

## Jefferson's Failed Anti-Slavery Proviso of 1784 and the Nascence of Free Soil Constitutionalism

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### ABSTRACT

Despite his severe racism and inextricable personal commitments to slavery, Thomas Jefferson made profoundly significant contributions to the rise of anti-slavery constitutionalism. This Article examines the narrowly defeated anti-slavery plank in the Territorial Governance Act drafted by Jefferson and ratified by Congress in 1784. The provision would have prohibited slavery in all new states carved out of the western territories ceded to the national government established under the Articles of Confederation. The Act set out the principle that new states would be admitted to the Union on equal terms with existing members, and provided the blueprint for the Republican Guarantee Clause and prohibitions against titles of nobility in the United States Constitution of 1788. The defeated anti-slavery plank inspired the anti-slavery proviso successfully passed into law with the Northwest Ordinance of 1787. Unlike that Ordinance's famous anti-slavery clause, Jefferson's defeated provision would have applied south as well as north of the Ohio River.

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## I. INTRODUCTION: JEFFERSON AND SLAVERY

Thomas Jefferson, once the object of wide veneration, is no longer universally beloved among academics and intellectuals. Indeed, one could state this proposition more boldly: more than a few contemporary historians, cultural theorists, and belles-lettrists appear to dislike Jefferson more intensely than most of us dislike anyone actually living and with whom we are personally familiar, for better or for worse. To be sure, most (but not all) of these highly critical voices disavow any personal malice towards Jefferson. Yet in a great many cases, the disavowals have the air of mere polite forms of words, while the animosity lingers palpably on the printed pages of recent books and journals.<sup>1</sup>

Perhaps legal academics are more forgiving in their assessments of Jefferson than the humanists.<sup>2</sup> Scholars and advocates of religious liberty in particular continue to celebrate Jefferson as a pioneer, or at least a committed progressive.<sup>3</sup> Still, in the law schools as in other

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<sup>1</sup> See, e.g., JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION* (2001); Paul Finkelman, *Jefferson and Slavery: Treason Against the Hopes of the World* [hereinafter Finkelman, *Jefferson and Slavery*], in *JEFFERSONIAN LEGACIES* 181 (Peter S. Onuf ed., 1993); Michael Zuckerman, *The Power of Blackness: Thomas Jefferson and the Revolution in St. Domingue*, in *ALMOST CHOSEN PEOPLE: OBLIQUE BIOGRAPHIES IN THE AMERICAN GRAIN* 175–218 (1993); Conor Cruise O'Brien, *Thomas Jefferson: Radical and Racist*, *ATLANTIC MONTHLY*, Oct. 1996, at 53–74. Pauline Maier's denial of animosity towards Jefferson has about it a gleam of truth, but her form of words is closely replicated by others who might be suspected of harboring less charitable opinions. See PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE*, at xvii (1997) ("Perhaps I should also explain I bear no animus towards Jefferson. True, I once nominated him the most overrated person in American history . . ."). For a balanced assessment of Jefferson and many of his recent detractors, see Benjamin Schwartz, *What Jefferson Helps to Explain*, *ATLANTIC MONTHLY*, Mar. 1997, at 60–72.

<sup>2</sup> See, e.g., BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* 55–76 (2005) (on Jefferson's sage and public spirited political judgment during the electoral crisis of 1800); LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 45–49 (2004) (on Jefferson's constitutional principles, with particular reference to separation of powers and democratic legitimacy); Jack N. Rakove, *Our Jefferson*, in *SALLY HEMINGS AND THOMAS JEFFERSON: HISTORY, MEMORY, AND CIVIC CULTURE* 210–35 (Jane Ellen Lewis & Peter S. Onuf eds., 1999) (on Jefferson's constitutionalism); BERNARD SCHWARTZ ET AL., *THOMAS JEFFERSON AND BOLLING V. BOLLING: LAW AND THE LEGAL PROFESSION IN PRE-REVOLUTIONARY AMERICA* 24–26, 58–66 (1997) (a glowing account of Jefferson's lawyerly talent).

<sup>3</sup> See, e.g., PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 3 (2002). That said, scholars of the Virginia Statute for Religious Freedom are much more likely to accept a central role for John Locke in Jefferson's thought than are scholars of the Declaration of Independence. See FRANCIS D. COGLIANO, *THOMAS JEFFERSON: REPUTATION AND LEGACY* 165 n.44 (2006). Interestingly, even Leonard Levy, who perhaps did as much as anyone to usher in the modern phase of post-hagiographic

fora, Jefferson has come under closer invigilation in recent years, and lost much of his former luster in the process.<sup>4</sup> But if truth be told, Jefferson—while often widely revered—has never been universally beloved. Enormously controversial in his own lifetime, the third President of the United States was simultaneously an apostle of liberty to his supporters, a wild-eyed zealot to his critics, and a scheming hypocrite to his staunchest opponents. His public image was contested while he lived and has ebbed and flowed since his death, frequently being co-opted or disowned by one side or another in national political struggles focused on order and liberty, localism and federal authority, individualism and the collective good, the utility and meaning of history, and even the meaning of (moral) meaning.<sup>5</sup>

For all the rancor associated with the Jeffersonian image through the course of American history, no aspect of Jefferson's life, thought, and work has attracted more critical attention and hostile reaction over the last forty-some years than his involvement with—and stance toward—African American slavery.<sup>6</sup> The heightened scrutiny of recent decades has served a useful corrective purpose regarding Jefferson's connection to slavery, which some earlier, more hagiographic writers had frequently been quick to gloss over and explain away. Few would now deny that Jefferson's complex and troubled (or simply troubling?) relationship with slavery was animated by attitudes towards African Americans that were at times more malign

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Jefferson studies, acknowledges Jefferson's bona fides respecting religious liberty. See LEONARD W. LEVY, *JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE* 4–8 (1963).

<sup>4</sup> See Finkelman, *Jefferson and Slavery*, *supra* note 1, at 211–12 (“Yes, there had been ‘treason against the hopes of the world.’ The treason was by that generation which failed to place the nation on the road to liberty for all. No one bore a greater responsibility for that failure than the author of the Declaration of Independence—the Master of Monticello.”). The phrase “treason against the hopes of the world” is Jefferson's, who used it in 1820 to describe the guilt that would attend the break-up of the Union (and hence a betrayal of the spirit of 1776 and thus failure of the one shining example of republican governance in the world) if the Missouri Crisis were not abated and resolved. See Letter from Thomas Jefferson to John Holmes (Apr. 22, 1820), in THOMAS JEFFERSON: WRITINGS 1434 (Merrill D. Peterson ed., 1984).

<sup>5</sup> MERRILL D. PETERSON, *THE JEFFERSON IMAGE IN THE AMERICAN MIND* (1960), is the classic study of Jefferson's multifaceted and highly politicized image from his death to the mid-twentieth century. Francis D. Cogliano provides an updated and contemporized perspective on various aspects of Jefferson's reputation and legacy. See COGLIANO, *supra* note 3. The express linkage of Jefferson to the problem of discovering the meaning of (moral) meaning goes back at least as far as nineteenth-century biographer James Parton, who in 1874 mused “if Jefferson was wrong, America is wrong. If America is right, Jefferson was right.” Gordon S. Wood, *The Trials and Tribulations of Thomas Jefferson*, in *JEFFERSONIAN LEGACIES*, *supra* note 1, at 395.

<sup>6</sup> See generally Finkelman, *Jefferson and Slavery*, *supra* note 1; GARRY WILLS, “NEGRO PRESIDENT”: JEFFERSON AND THE SLAVE POWER (2003); Zuckerman, *supra* note 1; O'Brien, *supra* note 1.

than munificent. And today, the stark contrast between the avowal of liberty in the Declaration of Independence and the practice of slavery in Jeffersonian America angers and intrigues historians, as it once angered and intrigued some of Jefferson's contemporaries.<sup>7</sup> Why indeed, one might ask with Dr. Johnson, were the loudest yelps for liberty heard from the drivers of Negroes?<sup>8</sup> The question cannot lightly be dismissed; but neither, I suggest, are the contradictions between Jeffersonian practice and principle as simple and straightforward as some scholars now assume.

When Jefferson died on July 4, 1826 (fifty years exactly since the first public reading of his celebrated proclamation in favor of universal liberty), most of his remaining slaves passed with his bankrupt estate into the hands of receivers and thence to the auction block. Jefferson freed only five slaves in his will, all members of the Hemings family, and so very probably blood relatives of his long deceased wife, Martha.<sup>9</sup> In two cases, the manumitted were probably, or at least pos-

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<sup>7</sup> See, e.g., PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON*, at ix (2d ed. 2001) [hereinafter FINKELMAN, *SLAVERY AND THE FOUNDERS*].

[D]espite Jefferson's fine words and our belief in this credo, it is clear that liberty was not available to most African-Americans at the time of the founding. . . . I argue that Jefferson himself, who owned over 150 slaves when he wrote the Declaration, did not in fact believe that blacks were entitled to the same rights as other Americans.

*Id.*

<sup>8</sup> Johnson's famous query, "How is it that we hear the loudest yelps for liberty among the drivers of negroes?," appeared originally in the pamphlet *TAXATION NO TYRANNY: AN ANSWER TO THE RESOLUTION AND ADDRESS OF THE AMERICAN CONGRESS (1775)*, reprinted in JAMES BOSWELL, *LIFE OF JOHNSON* 876 (Oxford Univ. Press 1998) (1791).

<sup>9</sup> It has long been widely assumed that Jefferson's father-in-law John Wayles lived in more or less open concubinage with his slave Betty Hemings, and thus became the father of Sally Hemings, who relocated to Monticello along with her mother and other family members after Wayles' death in 1774. The question whether any members of the next generation of Hemings were the children of Thomas Jefferson and Sally Hemings (presumably Mrs. Martha Wayles Skelton, Jefferson's half-sister) has famously provoked heated debate, impassioned denial, and painstaking genetic analysis. See, e.g., Eugene A. Foster et al., *Jefferson Fathered Slave's Last Child*, *NATURE*, Nov. 5, 1998, at 27; Eric S. Lander & Joseph J. Ellis, *Founding Father*, *NATURE*, Nov. 5, 1998, at 13. The Jefferson Foundation's official position is that Thomas Jefferson's paternity of some of Sally Hemings' children is highly probable. See *REPORT OF THE RESEARCH COMMITTEE ON THOMAS JEFFERSON AND SALLY HEMINGS (2000)*, [http://www.monticello.org/plantation/hemingscontro/jefferson-hemings\\_report.pdf](http://www.monticello.org/plantation/hemingscontro/jefferson-hemings_report.pdf). Nevertheless, prominent voices may still be heard in defense of the old scholarly consensus that a relationship between Sally Hemings and Thomas Jefferson was unlikely. See, e.g., *JEFFERSON-HEMINGS SCHOLAR'S COMMISSION, REPORT ON THE JEFFERSON-HEMINGS MATTER (2001)* (Dr. Paul Rahe, dissenting), <http://www.tjheritage.org/scholars.html>. To my knowledge, neither Jeffersonian historians nor Jeffer-

sibly, Jefferson's own children.<sup>10</sup> But Jefferson's anti-slavery legacy is hardly as hollow as many recent commentators—Joseph Ellis, Paul Finkelman, and Conor Cruise O'Brien among them—insist.<sup>11</sup> For all his racism, which these writers rightly emphasize, Jefferson never accepted the legitimacy of slavery. The man who played a leading role in ushering America towards independence could also see himself as the target of a justifiable revolution by his own slaves. In 1800, when a major uprising of Virginia slaves under the leadership of Gabriel (or Gabriel Prosser) was narrowly averted, Jefferson urged deportation rather than execution of the slave conspirators, on the grounds that their actions were legally justified.<sup>12</sup>

Jefferson's letter to Governor James Monroe three weeks after the failed uprising, urging the Governor to "stay the hand of the executioner,"<sup>13</sup> was not the only action of Jefferson's long life that could plausibly be labeled "anti-slavery." His argument in a provincial freedom suit of 1770<sup>14</sup> anticipated the *Somerset* decision of 1772, in which Lord Chief Justice Mansfield held that slavery was incompatible with the common law.<sup>15</sup> His proposed Constitution for Virginia of 1783,

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son's descendants have ever expressed reservations about the assumptions that John Wayles cohabited with Betty Hemings and that he was Sally Hemings' father.

<sup>10</sup> See FAWN M. BRODIE, *THOMAS JEFFERSON: AN INTIMATE HISTORY* 466 (1974). The persons freed in Jefferson's will were Burwell (no surname), John Hemings, Joe Fosset, Madison Hemings, and Easton Hemings. Sally Hemings, fifty-three years old in 1826, was not emancipated. *Id.* Madison Hemings, aged twenty-one, and Easton Hemings, aged eighteen, were her sons; her other light-skinned children had already "run-away" or passed into the white community. *Id.*

<sup>11</sup> ELLIS, *supra* note 1, at 90; Finkelman, *Jefferson and Slavery*, *supra* note 1, at 181–83; O'Brien, *supra* note 1, at 68–72.

<sup>12</sup> See William G. Merkel, *To See Oneself as a Target of Justified Revolution: Thomas Jefferson and Gabriel's Uprising*, 4 AM. NINETEENTH CENTURY HIST. 1 (2003).

<sup>13</sup> Letter from Thomas Jefferson to James Monroe (Sept. 20, 1800), in 9 THE WORKS OF THOMAS JEFFERSON 145 (Paul Leicester Ford ed., 1905) [hereinafter WORKS OF JEFFERSON].

<sup>14</sup> There is no official report of the case, *Howell v. Netherland* (1770), but Jefferson's argument for the claimant is found in THOMAS JEFFERSON, *REPORTS OF CASES DETERMINED IN THE GENERAL COURT OF VIRGINIA FROM 1730 TO 1740 AND FROM 1768 TO 1772* [hereinafter JEFFERSON, *REPORTS OF CASES*], reprinted in 1 WORKS OF JEFFERSON, *supra* note 13, at 470–81. David Thomas Konig of Washington University in St. Louis, who is completing a comprehensive study of Jefferson's legal thought and career, reports that Jefferson argued six freedom suits (all of them pro bono) between 1767 and 1776. See David Konig, *Antislavery in Jefferson's Virginia: The Incremental Attack on an Entrenched Institution* (June 18, 2006) (unpublished conference paper for "Too Pure an Air: Law and the Quest for Freedom, Justice, and Equality," University of Gloucestershire, UK) (on file with author).

<sup>15</sup> *Somerset v. Stewart*, (1772) 98 Eng. Rep. 499 (K.B.). The official report is more readily available at 20 Howell's State Trials 1, 79–82. The most complete and accurate transcript of the case, including the argument of counsel and supporting briefs, is housed at the New York Historical Society on Central Park West, where it

composed while constitutional revision appeared likely in the Old Dominion, included a gradual emancipation clause that would have freed all persons born to enslaved mothers in the state after 1800.<sup>16</sup> And in December 1806, with the federal constitutional prohibition against abolition of the slave trade soon scheduled to lapse, President Jefferson successfully pressed Congress to abolish the slave trade at the earliest possible juncture.<sup>17</sup> Jefferson made still other anti-slavery overtures in his earlier years,<sup>18</sup> but in this Article my focus is squarely on his draft of the Territorial Governance Act (or Ordinance) of 1784, which contained a clause that would have barred slavery from all of the new American nation's western territories after 1800, had it not failed to pass by the narrowest possible margin.<sup>19</sup>

The Territorial Governance Act was drafted by Jefferson during the winter of 1783–1784, when he served a brief stint with the Con-

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can be found in the folder labeled “Granville Sharp Papers (miscellaneous manuscripts in his hand).” On the significance of *Somerset*, see also Symposium, *Somerset’s Case Revisited*, 24 LAW & HIST. REV. 601 (2006) (featuring a major article by George Van Cleve and comments by Daniel Hulsebosch and Ruth Paley).

<sup>16</sup> In the end, Virginia summoned no constitutional convention in 1783 and the Constitution of 1776 remained in force until 1830, but Jefferson’s proposal was reprinted in early editions of the *Notes on Virginia*. See Thomas Jefferson, *Draught of a Fundamental Constitution for the Commonwealth of Virginia* (1783) [hereinafter Jefferson, *Draught Constitution*], reprinted in THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA app. at 213–14 (William Peden ed., 1954) (1787) [hereinafter JEFFERSON, NOTES ON VIRGINIA].

<sup>17</sup> Thomas Jefferson, *6th Annual Message* (1806), in 3 THE WRITINGS OF THOMAS JEFFERSON, at 477–79 (Albert E. Bergh & Andrew A. Lipscomb eds., 1904) [hereinafter WRITINGS OF JEFFERSON].

