scott," 1042-3, 1057-9. Date of the deaths of the two sons is not known, and the year of Lizzie's birth in 1844 is VanderVelde's best guess. Fehrenbacher thinks Lizzie could have been born as late as 1847 at *The Dred Scott Case*, 255. VanderVelde raises the question of where the Scotts might have lived while waiting for their trial at *Mrs. Dred Scott*, 237-9. Irene Emerson relinquished direct control over the Scotts on March 14, 1848, when she moved that they be put in the custody of the sheriff and hired out, in accordance with the 1845 statute that allowed "persons held in slavery to sue for their freedom." Ehrlich in *They Have No Rights*, argues that the Scotts remained in the custody of the sheriff, or hired out by him, for the duration of the case in the circuit court of St. Louis County, which was until March 18, 1858, after Taney's decision in the United States Supreme Court (49). Dred Scott and his family, then, might have been democracy's slaves, a reference to Paulin Ismard, *Democracy's Slaves: A Political History of Ancient Greece*, trans. Jane Marie Todd (Cambridge, Mass.: Harvard University Press, 2017). Irene Emerson moved to Massachusetts soon after her father died in 1848, marrying Dr. Calvin Clifford Chaffee in Springfield on November 21, 1850, and remained there for the rest of her life. Chaffee would enter politics in 1855 as an opponent of slavery. See Fehrenbacher, *The Dred Scott Case*, 274.

finally, over the geographic scope of the U.S. Constitution and Congress's power to prohibit the extension of slavery in the territories.[78] As the following pages will show, Taney's primary concern in the question about Dred Scott's eligibility to sue in a court of the United States was not citizenship, which Taney relegated to an accessory. Taney's primary concern went leagues deeper, to the division of persons into "the free and the subjected races," and where the knowledge of justice lay, and he torpedoed Dred Scott's right to sue from that fundamental place, adroitly making Dred Scott, and his family (their very lives) the reason for their own continued enslavement, which may help explain how it was intellectually possible for Dred Scott to be a "person," but not "people," and a "person," but "property," too.[79] Harriet Scott and Dred Scott did not obtain freedom on free soil, Taney decided in the end, "even if they had been carried there by the owner, with the intention of becoming a permanent resident," because the laws of Missouri, and the U.S. Constitution, protected Irene Emerson's and Dr. John Emerson's right to property in them there.

On April 6, 1846, Dred Scott and Harriet Robinson Scott sued Eliza Irene Sanford Emerson, Harriet alleging that Emerson:

> with force and arms etc., made an assault upon the said plaintiff, to wit at St. Louis in the County aforesaid, and then and there beat, bruised and ill treated her, the said plaintiff and kept and detained her in prison there, without any reasonable or probable cause whatsoever, for a long time to wit, for the space of twelve hours, there next following, contrary to the laws of the said state, and the will of said plaintiff:

[78] *Revised Statutes of the State of Missouri* (St. Louis, 1845), 531-4 (chapter 69), approved February 13, 1845. According to sections 9 and 10: "The action to be brought under the leave given, shall be an action of trespass for false imprisonment, and shall be instituted in the name of the petitioner, against the person holding him in slavery, or claiming him as a slave. The declaration shall be in the common form of a declaration for false imprisonment, and shall contain an averment, that the plaintiff, before an at the time of committing the grievances, was, and still is, a free person, and that the defendant held, and still holds, him in slavery."

[79] 60 U.S. 418, 452.

while "before and at the time of the committing of the said grievances, she was and still is a free person," and "the said defendant held and still holds her in Slavery." Dred Scott's suit copied his wife's, and neither required a word about the citizenship of the Scott family, or about the power of Congress to legislate on the topic of slavery. The questions at issue at this, the first juncture in adjudication over Harriet Scott's and Dred Scott's assertion of the title to freedom, were whether the freedom obtained at Fort Armstrong and Fort Snelling had extraterritorial effect *in Missouri*, and whether Irene Emerson still held the plaintiffs in slavery.

A recently decided case in the Supreme Court of Missouri in 1836, *Rachael, A Woman of Color v. Walker*, whose facts tracked *Harriet Scott*'s and *Dred Scott*'s closely, demonstrated what was possible in the state courts of Missouri by 1846. Harriet's former master, Major Lawrence Taliaferro, lived next door to the Indian Subagent, E.T. Langham, who had in the fall of 1830 travelled down to St. Louis to purchase Rachel as a slave for Army Lt. J.B.W. Stockton, stationed at Fort Snelling. Rachel lived at Fort Snelling, located, to repeat it, on the west bank of the Mississippi River in free territory governed by the Missouri Compromise, as Stockton's slave between the falls of 1830 and 1831, and then, when he carried her to St. Louis to sell her in 1834, after a stint in Prairie du Chien, on the east bank of the Mississippi River in free territory governed by the Northwest Ordinance of 1787, she sued William Walker, the slave trader who held her under Stockton in St. Louis, for trespass *vi et armis*. The jury found for the slave trader, and the presiding judge overruled motions for a new trial, which Rachel appealed. Before the Supreme Court of Missouri as the slave trader's counsel, Hamilton R. Gamble (Edward Bates's brother-in-law, who would rise to the Missouri Supreme Court himself at the election in 1851), had argued that Stockton only resided in free territory because of his military order, a necessity

that should save him from the forfeiture of his slave back in St. Louis, but Judge McGirk rejected the argument, reversing the judgment of the lower court and remanding for a new trial.[80]

"Though it be true that the officer was bound to remain where he did, during all the time he was there," McGirk wrote, "yet no authority of law or the government compelled him to keep the plaintiff there as a slave." Procuring a slave was "a voluntary act, done without any other reason than that of convenience," and it could not be the case, he concluded, "that the convenience or supposed inconvenience of the officer repeals as to him and others who have the same character, the ordinance and the act of 1821 admitting Missouri into the Union, and also the prohibitions of the several laws and constitutions of the non-slaveholding States."[81] Stockton's residence at Fort Snelling and Prairie du Chien with a woman he chose to keep as a slave liberated the slave, and her voluntary return to St. Louis with Stockton did not alter her condition of freedom. Strictly, it was Stockton's residence, and choice to slavehold, at Fort Snelling and Prairie du Chien that brought about Rachael's right to freedom, a right that was also, interestingly, the "forfeiture" of Stockton's "right to the slave," exacted in consequence of introducing slavery where positive law prohibited it.[82] In *Wilson v. Melvin* the next year, Judge Tompkins for the same court would write that a slave could not "reside" because "to acquire a residence one must have rights" and "the plaintiff had none."[83]

According to the Supreme Court of the Missouri by 1846, freedom obtained someplace where a constitution of a state, or a statute of the U.S. Congress, prohibited slavery by law,

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[80] The relationship of Gamble and Bates described at Fehrenbacher, *The Dred Scott Case*, 262-3.

[81] *Rachael v. Walker*, 4 Mo. 350, 354 (1836).

[82] Whether Dred Scott's freedom was a penalty imposed on Mrs. Emerson or a recognition of the legal effect produced by the master's voluntary act of taking his slave to free soil would become a question down the road. See Fehrenbacher, *The Dred Scott Case*, 298.

[83] *Wilson v. Melvin*, 4 Mo. 592, 597 (1837).

would obtain in Missouri, too, so long as the plaintiff proved that the turns of her life met certain expressed conditions: that the slaveholder intended to, or did in fact, there reside while keeping a slave; or that the slaveholder intended to, or did in fact, permit his slave to be there used as a slave. "There was nothing in the soil of Illinois as in England, that would work the emancipation of a slave by mere setting foot thereon," Tompkins wrote cheekily for the court in 1834.[84] To win her freedom, the plaintiff had to convince a jury that her owner intended to, or did in fact, reside and enslave her on free soil, or permit the plaintiff to be hired as a slave on free soil, and if accomplished, the state supreme court construed such residence or permission as an introduction, or engrafting, of slavery where positive law had prohibited it, which merited a forfeiture of the master's right to property in his slave both in that place, and back in Missouri.[85] Merely emigrating or travelling with a slave across a free state or free territory exempted a slaveholder from forfeiture, as did other exigencies, like swollen streams, broken wagons, or serious sickness along the way, but convenience for the slaveholder did not, nor a military order. *Rachael* held that the behavior of a U.S. army officer in service at Fort Snelling and Prairie du Chien lay accountable to, and so limited by, the Northwest Ordinance of 1787 and the Missouri Compromise of 1820.

The statutorily-prescribed form of action used by Rachel and the Scott family, trespass for assault and false imprisonment, got at the question of freedom circuitously: were Dred Scott and Harriet Scott slaves, then the beating, bruising, and ill-treatment they alleged was licit, as the

[84] *Nat v. Ruddle*, 3 Mo. 400 (1834).

[85] For hiring out in Illinois in the context of its constitution of 1818 and antedating Northwest Ordinance, see *Vincent v. Duncan*, 2 Mo. 214 (1830), *Ralph v. Duncan*, 3 Mo. 194 (1833), and *Nat v. Ruddle*, 3 Mo. 400 (1834). "The master who permits his slave to go there to hire himself," Tompkins wrote in *Ralph v. Duncan*, "offends against the law as much as one who takes his slave along with himself to reside there, and if we are at liberty to regard the moral effect of the act, it is much worse to permit the slave to go there to hire himself to labor, than for the master to take him along with himself to reside there under his own inspection or to hire him out personally to some person who will be bound to pay the master the hire" (195).

imprisonment was likewise impossible (they already living in chains), whereas were each "a free person," all the above behaviors would count as damage to them, to the relief of ten dollars each.[86] The matter of citizenship entered the record only when Dred Scott sued Irene Emerson's brother, John Sanford, in federal court on November 2, 1853, and Sanford responded by contesting the court's jurisdiction, which required diversity of citizenship between the parties. Dred Scott's condition at Fort Snelling under the Missouri Compromise entered the record for the first time only in the fall of 1851, as historians Walter Ehrlich and Don Fehrenbacher have estimated, in a brief filed superfluously in the Missouri Supreme Court by Lyman Norris, counsel for Irene Emerson. Before that juncture, neither side had questioned the constitutional uprightness of a congressional prohibition of slavery in the territories, and in that brief, Norris threw a pebble onto a pond whose ripple would assume the shape of a tempest after Dred Scott appealed from the federal circuit court in 1854, and the investigative tide turned to "whether the facts relied upon by the plaintiff" had ever "entitled him to his freedom" in the first place.[87]

The jury returned a verdict for Irene Emerson when the case went to trial on June 30, 1847, over a year after Dred Scott and Harriet Robinson Scott had petitioned to sue, and the Scotts responded by moving for a new trial, which the presiding judge, Alexander Hamilton (no relation), sustained to Emerson's objection. The Supreme Court of Missouri dismissed her writ

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[86] For example, in his not guilty plea to the federal trespass suit, filed after his plea in abatement failed, Sanford argued that "Dred Scott was a negro slave, the lawful property of the defendant, and as such slave he gently laid his hands upon him, and only restrained him of such liberty as he had a right to do." Printed in Paul Finkelman, ed., *Southern Slaves in Free State Courts: The Pamphlet Literature*, Series I of VII in the sixteen-volume facsimile series, *Slavery, Race, and the American Legal System 1700-1872* (New York: Garland, 1988), 3:8.

