
MAKING INDIANS “WHITE”: THE JUDICIAL ABOLITION OF NATIVE SLAVERY IN REVOLUTIONARY VIRGINIA AND ITS RACIAL LEGACY

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INTRODUCTION

In 1772, George Mason, later famous as the “Father of the Bill of Rights,” represented a slave named Robin and eleven other enslaved plaintiffs in the General Court of Virginia, the colony’s highest court.¹ The slaves claimed that maternal descent from an American Indian made their enslavement illegal, and Mason marshaled arguments from natural law and statutory history to support that contention.² In a terse one-paragraph opinion typical of the era, the court agreed, freeing the plaintiffs and ordering their former master to pay them nominal damages.³

¹ *Robin v. Hardaway*, 1 Jeff. 109 (Va. Gen. Ct. 1772); Judgment in the Case of Robin v. Hardaway (May 2, 1772) [hereinafter *Robin Judgment*], available at http://www.lva.virginia.gov/exhibits/destiny/public_opinion/robin_hardaway.htm. Interestingly, the case does not refer to Mason by his first name. Later scholarly works, however, have used his full name. See, e.g., 1 ROGER FOSTER, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 38 n.23 (Boston, Boston Book Co. 1895) (referring to the “argument of George Mason”).

² See *Robin*, 1 Jeff. at 109-18, 122-23.

Note that this Comment uses the words “Indian” and “Native” interchangeably to refer to descendants of North America’s indigenous inhabitants. The word “Indian,” as opposed to the bulkier “Native American,” is used despite its colonial implications because it accurately captures the seventeenth- and eighteenth-century legal categorizations and discussions at the heart of this Comment. Note also that all spelling, grammar, and capitalization in quotations are original unless otherwise noted, and such language has not been modified or marked as incorrect.

³ *Robin Judgment*, *supra* note 1.

Freedom suits were common in colonial Virginia.⁴ Although defined as property for almost all legal purposes and denied rights of citizenship, slaves could allege illegal enslavement and sue for their freedom. Courts recognized such claims throughout the slaveholding South from slavery's seventeenth-century beginnings onward; these suits offered one of the few routes to manumission in early America.⁵

The ordinary posture of the *Robin v. Hardaway* case, though, belied its extraordinary result. The court's decision marked a watershed in the legal history of Virginian slavery; it was the first recorded holding of an Anglo-American court that maternal descent from an American Indian alone established the right to freedom.⁶ This outcome was remarkable in the context of early America, where, despite present-day conceptions that all slaves were Africans, Indian slavery was ubiquitous. Indian slaves could be found in all thirteen mainland British colonies in 1772, as well as in the French and Spanish colonies

⁴ In his argument in *Robin*, Mason alluded to "hundreds" of such "actions brought in this court." *Robin*, 1 Jeff. at 116.

⁵ The most famous such case is *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). However exceptional the attention that case received, *Dred Scott* typified a common practice in which slaves petitioned and sued for their freedom.

⁶ It is important, however, not to overstate the importance of *Robin* alone, since there are suggestions in the record that the decision was emblematic rather than causal in this transformation. In his argument in the case, Mason claimed that "hundreds of the descendants of Indians have obtained their freedom, on actions brought in this court." *Robin*, 1 Jeff. at 116. It is impossible to judge the accuracy of these claims, since most of the records of the General Court were destroyed during the Civil War. David H. Flaherty, *A Select Guide to the Manuscript Court Records of Colonial Virginia*, 19 AM. J. LEGAL HIST. 112, 113 (1975). There is, however, some evidence against Mason's claim. Besides *Robin*, no similar freedom suits appear in the surviving General Court records. Moreover, it seems improbable that the court would need to rehear at such length, and redecide, a legal principle that was as "universal" as Mason claims. *Robin*, 1 Jeff. at 116. Finally, as late as 1769, Virginian laws described *free* Indians, suggesting that enslaved Indians continued to exist; by 1777, the term "Indian" had vanished from the state's slave laws. See JACK D. FORBES, *AFRICANS AND NATIVE AMERICANS: THE LANGUAGE OF RACE AND THE EVOLUTION OF RED-BLACK PEOPLES* 211-12 (2d ed. 1993) (providing a list of terms used in slave laws, in which "Indian" last appeared in a 1769 law). Nonetheless, even if *Robin* alone did not mark a watershed in legal views on Indian slavery, it was emblematic of a broader change. Well into the 1750s, courts had not even considered the possibility that Indian enslavement could be illegal. See, e.g., Northampton County Order Book No. 23, 1751-1753, at 186-87 (June 1752) [hereinafter Northampton County Order Book No. 23] (on file with the Library of Virginia) (describing the 1752 case of Anne Williams, who, despite Indian descent, remained enslaved). For more context, see *infra* notes 121-23 and accompanying text. As this evidence suggests, between 1750 and 1800, Indian slavery became presumptively illegal, a trend in which *Robin* played an important—if not dispositive—role.