<sup>18</sup> In *Notes on Virginia*, Jefferson reported that the Committee of Revisors, Thomas Jefferson, Edmund Pendleton, and George Wythe, who were charged shortly after independence with undertaking a revision of Virginia’s laws for submission as individual bills to the state legislature, drafted a proposed statute to provide for comprehensive gradual emancipation linked to colonization of the freed persons to locations outside the commonwealth. See JEFFERSON, NOTES ON VIRGINIA, *supra* note 16, at 137–38. This plan was to be presented as an amendment to Bill No. 51 on slavery once that bill was brought forward, but was not included in the report the Revisors made to the Assembly, lest its publication prior to actual legislative deliberation provoke a fatal conservative backlash. See *id.* The amendment was never moved, and no transcript of it survives. See Thomas Jefferson, *A Bill Concerning Slaves*, in 2 THE PAPERS OF THOMAS JEFFERSON 471–72 (Julian P. Boyd ed., 1952) [hereinafter PAPERS OF JEFFERSON]. Jefferson’s explanation that the emancipation scheme was kept out of the public light for reasons of legislative strategy appears credible given the extreme reaction to other emancipation proposals of the era. Cf. Letter from Thomas Jefferson to James Madison (Aug. 3, 1797), in 29 PAPERS OF JEFFERSON, *supra*, at 489 (on the fate of St. George Tucker’s emancipation proposal submitted to the Virginia General Assembly in 1797).

<sup>19</sup> See PLAN OF GOVERNMENT FOR THE WESTERN TERRITORY, REPORT OF THE COMMITTEE (Mar. 1, 1784) [hereinafter REPORT OF THE COMMITTEE], in 6 PAPERS OF JEFFERSON, *supra* note 18, at 581–617.

federation Congress before departing to take up a diplomatic post in France that kept him in Europe until 1788.<sup>20</sup> The Act marked the first effort of the national government under the Articles of Confederation to organize and administer the newly created National Domain, the western reserve of territory stretching from the Atlantic seaboard states to the Mississippi River, forged from the cessions (and to be supplemented by anticipated future cessions) of the Atlantic states' western claims.<sup>21</sup> The remaining sections of this Article explore and contextualize Jefferson's drafting of the Act, assess its status as a fundamental constitutional instrument, and evaluate the meaning and legacy of its defeated anti-slavery proviso.

Part II of the Article explains that the Act created a binding, entrenched system of reciprocal obligations, committing the existing states to future admission of new states whose rights and duties would mirror those of the established members of the Confederacy, even as it obligated the formative new states to adopt five core principles of republican governance and society.<sup>22</sup> In the process, the Act provided a template for three future clauses of the United States Constitution. As drafted, it reaffirmed the prohibition against titles of nobility contained in the Articles of Confederation,<sup>23</sup> introduced into American constitutional discourse language that developed into the Republican Guarantee Clause of the Constitution of 1788,<sup>24</sup> and proposed a prohibition on slavery in all future western states after 1800.<sup>25</sup>

<sup>20</sup> See *id.* at 582–86; DUMAS MALONE, *JEFFERSON THE VIRGINIAN* 403–23 (1948).

<sup>21</sup> See PETER S. ONUF, *THE ORIGINS OF THE FEDERAL REPUBLIC: JURISDICTIONAL CONTROVERSIES IN THE UNITED STATES, 1775–1787*, at 149–72 (1983).

<sup>22</sup> See 6 PAPERS OF JEFFERSON, *supra* note 18, at 587–600 (ed. note); ORDINANCE OF 1784 (U.S.) [hereinafter ORDINANCE OF 1784], in 6 PAPERS OF JEFFERSON, at 613–15.

<sup>23</sup> Compare *id.* at 608 (Jefferson's proposed language that the "respective [new state] governments shall . . . admit no person to be a citizen who holds any hereditary title"), and ARTICLES OF CONFEDERATION art. VI (U.S. 1781) ("nor shall the United States in Congress assembled, or any of them, grant any title of nobility"), with U.S. CONST. art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States"), and U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . grant any Title of Nobility").

<sup>24</sup> Compare ORDINANCE OF 1784, *supra* note 22, at 614 (quoting Jefferson's proposal "[t]hat their respective governments shall be [in] republican [forms]" (passed into law in Territorial Governance Act)), with U.S. CONST. art IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government").

<sup>25</sup> See PLAN OF GOVERNMENT FOR THE WESTERN TERRITORY, REVISED REPORT OF THE COMMITTEE (Mar. 22, 1784) [hereinafter REVISED REPORT OF THE COMMITTEE], in 6 PAPERS OF JEFFERSON, *supra* note 18, at 608 ("That after the year 1800[] of the Christian [ ]era, there shall be neither slavery nor involuntary servitude in any of the said states, otherwise than in punishment of crimes whereof the party shall have been convicted to have been personally guilty.").

While the Ordinance became law, Jefferson's clause prohibiting titles of nobility was rejected by a clear margin, and that prohibiting western slavery after 1800 failed by a single vote.<sup>26</sup> Jefferson's defeated anti-slavery language of 1784 resurfaced under other hands in the Northwest Ordinance of 1787, which prohibited slavery with ostensibly immediate effect in the territories north of the Ohio River, but left slavery unaffected in the southwest. The Ordinance of 1787, unlike that of 1784, was burdened by a fugitive slave clause.<sup>27</sup> Jefferson's defeated anti-slavery clause is significant not just because of what it might have been, but more importantly because of what it eventually became. Minus the fugitive slave clause imposed in 1787, the language drafted by Jefferson in 1784 was revived almost verbatim by the Reconstruction Congress in 1865 as Section 1 of the Thirteenth Amendment, finally prohibiting for all time slavery and involuntary servitude in the United States.<sup>28</sup>

Part III of the Article addresses academic critique of Jefferson's defeated proviso, in particular the claim that Jefferson laid little stock in the clause or in anti-slavery principles.<sup>29</sup> It makes the countervailing claim that Jefferson's common lawyerly world view and Whigish constitutionalism<sup>30</sup> steered him in the direction of cautious anti-

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<sup>26</sup> See *id.* at 611–12 n.21; see also *infra* notes 156–63 and accompanying text.

<sup>27</sup> Article 6 of the Northwest Ordinance of 1787 provides:

[t]here 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.

NORTHWEST ORDINANCE art. 6 (U.S. 1787).

<sup>28</sup> Compare REVISED REPORT OF THE COMMITTEE, *supra* note 25, at 608 (Jefferson's proposed language of 1784 that "there shall be neither slavery nor involuntary servitude in any of the said states, otherwise than in punishment of crimes whereof the party shall have been [duly] convicted to have been personally guilty"), with U.S. CONST. amend. XIII § 1 ("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.").

<sup>29</sup> See Paul Finkelman, *Treason Against the Hopes of the World: Thomas Jefferson and Slavery*, in JEFFERSONIAN LEGACIES, *supra* note 1, at 179, 199–200, reprinted in FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 7; Paul Finkelman, *Slavery and the Northwest Ordinance, 1787: A Study in Ambiguity*, 6 J. OF THE EARLY REPUBLIC 343 (1986) [hereinafter Finkelman, *Northwest Ordinance*].

<sup>30</sup> On Jefferson as a common lawyer, see generally EDWARD DUMBAULD, THOMAS JEFFERSON AND THE LAW (1978); SCHWARTZ ET AL., *supra* note 2. On Jefferson's Whigish constitutionalism, see DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON (1994). David Thomas Konig of Washington University in St. Louis is at work on what promises to be the definitive treatment of Jefferson's legal



slavery, especially where anti-slavery policy could be squared with his perceived need to maintain bonds of social control preserving white safety against rebellion in areas with substantial populations of enslaved and oppressed African American laborers.<sup>31</sup> Part III builds the related argument that Jefferson's commitment to anti-slavery in the West was less timid than his anti-slavery vision for his own state of Virginia with its large enslaved population. Even respecting Virginia—at least prior to the Haitian Revolution and the poignant example of justified large-scale white extermination at the hands of slave rebels—Jefferson was willing to contemplate and evaluate serious anti-slavery measures.<sup>32</sup> This differentiates his understanding of the constitutional posture of emancipation from that of populist property-focused pro-slavery petitioners, who threatened Lockean revolution against the Virginia authorities in the event of anti-slavery legislation.<sup>33</sup>

Part IV explores the question of enforcement of constitutional and statutory anti-slavery norms under the Articles of Confederation and under the pre-Reconstruction Constitution. Enforcement Clauses did not come into being until the Reconstruction Congresses passed and the states ratified the Thirteenth, Fourteenth, and Fifteenth Amendments.<sup>34</sup> Under the antebellum understanding of the “federal consensus” as under the Articles of Confederation, Congress lacked the power to attack slavery in those states where it already ex-

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thought. Some of Konig's provisional findings were presented in Konig, *supra* note 14.

<sup>31</sup> For the view that Jefferson was cautiously anti-slavery, see generally WILLIAM W. FREEHLING, *THE ROAD TO DISUNION: SECESSIONISTS AT BAY, 1776–1854*, at 121–23 (1990); DUNCAN J. MACLEOD, *SLAVERY, RACE AND THE AMERICAN REVOLUTION* 126–30 (1974); and William W. Freehling, *The Founding Fathers and Slavery*, 77 *AM. HIST. REV.* 81 (1972). Both authors stress that Jefferson's anti-slavery views did not translate into a successful anti-slavery agenda.

<sup>32</sup> See my argument in William G. Merkel, *Race, Liberty, and Law: Thomas Jefferson and the Problem of Slavery, 1776–1800* (Nov. 27, 2007) (unpublished D. Phil. Thesis, Oxford University) (on file with author).

<sup>33</sup> The Southside Virginia pro-slavery petitions of 1784–1785 are reprinted and analyzed in Frederike Teute Schmidt & Barbara Ripel Wilhelm, *Early Pro-Slavery Petitions in Virginia*, 30 *WM. & MARY Q.* 133, 133–46 (1973).

<sup>34</sup> U.S. CONST. amend. XIII § 2 (“Congress shall have power to enforce this article by appropriate legislation.”); U.S. CONST. amend. XIV § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”); U.S. CONST. amend. XV § 2 (“The Congress shall have power to enforce this article by appropriate legislation.”). On the origins of these clauses and their departures from prior practice, see BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 143–44 (1998), and HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835–1875*, at 275–78 (1982).

isted.<sup>35</sup> But criticism of Jefferson's 1784 proviso on grounds of non-enforceability makes little sense given the conception of plenary federal power over the Western territories that prevailed in 1784,<sup>36</sup> and indeed survived as the dominant paradigm until *Dred Scott* announced that the federal power over the territories applied only to regulating land as land, and only to territories existing in 1787.<sup>37</sup> Part IV attempts a real-minded assessment of the potential enforceability of the 1784 Anti-Slavery Clause in the West. While granting that slavery might well have been inevitable in the lower tier of the old southwest (Alabama and Mississippi), Part IV maintains that the narrowly failed proviso may well have had a sufficient deterrent effect on slaveowners to tip Kentucky and Tennessee toward freedom. Part V concludes the Article, and suggests links between Jefferson's early free-soil overtures and the free-soil constitutionalism that eventually brought the Republicans to power in 1860, setting the stage for the final climactic showdown over slavery and, in due course, the slow rebirth of freedom.<sup>38</sup>

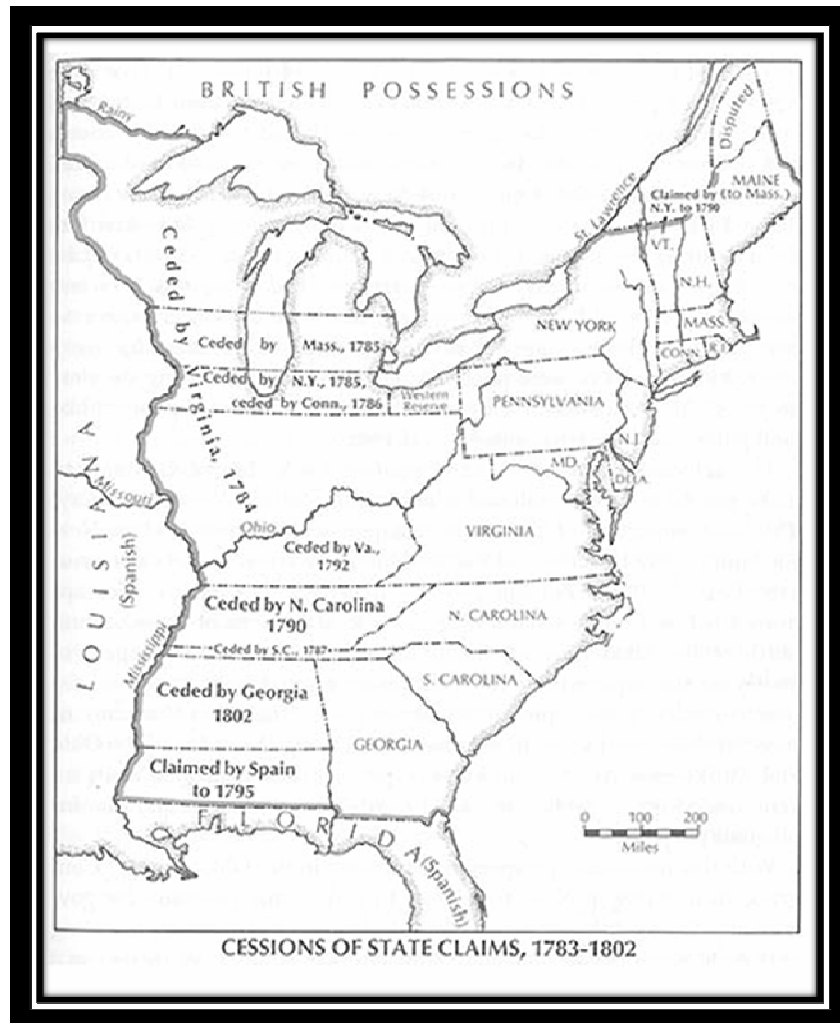
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<sup>35</sup> See WILLIAM M. WIECEK, *THE SOURCES OF ANTI-SLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848 passim* (1977).

<sup>36</sup> See ONUF, *supra* note 21, at 41–46 & *passim*.

<sup>37</sup> See generally *Am. Ins. Co v. Canter*, 26 U.S. (1 Pet.) 511 (1828) and WIECEK, *supra* note 35, at 114–55, for the pre-*Dred Scott* understanding. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), is analyzed in meticulous detail in DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 365–88 (1978), which discusses Chief Justice Taney's tortured reasoning respecting federal power in the territories.

<sup>38</sup> On the role of Jefferson's image in anti-slavery Republican thought, see PETERSON, *supra* note 5, at 190–91, and ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR WITH A NEW INTRODUCTORY ESSAY* (1995) [hereinafter FONER, *FREE SOIL*]. On the thwarted attempt to realize the egalitarian ideals of the Declaration after the Civil War, see ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1867* (1990) [hereinafter FONER, *RECONSTRUCTION*].



## II. THE ORDINANCE OF 1784

Jefferson rejoined Congress at Annapolis in December 1783, after a period of withdrawal from public life following the death of his wife in September 1782.<sup>39</sup> He spent some six months with that somewhat feeble national assembly, before departing on a five-year mission to France.<sup>40</sup> During his time with the Confederation Congress, Jefferson

<sup>39</sup> MALONE, *supra* note 20, at 401-18.

<sup>40</sup> *Id.*

devoted himself to affairs of state with a degree of diligence and fervor entirely uncharacteristic of the post-war, pre-Constitution national assembly.<sup>41</sup> With the possible exception of securing final ratification of the Treaty of Paris, his greatest concern as a congressional delegate was the creation and organization of the National Domain.<sup>42</sup> This desire to assure a republican future for the West produced what many historians long considered the most far-reaching of his unsuccessful anti-slavery efforts, the slavery prohibition proviso in the Territorial Government Ordinance of 1784.

Jefferson's special concern for issues touching the West developed many years before his return to the Continental Congress. Williamsburg's habitual disdain for the concerns of his native Albemarle provoked Jefferson's indignation even as a student at William and Mary, as a youthful Burgess, and as an attorney at the General Court whose practice focused on the concerns of western clients. This resentment of Tidewater influence along the frontier fuelled Jefferson's hostility to primogeniture and entail, and hastened his support for shifting the Capital upriver to Richmond. With western self-determination in mind, Jefferson played an influential role in establishing Kentucky as a county in 1776.<sup>43</sup> His proposed Virginia constitution of the same year contained radical land grant proposals,<sup>44</sup> favoring landless western settlers over speculators and absentee owners, and provided for the separation of new states from Virginia's western reaches. From the beginning then, the West's democratic possibilities, and the dangers inherent in land mongering and speculation, were central to Jefferson's republican vision of national destiny.<sup>45</sup>

Jefferson did not have a hand in Virginia's initial cession of her vast western domains to the Continental Congress in January 1781. At the time, he held the Governor's office, and maintained a scrupulous distance from legislative proceedings.<sup>46</sup> But as the doyen of progressive historians Merrill Jensen suggested nearly seventy years ago, the cession can be viewed as the culmination of Jefferson's five-year struggle to win

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<sup>41</sup> *Id.* at 411–12.