[87] 60 U.S. 430. Though Taney never put the following into words, Dred Scott was a free man by virtue of the Illinois constitution *in Illinois*. To answer whether Dred Scott was free by virtue of Dr. Emerson's residence at Fort Armstrong, in the free state of Illinois, *back in Missouri*, Taney would rely on his earlier decision in *Strader v. Graham*, 51 U.S. 82, 93-4 (1850), that the condition of black men as to freedom or slavery, after their return to Missouri from free soil, "depended altogether upon" the laws of the state of Missouri, and "could not be influenced by" the laws of another state. Taney explains at 60 U.S. 453. The Norris brief is discussed in Ehrlich, *They Have no Rights*, 61-2; and Fehrenbacher, *The Dred Scott Case*, 263-4.

of error on June 30, 1848, because the cause was still pending below, and at the retrial on January 12, 1850, the jury returned a verdict for the Scotts, whereupon the same presiding judge, Hamilton, refused what was now Irene Emerson's motion for a new trial.[88] Denied, she responded with a bill of exceptions for appeal to the State Supreme Court, and to the State Supreme Court the case went. Counsel for both sides agreed to merge the two cases into one on February 12, obscuring Harriet Scott's assault and imprisonment underneath her husband's, and they filed briefs in the Missouri Supreme Court in March.[89]

The Missouri Supreme Court, composed of Judges William Napton, John Ryland, and James Birch, in October agreed to reverse the lower court's judgment for Dred Scott, but the judge selected to write the opinion, William Napton, wanted to cite Lord Stowell's 1827 opinion in the case of *The Slave Grace*, recorded in John Haggard's *Reports of Cases Argued and Determined in the High Court of Admiralty*, not available in the state library, so he postponed completing his work until he received the law books whose material he wanted to incorporate into his opinion. The case of *The Slave Grace*, which Napton insisted on having at hand, had determined that while a slave remained in England, having entered from elsewhere, the law of England did nothing but relieve her "from the rigors of that [slave] code" she knew previously. Without an act or ceremony of manumission ("a title against all the world," he wrote), or any other act that could "formally destroy those various powers of property which the owner possessed over his slave by the most solemn assurances of law," the owner's rights, Stowell said, "could not be extinguished by mere silence," and the slave "continues a slave." Upon return "to his country," then, the "state of slavery" would follow. Think of it as "liberty, as it were," put "into a sort of parenthesis," Stowell suggested irreverently of the effect for the slave of a stay in

[88] *Emmerson v. Harriet, Of Color*, 11 Mo. 413 (1848) and *Emmerson v. Dred Scott, Of Color*, 11 MO. 413 (1848).

[89] For the merging of the two suits, see Fehrenbacher, *The Dred Scott Case*, 257.

England, adding that "experience has taught him [the enslaved] that slavery is not to be avoided."[90] On May 17, 1828, Lord Stowell sat down to write the following to Justice Story, with whom he shared a warm epistolary friendship: "I am a friend to abolition generally, but I wish it to be effected with justice to individuals."[91]

While Napton waited to receive Haggard's *Reports*, though, an election in the fall of 1851 unseated Napton and Birch, changing the composition of the court.[92] The newly elected supreme court of the state, composed of Judges Ryland, Hamilton Gamble (counsel for the slave trader in *Rachael*), and William Scott, convened to consider the original briefs in November, and at the beginning of the next year, on March 22, 1852, the court announced *Scott, A Man of Color, v. Emerson*, which reversed the lower court's judgment, as the previous court had intended to do, too, and left the Missouri Compromise alone, despite Norris's tantalizing suggestion in a brief filed tardily after the court had already reached a decision the previous November, that "the constitutional power" of Congress "to enact this section of the law" might not be sure.[93]

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[90] *The Slave, Grace*, 2 Haggard 94, 117-8, 100, 113, 117, 122, 131, 113 (1827). On September 22, 1828, Story wrote Lord Stowell, "I have read with great attention your judgment in the slave Grace Case from the Vice-Admiralty Court of Antigua. Upon the fullest consideration, which I have been able to give the subject, I entirely concur in your views. If I had been called upon to pronounce a judgment in a like case, I should certainly have arrived at the same result, though I might not have been able to present the reasons which lead to it in such a striking and convincing manner. It appears to me that the decision is impregnable. In my native state, (Massachusetts,) the state of slavery is not recognized as legal; and yet, if a slave should come hither, and afterwards return to his own home, we should certainly think that the local law would re-attach upon him, and that his servile character would be redintegrated." Joseph Story, *Life and Letters of Joseph Story*, ed. by his son, William W. Story (Boston: Little and Brown, 1851), 558. "I entirely concur in your views," Story told Stowell in his letter, but in *Commentaries on the Conflict of Laws* (Boston: Hilliard, Gray and Company, 1834), Story would write that "as soon as a slave lands in England, he becomes ipso facto, a freeman" (92), which suggests a misunderstanding. "The slave continues a slave…while he is in England," Stowell had written.

[91] Story, *Life and Letters*, 555.

[92] Fehrenbacher, *The Dred Scott Case*, 659n30.

[93] 15 Mo. 576, 580-1. "The whole tenor of our decisions upon the subject of Freedom are based upon false legal principles and untenable to the last degree," Norris wrote. "Suppose Congress should pass a law declaring that the keeping of black horses, a species of property existing in Missouri and recognized by the Constitution of the United States and of Missouri, 'shall be and the same is hereby prohibited in the territory of Utah.' The same government that passes the law, through the executive department, orders an officer, who unfortunately owns a black horse, that

Since the Supreme Court of Missouri had decided it in 1824, *Winny v. Whitesides* had provided the precedent for discerning the extraterritorial effect, in Missouri, of freedom gained in United States territory.[94] In that case, counsel for the slaveholders, among other arguments, had reproduced Lord Stowell's idea in *Grace*, that *whether or not* Winny, the enslaved plaintiff, became free during the three-to-four year residence of her owners in Illinois—free territory by the Northwest Ordinance of 1787 and a free state by its constitution of 1818 (the parties at trial in 1822 only considering the former)—with Winny in their service, the right of the owners "revived so soon as the slave was found in Missouri, unless the slave had, while residing there, asserted and obtained his freedom by the process of law." The supreme court, though, in an opinion by Judge Tompkins, emphatically rejected the strategy. Yes, were a citizen of country A to travel into country B and there "lose his horse" by means of a law in country B, contrary to the laws of country A, then said citizen would have a right to "take his horse again" should he ever find it in country A, Tompkins admitted, but one could not reason from horses and horse-holders to slaves and slave-holders. "The territory is, and was then [in 1787], the property of the States" to be "governed by a law enacted by the agents of those States," and it was "the policy of those States, as well as their duty," to respect and execute that law, Tompkins wrote. If a "person" obtained "personal rights" in the territories, then, by the laws enacted by the agents of the states, they attended her when she removed to one of the states, and the rights of the slaveholder would not reattach.[95]

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he can neither sell, lose nor give away, to the territory of Utah, and he takes with him his said horse (I admit that the horse, if there were horse abolitionists there, would get his freedom in Utah); but when he comes back here and asks you to give him up, would you do it? This is perhaps a strong and coarse illustration, but is it not a case in point?" 15 Mo. 581.

[94] In *Wilson v. Melvin* (1837) the Missouri Supreme Court confirmed that the construction of the Northwest Ordinance and the Illinois Constitution would be the same. 4 Mo. 592, 596.

[95] *Winny v. Whitesides*, 1 Mo. 472, 475 (1824).

What the agents of the states gave, the states themselves could not take away, was the point. The court could have drawn, but did not draw, a distinction between *Grace* and *Winny* by observing that while the former found relief from the slave code on the ground of a refusal to enforce (a silence), in the case of *Winny*, with the Northwest Ordinance in force, the U.S. Congress had prohibited slavery outright by positive law (a loud shout).

In his opinion for the Missouri Supreme Court, Judge Scott, who had dismissed Irene Emerson's writ of error back in 1848 for the same court, overturned the *Winny* precedent, and the case law that had grown from it, which had extended its application to cover the Illinois Constitution of 1818 as well, when he rejected the notion of "duty" to respect a law of Congress, or the constitution of Illinois, and concluded that Dred Scott was not free in Missouri.[96] He arrived at this conclusion not because something had occurred on free soil to interfere with Dred Scott's assumption of freedom *at the forts* (that argument would come later), but because the slavery prohibitions of the constitution of Illinois, and the federally-made laws for the territories of the United States, did not apply, would no longer be enforced, *in the state courts of Missouri*.[97] In sorting out how to respond when a slave travelled onto free soil and then returned ("on almost three sides the State of Missouri is surrounded by free soil," Scott lamented), the courts of the state had developed a requirement for residence on free soil, as distinguished from migration or travel, as well as conditions for hiring out where the Constitution of Illinois operated, and Judge Scott took a first step toward undercutting all of that delicate scaffolding by

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[96] In the meanwhile, Taney's decision in *Strader v. Graham*, 51 U.S. 82 (1850), had determined that when a territory from the old Northwest Territory became a state, its own state constitution would replace the Northwest Ordinance, and the Ordinance would no longer be in force (94-7).