<sup>42</sup> *Id.* at 412–16.

<sup>43</sup> *Id.* at 250–57.

<sup>44</sup> See Thomas Jefferson, *Third Draft, Before 13 June, 1776*, in 1 PAPERS OF JEFFERSON, *supra* note 18, at 356. Jefferson's first two drafts also contained the fifty-acre universal land grant provisions, but this clause was struck from the more conservative version finally enacted by the General Assembly.

<sup>45</sup> See MALONE, *supra* note 20, at 258–59; see generally PETER S. ONUF, JEFFERSON'S EMPIRE, THE LANGUAGE OF AMERICAN NATIONHOOD 33–36 & *passim* (2000).

<sup>46</sup> For an analysis of Jefferson's strict view of separation of powers when he assumed the Governor's office, see MAYER, *supra* note 30, at 57–66.

support for his precocious opinion favoring the creation of “free and independent colonies” from the Old Dominion’s western claims.<sup>47</sup> To Jensen, Jefferson was the ideological godfather of both the Virginia cession and the National Domain.<sup>48</sup> Jefferson’s draft state constitution of June 1776 contained the earliest proposals by any Virginian for laying off the western lands as independent, sovereign republics.<sup>49</sup> With his draft constitution of 1776, Jefferson became the first Virginian to abandon the extensive boundary claims of the original London Company Charter, the same document that frequently formed the basis of his arguments against Parliamentary authority over Virginia during the revolutionary period.<sup>50</sup> That Charter, however, encompassing territory that was ultimately carved into six mid-western states, remained the principal bulwark of a prominent lobby of speculators and Virginia imperialists who successfully resisted cession of the western claim for a further four years.<sup>51</sup>

By the late 1770’s, the Continental Congress had come to a virtual impasse over the issue of western lands. Maryland, having no territorial claims in the West, refused to ratify the Articles of Confederation until her powerful southern neighbor agreed to surrender her western lands to the Union.<sup>52</sup> Without Maryland, Congress lacked the unanimity required to empower the Articles and create the first truly national government. So long as Virginia’s General Assembly remained under the sway of opponents of western cession, the Union’s future seemed in doubt. Not until Jefferson had occupied the Governor’s chair for over a year did circumstances become more favorable to his vision of a National Domain forged from Virginia’s western empire. After New York’s cession of its western claims in March 1780, Maryland came under increasing pressure to ratify the Articles and join in a common western policy. Slowly, Maryland’s delegation grew more amenable to com-

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<sup>47</sup> See Merrill Jensen, *The Creation of the National Domain, 1781–1784*, 26 *MISS. VALLEY HIST. REV.* 232 (1939).

<sup>48</sup> See MERRILL JENSEN, *THE NEW NATION, A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION, 1781–1789*, at 353 (Northeastern University Press 1981) (1950).

<sup>49</sup> See Thomas Jefferson, *Second Draft, Before 13 June, 1776*, in 1 *PAPERS OF JEFFERSON*, *supra* note 18, at 352–53; see also 7 *THE PAPERS OF JAMES MADISON* 76–77, 79 n.12 (William T. Hutchinson & William M.E. Rachal eds., 1971) [hereinafter *MADISON PAPERS*].

<sup>50</sup> See Thomas Jefferson, *Draft of a Declaration of Rights, Prepared for the Virginia Convention of August 1774*, in 1 *PAPERS OF JEFFERSON*, *supra* note 18, at 119; see Thomas Jefferson, *Refutation of the Argument that the Colonies Were Established at the Expense of the British Nation*, in 1 *PAPERS OF JEFFERSON*, *supra* note 18, at 283; see also *NOTES ON VIRGINIA*, *supra* note 16, at 110–18 (offering Jefferson’s recapitulation of these arguments).

<sup>51</sup> See 7 *MADISON PAPERS*, *supra* note 49, at 74 (ed. note).

<sup>52</sup> See *id.* at 76–77 (ed. note).

promise. Meanwhile, in the Old Dominion, ongoing military and fiscal crises were bringing influential leaders around to the Governor's procession views. With British troops moving northwards from the Carolinas, and with more French aid contingent on the formation of a stronger national government, John Walker, Richard Henry Lee, Joseph Jones, and, especially, George Mason, began to push aggressively for nationalisation of the western domain. Mason, not generally an ardent champion of stronger central government, shared Jefferson's desire to see the West opened to veterans and settlers. This sense of urgency flowed not just from Virginia's precarious military situation, but from Mason's opposition to the western claims of the Philadelphia-based Indiana Company, whose financial backers enjoyed strong representation in the Continental Congress. Mason himself backed rival claims of the Virginia-based Ohio Company.<sup>53</sup>

Various factions in the Continental Congress, however, had long opposed Virginia's title to the western lands, not out of healthy solicitude for equality in size and population among the states of the Union, but because they feared that Virginia would not uphold claims obtained from Indian nations by large-scale speculators on the eastern seaboard. Jefferson's policy of nullifying private purchases of Indian lands—epitomized in his 1776 constitutional proposal—stood to deprive Philadelphia and New York landjobbers of millions of acres and dollars. Thus, his republican vision of the West stood arrayed against the politics of finance and interest. Moreover, these different visions of the West complicated the issue of transference of territorial title, even after the General Assembly had decided in principle to hand over the lands. If few members of Congress were conceptually opposed to Virginia's western lands passing into Congressional control, many members resisted Virginia's efforts to insure that the West became a haven for settlers rather than a boon to speculators.<sup>54</sup> The conditions Mason attached to the original cession of 1781 rendered that offer unacceptable to the majority in Congress.<sup>55</sup> It was another two years before the Old Dominion and the Confederation Congress were able to consummate the transfer of title to the Old Northwest.

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<sup>53</sup> See MERRILL JENSEN, *THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION, 1774–1781* (1970). For Mason's hostility to the Indiana and Vandavia Companies see *id.* at 217–18; for Mason's support of the Ohio Company, see *id.* at 205–08.

<sup>54</sup> On the Virginia delegation's hostility to the speculator interest, see, for example, Letter from James Madison to Joseph Jones (Nov. 21, 1780), in 7 *MADISON PAPERS*, *supra* note 49, at 190–91, in which Madison heaps much sarcasm and derision on lobbyists representing Philadelphia speculator interests.

<sup>55</sup> Jensen, *supra* note 47, at 332.

Shortly before Jefferson took his seat at the 1783 session of the Continental Congress, members began discussing organization of the West. After a long period of wrangling among states, partisans, and “interested” members, Virginia submitted a second conditional cession of its vast western claims in June 1783. Congress did not finally accept the Virginia Cession until March 1, 1784, but in the meantime, considerable urgency attached to laying an organizational framework in anticipation of final acceptance.<sup>56</sup> Thus, on December 18, 1783, Jefferson, fortified by his well-earned reputation as a strong supporter of the National Domain, assumed chairmanship of the Congressional committee selected to draw up a plan for temporary government of the West.<sup>57</sup> He completed a preliminary proposal shortly before acceptance of the Cession.<sup>58</sup>

Unlike George Washington and some other proponents of western organization, Jefferson was not pressed by fear of “banditti,” whom skeptics thought would surely overwhelm the West if vigorous government were not quickly installed.<sup>59</sup> In the words of Julian Boyd, the orderly and progressive division of the whole of the existing and potential domain into new states to be incorporated into the Union on a basis of equality was too great an object to be hastened by the fear of squatters, the pressures of land companies, or even the claims of officers and soldiers.<sup>60</sup>

So notwithstanding the sense of urgency animating many members in Congress, and his own passion to promote republican society and government, Jefferson approached organization of the West with the detached and scholarly air of an intellectual.

Between December 1783 and mid-February 1784, he developed three successively more comprehensive schemes for western government, moving beyond the “colony” Washington had proposed to the chairman of the Committee on Indian Affairs, through plans for six states, to his final ideal of numerous territories. Although the Committee on Western Land’s purpose had been limited to providing for temporary government, on March 1, 1784, Jefferson reported a proposal describing a three-stage process to full and permanent state-

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<sup>56</sup> See PETER S. ONUF, *STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE 1–20* (1987).

<sup>57</sup> 6 PAPERS OF JEFFERSON, *supra* note 18, at 586 (ed. note).

<sup>58</sup> *Id.* at 582–83.

<sup>59</sup> See ONUF, *supra* note 57, at 1–20.

<sup>60</sup> 6 PAPERS OF JEFFERSON, *supra* note 18, at 582–83 (ed. note).

hood in the Union.<sup>61</sup> After a period of temporary self-government, constitutional statehood could be achieved when the population reached 20,000. This crucial middle stage involved formation of social contracts, embodied in “Charters of Compact,” which would stand as “fundamental constitutions between the thirteen original states, and those newly described.”<sup>62</sup> Full admission to the Confederacy would occur when a new state’s population exceeded that of the least populous original state.<sup>63</sup> If the idea of admitting new states into the Confederacy was widely accepted by this time, no previous legal provisions existed under the Articles, and it was Jefferson’s words that first enshrined this republican principle into national law.<sup>64</sup>

He also included a clause changing the majority required for major new Confederation laws from nine of the original to two-thirds of the existing states.<sup>65</sup> He had no desire to give a small minority of states a blocking power, or to bind new states to the Confederation on less than equal terms. His solicitude extended not only to relations between the federal states, nor even to the mechanics of the new state governments, but also to the very fabric of society in the new domain. Jefferson’s objective was no less than to secure a republican future for the Union’s vast western reserve.<sup>66</sup> This republican

<sup>61</sup> Jensen, *supra* note 47, at 339–41; 6 PAPERS OF JEFFERSON, *supra* note 18, at 586–87 (ed. note).

<sup>62</sup> 6 PAPERS OF JEFFERSON, *supra* note 18, at 587 (ed. note).

<sup>63</sup> REPORT OF THE COMMITTEE, *supra* note 19, at 603.

<sup>64</sup> *Id.* at 586–87 (ed. note).

<sup>65</sup> Compare *id.* at 615, with ARTICLES OF CONFEDERATION art. IX (U.S. 1781), which required the consent of at least nine states for Congress to engage in a war, . . . grant letters of marque or reprisal in time of peace, . . . enter into treaties and alliances, . . . coin money, . . . regulate the value thereof, . . . ascertain the sums and expenses necessary for the defense and welfare of the United States, or any of them, . . . emit bills, . . . borrow money on the credit of the United States, . . . appropriate money, . . . agree upon the number of vessels of war, to be built or purchased, or the number of land or sea forces to be raised, . . . [or] appoint a commander in chief of the army or navy . . .

ARTICLES OF CONFEDERATION art. XI (U.S. 1781). Article XI required consent of nine states for admission of territories other than Canada, which was entitled to admission upon its ratification of the Articles. All other questions except adjournment required a majority of the states, per Article IX.

<sup>66</sup> On Jefferson’s republicanism, see generally LANCE BANNING, *THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY* (1978); DREW R. MCCOY, *THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA* (1980); Robert E. Shalhope, *Thomas Jefferson’s Republicanism and Antebellum Southern Thought*, 42 *J. OF S. HIST.* 529 (1976). Joyce Appleby famously argues that scholars like Banning and McCoy overstate Jefferson’s classical republican sensibilities, and indeed that the doyens of republican history, Bernard Bailyn, J.G.A. Pocock, and Gordon Wood (before GORDON WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION: HOW A REVOLUTION*



vision held no place for un-republican law, custom, or practice, whether held over from the colonial period, or originating with interested parties of the day. And crucially, in this thoroughly republican world, there was no place for slavery. In fact, a detailed analysis of the proposed Ordinance of 1784 reveals the most systematic prescription for construction of a republican state appearing in any official state paper of Jefferson's creation. This formula was utterly inimical to the expansion of American slavery, and in this respect, Jefferson's plan for the West far outstripped the model for a republicanized Virginia he had crafted while serving on the Committee of Revision.<sup>67</sup>

Jefferson submitted two draft proposals concerning the western lands to Congress, the *Report of the Committee* [on Government of the Western Territory] of March 1, and the *Revised Report* of March 22, 1784. Both are written entirely in his hand, and no commentator then or since expressed doubt that they represented Jefferson's own vision of western development.<sup>68</sup> After delineating orderly bounda-

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TRANSFORMED A MONARCHICAL SOCIETY INTO A DEMOCRATIC ONE UNLIKE ANY THAT HAD EVER EXISTED (1992) [hereinafter WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION]), overstate the role of republican thought in the revolutionary and early national experience, which, in Appleby's eyes, was always more liberal than republicans acknowledged. See JOYCE APPLEBY, CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790S (1984) [hereinafter APPLEBY, CAPITALISM AND NEW SOCIAL ORDER]; JOYCE APPLEBY, LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION (1992) [hereinafter APPLEBY, LIBERALISM AND REPUBLICANISM] (responding to classic republican histories such as BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975); and GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969) [hereinafter WOOD, CREATION OF AMERICAN REPUBLIC]). John Murrin, Professor Emeritus at Princeton and long a leading historian of American political thought, is at work on a comprehensive and reflective historiography of the intellectual and ideological dimensions of the American Revolution, placing the once heated and now subsided liberal/republican dispute in broader perspective. My own sense after twenty years of reflection is that Jefferson's Whig-republican commitments cannot be overestimated, while his liberal capitalist sensibilities have been much overstated.

<sup>67</sup> On Jefferson's work on the Committee of Revision, and the Committee's unreported gradual abolition plan, see *supra* notes 57-61 and accompanying text. Several respected authorities would disagree with my characterization of the 1784 plan as "utterly inimical to the expansion of slavery." See, e.g., FINKLEMAN, SLAVERY AND THE FOUNDERS, *supra* note 7, at 42 (arguing that delaying emancipation until 1800 would allow slavery to gain a foothold and resist its scheduled termination). I offer a counterargument based on the deterrence of slaveholder in-migration. See *infra* notes 178-83 and accompanying text. William Wiecek tends towards Finkelman's view, see WIECEK, ANTI-SLAVERY CONSTITUTIONALISM, *supra* note 35, at 60, and Duncan MacLeod tends toward mine, see MACLEOD, *supra* note 31, at 47-49.

<sup>68</sup> The Committee consisted of three members: David Howell of Rhode Island, Jeremiah Townley Chase of Maryland, and Jefferson, who served as chairman. The

ries for the new western states, and describing the mechanics of transition to full statehood, the *Revised Report* follows the *Report* of March 1 in stipulating five fundamental provisions binding both the United States and the new states to a republican future. The report

provided that both the temporary and permanent governments be established on these principles as their basis.

1. That they shall for ever remain a part of this confederacy of the United states of America.

2. That in their persons, property and territory they shall be subject to the government of the United states in Congress assembled, and to the Articles of confederation in all those cases in which the original shall be so subject.

3. That they shall be subject to pay a part of the federal debts contracted or to be contracted, to be apportioned on them by Congress, according to the same common rule and measure, by which apportionments thereof shall be made on the other states.

4. That their respective governments shall be in republican forms, and shall admit no person to a citizen who holds any hereditary title.

5. That after the year 1800. of the Christian era, there shall be neither slavery nor involuntary servitude in any of the said states, otherwise than in punishment of crimes whereof the party shall have been duly convicted to have been personally guilty.<sup>69</sup>

The preceding articles, Jefferson continued,

shall be formed into a charter of compact . . . and shall stand as fundamental constitutions between the thirteen original states and each of the several states now newly described, unalterable but by the joint consent of the Unites states in Congress assembled, and of the particular state [concerned].<sup>70</sup>

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committee appears to have been at least nominally a subcommittee of the Committee on Indian Affairs, also chaired by Jefferson. Howell, a future law professor at Brown and then United States district judge, became an enthusiastic supporter of Jefferson on the committee. See 6 PAPERS OF JEFFERSON, *supra* note 18, at 584–85 (ed. note). All the subcommittee's paper work, including the interlineations, are in Jefferson's hand. In the public eye, Jefferson has always been considered the author of Ordinance, and it was Jefferson who bore the brunt of jokes concerning the names chosen (in all but two cases later rejected by Congress) for the new states: Washington, Saratoga, Pelisipia, Polypotamia, Illinoia, Metropotamia, Assenisippia, Cherronesus, and Michigania. These names figure in Jefferson's papers dating from before the committee's formation. *Id.* at 584–600 (ed. note).

<sup>69</sup> REVISED REPORT OF THE COMMITTEE, *supra* note 25, at 608–09. This language is very nearly the same as the REPORT OF THE COMMITTEE, *supra* note 19, at 603–04.

<sup>70</sup> REVISED REPORT OF THE COMMITTEE, *supra* note 25, at 609.

In this Charter of Compact between the East and West, the termination of slavery takes a prominent and central position. Only perpetual union, authority of the Articles, responsibility for the federal debt, republican government, and proscription of aristocratic title merit mention alongside the mandated end of western slavery. Hence, eradication of slavery assumes an even higher status here than in Jefferson's proposed Virginia Constitution of 1782–1783, and a far more exalted place than it had in the Report of the Revisors, where emancipation was “held back” to be proposed only when the time for freedom had ripened in the public mind.<sup>71</sup>

In the proposed fundamental law for the Old Dominion, termination of slavery was constructed as a limit against legislative authority. There, Jefferson wrote that “the general assembly . . . shall not have the power to permit the continuance of slavery beyond the generation which shall be living on the thirty-first of December one thousand eight hundred.”<sup>72</sup> That pronouncement resonated with Jefferson's failed argument in *Howell v. Netherland*<sup>73</sup> and with the *Somerset* decision of 1772,<sup>74</sup> implying that slavery had no authority on its own, but instead required the positive and unnatural imposition of special legislation for its continuance. While a constitutional limitation of legislative power surely amounts to fundamental law, emancipation in the proposed Constitution of 1783 remained one of many clauses in a complex document, a document that would have established many types of authority and many rights against authority. The five principles proposed in the Ordinance of 1784, conversely, amount to a supreme distillation of higher-law constitutionality. They formed a Charter of Compact from which state constitutions must derive, but could not dissent. Finally, the charter of compact was *perpetual*,<sup>75</sup> though Jefferson thought constitutions could be altered by each rising generation, every nineteen years by his reckoning.<sup>76</sup> To be sure,

<sup>71</sup> Respecting ending slavery in Virginia, an established and more densely populated slave society, Jefferson repeatedly expressed concern lest emancipation be carried into effect precipitously, before the public mind had “ripened” to the idea. Perhaps his most thorough and revealing exposition of this view is set out in Letter from Thomas Jefferson to Edward Coles (Aug. 25, 1814), in 11 WORKS OF JEFFERSON, *supra* note 13, at 416.

<sup>72</sup> JEFFERSON, NOTES ON VIRGINIA, *supra* note 16, app. at 214.

<sup>73</sup> See *supra* note 14.

<sup>74</sup> See *supra* note 15.

<sup>75</sup> “[T]hey shall for ever remain a part of this confederacy of the United States of America.” REVISED REPORT OF THE COMMITTEE, *supra* note 25, at 608.

<sup>76</sup> See Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 PAPERS OF JEFFERSON, *supra* note 18, at 392–97; HERBERT E. SLOAN, PRINCIPLE AND INTEREST: THOMAS JEFFERSON AND THE PROBLEM OF DEBT 80–81 (2001). Jefferson's

Jefferson used the term unalterable only in a qualified manner. But alteration of any provision in the Charter of Compact did require joint consent of two-thirds of the existing states and the state proposing alteration, which, in the case of the slavery prohibition, would have amounted to a very formidable barrier to repeal. Under the system Jefferson proposed in 1784, to take one example, there would have been little hope of securing sufficient votes to allow Kentucky to convert to a slave state after its entry in 1792 (bearing in mind that Jefferson's plan applied to all territory ceded and to be ceded, not just to the territory northwest of the Ohio).<sup>77</sup> Before the Federal Constitution of 1788, with its demanding requirements for amendment, Jefferson envisioned the summoning of a new convention as the standard, and perhaps not infrequent, avenue to alteration of state and federal constitutions.<sup>78</sup> According to this understanding, Jefferson's Ordinance of 1784 provided a substantial added sense of permanence to the anti-slavery clause, a sense of entrenchment transcending that already inherent in state constitutions.

The termination provision in the Territorial Governance Act would not only have possessed more fundamental authority than the emancipation clause in his proposed constitution for Virginia, it would also have been more radical in its operation. The emancipation clause freed children born to slaves after 1800;<sup>79</sup> the termination provision ended all slavery after 1800. Moreover, the Ordinance of 1784 applied to "territory ceded or to be ceded by Individual states to

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calculation is based on a review of French demographic data suggesting half the adults living at any particular time would be deceased nineteen years thereafter. *Id.* at 277 n.7.

<sup>77</sup> Kentucky entered the Union with a narrowly-won slave constitution in 1792 as the fifteenth state. See THOMAS P. ABERNATHY, *THE SOUTH IN THE NEW NATION* 70–72 (1961). Had the 1784 proviso gone into operation, Kentucky would have had to enter as a free state, and then obtain the consent of ten of the other fourteen states to permit slavery and convert to slave status. Any five states—say New Hampshire, Massachusetts, Vermont, Connecticut, and Pennsylvania—could have vetoed the switch. Whether Jefferson's proviso would have prevented Missouri's entry as a slave state is a more complex question. By its own terms, the 1784 Ordinance (like the Northwest Ordinance of 1787) would not have applied to the Louisiana Purchase and subsequent territorial acquisitions, since these did not involve cessions by any of the federal states, but grants by foreign powers. While the anti-slavery clause would not have applied directly in Missouri, one might still wonder whether Missourians would have contemplated slavery quite so seriously if Kentucky and Tennessee had entered as free states under Jefferson's clause, rendering the empire of liberty that much grander, and the empire of slavery that much less expansive in the eyes of western expansionists.

<sup>78</sup> See RICHARD K. MATTHEWS, *THE RADICAL POLITICS OF THOMAS JEFFERSON: A REVISIONIST VIEW* 22 (1984); MAYER, *supra* note 30, at 299–302.

<sup>79</sup> Jefferson, *Draught Constitution*, *supra* note 16, app. at 209, 214.

the United states”<sup>80</sup>—as proposed it would have ended slavery not only in the Virginia cession of the Old Northwest, but also in the Carolina and Georgia cessions when those materialized, that is, in the lands that became the cotton belt of the Old Southwest.

Jefferson’s thoroughgoing effort to write slavery out of the republican West in 1784 contrasts sharply with the Revisors’ reluctant decision to retain slavery in Virginia in 1778, pending submission of the gradual emancipation bill that was never put forward. The *Report of the Revisors*<sup>81</sup> addressed republican civics in an existing society, a society whose manners (Jefferson readily admitted) were fatally flawed by human bondage. Part common-law restatement, part statutory codification, the Revisors’ work aimed to preserve liberties established by long standing custom, purge ancient freedoms of corrupting encroachments, and strip away unwieldy and oppressive vestiges of feudalism. In the end, however, the *Report of the Revisors* was less a blueprint for an ideal future than a codification of ordered liberty as it existed in Virginia practice.<sup>82</sup> While the Revisors recognized that slavery constituted an egregious affront to liberty, they lacked the mandate and the means to legislate it out of existence. Exist it did, and it was deeply ingrained. Extrication from slavery in Virginia was desirable, but it would be a prickly undertaking.<sup>83</sup>

The West told a different story. Here was a brave new world, a fresh canvas for Jefferson’s portrait of an ideal society.<sup>84</sup> It offered the ultimate forum for republican and enlightened creation, for state-building without corruption, without the dead hand of slavery inherited from the colonial past. The cession and the appointment

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<sup>80</sup> REPORT OF THE COMMITTEE, *supra* note 19, at 603–07.

<sup>81</sup> See Committee of Revisors at Fredricksburg, Revisal of the Laws 1776–1786 (1777), *reprinted in* 2 PAPERS OF JEFFERSON, *supra* note 18, at 305–657.

<sup>82</sup> See DUMBAULD, *supra* note 30, at 132–43; MAYER, *supra* note 30, at 66–69.

<sup>83</sup> See MACLEOD, *supra* note 31, at 34, 75–76 (1974); *see generally* Merkel, *supra* note 32.

<sup>84</sup> This image is informed in part by the opening chapters of LEO MARX, *MACHINE IN THE GARDEN: TECHNOLOGY AND THE PASTORAL IDEAL IN AMERICA* (1965). But see ONUF, *supra* note 45, at 33–46, which makes the point that Jefferson knew as well as anyone the intricacies of relations with the various native tribes who actually inhabited the West and their European allies. *Id.* In Onuf’s reading, Jefferson viewed the machinations of European powers as a serious threat to the republican West, but assumed that without European intervention Indian peoples would realize that their interest lay in peaceful integration into the white American nation and in adoption of settled agricultural lifestyles. *Id.* at 31. But see MCCOY, *supra* note 67, *passim* (explaining the importance of western expansion to the republican vision of Jefferson and Madison for preserving a society free of European corruption). On the allure of the far west, see generally DONALD JACKSON, *THOMAS JEFFERSON AND THE STONY MOUNTAINS: EXPLORING THE WEST FROM MONTICELLO* (1981).

of the Committee on Western Lands gave Jefferson authority to play the new Lycergus. Granted, slavery did exist on a small scale in the Northwest at the time of the Virginia cession. French-speaking inhabitants had held black slaves for several generations north of the Ohio; south of the Ohio slavery was more widely practiced by both whites and Indians.<sup>85</sup> But it was not then ingrained there as in Virginia. The West was not a slave society, and in 1784, Jefferson did not intend to let it become one. Slavery, as it existed in the National Domain, could be cast off without any fear of unbearable social turmoil.<sup>86</sup>

Notwithstanding Jefferson's awareness of slavery's presence in the West, the Land Act's ill-fated anti-slavery clause makes no mention of deportation or colonization to follow termination. Like the proposed Virginia constitution of the previous year, it elevates the end of slavery, but not black deportation, to higher-law status. Presumably, colonization would have been a local option left to the discretion of legislatures in the new states. In part, this reflects Jefferson's unwillingness to have Congress dictate policy on an issue of this level to the new sovereign states. Beyond the five fundamental stipulations of republicanism—themselves indispensable to the creation of sound political societies within the Confederation—sovereignty in the western states would be absolute.<sup>87</sup> However, the omission of a colo-

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<sup>85</sup> See WIECEK, *supra* note 35, at 108–09 (citing MORTON M. ROSENBERG & DENNIS V. MCCLURG, *THE POLITICS OF PRO-SLAVERY SENTIMENT IN INDIANA 1816–61*, at 1–10 (1968)); see also JOHN D. BARNHART, *VALLEY OF DEMOCRACY: THE FRONTIER VERSUS THE PLANTATION IN THE OHIO VALLEY 1775–1818*, at 159–60 (1953).

<sup>86</sup> Jefferson was famously troubled respecting the prospects for post-emancipation co-existence in Virginia. In *Notes on Virginia* he wrote,

Why not retain and incorporate the blacks into the state, and thus save the expence of supplying, by importation of white settlers, the vacancies they will leave? Deep rooted prejudices entertained by the whites; ten thousand recollections, by the blacks, of the injuries they have sustained; new provocations; the real distinctions which nature has made; and many other circumstances, will divide us into parties, and produce convulsions which will probably never end but in the extermination of the one or the other race.

JEFFERSON, *NOTES ON VIRGINIA*, *supra* note 16, at 138. But at other times during the 1780s, Jefferson contemplated more hopeful prospects for a multi-racial post-emancipation Virginia. See generally Merkel, *supra* note 32 (arguing that Jefferson did not become irrevocably committed to colonization as a condition for emancipation until the Haitian Revolution). Cf. Ashli Lee White, *A Flood of Impure Lava: Saint Dominguan refugees in the United States, 1791–1820* (2003) (unpublished Ph.D. dissertation, Columbia University) (on file with author) (exploring the impact of accounts of Haitian violence on political sensibilities in the United States).

<sup>87</sup> For a thoughtful analysis of this problem, see ONUF, *supra* note 56, at 43–49, and ONUF, *supra* note 21, at 41–46. The issue of whether federal sovereignty in the pre-statehood territories was absolute became contested during the ante-bellum pe-

nization proviso from the charter of Compact may reflect more than simply respect for localism and states rights.

In the section on establishment of temporary government, Jefferson wrote “[t]hat the settlers within any of the said states shall, either on their own petition, or on the order of Congress, receive authority from them, with appointments of time and place for their free males of full age to meet together for the purpose of establishing a temporary government.”<sup>88</sup> Thus Jefferson chose the more inclusive locution “free males of full age” over the racially restrictive “free white males” to outline the participatory process for establishing democratic governance in the West. In a state paper of constitutional import, Jefferson chose his words with especial deliberation.<sup>89</sup> He did not, for instance, write *free persons* or even the then-more gender-ambiguous *free men*, however distant the prospect of female suffrage may have been from the political horizons of the rising West. I am not aware whether Jefferson knew that some women were voting in New Jersey in 1780s, or whether he was acquainted with any of New Jersey’s female voters.<sup>90</sup> Much later in life, Jefferson met the early suffragette, Frances Wright, who visited Monticello with LaFayette in 1824,<sup>91</sup> but it seems a safe bet that Jefferson must have entertained, at least hypothetically, the eventuality of female suffrage, given that he chose his words precisely so as to exclude it. He was, after all, a famously meticulous legislative draftsman, and, as historians in our

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riod. The *Dred Scott* Court famously held that the powers of the United States were limited in the territories, and that claim appeared novel and bold until the time of the controversies over the Mexican cession and the Kansas/Nebraska Act. *Scott v. Sanford*, 60 U.S. (19 How.) 393, 395–96 (1857). I am not aware that anyone asserted a similar argument under the Confederation government. See FEHRENBACHER, *supra* note 37, at 365–88 (discussing Justice Taney’s approach to territorial questions concerning slavery); ONUF, *supra* note 21, at 41–46 (explaining the territorial situation under the Articles of Confederation); WIECEK, *supra* note 35, at 114–15 (regarding the pre-*Dred Scott* understanding of the territories).

<sup>88</sup> REPORT OF THE COMMITTEE, *supra* note 19, at 603.

<sup>89</sup> See generally ANDREW BERNSTEIN, *THE INNER JEFFERSON: PORTRAIT OF A GRIEVING OPTIMIST* (1995); JAY FLIEGELMAN, *DECLARING INDEPENDENCE: JEFFERSON, NATURAL LANGUAGE & THE CULTURE OF PERFORMANCE* (1993) (analyzing Jefferson’s meticulous, indeed obsessive, character as a writer and draftsman).

<sup>90</sup> For a discussion of female voting in New Jersey, first, pursuant to gender-neutral language in the state constitution of 1776, and then pursuant to a 1790 statute referring to voters as “he or she,” see MARY BETH NORTON, *LIBERTY’S DAUGHTERS, THE REVOLUTIONARY EXPERIENCE OF AMERICAN WOMEN, 1750–1800*, at 191–93 (Cornell Univ. Press 1996) (1980). The aforementioned practice ended following a referendum in 1807.

<sup>91</sup> He met Frances Wright in 1824, two years before his death. He was by that time somewhat set in his ways. On Wright’s Monticello visit, and for a speculative account of Jefferson’s reaction, see BRODIE, *supra* note 10, at 460–64.

time have pointed out, it was “careless” or over-broad constitutional drafting that was “blamed” for the early assertion of female entitlement to vote in New Jersey.<sup>92</sup>

Whether or not Jefferson knew women voters, he personally knew many free black men and generally knew of hundreds more.<sup>93</sup> By 1784, he must have known that most state constitutions did not exclude free black men from voting,<sup>94</sup> and that free blacks were voting to a considerable extent in Maryland, North Carolina, New Jersey, New York, and Pennsylvania.<sup>95</sup> Indeed, the observant Jefferson had by now resided (albeit fairly briefly) in two of the states where blacks were voting regularly (Pennsylvania and Maryland), and visited a third (New Jersey), all during the autumn election cycles.<sup>96</sup> So if Jefferson went to the length of specifying that voters in the West should be male, when the exclusivity of the male franchise was—at least outside of New Jersey—taken for granted, why did he not also specify that they should be white, when free black men were voting in at least five states? The fifth proviso to the Charter of Compact dictated that from 1800 there would be significant numbers of free blacks in the ceded territories, in fact that all blacks in the ceded territories would be free.<sup>97</sup> Would these men then number amongst the *free males of full age*, and participate in the formation of governments?

Jefferson did not insist that they must, or even that they should, but his choice of words suggests an interesting ambivalence. If he in-

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<sup>92</sup> NORTON, *supra* note 90, at 192–93.

<sup>93</sup> See generally Letter from Thomas Jefferson to Edward Bancroft (Jan. 26, 1789), in 14 PAPERS OF JEFFERSON, *supra* note 18, at 492 (discussing Jefferson’s awareness of Virginia’s growing free black community).

<sup>94</sup> While John Adams’s definitive comparative study of state constitutions, *A Defence of the Constitutions of Government of the United States*, did not appear until three years later in 1787, it is unthinkable that Jefferson, who was so fascinated by comparative constitutionalism, had not consulted the texts of the existing state constitutions in 1783 when he prepared his Draft Constitution for Virginia. See generally WOOD, CREATION OF AMERICAN REPUBLIC, *supra* note 66, at 127–28 (1969) (explaining Jefferson’s joining in the national intellectual obsession with state constitution-making during the revolutionary period).