[97] Scott's refusal to respect antislavery statutes promulgated elsewhere, and Taney's later argument that the Missouri Compromise was unconstitutional, shared a premise: that the acts at issue injured/harmed slave owners.

questioning the moral dimensions of time. "Is there any different in principle or morality between holding a slave in a free territory two days more than one day?" he asked perceptively.[98]

Judge Scott chose to exhaust his analysis of the extraterritorial effect of slavery prohibitions by pushing it through the lens of comity, which Story had once, in the work that Scott leaned on heavily in his opinion, likened to "beneficence, humanity, and charity." As the title of that work suggested, *Commentaries on the Conflict of Laws* (published in 1834, one year after *Commentaries on the Constitution* in 1833) explicated some common principles for judicial use when laws of different countries, or different states of the American Union, conflicted with one another, and Story located the nerve of the work, as explained at the beginning, in sections 7 and 8, in this, that "it is an essential attribute of every sovereignty, that it has no admitted superior, and that it gives the supreme law within its own domains on all subjects appertaining to its sovereignty" (a shared attribute that established an equality among sovereigns), but that "the laws of one country can have no intrinsic force, *proprio vigore*, except within the territorial limits and jurisdiction of that country," so whatever one sovereign yielded to another, "it yields by its own choice to yield; and it cannot be commanded by another to yield it as a matter of right."[99] No sovereign was obliged "to yield the slightest obedience to" the laws of another," Story wrote. "Whatever extra-territorial force they are to have, is the result, not of any original power to extend them abroad," but of something else again: "respect," and one sovereign "may with impunity disregard" the law pronounced by another when the former, her own final judge of the occasion, nature, and extent of her duty, deemed it "prejudicial," "hostile," "contrary," or

[98] *Scott v. Emerson*, 15 Mo. 576, 584 (1852).

[99] Story, *Conflict of Laws*, 7-8.

"repugnant" to her own policy, interests, or rights.[100] With this food, the Supreme Court of Missouri gave to itself, the supreme court of a sovereign state whose statutes and case law protected the right of a slaveholder to property in her slave, what it had denied the U.S. army officer in *Rachael*: the discretion to judge what was right for her.[101]

"The States of this Union, although associated for some purposes of government, yet, in relation to their municipal concerns have always been regarded as foreign to each other," Judge Scott wrote for the court. "It is a humiliating spectacle, to see the courts of a State confiscating the property of her own citizens by the command of a foreign law."[102] Now, the Constitution of Illinois could fairly be said to proceed from a "foreign" sovereign, yes, but Judge Scott did not make clear whether "the laws of the United States, enacted for the mere purpose of governing a territory" proceeded from a foreign sovereign, too. Presumably, his answer would have been in the negative, since he never contradicted Tompkins's assertion in *Winny* that "the territory is…the property of the States,…governed by…the agents of those States," taking "agents" for members of the U.S. Congress, who, like the officers of the government of Missouri, derived their authority from an antedating sovereign people, however construed. (Whom the U.S. Congress served, and how that debt limited the range of its legislative powers, would figure later, for Taney, whose analysis, unlike Scott's, did not rely on comity.) Scott did not expressly

[100] Story, *Conflict of Laws*, 8, 7, 36, 37.

[101] "It is not to be taken for granted, that the rule of the foreign nation is right, and that its own is wrong," Story wrote. *Conflict of Laws*, 34. Story also took care to clarify the following in section 38, "There is, then, not only no impropriety in the use of the phrase 'comity of nations,' but it is the most appropriate phrase to express the true foundation and extent of the obligation of laws of one nation within the territories of another…It is not the comity of the courts, but the comity of the nation, which is to be administered." (37).

[102] 15 Mo. 583-4.

propose that the laws of the United States Congress were foreign to the laws of Missouri; he simply asserted that the laws for the territories stayed in the territories, and that was that.[103]

Understanding the enforcement, in Missouri, of a slavery prohibition propounded elsewhere as penal was one way to solve the problem of *Somerset v. Stewart.* The extraterritorial reach of slavery had only become a question of pressing importance after that watershed case, decided in the King's Bench before the American Revolution in 1772, which cropped the grounds for a slaveholder's exercise of dominion, authority, or coercion over his slave down to positive law, leaving it bereft of any authoritative basis in objective or subjective morality, as such. In his opinion for the court, Lord Mansfield had held, famously, that no "dominion, authority or coercion can be exercised in this country, on a slave according to the American laws," because "the state of slavery," including, crucially, "the power of master over his slave," was "of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law." If positive law provided the only foundation for the exercise of a master's power, then the physical movement of a slave (and not of a runaway, regulated as it was by the fugitive slave clause of the U.S. Constitution) beyond a corner of the world that preserved and protected that power by positive law into a corner that did not, and then back again, set up a

[103] To reject the laws because they were foreign, and to reject them because they were prejudicial, were distinguishable points. In *Strader v. Graham*, 51 U.S. 82, 94 (1850), a case in which three men, Reuben, Henry, and George, musicians and slaves of Armstrong, travelling with Williams, a free black man, by the permission of Armstrong, fled with their instruments and books on a boat from Louisville to Cincinnati, and on to freedom in Canada, Taney had written this: "The regulations of Congress, under the old Confederation or the present Constitution, for the government of a particular territory, could have no force beyond its limits. It certainly could not restrict the power of the states within their respective territories; nor in any manner interfere with their laws and institutions; nor give this court any control over them. The Ordinance in question [Northwest Ordinance of 1787], if still in force, could have no more operation than the laws of Ohio in the state of Kentucky, and could not influence the decision in that state, nor give this court jurisdiction upon the subject." Taney dismissed the writ on error for want of jurisdiction, writing that "the condition of the negroes…as to freedom or slavery, after their return, depended altogether upon the laws of that state, and could not be influenced by the laws of Ohio. It was exclusively in the power of Kentucky to determine for itself whether their employment in another state should or should not make them free upon their return. The Court of Appeals have determined, that by the laws of the state they continued to be slaves. And their judgment upon this point is, upon this writ of error, conclusive upon this court." Cf. Fehrenbacher, *The Dred Scott Case*, 298-9.

complicated question that Judge Scott answered by saying that the supreme court of the sovereign state of Missouri had the discretion to simply refuse to enforce laws that were oppressive or injurious to "the rights, the policy or the institutions of the people of this State." This freedom to decide, he might have said, belonged to the state of Missouri.

Instead of appealing from the state supreme court, Dred Scott on November 2, 1853, filed a federal suit for trespass *vi et armis* in the U.S. Circuit Court for the district of Missouri, alleging that John F.A. Sanford, Irene Emerson's brother and a citizen of New York (whose ownership of the Scott family at that juncture, while never questioned on the record, was quite dubious), had in St. Louis assaulted, unlawfully held as a slave, imprisoned, and threatened Scott, a citizen of the state of Missouri, as well as Harriet, and their two daughters Eliza and Lizzie.[104] Sanford then, in response, denied the federal court's jurisdiction for the reason that "the said plaintiff, Dred Scott, is not a citizen of the State of Missouri, as alleged in his declaration, because he is a negro of African descent; his ancestors were of pure African blood, and were brought into this country and sold as negro slaves."[105] Sanford did not challenge Scott's citizenship on the ground that Scott was a slave. He challenged Scott's citizenship on the ground that Scott was "a negro." In April of 1854, Judge Robert W. Wells sustained Dred Scott's right to sue in federal court on the ground that Sanford's plea that Scott was "a negro" did not suffice to deny Scott citizenship under the diverse citizenship clause of the U.S. Constitution. "Every person born in the United States and capable of holding property was a citizen having the right to

[104] Sanford died just two months after Taney announced the opinion, on May 5, 1857, and his probate papers, according to Fehrenbacher, contained no mention of the Scotts. See Fehrenbacher, *The Dred Scott Case*, 272, 662n13. "If Sanford owned the Scotts in 1853," he writes, "he must have returned them to his sister at some time before his death in 1857," because when Taylor Blow manumitted the Scotts three weeks later, he had acquired them from Irene Sanford Emerson Chaffee and her then husband, who had lived in Massachusetts continuously since their marriage.

[105] Transcribed at Finkelman, *Southern Slaves in Free State Courts*, 5-6.

sue in the United States courts," Wells decided.[106] Sanford chose to proceed on the merits, and on May 15, the jury found Sanford not guilty, Scott a slave (the form of action required the two to depend on one another: were Scott a free man, Sanford assaulted him, whereas if Scott were a slave, Sanford merely "gently laid his hands upon him"). After Wells dismissed a motion for a new trial, Dred Scott wrote a bill of exceptions, which Wells allowed, signed, and sealed, and the case was brought up to the United States Supreme Court by writ of error.

The highest court in the land, then, heard oral arguments in the case for the first time early the next year, from February 11 to 14, 1856, and again, in re-argument at the end of that year, from December 15 to 18, focusing not on whether slavery reattached in Missouri, the question all lower courts up to that point had asked, but on whether Dred Scott was "a citizen of the State of Missouri within the meaning of the 11th section of the judiciary act of 1789," a question no federal court had yet settled.[107]

"This is certainly a very serious question," Taney wrote in his opinion, "and one that now for the first time has been brought for decision before this court."[108] If a *free* black man qualified as a "citizen" for the purpose of diverse-citizenship jurisdiction, then he could sue his citizen-master in the federal courts, a prospect that raised significant problems for the integrity of national fugitive slave legislation, which denied fugitive slaves procedural due process. Such a prospect, besides, did not disinvite a curious court from digging into whether an enslaved black

[106] Transcribed at Ehrlich, *They Have No Rights*, 84.

[107] See Fehrenbacher, *The Dred Scott Case*, 277. In *They Have No Rights*, 92, Ehrlich reports that on January 7, 1855, Roswell Field, Scott's lawyer at the federal trial, wrote in a letter to Montgomery Blair, who would argue the case before the Supreme Court, that the writ of error had been granted in order to decide whether Dred Scott was restored to slavery when he returned to Missouri.

[108] *Dred Scott v. Sandford*, 60 U.S. 403 (1857).

man could ever become free on federal territory at all.[109] As Senator John C. Calhoun disclosed on January 9, 1838, the U.S. Congress had been curious about just that for some time. It was the one issue, he said, sufficiently cataclysmic to rent the union in two, like the effect of Satan casting out his demons.

Back on August 12, 1848, about a year after Dred Scott's and Harriet Robinson Scott's first state trial, remarking on a bill proposed to organize the Territory of Oregon, Daniel Webster, Senator from Massachusetts, addressed senators who argued that prohibiting slavery in the territories violated slaveholders' rights.[110] "Why, they say that we deprive them of the privilege of carrying their slaves, as slaves, into the new territories," Webster observed:

> Well, Sir, what is the amount of that? They say that in this way we deprive them of the opportunity of going into this acquired territory with their property. Their 'property'? What do they mean by 'property'? We certainly do not deprive them of the privilege of going into these newly acquired territories with all that, in the general, and common, and universal understanding of mankind, is esteemed property. Not at all. The truth is just this. They have, in their own States, peculiar laws, which create property in persons.