<sup>95</sup> For a discussion of free black suffrage during the revolutionary period, see JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 171 (8th ed. 2004). In New Jersey, some black women voted as well. See NORTON, *supra* note 92, at 191–93. In most states where they had voted, free blacks were disenfranchised in the early nineteenth century. See IRA BERLIN, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH 91 (1974); LEON LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790–1860, at 74–93 (1961).

<sup>96</sup> See MALONE, *supra* note 20, at 399–423 (describing Jefferson’s journeys through the mid-Atlantic region from autumn 1782 to spring 1784).

<sup>97</sup> See *supra* note 71.



tended only that his constitutional language should leave the decision (which he might in turn have expected to be an unthinking choice for exclusion) to local legislatures, the fact that he did not feel compelled to forestall the eventuality of participation of small numbers of blacks in American political society suggests that he could contemplate that very possibility—and contemplate it without horror and hysterics.<sup>98</sup> Of course the West was not plantation Virginia. These were frontier societies with small black populations. This remoteness and sparseness of black population could create sufficient symbolic distance to make a permanent black role—and even black citizenship—in trans-Allegheny society less alarming to Jefferson than it appeared in the Tidewater or Piedmont.

Back home in Virginia, Jefferson was not always comfortable with the prospect of a multi-racial post-emancipation society. In the *Notes on Virginia*, he urged that the vast majority of former slaves from the plantations be colonized outside the state after emancipation.<sup>99</sup> However, the presence of small numbers of African individuals after slavery did not necessarily alarm him even in the East,<sup>100</sup> and Jefferson's subsequent dealings with skilled African American workers evinces a level of ease with the black artisan classes of Philadelphia and Virginia. This is consistent with his visions of a free Monticello, where Jupiter still worked as coachman and valet, and Isaac still operated the nail factory.<sup>101</sup> The truth may be more striking still. While Jefferson frequently discussed the post-slavery shape of agricultural production in Virginia,<sup>102</sup> it is not at all clear that he had the capacity to imagine Monticello itself without Isaac, Jupiter, and the other

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<sup>98</sup> *Contra* ONUF, *supra* note 46, at 147–88 & *passim* (arguing that Jefferson could not be reconciled to post-emancipation coexistence under any circumstances). Onuf's is perhaps the prevailing view among modern authorities. I disagree. In my thesis, *Race, Liberty and Law*, I concede that Jefferson expressed skepticism respecting post-emancipation coexistence on several occasions during the 1780s, but point out that he also openly engaged and accommodated prospects of a multi-racial post-slavery Virginia at other times during the years immediately following independence. *See generally* Merkel, *supra* note 32. I argue that Jefferson's hostility towards emancipation without colonization existed only in response to the extreme violence of the Haitian Revolution, and the extermination and expulsion of the former French colony's white population. *Id.*

<sup>99</sup> JEFFERSON, NOTES ON VIRGINIA, *supra* note 16, at 137–38, 143.

<sup>100</sup> Jefferson outlined plans to free his own slaves and commingle them with German settlers on his estates. *See* Letter from Thomas Jefferson to Edward Bancroft (Jan. 26, 1789), in 14 PAPERS OF JEFFERSON, *supra* note 18, at 492 (writing the letter in 1789 but mistakenly attributing the letter to 1788).

<sup>101</sup> *See* Merkel, *supra* note 32.

<sup>102</sup> *See, e.g.*, Letter from Thomas Jefferson to Edward Bancroft (Jan. 26, 1789), in 14 PAPERS OF JEFFERSON, *supra* note 18, at 492–93.

skilled black workers and familiar domestics on whom he always depended.<sup>103</sup> When he contemplated Virginia without slavery, Jefferson readily pictured his own estates cultivated by free laborers, but Jefferson's productive fields were not directly visible from his home. As far as I know, he never described how Monticello itself would look without African American residents and workers, whether free or enslaved.<sup>104</sup>

Monticello, though, was not the West, and for present purposes, my principal point is that Jefferson's vision of the west was free and overwhelmingly white, but not inherently exclusively European. In contemplating the western future, Jefferson assumed Indians, and perhaps in due course Latin Americans, would ultimately be absorbed through racial mixture into the Anglo-American people.<sup>105</sup> In the interim, Indians would remain distinct peoples, becoming, Jefferson assumed, more and more Anglo-American in their ways of life.<sup>106</sup> In theory, but not in practice, Jefferson disdained racial mixture of whites and blacks.<sup>107</sup> Whites and blacks, he devoutly hoped (or so he said), would not interbreed.<sup>108</sup> Still, his constitutional and legislative usage in the 1780s is entirely consistent with continued cohabitation of whites and small numbers of blacks in the west, who, not interbreeding, would necessarily remain separate people; a majority and small minority, being distinct and adjacent. In the East, meanwhile, Jefferson urged colonization of the majority of persons to be freed when emancipation eventually came.<sup>109</sup> His was still an understanding of colonization as primarily an anti-slavery measure, as a co-

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<sup>103</sup> The codependence hypothesis is famous in the philosophy of slavery, and is perhaps most closely associated with Hegel and with Orlando Patterson. See DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY DURING THE AGE OF REVOLUTION, 1770–1823*, at 558–64 (1975) (writing on Hegel and the epistemology of slavery); ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY passim* (1982). Of course, the realization goes back to classical times, as the old Latin paradigm drill on the ablative absolute suggests (“His slave having died, Cicero was very sad.”). Perhaps recalling his own childhood Latin lessons, Jefferson wept bitterly when Jupiter died in 1800, after more than forty-five years of uncompensated service dating back to Jefferson's school days. BRODIE, *supra* note 10, at 376. For a cogent recent exploration of Jefferson's multilayered dependence on Monticello's enslaved population, see Lucia Stanton, *Those Who Labor for My Happiness: Thomas Jefferson and His Slaves*, in JEFFERSON LEGACIES 147, 147–80 (Peter S. Onuf ed., 1993).

<sup>104</sup> See, e.g., the highly speculative but perceptive analysis of Fawn Brodie in BRODIE, *supra* note 10, at 455–70, which pictured the aged Jefferson as psychologically and financially incapable of extricating himself from slavery.

<sup>105</sup> See ONUF, *supra* note 45, at 50–52.

<sup>106</sup> *Id.* at 51.

<sup>107</sup> See JEFFERSON, NOTES ON VIRGINIA, *supra* note 16, at 138.

<sup>108</sup> See *id.* at 143.

<sup>109</sup> *Id.*

requisite of emancipation, required to ensure peace and stability after the bonds of slavery had been loosed, not a means to remove small numbers of free blacks from an upper South committed to continued slaveholding.<sup>110</sup> By the 1830s, colonization may have been widely construed among Southerners as a means to buttress slavery by purging a restless element from society—and Jefferson's own arguments for deportation of the Gabriel conspirators partly prefigured this construction as early as 1800—but in the 1780s, the constitutionalism behind the colonization Jefferson favored focused squarely on freedom.<sup>111</sup> And in the 1780s, Jefferson's colonizationist imperative was, unlike the principle of western freedom, neither ironclad nor absolute, his occasional contrary protestations notwithstanding.<sup>112</sup>

### III. RESTORING THE ANTI-SLAVERY IMAGE OF THE FAILED CLAUSE

The fifth plank of Jefferson's Charter of Compact was not allowed to stand. It appears in both the *Report* of March 1 and the *Revised Report* of March 22, but not in the *Ordinance of 1784* as finally adopted by Congress on April 23.<sup>113</sup> The anti-slavery clause wanted support from only one additional state for passage; New Jersey (although then still quite a slave state)<sup>114</sup> was not seated, and even the single vote of a further Virginia or North Carolina delegate would have tipped either of those states in favor of enactment. The importance of this unsuccessful effort to abolish and exclude slavery from the west transcends the question of Jefferson's views on black eligibility for American citizenship. Among the issues raised by the anti-

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<sup>110</sup> See *id.* at 138.

<sup>111</sup> For a discussion of the ideological transformation within the colonization movement, see generally ERIC BURIN, *SLAVERY AND THE PECULIAR SOLUTION: A HISTORY OF THE AMERICAN COLONIZATION SOCIETY* (2005).

<sup>112</sup> In *Jefferson's Empire*, Onuf relies on JEFFERSON, NOTES ON VIRGINIA, *supra* note 16, to make the argument that Jefferson was always opposed to coexistence. ONUF, *supra* note 45, at 147–88. I largely agree with Onuf's reading of the *Notes*, but in the decade after Jefferson completed his book, he made numerous statements inconsistent with an ironclad commitment to removal. See Merkel, *supra* note 84, at 265–320.

<sup>113</sup> Cf. REPORT OF THE COMMITTEE, *supra* note 19, at 604; REVISED REPORT OF THE COMMITTEE, *supra* note 25, at 608; ORDINANCE OF 1784, *supra* note 22, at 613–15.

<sup>114</sup> The census of 1790 shows that 11,423 slaves lived in New Jersey; 7.7% of the state's population was black, and 80.5% of the black population was enslaved. New Jersey did not pass a gradual emancipation law until 1804. See DAVIS, *supra* note 103, at 31. Eighteen slaves are still shown residing in New Jersey in the census of 1860. For census data on New Jersey in 1790, see SCHEDULE OF THE WHOLE NUMBER OF PERSONS WITHIN THE SEVERAL DISTRICTS OF THE UNITED STATES 40–43 (1790), available at [www2.census.gov/prod2/decennial/documents/1791a-01.pdf](http://www2.census.gov/prod2/decennial/documents/1791a-01.pdf). For census data concerning 1860, see J.G. RANDALL & DAVID HERBERT DONALD, *THE CIVIL WAR AND RECONSTRUCTION* 5 (2d ed. 1969).

slavery clause in the *Ordinance of 1784* are the degree of importance Jefferson attached to that provision, the effects it may have had on the Southwest if it had gone into operation, and the way in which it compares to Article VI of the *Ordinance of 1787*.

The progressive era view that Jefferson's *Ordinance for Territorial Government of 1784* was rather more republican, and the *Northwest Ordinance of 1787* more reactionary,<sup>115</sup> and a corollary notion that the anti-slavery plank of 1784 surpassed Article VI of 1787 in its freedom-favoring propensities, have suffered fierce attacks in more recent decades by scholars including Robert Berkhofer, Peter Onuf, and Paul Finkelman.<sup>116</sup> In particular, Berkhofer has portrayed the *Northwest Ordinance* as a progressive improvement on the Land Act of 1784, Finkelman has sharply criticized notions that the *Ordinance of 1784* reflected any sincere and committed anti-slavery sentiments on the part of Jefferson,<sup>117</sup> and both Finkelman and Onuf have suggested that even if the anti-slavery clause of 1784 had taken effect, it would have had little influence in stemming the spread of bondage into the Southwest.<sup>118</sup>

But it is Professor Finkelman who has been by far the most prolific and persistent among the critical revisionists. He places particu-

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<sup>115</sup> See, e.g., MERRILL JENSEN, *THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION, 1781–1789* (1950):

It is too often said, and believed, that the Northwest Ordinance of 1787, which repealed the Ordinance of 1784, provided for democracy in the territories of the United States. The reverse is actually true. Jefferson's Ordinance provided for democratic self-government of western territories, and for that reason it was abolished in 1787 by the land speculators and their supporters who wanted congressional control of the West so that their interests could be protected from actions of the inhabitants.

*Id.* at 354.

<sup>116</sup> See Robert F. Berkhofer, Jr., *Jefferson, the Ordinance of 1784, and the American Territorial System*, 29 WM. & MARY Q. 231, 260 (1972); Finkelman, *Jefferson and Slavery*, *supra* note 1, at 181–221; Finkelman, *Northwest Ordinance*, *supra* note 29, at 353–59 (1986); Onuf, *supra* note 56, at 110–13. The pro-Jefferson view of the progressive historians is set out in JENSEN, *supra* note 115, at 352–59; MERRILL D. PETERSON, *THOMAS JEFFERSON AND THE NEW NATION: A BIOGRAPHY* 279–86 (1970); and FRANCIS S. PHILBRICK, *THE RISE OF THE WEST, 1754–1830*, at 120–33 (1965). Roughly speaking, progressive historians did their graduate work under supervisors who did their graduate work in the progressive era prior to World War I. Progressives stressed material over ideological determination in American history, and rejected the “consensus school’s” counter-arguments that there had never been class struggle in the United States. The progressives tended to celebrate an agrarian past, and in so doing many of them underplayed the role of slaveholding in Jefferson and Jackson’s Democratic Party.

<sup>117</sup> Finkelman, *Jefferson and Slavery*, *supra* note 1, at 198–200.

<sup>118</sup> *Id.* at 198; Onuf, *supra* note 56, at 110–11.

lar emphasis on the argument that Jefferson laid little stock in the slavery termination clause of 1784. Finkelman's reasoning here relies not so much on interpretation of evidence relating to the *Ordinance of 1784*, but on a general belief that Jefferson was far more committed to slavery than to anti-slavery. For Finkelman, white property rights simply meant more to Jefferson than to black claims to liberty.

The American revolutionaries were trapped in an ideology of private property that made it almost impossible for them collectively to give up their own pursuit of happiness for the liberty of others. In the Ordinance the ideals of liberty came into conflict with the selfish happiness of the ruling race. Thus, the Congress could easily declare there would be no slavery in the Northwest Territory. It was quite another matter to eliminate the institution there.<sup>119</sup>

To be "trapped in an ideology of private property"—and even to rate the private pursuit of personal wealth as the highest public ideal—seems, at first blush, a plausible way for human beings to attempt to organize and understand their lives.<sup>120</sup> After all, eminent historians such as Joyce Appleby and Gordon Wood of 1992 (but not Gordon Wood of 1969) maintain that the American revolutionaries did this generally, not simply with respect to slavery.<sup>121</sup> And in recent decades, the Chicago School of Economics, and its near cousin the Law and Economics mode of jurisprudence, have insisted that we should orient our public policy along these very same principles and that it would be unnatural not to do so.<sup>122</sup> Notwithstanding this argument's wide appeal in our own time, there are cogent contextual reasons for doubting that Jefferson actually understood policy questions principally in terms of an irresolvable clash between rival absolute interests in private property. Specifically, the conceptions of property with which eighteenth-century Anglo-Virginian country gentlemen and Whig lawyers were most intimately familiar cannot readily be employed in the manner Finkelman suggests they were (i.e., as ab-

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<sup>119</sup> See generally Finkelman, *Northwest Ordinance*, *supra* note 29.

<sup>120</sup> *Id.*

<sup>121</sup> See generally APPLEBY, LIBERALISM AND REPUBLICANISM, *supra* note 66; APPLEBY, CAPITALISM AND NEW SOCIAL ORDER, *supra* note 66; WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION, *supra* note 66. *Contra* WOOD, CREATION OF AMERICAN REPUBLIC, *supra* note 66.

<sup>122</sup> See, e.g., Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

solute epistemological barriers protecting a master's uncompromisable assertion of ownership against a slave's moral claim to freedom).

As an old Whig and a country lawyer, Thomas Jefferson's archetypal image of property was not a complete and uncontested ownership claim to a legally protected interest (or thing, or slave) that no one but the possessor could control and that the possessor could absolutely control. Rather, his focus was the English system of estates in land—bundles of conflicting, circumscribed, limited, multivalent interests, still rooted in corporate feudalism, and not necessarily attuned to the dictates of liberal capitalism that were then quickly permeating the law of contract.<sup>123</sup> The interests in real property that formed the dominant trope of aristocratic, genteel, and yeomanly self image in Jane Austen's England and in Rhys Isaac's Virginia were legally defined by a complex maelstrom of doctrines extending to fee tail, joint tenancies, estates pur autre vie, non-possessory rights and limitations of others' rights such as easements and servitudes (each with its negative counterpart, each enforceable by instrument or operation of law), and covenants that ran with the land.<sup>124</sup> Alienation was conditioned by a host of abstruse doctrines such as the Rule Against Perpetuities, the Rule in Shelley's Case, and the Doctrine of Worthier Title.<sup>125</sup> These

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<sup>123</sup> See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* (1977).

<sup>124</sup> Conflicted interests in landed estates and the status attendant thereto inspired a whole genre of "inheritance novels," including Samuel Richardson's *Clarissa*, Frances Burney's *Evelina*, and Jane Austen's *Pride and Prejudice*. See SAMUEL RICHARDSON, *CLARISSA, OR, THE HISTORY OF A YOUNG LADY* (Angus Ross ed., Penguin Books 1986) (1748); FRANCES BURNEY, *EVELINA* (Edward A. Bloom ed., Oxford Univ. Press 2002) (1778); JANE AUSTEN, *PRIDE AND PREJUDICE* (Wordsworth Editions Ltd. 1993) (1813). One particularly poignant literary perspective on the vicissitudes engendered by complex interests in estates in land is William Makepeace Thackeray's *The Luck of Barry Lyndon*, published in 1844 but set in the mid 18th century. See WILLIAM MAKEPEACE THACKERAY, *THE LUCK OF BARRY LYNDON* (Edgar F. Harden ed., Univ. of Michigan Press 1999) (1844). Redmond Barry takes the name Barry Lyndon when he marries the wealthy widow of Lord Bullingdon. But he holds only a life estate pur autre vie in the estate, which will devolve to his step-son who holds a future interest in the form of a fee simple subject to condition precedent and will take upon the death of his mother provided he has reached maturity. Rhys Isaac's *The Transformation of Virginia, 1740–1790*, is a brilliant study of role playing in genteel eighteenth century Virginia, laying great emphasis on the land as setting. See RHYS ISAAC, *THE TRANSFORMATION OF VIRGINIA, 1740–1790* (1999).