When a statute of Congress stipulated "that they shall not carry slaves thither, and continue that relation," Webster said to set the record straight, "there is, then, no exclusion of Southern people; there is only the exclusion of a peculiar local law."[111] Reasoning with reference to "peculiar local law" to battle the extraterritorial reach of slavery descended from *Somerset,* but opening a wide and easy way for slavery's extension did not require disputing that precedent, as Taney showed in 1857 when he simply followed in the path of Webster's sparring partner, Calhoun, insofar as

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[109] Dred Scott was a free man *in Illinois* by virtue of Dr. Emerson's residence at Fort Armstrong. That was never questioned.

[110] Webster had been counsel for David Canter, claimant, in *American Insurance Company and the Ocean Insurance Company v. 356 Bales of Cotton, David Canter*, 26 U.S. 511 (1828) with an opinion by Chief Justice John Marshall, which both sides of *Dred Scott* would rely upon to meet different ends.

[111] *Writings and Speeches of Daniel Webster* (Boston: Little, Brown, & Company, 1903), 10:40, 42.

the two viewed the U.S. Constitution, and not comity, as the ample and sufficient source of answers about the extraterritorial extension of human behaviors supported by local law. "In considering the question before us, it must be borne in mind that there is no law of nations standing between the people of the United States and their Government, and interfering with their relation to each other," Taney wrote in *Dred Scott*. "The powers of the Government, and the rights of citizen under it, are positive and practical regulations plainly written down."

Chief Justice Roger Brooke Taney, an old man, almost eighty, born in Maryland on March 17, 1777, to a man named Michael and a woman named Monica Brooke, read his opinion of the court on March 6, 1857, after having administered the oath of office to Democrat president-elect James Buchanan at the inaugural on the Capitol's East portico on March 4.[112] The prose he read that day, seated in front of a window that some witnesses said obscured his face, committed to posterity a mirror and a witness that both expressed a sound narrative about the course of human events in America, and shone back the possibilities of what direction that course could take.[113] Crossing the Atlantic on the *Arbella* in April of 1630, John Winthrop had implored his fellow travellers to provide for their posterity by doing justly, loving mercy, and walking humbly with God. "For this end," he had said, "we must be knit together in this work as one man."[114] Two hundred twenty-six years later, in 1857, Taney disclosed that that man, the artificial body politic, was poised to cast out liberty as a demon, to borrow the terms of Lincoln's

[112] The court had first selected Justice Samuel Nelson to write a narrow majority opinion, but between February 14 and 19, James Wayne moved for the decision to include all issues raised in oral argument, and for Taney to be the one to write it. Nelson's opinion then became a concurrence. For this interesting development, see Fehrenbacher, *The Dred Scott Case*, 308-9; and Ehrlich, *They Have No Rights*, 129.

[113] Hopkins, *Dred Scott's Case*, 32, reports that the windows behind the justices' seats in the old courtroom "made it difficult for the spectators to see the justices' faces, once they were seated."

[114] John Winthrop, "Christian Charity, A Model Hereof," in *Puritans in the New World: A Critical Anthology,* ed. David D. Hall (Princeton: Princeton University Press, 2004), 169.

gospel lesson in June 1858, and at that moment, the end met the beginning, met the end, which met assault, imprisonment, the Scott family's "great fear and pain" in return for the need for protection and safety, and at the very last, met what was right as opposed to what was wrong, though not how Taney—who had a yellow-brown mongrel name, homologue of the color "tawny"—intended.

IV.

If Taney's was a history, it was also a story, a story about the origins of government. According to his decision in *Dred Scott v. Sandford*, slavery changed the nature of freedom such that it evacuated freedom of security in rights; blackness had to do with the rights of an owner, even when black men, women, and children were free; and the result enslaved those he considered a "race."[115] Taney determined that "negro[es], whose ancestors were imported into this country, and sold as slaves" were "persons," yes, but not "people," who "had never been…supposed to possess any political rights which the dominant race might not without or grant at their pleasure," and so far from "an open, glaring, and scandalous tissue of lies," as orator and abolitionist Frederick Douglass described the opinion in June, Taney's decision was faithful to the constitutional order put in place by the sovereign people in 1787-8, whose decision to separate persons into the free and the slave established a justice that admitted of condescending choice. In 1857, Taney simply tended that ground on a transparently racist register, extending the sphere of the enslaved to include the enslaveable: "that unfortunate race," he wrote, "which…might justly and lawfully be reduced to slavery" for the "benefit" of "the

[115] 60 U.S. 426, 412.

white man."[116] Lincoln, in reply, would not disagree with Taney that the memorialized choice of the sovereign provided the common measure of what counted as right in areas under the Constitution's jurisdiction; he just drew the opposite conclusion when he told the crowds gathered to hear him that the choice was on the side of deeming slavery wrong instead of right.

Preserving the Union, Lincoln thought, would require a rejection of Taney's view in favor of his. "Let us return it [slavery] to the position our fathers gave it," he implored in Peoria in 1854.[117] "It is not true that our fathers, as Judge Douglas assumes, made this government part slave and part free," he said to make the same point later, on October 15, 1858. "Understand the sense in which he puts it. He assumes that slavery is a rightful thing within itself,--was introduced by the framers of the Constitution. The exact truth is, that they found the institution existing among us, and they left it as they found it. But in making the government they left this institution with many clear marks of disapprobation upon it."[118]

It was the great Douglass years earlier, however, in an Independence Day oration in Rochester, New York on July 5, 1852, who authoritatively reported that the knowledge of justice lay elsewhere, and in so doing dropped a line for anyone after him to see, that it was not the slaveholder, but the slave, who, above all the buyers and sellers of men, towered high and grand and inviolable as America's real sovereign, the knower of what was just.

The facts stated in Sanford's plea in abatement, Taney concluded, disqualified Scott from suing in a court of the United States, and he got at that conclusion in the following way. The "Indian race" formed "a free and independent people,…and their freedom has constantly been

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[116] *The Frederick Douglass Papers*, vol. 3, *1855-63*, ed. John Blassingame (New Haven: Yale University Press, 1985), 3:167; 60 U.S. 407.

[117] *Works of Abraham Lincoln*, 2:276. "…If we do this, we shall not only have saved the Union; but we shall have so saved it, as to make, and to keep it, forever worthy of the saving."

[118] *Works of Abraham Lincoln*, 3:308.

acknowledged, from the time of the first emigration to the English colonies to the present day," Taney began, and this freedom prohibited external dominion without consent.[119] On the contrary, descendants of imported African slaves by 1787 "had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them."[120] It was not rightlessness (indeed, Taney never suggested that), but the way rights got distributed in America that was the crucial matter, and the subjects of his investigation were not free women and men versus slaves, but the enslaveable and subjectable versus non-enslaveable and non-subjectable "races."[121] It was the impossibility of escape, even after acquiring freedom, from the position in which one's need to vote, for example, or to travel or to study, or marry whom one wished, or bear arms, was but the occasion for someone else to give or withhold the object, that gave Taney sufficient proof that such a someone formed no part of "the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives," for who would create a such a world for herself, Taney all but asked.[122] No one would, he intimated.

Taney did not object to the power of a slaveholder to manumit his slave, or to the power of a state to make a citizen of whomever it chose.[123] What he rejected was allowing either of those choices to affect the nature of the Union, which a black man suing in one of its courts would do, that is to say, he refused to allow a slaveholder or state to think that it could "introduce

[119] 60 U.S. 404.

[120] 60 U.S. 405.

[121] 60 U.S. 418, 420.

[122] 60 U.S. 404.

[123] 60 U.S. 425.

a new member into the political community created by the Constitution of the United States…by making him a member of its own."[124] The test for belonging "in this new political family, which the Constitution brought into existence," Taney thought (together with its "rights of man" and "rights of the people," rich benefits and protections), was eligibility to benefit from the Constitution's privileges and immunities clause, Article 4, section 2, clause 1, which, by its "paramount authority," disallowed caprice in the area of "rights of person and rights of property" by prohibiting a state from allowing a member of another state nothing but what the hosting state chose to grant him.[125]

The anti-miscegenation statutes of Massachusetts in 1705, 1786, and 1836, of Maryland in 1717, and Rhode Island in 1822 and 1844; the police regulations imposed on black humanity in the slaveholding states; Connecticut's legislative pronouncement in 1784 that "the abolition of slavery should be effected as soon as may be consistent with the rights of individuals, and the public safety and welfare," its mobility restrictions imposed on free black women and men in 1774, and its criminalization of schools for "persons of the African race" in 1833; the disallowance of anyone but "free white citizens" from enrolling in the state militia in New Hampshire in 1815 and 1855; and most significantly, the Fugitive Slave Clause of the U.S. Constitution (Article 4, Section 2, clause 3), by which, Taney wrote, "the states pledge[d] themselves to each other to maintain the right of property of the master…as long as the Government they then formed should endure," making the "negro race as a separate class of persons," vulnerable to capture and commodification, seizure and transportation, everywhere in the Union: all of these actions, Taney argued, made it impossible for black humanity to rest in

[124] 60 U.S. 406, 405. "…the union of those who were at that time members of distinct and separate political communities into one political family."

[125] 60 U.S. 407, 409, 410, 423, 425.

the security, liberty and safety promised by the U.S. Constitution (a "well-considered instrument," he called it) at the time the states adopted it, and likewise confirmed, he was "absolutely certain," that the members of the enslaveable race had no place among the sovereign people.[126] Behold the telltale sign, he urged, the absence of any debt, that was obligation, to them.[127]

It cannot be supposed, Taney wrote, that the states who ratified the Constitution "intended to secure to them rights, and privileges, and rank, in the new political body throughout the union, which every one of them denied within the limits of its own dominion."[128] They chose, he continued, to leave "it altogether with the several states to deal with this race, whether emancipated or not, as each State may think justice, humanity, and the interest and safety of society, require."[129] The only organ with the power to bestow that union-wide safety (call it happiness, hope), Taney explained, was the U.S. Congress, and it had already, on March 26, 1790, limited the pool of naturalizable subjects to "aliens being free white persons."[130]

Taney was not alone in the superlatively racist opinion that sovereignty and enslaved-and-enslaveable blackness were incompatible. Attorney General Caleb Cushing had suggested it very recently in an opinion for the Secretary of the Interior on July 5, 1856, and it was an opinion

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[126] 60 U.S. 413, 408, 416, 412, 414, 415, 411, 416, 423.

[127] 60 U.S. 419.