<sup>125</sup> The Rule Against Perpetuities holds that "[n]o [contingent future] interest [in land] shall vest [in interest, not in possession], unless it must vest, if vest at all, within twenty-one years plus the period of gestation of a life in being at the time of its creation." *Duke of Norfolk's Case*, (1862) 22 Eng. Rep. 931 (Ch.). The Rule in Shelley's Case holds "[w]hen the ancestor, by any gift or conveyance, taketh an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or fee tail, 'the heirs' are words of limitation of the es-

gave rise to varied contingent current and future interests subject to eventual claims and conditions embodied in such forms as the fee on condition, the fee subject to condition subsequent, and fee subject to reversion.<sup>126</sup> For every owner or tenant the law recognized a host of possible future replacements. The current possessor had duties to these persons (many not yet in existence or even ascertainable) that restricted what the “owner” could do with lands and buildings currently in his or her custody.

Without working one’s way through a historically-minded casebook on real property law,<sup>127</sup> it is hard to appreciate the otherworldliness of these conceptual assumptions about property. The most important insight is that they are very unlike the modern libertarian notions of ownership that Professor Appleby had in mind in exploring the property-focused ideals of market farmers in upstate New York who voted for Jefferson in 1796 or 1800, although these farmers may well have been articulating very liberal notions precisely because they desired to cast off the expressly feudal ideals of property held by the Hudson River patroons.<sup>128</sup> Even more so than a jointly held life tenancy in marital property in a modern freehold encum-

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tate, and not words of purchase.” Shelley’s Case, (1581) 76 Eng. Rep. 199 (K.B.). The Doctrine of Worthier Titles holds that “[a]t common law, where a testator undertook to devise to an heir exactly the same interest in land as such heir would take by descent, descent was regarded as the ‘worthier title’ and heir took by descent rather than devise.” BLACK’S LAW DICTIONARY 1607 (6th ed. 1990). The point to reviewing these conditions on alienation is that notions of “it (or he or she) is mine, and therefore I can do with it as I please” do not as readily resonate in Jefferson’s culture as we might assume.

<sup>126</sup> See generally J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 248–97 (4th ed. 2002); A.W.B. SIMPSON, A HISTORY OF THE LAND LAW 208–41 (2d ed. 1986).

<sup>127</sup> A good example of a classic estates in land casebook is CASNER & LEACH, CASES AND TEXT ON PROPERTY, in any of the editions published between 1950 and 2000. See, e.g., CASNER & LEACH, CASES AND TEXT ON PROPERTY (3d ed. 1985). More recent editions, reworked by younger authors, have forsaken the medieval heritage in favor of modern pragmatism.

<sup>128</sup> See APPLEBY, CAPITALISM AND NEW SOCIAL ORDER, *supra* note 66, at 4–5, 44. On the remnants of feudal ideology in the Hudson River Valley and early nineteenth century landlord tenant disputes see REEVE HUSTON, LAND AND FREEDOM: RURAL SOCIETY, POPULAR PROTEST, AND PARTY POLITICS IN ANTEBELLUM NEW YORK (2000) and CHARLES W. MCCURDY, THE ANTI-RENT ERA IN NEW YORK LAW AND POLITICS, 1839–1865 (2001). John F. Hart’s work, illustrating the comprehensive nature of land use regulation in colonial and early national America, while refuting Justice Scalia’s misplaced originalist assertions that regulation should trigger the Takings Clause, also aptly illustrates that the paradigmatic understanding of property in Jefferson’s day did not amount to an individualistic claim of absolute immunity against others’ rights and the public weal. See John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996); John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099 (2000).

bered by two mortgages and burdened by easements, restrictive covenants, and zoning regulations, the real estate titles of Jefferson's Virginia were complex and conflicted. Cutting against all our Applebyian intuitions, the quintessential liberal fixation with property as absolute and unassailable is actually Roman rather than Anglo-American in origin—at least in so far as we are concerned with intellectual provenance rather than popular resonance. The Roman law notion of dominium, defining a unitary property interest consisting of *usus*, *fructus*, and *abusus* (right to possess, benefit from, and alienate), was certainly familiar to Jefferson as an academic counterpoint to the common law, but dominium was foreign to the law and principles of the English speaking world.<sup>129</sup> Paradoxically then, the property that formed the third pillar of Locke's triad alongside life and liberty was not quite Lockean as we know it (or as Professor Ableby knows it).

While the property law of eighteenth century Virginia was arcane and opaque, it was also quotidian and ubiquitous. The disputes that dominated Jefferson's law practice from 1766 to 1772 were questions about real estate and many were incredibly intricate.<sup>130</sup> In agrarian Virginia, ownership of land—perhaps more even than of slaves—made a gentleman a gentleman, a planter a planter, and a freeman a

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<sup>129</sup> On the differences between Roman and Anglo-American property law in the eighteenth century, see RENE DAVID AND JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 86 (1985) and sources cited therein; MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES ON THE CIVIL AND COMMON LAW TRADITIONS, WITH SPECIAL REFERENCE TO FRENCH, GERMAN, ENGLISH AND EUROPEAN LAW 269–70 (2d ed. 1994); and JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 65–67 (2d ed. 1985). I look forward to consulting Thomas Jefferson's *Legal Commonplace Book* to acquire a deeper appreciation of his early exposure to Roman law. The *Commonplace Book* contains Jefferson's notes and summaries of his reading as a law student from 1762–1767. I am grateful to Professor David Konig for making his transcription available. When published in the context of a major work on Jefferson's legal thought, the Konig transcription will provide a great boom to Jefferson scholarship, as the only serviceable way to consult the *Legal Commonplace Book* until now has been to visit the Huntingdon Library to review the manuscript. As noted above, Jefferson cited civil law commentators—particularly Pufendorf—in his argument in *Howell* in 1770, so he certainly had some familiarity with civil law early in his career. Shortly after he left Washington in 1809 he prepared an extensive and informed memorandum of civil law property issues involved in a dispute over title to alluvial mud flats in New Orleans. See DUMBAULD, *supra* note 30, at 36–74. Jefferson's catalogue of books donated to the Library of Congress in 1812 includes over forty French and Latin titles on law in various non-English speaking countries, including the Codes of Justinian and Napoleon.

<sup>130</sup> See generally FRANK L. DEWEY, THOMAS JEFFERSON, LAWYER (1986) (emphasizing Jefferson's focus on real estate law); SCHWARTZ ET AL., *supra* note 2 (studying a highly complex real property case that Jefferson argued against George Wythe).



freeman. Ownership of land not only had an exact analogy in English society, practice, and theory that slave-owning did not, it also extended across far wider segments of the population, down to the western farmers who made up Jefferson's client base during his years at the bar.

As a real property lawyer, Jefferson therefore had the intellectual equipment, engrained habits, and natural inclination to avoid falling into the property-focused trap that Finkelman described. To be sure, slaves and masters had conflicting claims, but Jefferson's understanding of property hardly confined him to absolutist, uncompromising positions. If anything, it did just the opposite. Any supposition that Jefferson's lawyerly notion of property in man was unqualified and indefeasible is further undermined by the fact that slaves were not considered personal property in Virginia until an act of the legislature in 1792 converted slaves from real estate to chattels personal. When Jefferson practiced law, and when he wrote the ordinance of 1784, Virginia slaves were subject to most of the doctrines conditioning alienation that attached to land.<sup>131</sup>

In truth, Jefferson seldom, if ever, mentioned the sanctity of property in the context of slavery, except in a few rare instances where he distanced himself from those who supported slavery out of naked interest. As a natural rights philosopher, a real Whig, and eventually a nascent romantic, Jefferson could readily acknowledge that black liberty trumped white claims of property. In fact, it was not even close, as Jefferson suggested in his discussion of slave behavior in the *Notes on Virginia*, by pointing out that slaves' disposition to theft was understandable given that deprivation of liberty has robbed them of all property.<sup>132</sup> On several occasions Jefferson went one step further and acknowledged that as a matter of morality, a slave rebel's violent assertion of liberty had more merit than even a white owner's right to life. In broad terms, this is precisely the import of his famous statement in the *Notes on Virginia* respecting God's judgment on Virginia's slaveholding, and the Almighty's certain siding with slaves in the event of a revolution.<sup>133</sup> When slave revolt was attempted in 1800,

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<sup>131</sup> See THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1689–1860*, at 66–71 (1996). Jefferson supported the 1792 revision to the law because it facilitated more equal partition of decedents' estates. *Id.* at 71.

<sup>132</sup> JEFFERSON, *NOTES ON VIRGINIA*, *supra* note 16, at 142 (“That disposition to theft with which they have been branded, must be ascribed to their situation, and not to any depravity of the moral sense. The man, in whose favour no laws of property can exist, probably feels himself less bound to respect those made in favour of others.”).

<sup>133</sup> *Id.* at 163.

Jefferson responded consistently with the principles he had published and urged the rebels' lives be spared on grounds of justification.<sup>134</sup>

But Jefferson's views were by no means typical of his society. If the Lockeian premise on which Finkelman relies to explain Jefferson's inaction does not easily harmonize with Jefferson's lawyerly worldview, property-based pro-slavery notions did resonate with a large segment of society. The claim that property rights—particularly property rights in slaves—were so fundamental as to be immune from legal or political challenge figured prominently in the pro-slavery petitions submitted from eight “blackbelt” counties in Southside and southwestern Virginia to the Virginia state legislature in 1784–85. The petitions, reprinted and analyzed by Frederika Teute Schmidt and Barbara Ripel Wilhelm in the *William and Mary Quarterly*, made their way to Richmond in five variations under 1,244 signatures.<sup>135</sup> They offer the clearest window into the reactionary popular attitudes of Virginians toward slavery that Jefferson habitually invoked when explaining his own cautious views on the subject of emancipation.<sup>136</sup> The immediate motivation behind the 1784–1785 petitions was a Methodist memorial received by the legislature urging emancipation, but the pro-slavery petitioners also took aim at the liberal manumission statute of 1782. Although the Methodist memorial was unanimously rejected by the General Assembly, the pro-slavery petitioners were disturbed that it was not treated with more contempt and that the vote to repeal the manumission statute that followed its reading failed by a 52-35 margin.<sup>137</sup>

The pro-slavery petitioners' approach to possible emancipation differed fundamentally from Jefferson's in several respects, besides the issue of a property-focused right to insurrection against tyrannical government. It is important in that context to stress the obvious

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And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God? That they are not to be violated but with his wrath? Indeed I tremble for my country when I reflect that God is just: that his justice cannot sleep for ever: that considering numbers, nature and natural means only, a revolution of the wheel of fortune, and exchange of situations is among possible events: that it may become probable by supernatural interference! The Almighty has no attribute which can take side with us in such a contest.

*Id.*

<sup>134</sup> For a detailed treatment, see generally Merkel, *supra* note 12.

<sup>135</sup> See Schmidt & Wilhelm, *supra* note 33, at 133.

<sup>136</sup> See e.g., Letter from Thomas Jefferson to Edward Coles (Aug. 25, 1814), in 9 WRITINGS OF JEFFERSON, *supra* note 17, at 477–79.

<sup>137</sup> Schmidt & Wilhelm, *supra* note 33, at 135.

point that Jefferson, unlike the petitioners or the founders of the Confederacy, never invoked the Declaration of Independence as an argument against abolition.<sup>138</sup> On the most basic level, Jefferson accepted that emancipation was ultimately desirable, while the petitioners were adamant in their insistence that emancipation must never come. The petitioners and Jefferson differed also in important particulars. First, the petitioners relied heavily on scriptural, specifically Old Testament authority, to make the case that slavery was legitimate and therefore immune from legislative tampering.<sup>139</sup> Second, the petitioners' essentially populist claims avoided all reference to secular authority except the American Revolution itself. Their argument was in essence that having rebelled against Britain for attempting to take colonists' property by means of taxation, they were prepared to rebel against Virginia if the legislature attempted to take property by emancipation.<sup>140</sup> Third, although the petitioners did not use the Calhounite phrase "positive good," the clear import of their language was that as a useful and God-sanctioned institution, slavery was worthy on its own terms.<sup>141</sup> Jefferson never made these claims; indeed, they are claims that are wholly un-Jeffersonian. A fourth difference is that the petitioners maintained that black freedom was less valuable than white property, because by divine curse and fiat blacks were permanently inferior.<sup>142</sup> This assertion is at odds with Jefferson's careful distinction between equality of the moral sense (the basis for political and civil rights), and intellectual equality (which ideally had no bearing on a person's or race's rights and standing to participate in society).<sup>143</sup>

The one area of significant overlap between Jefferson's attitudes and those of the petitioners is concern that free blacks would fall into idleness and resort to theft and other criminal behavior and that without the heavy hand of white social control, race war would become likely.<sup>144</sup> Yet here too, the approaches ultimately diverge, with

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<sup>138</sup> It is worth recalling the familiar point that Jefferson replaced "property," the third prong of the Lockean triad of fundamental liberties, with the "pursuit of happiness" in the Declaration, and that his list of grievances had far more to say about abridgement of constitutional processes and liberties than it did regarding property-focused claims of immunity against taxation. See *THE DECLARATION OF INDEPENDENCE* (U.S. 1776).

<sup>139</sup> See, e.g., Schmidt & Wilhelm, *supra* note 33, at 139.

<sup>140</sup> See, e.g., *id.* at 140–41.

<sup>141</sup> See, e.g., *id.* at 144.

<sup>142</sup> See, e.g., *id.* at 145.

<sup>143</sup> See MATTHEWS, *supra* note 78, at 53.

<sup>144</sup> See JEFFERSON, NOTES ON VIRGINIA, *supra* note 16, at 138.

Jefferson referring to the scientific method and pleading caution pending further observation and the unfolding of beneficial environmental conditions and the petitioners referring to Old Testament authority to explain permanent black perniciousness.<sup>145</sup>

Among Virginians, the chief objections to emancipation remained solicitude for social stability on the part of cultivated intellectuals like Jefferson and a naked commitment to private interest buttressed by scriptural support for slavery among less cosmopolitan, more material planters.<sup>146</sup> Overt, secular pro-slavery was not particularly rarefied in the revolutionary period.<sup>147</sup> The right-to-property-based pro-slavery view that surfaced in the Southside petitions was more populist than philosophical or jurisprudential. Sophisticated defenses of slaveholding did not become a mainstay of southern ideology until well into the nineteenth century.<sup>148</sup> Indeed, as Robert Forbes reminds us, for most of its history Southern slavery was defended chiefly on the basis of interest and power, not principle.<sup>149</sup> Certainly, during the period of the confederate government, the upper South's slaveholding political leaders said little if anything favoring slavery and left no record of any efforts to develop a property-rights-centered pro-slavery theory.<sup>150</sup> In sum, the Lockean petitions of

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<sup>145</sup> Cf. *id.* at 143; Schmidt & Wilhelm, *supra* note 33, at 145.

<sup>146</sup> See Schmidt & Wilhelm, *supra* note 33, at 138–40 (reprinting the petitions).

<sup>147</sup> It is interesting that only two of twenty-four classic articles reprinted in ARTICLES ON AMERICAN SLAVERY: PROSLAVERY THOUGHT, IDEOLOGY, AND POLITICS (Paul Finkelman ed., 1989) [hereinafter PROSLAVERY THOUGHT] address the revolutionary period. One of these, Schmidt & Wilhelm, *supra* note 33, deals not with the ideals of the elite, intellectual classes, but rather with a populist outcry against the social dislocation that accompanied liberalization of Virginia's manumission laws in 1782. The other article touching the eighteenth century, Kenneth S. Greenberg, *Revolutionary Ideology and the Proslavery Argument: The Abolition of Slavery in Antebellum South Carolina*, 42 J.S. HIST. 365 (1976), focuses chiefly on the later period. And even South Carolina's most famous eighteenth century defense of slavery, voiced at the Constitutional Convention by Pierce Butler, was cast squarely in terms of interest rather than philosophy. See Pierce Butler, Speech at the Constitutional Convention (July 13, 1787), in 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 605 (rev. ed. 1966) (Max Farrand ed., 1911). The remaining twenty-two case studies in Finkelman's compendium deal with the period beginning with the Missouri Crisis.