[128] 60 U.S. 416. In the sixth edition of James Kent's *Commentaries on American Law* (New York, 1848), 2:258nb, published, like Blackstone's *Commentaries*, in four books, Kent wrote that "negroes or other slaves, born within and under the allegiance of the United States, are natural born subjects, but not citizens," but he also wrote that "if a slave born in the United States be manumitted, or otherwise lawfully discharged from bondage, or if a black man be born within the United States, and born free, he becomes thenceforward a citizen, but under such disabilities as the laws of the states respectively may deem it expedient to prescribe to free persons of color." For this reason, both sides of *Dred Scott* cited Kent approvingly, Blair in re-argument in December 1836 *and* Taney.

[129] 60 U.S. 426.

[130] 60 U.S. 417-9.

the chief justice had held for some time.[131] In an unpublished opinion composed as Attorney General under President Andrew Jackson in the summer of 1832 to answer a question about whether states may imprison free negroes who entered their ports on foreign ships, Taney wrote the following, which deserves quotation in full for its remarkably close resemblance to the impulses he would have the opportunity to explicate in full in *Dred Scott*. "The African race in the United States even when free, are every where a degraded class, and exercise no political influence," he wrote that June:

> The privileges they are allowed to enjoy, are accorded to them as a matter of kindness and benevolence rather than of right. They are the only class of persons who can be held as mere property, as slaves. And where they are nominally admitted by law to the privileges of citizenship, they have no effectual power to defend them, and are permitted to be citizens by the sufferance of the white population and hold whatever rights they enjoy at their mercy. They were never regarded as a constituent portion of the sovereignty of any state. But as separate and degraded people to whom the sovereignty of each state might accord or withhold such privileges as they deemed proper. They were not looked upon as citizens by the contracting parties who formed the Constitution. They were evidently not supposed to be included by the term *citizens*. And were not intended to be embraced in any of the provisions of that Constitution but those which point to them in terms no to be mistaken.[132]

Dred Scott could not sue for his freedom in a court of the United States, situated in Missouri, because the Constitution of the United States abandoned him to the kindness, benevolence, and mercy of the unenslaveable race, and this finding dovetailed elegantly with the second finding, that because the Constitution protected the persons and property of the unenslaveable race, not only in the states, but in the territories, the facts of the case relied on by Dred Scott did not entitle him to his freedom.[133]

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[131] C.C. Andrews, ed., *Official Opinions of the Attorneys General of the United States* (Washington: Robert Farnham, 1856), 7:746-53.

[132] Transcribed in Carl Brent Swisher, *Roger B. Taney* (New York: Macmillan, 1935), 154.

[133] 60 U.S. 430. I am not going to discuss Taney's argument that the article of the Constitution conferring on Congress the power "to dispose of and make all needful rules and regulations respecting the territory or other

One way to understand Taney's opinion on the score of the Missouri Compromise is to see that he discerned a positive constitutional duty on the part of the general government to never infringe upon "the right of property of the master in a slave," which disabled the general government from "prohibit[ing] a citizen of the United States from taking any property which he lawfully held into a Territory of the United States."[134] Taney, like Judge Tompkins in *Winny*, thought that whatever the General Government acquired, "it acquire[d] for the benefit of the people of the several states who created it," as "their trustee acting for them,…charged with the duty of promoting" the beneficiaries' interests and holding the territory "for their common use until it shall be associated with the other States as a member of the Union."[135] Whereas Tompkins in 1824 looked out over at that debt and gave Congress the benefit of the doubt, Taney in the winter of 1856-7, looked out over the same debt and concluded that the Congress transgressed its constitutionally prescribed powers, rendering its action void and inoperative. "The powers of the Government, and the rights of the citizen under it, are positive and practical regulations plainly written down," he wrote, satisfied. "It has no power over the person or property of a citizen but what the citizens of the United States have granted."[136]

To reach the incendiary place Taney reached, he needed to make the following points along the thistly way: one, that the Constitution, including the Fifth Amendment, which provided "that that no person shall be deprived of life, liberty, and property, without due process of law," applied in the territories and so regulated Congress in the intercessions it could make there; two,

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property belonging to the United States," could "have no influence upon a territory afterwards acquired from a foreign Government," 60 U.S. 432.

[134] 60 U.S. 451, 446.

[135] 60 U.S. 448.

[136] 60 U.S. 451.

that "the right of property in a slave is distinctly and expressly affirmed in the Constitution"; and three, that because "the Constitution…makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction, or deny to it the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachments of the Government."[137] Taney found support for the first point in Chief Justice John Marshall's decision for the Supreme Court of the United States in *American Insurance Company v. 356 Bales of Cotton, David Canter* in 1828, which had held that the U.S. Constitution applied in the territory of Florida, ceded by Spain in 1819, and that while the inhabitants of Florida would not "participate in political power" until Florida became a state of the union, they were in the meanwhile entitled "to the enjoyment of the privileges, rights, and immunities of the citizens of the United States."[138] This decision called it licit for the constitution to bear down on those who had no share of the rule that governed them. Moreover, as legal scholar Mark Graber has illuminatingly argued in *Dred Scott and the Problem of Constitutional Evil*, "mainstream thinkers in both the free and slave states at the time *Dred Scott* was decided concluded that persons had a constitutional right not to be divested of property rights and that bans on slavery, a common form of property, in the territories divested persons who moved into them of their property rights. Moving to the territories was legal, and persons could be divested of existing property rights only if they had committed a crime."[139]

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[137] 60 U.S. 448, 451.

[138] 26 U.S. 511, 542. In *Webster v. Reid* in 1850, Justice McLean for a unanimous court under Chief Justice Taney, suggested that the first eight amendments held the territorial governments to account. 52 U.S. 437, 460. Graber discusses the same in his important, *Dred Scott and the Problem of Constitutional Evil*, 59.

[139] Graber, *Dred Scott and the Problem of Constitutional Evil*, 65.

The Republicans who agreed to party platforms in both 1856 and 1860 agreed with Taney that constitutional rights obtained in the territories, they just disagreed about for whom. "Our Republican fathers, when they had abolished Slavery in all our National Territory, ordained that no person shall be deprived of life, liberty, or property without due process of law," the Republican Platform of 1856 resolved. "It becomes our duty to maintain this provision of the Constitution against all attempts to violate it for the purpose of establishing Slavery in the Territories of the United States by positive legislation, prohibiting its existence or extension therein."[140] The point of contention, of course, lay in the content of "person" and "property," the difference that made the difference. Republicans insisted that a slave was a "person" who should benefit from substantive fifth amendment protection, whereas Democrats said absolutely not, slaves counted as "property" and so their owners were the ones who ought to benefit from fifth amendment protection at the slave's expense. In a speech on the portico of the White House on July 9, 1860, before the presidential election of that year, President Buchanan left no room for doubt about the question *Dred Scott* had settled. "The Supreme Court of the United States have decided," he told the crowd, "what was known to us all to have been the existing state of affairs for fifty years,--that slaves are property. Admit that fact, and you admit everything."[141]

According to the Supreme Court in 1857, the knowledge of *who* counted as property (as what counted as justice) belonged to "the people of the several states" who enshrined "the right of property in a slave" in the Constitution at the close of the eighteenth century.[142] The chief justice cited the twenty-year extension of the Atlantic slave trade and Fugitive Slave Clause as

[140] Kirk Porter and Donald Bruce Johnson, comp., *National Party Platforms 1840-1956* (Urbana: University of Illinois Press, 1956), 27. For the due process clause of the fifth amendment in the Republican Platform of 1860, see 32 in the same.

[141] Curtis, *Life of James Buchanan*, 293.

[142] 60 U.S. 435.

evidence for his homogeneity of property claim, but he could have discussed the three-fifths clause as well, which lay the groundwork for the constitutional democracy of the United States in a scheme of political representation that drew unto itself the destabilizing energy of authorization by men with rights to property in the persons of their slaves. Taney found "a total absence of power" in the U.S. Congress to exercise power over the "rights of person" and "rights of property" in the states or in the territories, and this was as sure and solid and immovable as its lack of power to touch the establishment of religion, or the free exercise thereof, the freedom of speech or of the press, the right of the people peaceably to assemble, or petition the government for the redress of grievances, the right to keep and bear arms, or to trial by jury. This rule, moreover, prohibited Congress from conferring any like power on a local territorial government.[143]

Back in the contest over whether a state had the power to nullify an act of the general government in the early decades of the nineteenth century, disagreement between Senators Calhoun and Webster (the former a servant of South Carolina, the latter of Massachusetts) had ably distilled what would rear its head as the bane in the Supreme Court in the winter of 1856-7. Back in that protracted contest, Calhoun had insisted that sovereign power resided in each of the several states, whereas Webster had insisted that it resided in an aggregate American people. In turn, Calhoun had insisted that the several states created the general government, whereas Webster insisted the people, instead, achieved the feat. At stake for whom the general government was designed to benefit, as well as who could licitly control, restrain, modify, or reform it, their disagreement also put to question who could licitly *pass judgment on* the constitutionality of acts of the general government, and the force of *that* question during the nullification controversy: with whom did sovereignty reside, was what mattered so deeply in

[143] 60 U.S. 451.

Dred Scott, though for Taney, to the sovereign belonged not just the knowledge of the constitutionality of the acts of the general government, which the federal courts respected through judicial review, but the knowledge of who counted as property and what counted as right and wrong.

In written response to a federal protective tariff in December of 1828, as Vice President to John Quincy Adams, and again in a floor debate over a tariff introduced in January of 1833, then a Senator from South Carolina, Calhoun had maintained an unusual view that the several sovereign states delegated power reciprocally among themselves at the founding, such that the general government was not superior to, but rather the coordinate "joint agent" of, "twenty-four sovereignties, united by constitutional compact."[144] On this foundation he denied the existence of a "common umpire," and argued instead that each state, as a high and equal, "exclusive and final[,] judge…of the infractions of the compact, and of the mode and measure of redress," had a right to determine for itself the constitutionality of the general government's behavior.[145]

In his turn, Webster responded first to Calhoun's colleague, South Carolina Senator Robert Young Hayne, on January 26, 1830, and later to the tariff noted above, reported at the beginning of 1833. Webster countered by arguing that the whole point of the meeting in Philadelphia in 1787 was to "form a common government, to be conducted by common counsels," which had no obligation "to act through state agency, or depend on state opinion and state discretion" and instead placed its hand "on individual conscious and individual duty,"

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[144] *Works of John C. Calhoun*, ed. Richard Crallé (New York, 1853), 2:285, 291, 262 (delivering "certain definite powers" to the general government "to be exercised jointly"). See, as well, *Papers of John C. Calhoun*, ed. Clyde N. Wilson (Columbia, S.C., 1977), 14:54.