<sup>148</sup> See 2 MICHAEL O'BRIEN, CONJECTURES OF ORDER: INTELLECTUAL LIFE AND THE AMERICAN SOUTH, 1810–1860, at 938–92 (2004).

<sup>149</sup> ROBERT P. FORBES, THE MISSOURI COMPROMISE AND ITS AFTERMATH: SLAVERY AND THE MEANING OF AMERICA 40–41, 148–55 (2007).

<sup>150</sup> See generally MACLEOD, *supra* note 31. MacLeod advances the argument that there was no need for overt pro-slavery until after the Missouri Crisis, when Northern opponents of slavery finally tired of waiting for slavery to die of its own accord in the South. MacLeod makes the subtler and equally cogent point that Southerners such as Jefferson who objected to slavery on philosophical and moral grounds likewise deceived themselves about the power of revolutionary ideals to end slavery with local

black-belt slave owners notwithstanding, the epistemology of property was not the major factor in Jefferson's political and philosophical relationship with chattel slavery in 1784 and never became a guiding concern for Jefferson, even in his more conservative old age.

Besides focusing on overly rigid conceptions of property rights insufficiently attuned to Whiggish and common lawyerly fixations with estates in land, Finkelman's argument that Jefferson laid little stock in the anti-slavery clause of 1784 struggles to accommodate direct documentary evidence to the contrary. Jefferson's own pen attests to the great weight he laid in the anti-slavery clause and to his grave disappointment at its narrow defeat. In a letter dated April 25, 1784 to Madison, now in the General Assembly in Richmond, Jefferson lamented the clause's failure and the want of that crucial single additional vote.<sup>151</sup> "The act of Congress now inclosed," Jefferson instructed his protégé, "extends not only to the territory ceded, but *to be ceded*."<sup>152</sup> He continued,

You will observe two clauses struck out of the report, the 1st. respecting hereditary honours, the 2d. slavery. The 1st. was done not from an approbation of such honours, but because it was thought an improper place to encounter them. The 2d. was lost by an individual vote only. Ten states were present. The 4. Eastern states, N. York, Pennsva. were for the clause. Jersey would have been for it, but there were but two members, one of whom was sick in his chambers. South Carolina Maryland and !Virginia! voted against it. N. Carolina was divided as would have been Virginia had not one of it's [sic] delegates been sick in bed.<sup>153</sup>

I have seen no other use of double exclamation points by Jefferson. This unusual punctuation speaks not only to the importance Jefferson attached to the anti-slavery clause, but to his image of Virginia as an anti-slavery state, an image he assumed Madison would share. That he was surprised—even shocked—to see the Virginia delegation turn against mandatory emancipation in the West implies that, during the Revolutionary period, Jefferson had genuine expectations of living to see the end of slavery in Virginia. It also suggests that he still

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consent even where it was entrenched. See WILLIAM M. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 141–50 (1972).

<sup>151</sup> Letter from Thomas Jefferson to James Madison (Apr. 25, 1784), in 7 *PAPERS OF JEFFERSON*, *supra* note 18, at 118.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

underestimated Virginia's (and perhaps his own) attachment to the institution.<sup>154</sup>

A second letter bearing on the proposed emancipation clause is the subject of somewhat more ambiguous interpretation. Jefferson's letter of May 3, 1784, to his musical and literary friend and former colleague in Congress, Francis Hopkinson, pursued an ironic vein, and wondered whether prosecution for libel might lie against *Pennsylvania Packet* editor "Claypole for publishing in his gazette of April 27. as an act of Congress a paper which certainly was no act of theirs, and which contained a principle or two not quite within the level of their politics."<sup>155</sup> Claypole apparently had not printed the final version of the *Ordinance of 1784* as adopted on April 23, but printed Jefferson's revised report that still contained the clauses against slavery and hereditary titles. Jefferson labeled this earlier revised report "a pretended act for dividing the western country into states and fixing the principles on which their governments should be erected, two of which as this forgery [Claypole's published report] pretends were an exclusion of hereditary honours, and an abolition of slavery."<sup>156</sup> He then assured Hopkinson that "[w]hen the true act shall be published you will find no such pettyfogging ideas in it."<sup>157</sup>

Finkelman argues that Jefferson's ironic style in his letter to Hopkinson implies a lack of seriousness regarding anti-slavery. But a slightly jocular tone (if indeed it was that, rather than a bluntly sarcastic one) does not necessarily mean Jefferson took anti-slavery lightly. After all, one often hears ironic comments about the current President's foreign and environmental policies from people who find those policies deeply disturbing. Similarly, Jefferson, who was always sensitive about the fate of legislation he sponsored, likely felt some bitterness and frustration at Congress' rejection of two high principles of his western design. This is Dumas Malone's reading, and while Malone's sympathetic views of Jefferson's relation to slavery are certainly informed by his New South roots in Jim Crow Mississippi, Malone's argument actually focuses on the clause barring titles of nobility.<sup>158</sup> Jefferson was then thoroughly exercised over the Society of Cincinnati, as much because of its hereditary character as because

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<sup>154</sup> See MACLEOD, *supra* note 31, at 126–30 (on elite attachment to slavery); see generally Schmidt & Wilhelm, *supra* note 33 (on pressure from small slaveholders to preserve the institution).

<sup>155</sup> Letter from Thomas Jefferson to Francis Hopkinson (May 3, 1784), in 7 PAPERS OF JEFFERSON, *supra* note 18, at 205.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> MALONE, *supra* note 20, at 415–16.

of its military tenor, and in meetings with Washington he stressed the importance of moderating the aristocratic image of the Society of Cincinnati.<sup>159</sup> This counsel to Washington concerning the dangers of aristocracy, along with his regretful report to Madison about narrowness of the anti-slavery clause's defeat, and his low overall impression of Congress (an impression very widely shared)<sup>160</sup> all suggest Jefferson considered the failure of the two clauses a product of low-mindedness rather than a subject for jesting. There is also perhaps some sense of embarrassment that the matter was taken up prematurely in the papers. Diffidence was foreign to Jefferson regarding most issues, but not anti-slavery. In this regard Jefferson may have felt uneasy that Claypole's publication of the uncensored ordinance might involve him in public controversy in his home constituency, something Jefferson sought to avoid following his recent travails at the hands of public and legislative critics of his handling of the British invasion during his governorship.<sup>161</sup> Wariness respecting public censure of his failed anti-slavery proposals mirrored his reluctance to publish the *Notes on Virginia* and their strictures against slavery in America.<sup>162</sup>

#### IV. WOULD THE CLAUSE HAVE MADE A DIFFERENCE?

Those who argue that the failed anti-slavery clause of the *Territorial Government Act* has been overestimated also focus on the Old Southwest. The argument here is that even if the fifth provision of Jefferson's Charter of Compact had been allowed to stand, and even if the *Ordinance of 1784* had not been superseded by the *Ordinance of 1787*, it would have had little effect on the development of Alabama, Mississippi, and Tennessee. This claim too has been advanced most adamantly by Professor Finkelman: "It is difficult to imagine how Jefferson's proposal would have worked, had it been accepted; by 1800 some of the territories probably would have had large slave populations and politically powerful masters who would have worked to undermine the Ordinance of 1784, had it included Jefferson's prohibi-

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<sup>159</sup> *Id.* at 415.

<sup>160</sup> See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 185 (1996).

<sup>161</sup> On Jefferson's reaction to public censure and legislative inquiry concerning his handling of the British invasion during his governorship, see MALONE, *supra* note 20, at 361–69.

<sup>162</sup> See Letter from Thomas Jefferson to Francois Jean, Chevelier de Chastellux (Sept. 2, 1785), in 8 PAPERS OF JEFFERSON, *supra* note 18, at 467–69. For a discussion of Jefferson's reluctance to circulate the *Notes on Virginia*, see JOSEPH J. ELLIS, AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON 85–90 (1997).

tion.”<sup>163</sup> Finkelman’s critique aims at the Northwest as well as Southwest; his point is not simply that Jefferson’s clause would not have prevented slavery spreading into Alabama and Mississippi, but that it would have eased the growth of slavery in Indiana and Illinois.<sup>164</sup>

Finkelman’s assertion has some purchase. Doubtless, slave masters in the West would have endeavored to perfect their property claims against would-be emancipationists, but it is equally true that in *every* modern jurisdiction where slavery existed, politically powerful masters resisted the imposition of anti-slavery legislation. In all of those jurisdictions, however, slavery was eventually overthrown—by internal political means in the American North and Midwest, by revolution in Haiti, by imposition of imperial legislation in the British colonies, by military conquest in the American South, and by surrender to world opinion and Anglo-American economic coercion in Brazil and Cuba.<sup>165</sup> If Jefferson’s termination clause had passed in 1784, its prospects would have compared favorably to abolition laws that ultimately proved successful in other regions. Even as late as 1800, when emancipation was scheduled to take effect, the situation in large areas of the Trans-Appalachian American West (Tennessee and the entire Northwest)<sup>166</sup> more closely resembled that in northeastern states where slaveowners acquiesced unhappily but peacefully in abolition by political means than that which ultimately developed in the ante-bellum Southwest in the absence of a Federal slavery-termination provision.

In reflecting on the prospects for slavery’s western expansion and entrenchment in the United States of 1784, it is useful to bear in mind that the United States did not then include Spanish Louisiana, with its heavy slave populations in the regions surrounding New Orleans. In the 1780s, whites owned only a handful of slaves in the territory comprising the modern states of Alabama and Mississippi, and even in the more densely settled Tennessee region of North Carolina

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<sup>163</sup> Finkelman, *Northwest Ordinance*, *supra* note 29, at 353. Not that Finkelman’s position is idiosyncratic; William Wiecek, for example, adopts the same reasoning in WIECEK, *supra* note 35, at 60.

<sup>164</sup> PROSLAVERY THOUGHT, *supra* note 147, at 369–70.

<sup>165</sup> See generally ROBIN BLACKBURN, *THE OVERTHROW OF COLONIAL SLAVERY, 1776–1848* (1988); DAVIS, *supra* note 103; DAVID BRION DAVIS, *SLAVERY AND HUMAN PROGRESS* (1984).

<sup>166</sup> According to the Federal Census of 1800, Tennessee had a black population of 13.2%, of whom 97.8% were enslaved. See Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals By Race, 1790 to 1990, and By Hispanic Origin, 1970 to 1990, For The United States, Regions, Divisions, and States* (U.S. Census Bureau Population Division, Working Paper, No. 56, 2002), available at <http://www.census.gov/population/documentation/twps0056/tab57.pdf>.



and Kentucky region of Virginia slavery was not yet firmly rooted.<sup>167</sup> To assess the potential efficacy of Jefferson's provision, the precise issue therefore is not whether the Southwest that came into existence by 1800 in the absence of the anti-slavery clause would have acquiesced in emancipation, but whether a Southwest that would have developed between 1784 and 1800 with emancipation scheduled for 1800 would have been settled by politically powerful slavemasters with large numbers of slaves and the clout to resist or overturn the emancipation law. Addressing this question requires consideration of another closely related criticism of the deleted clause of 1784—also argued forcefully by Professor Finkelman—to wit, that Jefferson's Ordinance lacked an enforcement clause.<sup>168</sup>

This particular critique is somewhat puzzling in that it is nakedly anachronistic. A noted constitutional historian, Professor Finkelman is certainly aware that enforcement clauses did not enter into American constitutionalism until passage of the Reconstruction Amendments, which makes his decision to condemn Jefferson for not including one in 1784 difficult to comprehend. To be sure, the introduction of enforcement clauses in the Thirteenth, Fourteenth, and Fifteenth Amendments reflected the greater powers Congress arrogated to itself at the time of their passage—powers which may well have been necessary to wipe all vestiges of slavery off the statute books where the institution was deeply ingrained<sup>169</sup> and powers which the Congress, established by the Articles of Confederation, clearly lacked.<sup>170</sup> But Finkelman's criticism regarding the absence of an enforcement clause could be leveled against *any* pre-Civil War legislation, including Nathan Dane's (and/or Rufus King's) Northwest Ordinance, the provision Finkelman so much prefers to the failed clause of 1784.<sup>171</sup>

An enforcement provision, giving Congress authority to implement powers it had itself just proclaimed, was without the realm of possibility under the Articles of Confederation. The states had dele-

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<sup>167</sup> See BARNHART, *supra* note 85, at 37–44, 135–137 (stating that western population figures before the first federal census of 1790 are at best speculative).

<sup>168</sup> See FINKELMAN, *SLAVERY AND THE FOUNDERS*, *supra* note 7, at 44.

<sup>169</sup> See ACKERMAN, *supra* note 34, at 131; FONER, *RECONSTRUCTION*, *supra* note 38, at 199.

<sup>170</sup> For a trenchant analysis of Congressional weakness under the Articles, see RAKOVE, *supra* note 160, at 23–56. However, for a famous argument that government under the Articles was far less futile than popular memory would have it, see JENSEN, *supra* note 47.

<sup>171</sup> See PROSLAVERY THOUGHT, *supra* note 147, at 353. Dane is generally credited with inserting the anti-slavery aspects of article VI, while King is blamed for the fugitive slave clause. *Id.*

gated no authority for Congress to augment its own powers, absent an amendment agreed unanimously by the legislatures of each state.<sup>172</sup> However, something very nearly as useful—the plenary powers inherent in sovereignty (called the police powers a generation later)<sup>173</sup>—did exist respecting the West, and this realization was commonplace in the constitutional discourse of the day. Assuming that the transfer of sovereignty over the West from the old states to Congress was complete pending the re-delegation of that sovereignty to the new territories and states as they emerged, the doctrine that Congress had the power to act with reference to the National Domain did not then need to await the rise of enforcement clauses.<sup>174</sup> Perhaps ironically,

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<sup>172</sup> See ARTICLES OF CONFEDERATION art. XIII (U.S. 1781); see generally RAKOVE, *supra* note 160, at 25. On the issue of the more limited assertions of authority in the Territorial Governance's Act being *ultra vires*, see 6 PAPERS OF JEFFERSON, *supra* note 18, at 587–88 (ed. note). Clearly the same considerations apply to the Northwest Ordinance. My point is that the *ultra vires* problem would hardly disappear on account of the Confederation Congress announcing *ipse dixit* that it had the authority to do what it had just done. That said, the Congressional power grab could still be legitimated through the development of a new convention in the Diceyan sense, through popular ratification in the Ackermanian sense, or through the ratification of a new constitutional instrument recognizing the national government's plenary authority over the western territories.

<sup>173</sup> According to David Watson, the phrase “police powers” was first used to describe the authority of states to regulate their internal affairs by Justice Story in *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842). 1 DAVID K. WATSON, *THE CONSTITUTION OF THE UNITED STATES, ITS HISTORY, APPLICATION AND CONSTRUCTION* 598–99 (1910). In *Prigg*, Story held that the federal Fugitive Slave Law of 1793 was constitutional and that state officials ought to enforce it, but that the federal government could not compel state officials to act in that or any other capacity. See 41 U.S. 539.

<sup>174</sup> ONUF, *supra* note 21, at 41–46 (exploring the rising consensus among members of the Confederation Congress in the 1780s that national authority over the ceded western territories was absolute, subject only to the conditions attached to the grants of cession by Virginia and the other ceding states). Congressional action infringing on state sovereignty was a different story under the Articles and also later in the antebellum years of co-sovereignty and dual federalism under the Constitution. But in the West, there were, as yet, no states to be co-sovereign. Hence, the police power, that is, the power to legislate for general purposes of safety, health, welfare, and morals inherent in sovereignty, clearly resided with Congress respecting territories not yet admitted as states. Prior to *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856), this remained the orthodox understanding under the Constitution of 1788 as it had been under the Articles, so much so that during the Missouri Crisis President Monroe's cabinet—which included Southerners John C. Calhoun, William H. Crawford, and William Wirt—advised unanimously that the plenary federal power over the territories included the power to prohibit slavery. See WIECEK, *supra* note 35, at 115; see also *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828). One could also make a case by analogy to the law of treaties that the anti-slavery clause of 1784 would have been self-executing; that is, that no further domestic (namely, state or territorial) legislation would have been required to give it legal effect. As previously noted, the language of the fifth article of the Compact closely tracked the future language of Section One of the Thirteenth Amendment. I take it to be fairly orthodox that Section One is in fact

Finkelman's suggestion that no positive anti-slavery action was possible before the advent of the enforcement clause is not only ahistorical; rather, it exonerates Jefferson of any lethargy on the anti-slavery front, precisely because he lived and died long before the Thirteenth Amendment became law.

In sum, there is something rather circular and illogical about Finkelman's approach to this issue. He starts with the presupposition that Jefferson was pro-slavery, and therefore could not have wholly supported any radical anti-slavery proposal.<sup>175</sup> Next, he argues that the anti-slavery clause of 1784 was too radical and precocious to have been effective, for which reason historians should not afford its author any credit.<sup>176</sup> He finally suggests that this visionary quality shows, of all things, that Jefferson did not take the measure seriously himself.<sup>177</sup> The most serious flaw in Finkelman's argument, however, derives not from the incompatibility of its several underlying premises, but from its failure to account for a crucial factor: the deterrent effect of the clause on slaveholders contemplating migration into the southwestern territories.

At other places in his narrative, and in other contexts, he treats this deterrent effect in considerable detail. For instance, in his discussion of the pro-slavery petitions of French inhabitants that followed passage of the Northwest Ordinance in 1787, Finkelman writes that "when the Congress failed to respond positively to their petitions, many of the French settlers voted with their feet."<sup>178</sup> Finkelman clearly is too careful a scholar not to recognize that an anti-slavery

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self-enforcing: That "[n]either slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction" is, from a *de jure* perspective, the end of the story—countervailing state or federal law is simply nugatory, and cannot legally be applied. U.S. CONST. amend. XIII, § 1. The Enforcement Clause, set out in Section Two, gives Congress further authority to provide for police action against non-compliant supporters of the old system of coerced labor or its equivalents and also to reach the badges and incidents of slavery. *Id.* § 2. It is fairly straightforward, then, to argue that Jefferson's failed anti-slavery clause would have had the same reach (in terms of subject matter, not geography) as Section One of the Thirteenth Amendment; that is, it would have prohibited slavery (but not badges and incidents like segregation or black codes) on its own terms, even without further legislative action. Legal effect and compliance are, of course, different questions, but those additional powers to compel compliance that Congress acquired respecting former slave states by virtue of Enforcement Clause of the Thirteenth Amendment were unnecessary respecting the territories—at least prior to *Dred Scott's* unsupported claim that Congressional authority over the territories pertained only to regulation of land as land.

<sup>175</sup> See Finkelman, *Jefferson and Slavery*, *supra* note 1, at 181, 186.

<sup>176</sup> See *id.* at 199.

<sup>177</sup> See *id.* at 199–200.

<sup>178</sup> See Finkelman, *Northwest Ordinance*, *supra* note 29, at 363.

law—even one without an enforcement clause—could create sufficient uncertainty among slaveholders to drive them and their human property from a territory. “With the passage of the [Northwest Ordinance],” Finkelman continues, citing a letter to the Territorial Governor, “many aggravating circumstances rumored that the very moment’ the territorial governor arrived ‘all their slaves would be set free.’ Thus a ‘panic seized upon their minds’ and the wealthiest settlers sought ‘from the Spanish Government that security which they conceived was refused to them’ by the United States”<sup>179</sup> But why would no similar logic of deterrence apply to the *Ordinance of 1784*? If an anti-slavery ordinance could drive slaveholders from their homes in the Northwest, surely it could also have kept other slave-owners from moving into the unsettled areas of the Southwest. If these territories, because of their climate, held out the potential for greater returns on slave labor than those north of the Ohio, the scope of investment required for plantation-based agriculture also entailed far greater risks where the future of slave property was uncertain.<sup>180</sup>

To be fair, this problem of inconsistency on deterrence does not wholly escape Finkelman’s notice. But even his effort to forestall criticism on this account seems more geared toward condemning Jefferson than toward historical explanation. “Those slaveowners who remained in the Northwest Territory,” Finkelman writes, “quickly discovered that the words of the ordinance were much like the words of the Declaration of Independence.”<sup>181</sup> He lays great stock in the local anti-slavery efforts of the next generation of Northwesterners, rather than those of the nation’s Founding Fathers, but he cannot ultimately escape the deep commitment of these very Northwesterners to the anti-slavery principles and legacies they associated with the Founding Fathers, most especially with Jefferson himself.<sup>182</sup> Indeed, Finkelman’s whole history of Northwestern pro-slavery is an account of efforts to overthrow Article VI of the Northwest Ordinance, justify slave constitutions in the face of that Ordinance, and discount the anti-slavery legacy of the Founders. As Finkelman reports, the most com-

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<sup>179</sup> *Id.* (citing Letter from Bartholomew Tardiveau to Arthur St. Clair (June 30, 1789), in 2 THE ST. CLAIR PAPERS 117–18 (William Henry Smith ed., 1882)).

<sup>180</sup> On slaveholders in the United States as cost benefit analyzers and rational economic actors, see ROBERT FOGEL & STANLEY ENGERMAN, TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY (1974).

<sup>181</sup> PROSLAVERY THOUGHT, *supra* note 147, at 363.

<sup>182</sup> See *id.* at 367–69; see also FONER, FREE SOIL, *supra* note 38, at 84; PETERSON, *supra* note 5, at 189–209.

mon refrain of these pro-slavery campaigners was that Article VI was keeping wealthy slave owners out of the Territories.<sup>183</sup>

While rejecting the notion that Jefferson's free-soil clause would have had no effect, I do not mean to suggest that the clause would necessarily have prevented slavery from becoming firmly established anywhere in the Southwest. It would most likely have affected the northernmost and most mountainous portions of the Old Southwest, in which slavery never became as widely and firmly established as it did in Alabama and Mississippi. Kentucky was not part of the original Virginia cession, and the Bluegrass State never went through a territorial stage, passing instead directly out of Virginia into full membership in the Union in 1792.<sup>184</sup> North Carolina's cession of Tennessee did not take place until North Carolina ratified the Constitution in 1789, at which point Congress took over administering the Territory South of the Ohio, leading eventually to Tennessee's admission in 1796.<sup>185</sup> Regarding the remainder of the Old Southwest, it is all but certain that South Carolina and Georgia never would have made their cessions had Jefferson's provision remained in force, and even without an anti-slavery provision in place, conflicting Spanish claims, Indian wars, and complex Georgia politics involving various factions of well connected speculators with conflicting claims to Indian lands in the Yazoo delayed establishment of the Mississippi Territory (comprising the future states of Mississippi and Alabama) until 1798.<sup>186</sup> At that time, Congress considered but rejected legislation that would have prohibited slavery in the new territory.<sup>187</sup>

For the future states of Kentucky and Tennessee, however, approval of Jefferson's anti-slavery clause in 1784 would have created a period of substantial uncertainty, and any uncertainty worked against the immigration of slaveholders. Demographic history prior to the first federal census of 1790 is inexact, but even in 1790 Tennessee (The United States Territory South of the Ohio) had a black population of only 10.6% (of whom 90.4% were enslaved), similar to New York's (7.6%, of whom 82.1% were enslaved) or New Jersey's (7.7%, of whom 80.5% were enslaved), where slave owners lacked sufficient clout to prevent emancipation by political means.<sup>188</sup> Whether slave

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<sup>183</sup> PROSLAVERY THOUGHT, *supra* note 147, at 368

<sup>184</sup> ABERNATHY, *supra* note 77, at 69–73.

<sup>185</sup> *Id.* at 60.

<sup>186</sup> For a meticulous account of the events leading to the creation of the Mississippi Territory, see *id.* at 136–216.

<sup>187</sup> See DAVIS, *supra* note 103, at 30.

<sup>188</sup> For census figures for these states for 1790, see Gibson & Jung, *supra* note 166, at <http://www.census.gov/population/documentation/twps0056/tab57.pdf> (Ten-

owners would have streamed in to Tennessee in the 1790s with emancipation scheduled for 1800 is open to doubt. While Kentucky's black population for the 1790 census (conducted in the district which was then still part of Virginia) was already 17% (99.1% of whom were enslaved),<sup>189</sup> it is questionable whether slaveowners would have risked establishing themselves in the region after 1784 with Jefferson's clause and its 1800 deadline looming over all territories to be ceded.<sup>190</sup> This marginal uncertainty may have been determinative, and even in 1792, state constitutional sanction of slavery was only achieved after a hard fight in the convention.<sup>191</sup> Immigrants into Kentucky between 1784 and 1792 could not have foreseen that Kentucky would never pass into territorial status, or that they would win constitutionalization of slavery at the time of statehood, even if the eventual separation of the region from Virginia was expected by the time of the Territorial Governance Act. All this is of course hypothetical, but while I cannot show that Jefferson's provision would have reduced the eventual number of slave states, neither can Finkelman show that it would not have.<sup>192</sup>

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nessee), <http://www.census.gov/population/documentation/twps0056/tab45.pdf> (New Jersey), <http://www.census.gov/population/documentation/twps0056/tab47.pdf> (New York). New York adopted a gradual emancipation statute in 1799; New Jersey did so in 1804. The last decennial census showing a slave population for New York is 1840 (four slaves); for New Jersey, the census of 1860 reports eighteen slaves. On slaveowner (and other) resistance to emancipation in these states, and in the North generally, see ARTHUR ZILVERSMIT, *THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH* (1967).

<sup>189</sup> For Kentucky census data, see Gibson & Jung, *supra* note 166, at <http://www.census.gov/population/documentation/twps0056/tab32.pdf>.

<sup>190</sup> I am assuming that the overwhelming majority of slaveowners and slaves present in Kentucky in 1790 arrived in the 1780s, as it is improbable that there were many slaves in this war-ravaged frontier region beyond the Proclamation Line prior to the establishment of peace in 1783. Indeed, those that were there certainly had every opportunity to flee during the War. Moreover, the total population of 184,139 for 1790 is more than nine times that of the 20,000 estimated for 1782, so even if slavery had a foothold before the war's end, the vast majority of slaves and slavemasters came later.

<sup>191</sup> See ABERNATHY, *supra* note 77, at 70–72.

<sup>192</sup> It is noteworthy that Malone boldly claimed that passage of the fifth plank would have made secession impracticable, if not impossible. See MALONE, *supra* note 20, at 414. I find Malone's observation especially intriguing in that it takes for granted that secession was undesirable, suggesting how large a gap separates Southern apologists of the tragic-blunder school from the more militant Southern partisans of the current day such as CHARLES ADAMS, *WHEN IN THE COURSE OF HUMAN EVENTS: ARGUING THE CASE FOR SOUTHERN SECESSION* (2000); THOMAS DILORENZO, *THE REAL LINCOLN: A NEW LOOK AT ABRAHAM LINCOLN, HIS AGENDA, AND AN UNNECESSARY WAR* (2002); and JEFFREY ROGERS HUMMEL, *EMANCIPATING SLAVES, ENSLAVING FREE MEN: A HISTORY OF THE AMERICAN CIVIL WAR* (1996), whose scholarship is savaged in Daniel Ferber, *Libertarians in the Attic, or a Tale of Two Narratives*, 32

In the end, there is no need to dwell on hypothetical history. Both Paul Finkelman and Peter Onuf have demonstrated that the anti-slavery provision of the Northwest Ordinance was widely held among residents of Ohio, Indiana, and Illinois to have had precisely the effect that Finkelman denies Jefferson's plank could have had in the Southwest.<sup>193</sup> Boosters in these territories urged pro-slavery state constitutions in the hopes of overcoming their regions perceived disadvantages relative to Kentucky. The Old Northwest attracted a trickle of slave owners ready to take their chances that the anti-slavery plank would be repealed (even though by the terms of the Ordinance it could not be) or that state constitutions would depart from the Ordinance and sanction slave holding. Meanwhile, Kentucky, with a narrowly-won slave constitution, attracted slave owners by the thousands.<sup>194</sup> Most masters did not wish to chance their property for the sake of slavery's expansion. Some fifty years later during the Kansas crisis, another generation of slaveowners behaved in precisely the same way. Border Ruffians may have crossed over from Missouri in droves to *vote* slavery, but settling with their human property amounted to a very different story. There were never more than a few hundred bondsmen in Kansas while one hundred thousand toiled on the other side of the Missouri border.<sup>195</sup>

As in the Northwest and in Kansas, so in British Trinidad and Guyana, slaveholders were deterred from immigration, investment, and long-term commitments by even the vaguest and most indefinite anti-slavery laws, and, to a surprising degree, even by rumors of impending metropolitan or national anti-slavery pronouncements. No federal law as strong as Jefferson's anti-slavery plank of 1784 obtained in any slave-holding region of the United States before the Civil War. However, aggressive British regulation of West Indian slavery in the period leading up to emancipation and apprenticeship seems to have curtailed the growth of slavery in the islands very sharply, even in the virgin territories acquired during the Napoleonic Wars.<sup>196</sup> If they behaved like their West Indian counterparts, some slaveowners in the

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REV. AM. HIST. 184 (1984). Like Malone, I have much more empathy for the Lost Clause than the Lost Cause. But Finkelman's position on this issue is not wholly idiosyncratic. It is endorsed by William Freehling—himself perhaps not always the model of orthodox opinion. See FREEHLING, *supra* note 31, at 585 n.36.

<sup>193</sup> Finkelman, *Jefferson and Slavery*, *supra* note 1, at 362–63; ONUF, *supra* note 56, at 116–117.

<sup>194</sup> See FREEHLING, *supra* note 31, at 139.

<sup>195</sup> See DAVID M. POTTER, *THE IMPENDING CRISIS: 1848–1861*, at 199–204 (Don E. Fehrenbacher ed., 1976).

<sup>196</sup> See DAVIS, *supra* note 103, at 441–43.

Old Southwest may have fought to overturn the clause before it took effect in 1800, but many others would have stayed away or sold their slaves to seaboard slave owners.<sup>197</sup> It is impossible to say how much Jefferson's clause would have slowed the spread of slavery into the Southwest, but that it would have slowed it—especially in the more marginal areas for slave production—is very likely.

## V. CONCLUSION

The failed anti-slavery provision of 1784 is perhaps one of the most significant legislative clauses that never was. Quite apart from questions respecting its likely effects on the future spread of slavery if it had taken effect, the provision established an important milestone in the history of anti-slavery constitutionalism in the United States, marking out the first attempt to write free-soil provisions into a national constitutional instrument.<sup>198</sup> It also forms part of a larger republican constitutional vision for the West and for the nation. Jefferson took a leading role in mapping out a western design premised on federalism rather than colonialism, and committed to republican principles of governance.<sup>199</sup> He recognized that those principles could not accommodate slavery or slaveholding. The Territorial Governance Act of 1784 also marks the high point of Jefferson's anti-slavery politics. A month after the Act became law, Jefferson sailed for Paris, and soon after his return to the United States in December 1788, his personal indebtedness, his commitments to the special interests of Virginia in national politics, and his reaction to the revolution in Haiti began to sap away at his anti-slavery principles. As the 1790s ran their course and the Haitian Revolution became ever more violent, Jefferson's growing inability to envision large scale post-emancipation coexistence and cooperation of whites and blacks in the great experimental republic he helped found wholly undermined his desire to bring about a near-term end to slavery.<sup>200</sup> But a generation after he was gone, the anti-slavery vision of the West he articu-

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<sup>197</sup> That Southerners would behave like white West Indians may perhaps seem a strange assumption. Southerners, after all, were Southerners for a lifetime, and not sojourning profiteers in exotic, dangerous, and alien lands. But in other respects, their behavior could correspond to that of West Indians (and West India interest men): they were economic actors, who planned their investment decisions—including where to locate and how many slaves to buy—around cost benefit analysis. The prospect that slavery might be abolished was by necessity a crucial element in this calculus.

<sup>198</sup> See WIECEK, *supra* note 35, at 60.

<sup>199</sup> See ONUF, *supra* note 45, at 76.

<sup>200</sup> Merkel, *supra* note 32, at 265–320.



lated during the 1780s became a mainstay of Free Soil and Republican Party principles, and a crucial contributor to the politics of emancipation. Less racist than Jefferson, more bold in their faith in coexistence, and unencumbered by personal interests in slaveholding, the Republican Party of the 1860s secured the free-soil vision under the reconstructed Constitution that Jefferson first articulated under the Articles of Confederation.<sup>201</sup> In the Thirteenth Amendment, they chose Jefferson's words of 1784, passed down through the Northwest Ordinance and all state constitutions of the Old Northwest, to prohibit slavery throughout the United States forever.<sup>202</sup>

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<sup>201</sup> See RICHARD J. CARWARDINE, *LINCOLN: PROFILES IN POWER* (2003); see generally FONER, *FREE SOIL*, *supra* note 38; PETERSON, *supra* note 5, at 162–64.

<sup>202</sup> The failed Anti-Slavery provision proclaimed “[t]hat after the year 1800 of the Christian era, there shall be neither slavery nor involuntary servitude in any of the said states, otherwise than in punishment of crimes whereof the party shall have been duly convicted to have been personally guilty.” ORDINANCE OF 1784, *supra* note 22. The Thirteenth Amendment provides that “[n]either 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.” U.S. CONST. amend. XIII § 1. Cf. ILL. CONST. art. VI, § 1 (1818); IND. CONST. art. XI, § 7 (1816); MICH. CONST. art. XI, § 1 (1837); MINN. CONST. art. 1, § 2, cl. 2 (1858); OHIO CONST. art. VIII, § 2 (1802); WIS. CONST. art. 1, § 2 (1848); NORTHWEST ORDINANCE art. VI (1787).