[145] *Works of Calhoun*, 2:301, 295, 293. For "The South Carolina Exposition and Protest," see *Papers of Calhoun*, 10:442-539, and for "A Disquisition on Government" and "A Discourse on Government," see *Papers of Calhoun*, vol. 28 (Columbia, S.C., 2003).

"yielding…protection on the one hand, and demanding…obedience on the other."[146] Calhoun's refusal to acknowledge a common umpire or judge would unceremoniously throw us back to the days of the confederation, Webster inveighed, when union reduced to "a rope of sand," and disagreements between the states (as Madison, George Mason, and Alexander Hamilton had understood) would find resolution in violence, or worse, outright civil war.[147] Interposition of a state to arrest a general law would subvert the direct relation between the general government, on the one hand, and persons and things, on the other, Webster detected, and that direct relation was, he said, the only hope for the preservation of the Constitution. Such interposition would furthermore, he added, decimate "the first great principle of all republican liberty": that "in matters of common concern, the judgment of a majority must stand as the judgment of the whole."[148] (The enslaved population, actually, had rendered that hope futile from the outset, as Madison knew.) Were one state to sit as sole arbitress of the constitutionality or unconstitutionality of national laws, Webster warned, the laws for the whole, "such resistance would shatter the union into atoms."[149] The preservation of the union, he said, absolutely required a common umpire, a common judge.

On December 28, 1837, well before the War with Mexico and David Wilmot's proposal in the House of Representatives to prohibit slavery in any territory acquired in the war's aftermath, Calhoun brought his ideas about the nature of union and the foundation of government to bear on the question of slavery when he responded to a memorial from the Vermont

[146] *Writings and Speeches of Webster*, 6:195, 204, 203 (1833), and 67 (1830).

[147] *Writings and Speeches of Webster*, 6: 57 (1830), 200 (1833).

[148] *Writings and Speeches of Webster*, 6: 203-4, 219 (1833).

[149] *Writings and Speeches of Webster*, 6: 228 (1833).

legislature, presented by Vermont Senator Benjamin Swift, with six resolutions of his own.[150] The memorial from Vermont had expressed opposition to both the annexation of Texas and "the admission into this Union of any State whose Constitution tolerates domestic slavery," and it had furthermore asserted positively that Congress had the power, by the Constitution, both to "abolish slavery and the slave trade in the District of Columbia, and in the Territories of the United States," and to "prohibit the slave trade between the several States of this Union, and to make such laws as shall effectually prohibit such trade."[151] Admitting openly on January 11 of the following year that he was gunning to place the practice of slavery in the territories and in the District of Columbia "under the shield of all the slaveholding States, where alone it can be safely placed, and…held to be impregnable," Calhoun introduced his countermeasures not only "as the antagonist of the Vermont resolutions," he explained on January 5, 1838, but "to ascertain whether, in the opinion of the Senate, there was any constitutional ground adequate to resist the assaults on our rights and property, on which the slave-holding states could stand."[152] In Vermont's memorial he perceived a threat, a fell spirit, fierce and cruel and persecutory, he confessed, and he wanted to locate and arrest it before it divided the union, or drenched it in blood, by "find[ing] some common constitutional ground," permanent, "some constitutional barrier and guaranty" on which to stand like on a rock to rally.[153]

Webster had based his opposition to state interposition on the idea that at the moment the people, in a character transcendent of the several states, erected the general (or national)

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[150] *Congressional Globe*, 29th congress, 2nd session (February 1, 1847): 303. Calhoun offered the resolutions for debate only, and not as a bill. The point was not lawmaking. See *Papers of Calhoun*, 14:33n.

[151] "Resolutions of the Vermont Legislature," *The Liberator*, January 26, 1838.

[152] *Papers of Calhoun*, 14:90 (January 11); *Papers of Calhoun*, 14:57 (January 5).

[153] *Papers of Calhoun*, 14: 58, 61, 59 (January 5), and 83 (January 5).

government (their creature, the offspring of the majority will), by transferring to it a portion of their original power, they placed the ultimate right of discerning the content and extent of the general government's delegated powers "with the government itself, in its appropriate branches."[154] Calhoun, contrariwise, maintained the opposite doctrine, that the sovereign states erected the general government (their creature, the offspring of the majority will of the states), by transferring a portion of their original power among themselves, each one remaining the highest and equal arbiter of the constitutionality of the acts of the general government. Calhoun's diagnosis of the disease befalling the country in the winter of 1837-8 cohered very well with this earlier doctrine. The disease's culprit, Calhoun said on January 3, 1838, was the belief among "abolitionists" (he called them "madmen") that "they were responsible for the sins of the slave-holding States, and had just such a right to control them as a State has to control its counties," a "conception of their responsibility" that originated "in that mistaken conception of our system, which regards it, not as it really is—a union of States for the mutual good and security of each, but a great and consolidated community, in which the States bear the same relation to the whole as counties do to States; and, of course, in which the whole is responsible for the parts."[155] That was significant.

In 1857, Taney wrote that the knowledge of justice belonged to those who formed the sovereignty in 1787, and two decades before, Calhoun must have perceived something similar when he insisted that sovereignty lay with the several states, or perhaps, more accurately, roundabout each master and slave, whose creature the general government was. "All…attacks" on "domestic slavery, as it exists in the Southern and Western States of this Union," he asserted in his fourth resolution, were "a manifest breach of faith, and a violation of the most solemn

[154] *Writings and Speeches of Webster*, 6: 67 (1830).

[155] *Papers of Calhoun*, 14:85 (January 10); 14:50 (January 3); and 14:59 (January 5).

obligations, moral and religious"; and "the intermeddling of any state or states, or their citizens, to abolish slavery in this District, or any of the Territories, on the ground, or under the pretext, that it is immoral or sinful; or the passage of any act or measure of Congress with that view, would be a direct and dangerous attack on the institutions of all the slaveholding States," he wrote in the fifth. The nature of union, in his view, determined where responsibility for the parts, and the measure of morality, lay. He had seen this coming since 1833, he confessed, and told as much to Webster at the time, who had, for his part, when he sat down on May 17, 1833, to write John Bolton of Georgia, who had requested Webster to state his opinion on "the powers of Congress on the subject of slaves and slavery; and of the existence of any wish or design, on the part of Northern men, to interfere with the security or regulation of that species of property," referred Bolton to his celebrated speech in response to Senator Hayne in 1830.

Calhoun spied a positive constitutional duty to abstain from interfering with, weakening, or destroying slavery where it already was, and might travel, but he spied, too, as Taney would, a positive constitutional duty to actively cherish and support, strengthen and uphold, it in the same.[156] On January 11, 1838, Calhoun answered affirmatively when asked if any Senator denied the right of Congress to abolish slavery in the District of Columbia or the territories, and on the previous day, January 10, he had conceded what he really found when he ventured out searching for the identity of America's sovereign.[157] "The Southern States are an aggregate, in fact, of communities, not of individuals," Calhoun observed that winter day. "Every plantation is a little

[156] *Papers of Calhoun* 14: 32, 55. Because, Calhoun explained, of the "solemn pledge to protect and defend each other, given by the states, respectively, on entering into the constitutional compact, which formed the union" and "that equality of rights and advantages which the Constitution was intended to secure alike to all the members of the Union" (32). In his brief to the Supreme Court, Scott's counsel would attack that argument as bologna. Taney reasoned from different ground.

[157] *Papers of Calhoun,* 14:90.

community, with the master as its head, who concentrates in himself the united interests of capital and labor, of which he is the common representative."[158]

The thirteenth-century law book Blackstone ordered from the Bodleian Library on September 22, 1759, had recorded that "the first and briefest division of persons is this, that all humans beings are either free (*liberi*) or slave (*servi*), that is, every human being is either free (*liber*) or slave (*servus*), that the plural may so be opened up into the singular." With that insight this dissertation began, and with it this dissertation will end, too, for the world was round and human events were entwined, and, as Calhoun and after him, Frederick Douglass, knew, inside of "all" lay "every last."

V.

Harriet Robinson Scott's most recent biographer, historian Lea VanderVelde, confirms that only one likeness of her survives, a likeness captured because Harriet made it the price for a daguerreotype of her husband, wanted by journalists for *Frank Leslie's Illustrated Newspaper* in the summer of 1857. When these white newsmen came by her home in St. Louis to request it, she negotiated a trade: a set of daguerreotypes of the entire family to keep for themselves in exchange for her willingness to allow the sitting. Harriet, Dred, Eliza, and Lizzie Scott were free people that summer, manumitted by Taylor Blow in May, after Sanford's death on May 5, and so it came to pass that the family acquired personal liberty by the choice of Blow to release them from his hand, a release at the pleasure of a nonenslaveable man that Taney would not have objected to at all.

On October 16, 1854, in Peoria, Illinois, in response to an act of Congress that had repealed the Missouri Compromise's slavery prohibition in the Kansas and Nebraska territories,

[158] *Papers of Calhoun,* 14:84.

Lincoln said that Senator Stephen Douglas's "great mistake" in his support for leaving it in the hands of inhabitants of open territory to decide for themselves whether to adopt slavery locally or not was this, "that the Judge has no very vivid impression that the negro is a human; and consequently has no idea that there can be any moral question in legislating about him. In his view, the question of whether a new country shall be slave or free, is a matter of utter indifference, as it is whether his neighbor shall plant his farm with tobacco, or stock it with horned cattle."[159] Now, "*declared* indifference," Lincoln saw, masked "*covert* real zeal," because indifference required acceptance of the possibility that men might become enslaved "who otherwise would be free." Indifference, then, was illusory, for it did not spare anyone from deciding whether that perpetuation was "right or wrong."[160]

"There is humanity in the negro," Lincoln implored, and you require me to deny that when you ask me to assume an orientation of indifference to its spread.[161] "The doctrine of self-government is right—absolutely and eternally right—but it has no just application as here attempted," he said, addressing Senator Douglas. "Or perhaps I should rather say that whether it has just application depends upon whether a negro is *not* or *is* a man. If he is not a man, why in that case, he who *is* a man may, as a matter of self-government, do just as he pleases with him. But if the negro *is* a man, is it not to that extent, a total destruction of self-government, to say that he not shall not govern *himself*?"[162]

Lincoln rejected "the establishment of political and social equality between the whites and blacks," as likewise the notion "that white and black are not different," he assured his crowd,

[159] *Works of Lincoln*, 2:281.

[160] *Works of Lincoln*, 2:255, 263-4.

[161] *Works of Lincoln*, 2:264.

[162] *Works of Lincoln*, 2:265-6.

but, at the same time, he emphasized, "there can be no moral right in connection with one man's making a slave of another."[163] That went to "the very foundation" of one's "sense of justice," he contended, "and that cannot be trifled with."[164] The question of slavery's extension put at stake much more than "a mere right of property," he advised on June 16, 1858, at Springfield, and reducing the question to those terms was evidence of the central, galling problem.[165]

"In legislating for new countries, where it does not exist, there is no just rule other than that of moral and abstract right!" Lincoln exclaimed almost exactly four years later, on October 7, 1858, in the fifth debate with Douglas at Galesburg. "Judge Douglas declares that if any community want Slavery they have a right to have it. He can say that logically, if he says that there is no wrong in Slavery; but if you admit that there is a wrong in it, he cannot logically say that anybody has a right to do wrong…you cannot institute any equality between right and wrong."[166] The problem with *Dred Scott*, then, whose "essence," Lincoln thought, could be found in Taney's argument that the Constitution distinctly and expressly affirmed the right of property in a slave, was that it favored what was wrong instead of what was right, and led inevitably to the conclusion that no law or constitution could undo the constitutional right to do wrong. "The fault is not in the reasoning," Lincoln explained, "but the falsehood in fact is in a fault of the premises."[167]

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[163] *Works of Lincoln*, 2:261, 266.

[164] *Works of Lincoln*, 2:282.

[165] *Works of Lincoln*, 2:468.

[166] *Works of Lincoln*, 3:226.

[167] *Works of Lincoln*, 3:230-1. On October 13 in Quincy, Lincoln had Howard's *Reports* at hand. "At Galesburg, I tried to show that by the Dred Scott Decision, pushed to its legitimate consequences, slavery would be established in all the States as well as in the Territories," he said. "I will thank Judge Douglas to lay his finger upon the place in the entire opinions of the court where any of them 'says the contrary'…I have examined that decision with a good deal of care, as a lawyer examines a decision, and so far as I have been able to do so, the Court has no where in its

The controversy over the spread of slavery, Lincoln persisted on to say in the penultimate debate on October 14 at Quincy, "necessarily springs from difference of opinion," and "the difference of opinion, reduced to its lowest terms, is no other than the difference between men who think slavery a wrong and those who do not think it wrong." Republicans "think it wrong," and so "propose a course of policy that shall deal with it as a wrong," Lincoln explained, whereas the Democrat "holds that slavery is not wrong," and therefore "goes for a policy that does not propose dealing with it as a wrong," taking care throughout to respect a "studied exclusion of the idea that there is anything wrong in slavery," and to "constantly object to anybody else saying so," leaving "no suitable place to oppose it."[168] After Lincoln charged Douglas with "the high distinction, so far as I know, of never having said slavery is either right or wrong," Douglas at last capitulated at the same debate. "He tells you that I will not argue the question whether slavery is right or wrong," he responded, chided yet defiant. "I tell you why I will not do it…It is none of our business," a question well without a Senator's "constitutional power of action."[169] "It does not become Mr. Lincoln or anyone else, to tell the people of Kentucky that they have no consciousness," Douglas warned, echoing Calhoun, "that they are living in a state of iniquity, and that they are cherishing an institution to their bosoms in violation of the law of God."[170]

It was not only absurd, but intellectually dishonest, Lincoln concluded in the final debate on October 15 in Alton, "to build up a system of policy upon the basis of caring nothing about

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opinions said that the States have the power to exclude slavery, nor have they used other language substantially that" (3:250-1).

[168] *Works of Lincoln*, 3:254-6.

[169] *Works of Lincoln*, 3:266.

[170] *Works of Lincoln*, 3:275.

the very thing that every body does care the most about." As soon as you admit that slavery is wrong, he understood clearly by that exchange:

> You may turn over everything in the Democratic policy from beginning to end, whether in the shape it takes on the statute book, in the shape it takes in the Dred Scott decision, in the shape it takes in conversation or the shape it takes in short maxim-like arguments…That is the real issue. That is the issue that will continue in this country when these poor tongues of Judge Douglas and myself shall be silent. It is the eternal struggle between these two principles—right and wrong—throughout the world. They are the two principles that have stood face to face from the beginning of time; and will ever continue to struggle.[171]

The answer to the "moral,…social,…political wrong" of slavery, however, to the "monstrous injustice" it was, as Lincoln described it in Peoria back in 1854, was not to evacuate subjection and degradation from the idea of manhood equality, for the right to life, liberty, and the pursuit of happiness, according to candidate Lincoln, the right to eat bread without leave of anybody else and the natural right to oneself, did not require freedom from systemic vulnerability to caprice.[172] "The inferior races are our equals," Lincoln said oxymoronically in the fifth debate at Galesburg on October 7, disclosing the germ that would allow *Dred Scott* to survive the emancipation of "all persons held as slaves" in the rebelling states on January 1, 1863.

A black man's share in the Declaration of Independence, Lincoln explained in the same debate in order to clarify his position, was a "humble" share, which put to serious question not only the shape and height of happiness a black man could hope for in this view, but the distance between Lincoln's position and Douglas's.[173] Lincoln and Douglas reached at least one identical conclusion from opposite premises. Douglas argued that the black man had no share in human equality, while Lincoln argued that he did, but both opposed "political and social equality

[171] *Works of Lincoln*, 3:315.

[172] *Works of Lincoln*. 2:255.

[173] *Works of Lincoln*, 3:222, 234.

between the white and black races," as likewise "negro citizenship."[174] "It does not follow by any means that because a negro is not your equal or mine that hence he must necessarily be a slave," Douglas confessed on September 15. "On the contrary, it does follow that we ought to extend to the negro every right, every privilege, every immunity which he is capable of enjoying consistent with the good of society."[175] One did not have to call a black man a beast to attack the fullness of his humanity, as Lincoln knew. "I as well as Judge Douglas, am in favor of the race to which I belong, having the superior [political and social] position," Lincoln confirmed on August 21, repeating it verbatim on October 13. "I have never said anything to the contrary."[176] The line of distinction between giving an enslaved woman permission to eat bread, and giving her permission to forever walk in liberty, was fine indeed, as likewise the line of distinction between those two deliveries and this one: "to extend to the negro race, and to all other dependent races all the rights, all the privileges, and all the immunities which they can exercise consistently with the safety of society," as Douglas had it. Historians, then, must consider how those acts differed from the phenomenon Roger Taney observed in *Dred*, that the "dominant race" may do as it pleased, but that is work for another day.[177]

It was Frederick Douglass who saw that the possessor of the knowledge of justice in the United States of America, "the light in the sun,…unlimited, by any thing human," was not the slaveholder who chose to manumit, or the aggregate people (Webster), or the people of the several states (Calhoun and Taney), or the majority of qualified voters (Story) who authorized

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[174] *Works of Lincoln*, 3:16, 179.

[175] *Works of Lincoln*, 3:113, repeated on October 15, adding, "The question then arises what are those privileges, and what is the nature and extent of them. My answer is that that is a question which each State must answer for itself." 3:297.

[176] *Works of Lincoln*, 3:16, 249.

[177] *Works of Lincoln*, 3:296.

the actions of government, but the person who suffered enslavement and treatment exhausted by expressions not required or invited by claims on her part.[178] "Mr. President, Friends and Fellow Citizens," Douglass addressed the crowd gathered in Corinthian Hall in Rochester New York on July 5, 1852, to then expose to view what may, in the history of American letters, remain its most penetrating and poignant insight: "There is not a man beneath the canopy of heaven, that does not know that slavery is wrong for him."[179]

For the reason, then, of that inescapable, no, self-evident truth, Douglass, possessor of the knowledge of what was just and what counted as property, and sitting together with all the enslaved in highest possible judgment of the rectitude of the actions of the country that was theirs yet had abandoned them to "the lust, caprice, and rapacity of the buyers and sellers of men," authoritatively professed:

> The existence of slavery in this country brands your republicanism a sham, your humanity as a base pretense, and your Christianity as a lie. It destroys your moral power abroad and it corrupts your politicians at home. It saps the foundation of religion; it makes your name a hissing, and a bye-word to a mocking earth. It is the antagonistic force in your government, the only thing that seriously disturbs and endangers your Union. It fetters your progress; it is the enemy of improvement, the deadly foe of education; it fosters pride; it breeds insolence; it promotes vice; it shelters crime; it is a crime to the earth that supports it; and yet, you cling to it, as if it were the sheet anchor of all your hopes.[180]

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[178] Taney's conception of "people" at 60 U.S. 406, 435, 441, 448. "It is true, every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognized as citizens of the several States, became also citizens of this new political body," Taney wrote. "It was the union of those who were at that time members of distinct and separate political communities into one political family, whose power, for certain specified purposes, was to extend over the whole territory of the United States." 60 U.S. 406.

[179] Frederick Douglass, *Oration, Delivered in Corinthian Hall, Rochester* (Rochester: Less, Mann, and Co., 1852), 3, 19. It sounded something like what Benjamin Franklin had perceived, but failed to understand the magnitude of, at the constitutional convention on July 6, 1787, that "those who feel, can best judge." Max Farrand, *The Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1966), 1:546.

[180] Douglass, *Oration*, 24-5, 34-5.

There was no question, he concluded, "with all the emphasis" and "severest language" he commanded, about this: "whether we turn to the declarations of the past, or to the professions of the present, the conduct of the nation seems equally hideous and revolting. America is false to the past, false to the present, and binds herself to be false to the future."[181]

In a lecture in Cork, Ireland on October 14, 1845, Douglass had called the position of a slave "the most extraordinary position that one human being ever stood before his race," more extraordinary than that of kings or lords or presidents or electors, and five years later, at the sixteenth anniversary meeting of the American Anti-Slavery Society in New York, New York on May 7, 1850, he would speak of a debt owed to the black community whose depth he only found an interstice to reveal while responding to a jeer from the crowd.[182] "If you are not indebted to us slaves, to whom are you indebted?" he asked. "Whose labor raised the cotton for the shirts on your backs? Whose labor produced the sugar that sweetens your coffee? The negro's, and well you know it; and we would do more for you, if you would let us." When a member of the audience shouted, "Yes, you would cut our throats for us," Douglass responded calmly, "No, not cut your throats,…No; the idea of cutting your throats is out of the question, for we have been handling the razor for half a century, and have not yet cut one."[183]

The vital locus of government, which William Blackstone had identified all those years ago from his perch in All Souls College as the "supreme, irresistible, absolute, uncontrolled authority, in which…the rights of sovereignty, reside," had long lain elsewhere than that jeerer

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[181] Douglass, *Oration*, 16.

[182] *Douglass Papers*, 1:39.

[183] *Douglass Papers*, 2:242. "Not yet cut one," was misleading, as Nat Turner's insurrection in August 1831 made clear. "Already slaveholders go to bed with bowie knives, and apprehend death at their dinners," Douglass would say later. "Those who enslave, rob, and torment their cooks, may well expect to find death in their dinner-pots" (3:170).

thought, Douglass suggested, and it gave an entirely new meaning to the following insight Douglass expressed before leaving for Europe in May of 1845, in an address for the twelfth anniversary convention of the American Anti-Slavery Society: "These hands—are they not mine? This body—is it not mine? Again, I am your brother, white as you are. I am your blood-kin. You don't get rid of me so easily. I mean to hold on to you."[184]

Frederick Douglass published a response to *Dred Scott* on June 12, 1857, and in those pages, after confessing the futility of trying "to descry, in the dim and shadowy distance,…the precise speck of time at which the cruel bondage of my people should end, and the long entombed millions rise from the foul grave of slavery and death," he argued that Taney's decision could not stand.[185] "Judge Taney can do many things, but he cannot perform impossibilities," Douglass wrote, "he cannot bale out the ocean, and "he cannot change the essential nature of things—making evil good, and good, evil."[186] Douglass thought Taney's conclusions constitutionally and historically unsound, but constitutionality and historicity were not, this chapter has attempted to argue, Taney's mistakes. Taney's mistake lay in thinking, believing, that the national government's greatest debt went to sovereign slaveholders, who possessed the knowledge of justice, when in truth, that debt and that knowledge belonged to the enslaved, and to all of their ancestors, and to all of their descendants down to today, as yesterday, and for "as long as the Government they then formed should endure."[187]

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[184] William Blackstone, *Commentaries on the Laws of England* (Chicago: University of Chicago Press, 1979), 1:48-9; *Douglass Papers*, 1:33.

[185] *Douglass Papers*, 3:164, 168. "Devilish," "hell-black," "demonical," "unlooked for and monstrous," "lying," he said of the opinion. "The Constitution knows all the human inhabitants of this country as 'the people,'" he wrote, and it secured the blessings that were "the glorious birthright of our common humanity" (182-30).

[186] *Douglass Papers*, 3:167.

[187] 60 U.S. 411.

Epilogue

On March 4, 1861, four years after his opinion in *Dred Scott v. Sandford*, Chief Justice Roger Taney administered the oath of office to President-elect Abraham Lincoln. Seven states had already seceded from the union by that time, and the secessionists had just in February gathered in Montgomery, Alabama to form the Confederate States of America, dedicated to the fervent hope that racial slavery would be perpetual. Drafters of the Constitution of the Confederate States of America, adopted on March 11, wanted to eliminate any confusion left by the Constitution of the United States of 1787, and so took care to replace "other persons" with "all slaves" in Article I, Sec. 2 (the three-fifths clause) and "no person" with "no slave" in Article IV, Sec. 2 (the fugitive slave clause). The paper confirmed that "no…law denying or impairing the right of property in negro slaves shall be passed," and it guaranteed, besides, what Taney already knew, that "the citizens of each State…shall have the right of transit and sojourn in any State of this Confederacy, with their slaves and other property; and the right of property in said slaves shall not be thereby impaired."[1]

Bracton had said that it was point of view, position from which to stand see, that determined whether a person was wholly free or wholly slave, and John Brown, a fierce abolitionist—a "radical" some called him, "insane," said others—had assumed his own perspective on the morning of May 8, 1858, when he gathered with forty-six men (thirty-four black and twelve white)—"true friends of freedom" the invitation had said—to draft a constitution for themselves. "It proved to be a frame of government based on the national Constitution, but much simplified and adapted to a moving band of guerrillas," W.E.B Du Bois

[1] Constitution of the Confederate States of America printed in parallel to the Constitution of the United States of America in Jefferson Davis, *Rise and Fall of the Confederate Government* (New York: Appleton and Company, 1881) I: 649, 669, 658, 669.

wrote in his biography of Brown. "Mr. Brown's scheme was to fortify some place in the mountains, and call the slaves to rally under this colors."[2] The preamble to that paper, which Brown had in his possession at Harper's Ferry in 1859, expressed the following in a direct answer to Taney's opinion in *Dred Scott*:

> We, citizens of the United States, and the Oppressed People, who, by a recent decision of the Supreme Court are declared to have no rights which the White Man is bound to respect; together with all other people degraded by the laws thereof, Do, for the time being ordain and establish ourselves, the following PROVISIONAL CONSTITUION AND ORDINANCES, the better to protect our Persons, Property, Lives and Liberties; and to govern our actions:

Its first article, then, defined the "qualifications for membership" as these:

> All persons of mature age, whether Proscribed, oppressed, and enslaved Citizens, or of the Proscribed and oppressed races of the United States, who shall agree to sustain and enforce the PROVISIONAL CONSTITUTION AND ORDINANCE of this organization, together with all minor children of such persons, shall be held to be fully entitled to protection under the same.[3]

Brown's raid on the federal arsenal at Harper's Ferry in October 1859 in the hope of taking hostages and emancipating slaves did not succeed, and after a trial in November at which his provisional constitution played a central role, the Commonwealth of Virginia found him guilty of, and hanged him for, "treason, conspiring and advising with slaves and others to rebel, and murder in the first degree."[4]

In that inaugural address in 1861, Lincoln described "the American people" as his "rightful masters" and addressed the recent secessions by reflecting on who was the ultimate judge in the American polity. The Supreme Court did not irrevocably fix answers to the "vital

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[2] W.E.B. Du Bois, *John Brown*, ed. Henry Louis Gates, Jr. (New York: Oxford University Press, 2007), 109-10.

[3] Transcribed in Robert L. Tsai, "John Brown's Constitution," *Boston College Law Review* 51, no. 1 (2010): 151-207, 187.

[4] *The Life, Trial, and Execution of Captain John Brown* (New York: Robert M. DeWitt, 1859). Robert L. Tsai discusses the constitution and trial in "John Brown's Constitution," *Boston College Law Review* 51, no. 1 (2010): 151-207.

questions, affecting the whole people," he said. Were that the case, "then the people will have ceased, to be their own rulers." "This country, with its institutions, belongs to the people who inhabit it," he reminded his audience. "Why should there not be a patient confidence in the ultimate justice of the people? Is there any better, or equal hope, in the world?" Lincoln knew that "one section of our country believes slavery is right, and ought to be extended, while the other believes it wrong, and ought not to be extended," distilling the entire secessionist movement into that disagreement, and asked for the people to refrain from hasty steps and to please have patience that whatever the truth was, and whatever justice required, would "surely prevail, by the judgment of this great tribunal, the American people."[5]

By that juncture, Frederick Douglass already knew that the judgment Lincoln longed for would necessitate a descent into hell. "Moral considerations have long since been exhausted upon slaveholders," he wrote in an editorial composed shortly after Brown's conviction in November 1859 in order to explain that Brown, so far from insane, had merely met slavery with slavery's own weapons. "It is vain to reason with them. One might as well hunt bears with ethics and political economy for weapons."[6] Conceived in war in North America since 1641, slavery would be undone by war, but even after the Emancipation Proclamation of January 1, 1863, in which Lincoln "order[ed] and declare[d] that all persons held as slaves within said designated [rebelling] States and parts of States, are, and henceforward shall be free"; and the Thirteenth Amendment, ratified in 1865, which prohibited slavery except as punishment for crime,

[5] *The Collected Works of Abraham Lincoln*, ed. Roy P. Basler (New Brunswick, NJ: Rutgers University Press, 1953), 4: 265, 268, 269, 270, 268-9, 270.

[6] Frederick Douglass, "Capt. John Brown Not Insane," *Douglass' Monthly* (Rochester, NY, 1859).

Douglass *still in 1866* understood that he needed the tools to save himself.[7] In 1857, Taney wrote that black humanity had no rights but those that "the dominant race might…withhold or grant at their pleasure," and Douglass's request that Andrew Johnson "favorably regard the placing in our hands, the ballot with which to save ourselves," was moving proof that a definitive rejection and repudiation of that idea had not yet come to pass.[8]

Taney thought that the knowledge of justice lay with a sovereign people for whom the U.S. Constitution memorialized its choice to locate rights to property in persons. That was the one mistake that made his otherwise sound opinion deeply, unrecoverably false, and the entire history of the United States from that moment onward can perhaps be understood as a protracted struggle to recover from that error. One response, of course, has been repentance. On December 2, 2016, almost 160 years after *Dred Scott*, descendants of Harriet and Dred Scott and Roger Taney convened at a conference for reconciliation. There, Charlie Taney, the great-great-grandnephew of the chief justice, publicly apologized on behalf of his family to the Scott family, after confessing privately to a reporter that he had never before thought of his obligation to the present in those terms, "using those words."[9] Another response has been repudiation, as manifested in the wee hours of August 18, 2017, when workers made haste after a violent revival of white nationalism on the campus of the University of Virginia, to fell a 145-year-old statue of

[7] "Final Emancipation Proclamation," in *The Emancipation Proclamation: A Brief History with Documents*, ed. Michael Vorenberg (Boston: Bedford/St. Martin's, 2010), 71; John Hope Franklin, *The Emancipation Proclamation* (Wheeling, IL: Harlan Davidson, 1963), 82.

[8] *Dred Scott v. Sandford*, 60 U.S. 393, 412-3 (1857); W.E.B. Du Bois, *Black Reconstruction: An Essay Toward a History of the Part Which Black Folk Played in the Attempt to Reconstruct Democracy in America, 1860-1880* (New York: Russell and Russell, 1935), 297.

[9] "American Pendulum II," in the WNYC podcast *More Perfect* (October 2, 2017).

Taney on the grounds of the Maryland State House.[10] A poet once suggested, though, that redemption would require more than apology and condemnation when she wrote:

> I am changed forever I want to say
> forgive me
> forgive me
> forgive me
>
> you whom I have wronged, please
> take me
>
> with you.[11]

Taney will not be dismantled until we, the people whose voices inhabit this country, assume that radically different direction. This means, then, that *Dred Scott v. Sandford* will not unravel until we rip mercy out from justice's frame and understand that the knowledge of what was right belonged to the persons Taney counted on to be out. Their judgment, this dissertation urges at the last, may be the hope of the world.

[10] Josh Hicks and Ovetta Wiggins, "Justice Taney defended slavery in 1857. Now his statue is gone from Md.'s State House," *Washington Post*, August 18, 2017.

[11] Antjie Krog, "country of grief and grace," in her *Skinned* (New York: Seven Stories, 2013), 142.