of North America.⁷ In Virginia alone, thousands of descendants of enslaved Indians toiled alongside African slaves on plantations.⁸ *Robin v. Hardaway* repudiated this history and deemed the previously common institution illegal in all but a few circumstances, inaugurating a line of cases that culminated in 1806. In the end, Virginia courts concluded that enslaved descendants of Native Americans were “*prima facie* free,” judicially abolishing Indian slavery in Virginia.⁹ This precedent spread: throughout the antebellum period, courts in Connecticut, Louisiana, Missouri, New Jersey, South Carolina, and Tennessee all grappled with Virginia’s decisions and debated whether maternal descent from American Indians was sufficient to establish freedom.¹⁰

Explaining this shift in the racial basis of slavery is more difficult than observing it. The *Robin* court and its successors claimed merely to be engaged in statutory interpretation, and Mason argued for Indians’ freedom on the basis of the libertarian principles of the Revolutionary War.¹¹ This Comment argues, however, that the ultimate grounds for this doctrinal innovation lay deeper, in the changing demographics of early America. Although not the judges’ conscious motivation, *Robin* and its progeny solidified chattel slavery rather than

⁷ See ALMON WHEELER LAUBER, INDIAN SLAVERY IN COLONIAL TIMES WITHIN THE PRESENT LIMITS OF THE UNITED STATES 48-117 (AMS Press 1969) (1913) (discussing the enslavement of Indians by the French, Spanish, and British); Alan Gallay, *Introduction: Indian Slavery in Historical Context* (describing the broad geographical scope of Indian slavery in early America), in INDIAN SLAVERY IN COLONIAL AMERICA 1, 26 (Alan Gallay ed., 2009).

⁸ See C.S. Everett, “*They Shalbe Slaves for Their Lives*”: *Indian Slavery in Colonial Virginia* (chronicling the numbers of enslaved Indians in Virginia and observing that “rather than being merely incidental to African slavery, Indian slavery was ubiquitous, and probably a central component of Virginia’s storied past”), in INDIAN SLAVERY IN COLONIAL AMERICA, *supra* note 7, at 67, 67.

⁹ *Hudgins v. Wrights*, 11 Va. (1 Hen. & M.) 134, 139 (1806) (opinion of Tucker, J.); see also *infra* Section II.C (discussing more fully the line of cases following *Robin*).

¹⁰ See, e.g., *Wilson v. Hinkley*, 1 Kirby 199, 202 (Conn. Super. Ct. 1787) (reasoning that an individual whose mother was an Indian was “born of a free woman” and therefore was not a slave); *Seville v. Chretien*, 5 Mart. (o.s.) 275, 283-91 (La. 1817) (finding that an individual’s Indian ancestry did not entitle her to freedom under Louisiana law); *State v. Van Waggoner*, 6 N.J.L. 374, 375-76 (1797) (rejecting the argument that Indians cannot be slaves); *Jeffries v. Ankeny*, 11 Ohio 372, 374-75 (1842) (holding that “free white citizens” include those of Indian heritage); *State v. Belmont*, 35 S.C.L. (4 Strob.) 445, 450-53 (1850) (holding that an individual with Indian ancestry was competent to testify at trial); *Vaughan v. Phebe*, 8 Tenn. (Mart. & Yer.) 5, 18 (1827) (“[I]f [the plaintiff] be shown to be descended from Indian ancestors in the maternal line, all doubt will cease as to her being at least *prima facie* free.”); see also *infra* Section IV.A (describing the effect of Virginia’s debate over Indian slavery on other states).

¹¹ *Robin*, 1 Jeff. at 114.

weakening it. By making Indians legally "white"¹² (or "black," as we shall see in some instances), the courts erased a complex triracial past and created instead a society legally divided into the stark categories of free whites and enslaved blacks. This erasure has present-day legal consequences for federal tribal recognition, struggles over tribal membership, and interpretation of the Equal Protection Clause.

To understand the nature of this transformation, this Comment builds on two previously unconnected bodies of scholarship. A growing literature on early American history examines the formerly neglected role of Indian slavery and argues that the institution was far more widespread and important than previously thought.¹³ These works rely heavily on court records, deeds, and other legal sources and acknowledge the law's importance in passing, but they neglect the legal historical narrative. By ending their chronologies in the mid-eighteenth century, they overlook the complex judicial debate over the legacy of Indian slavery in revolutionary and antebellum America.¹⁴ By contrast, freedom suits, including those involving plaintiffs

¹² I use the term "white" here to reflect the language employed by contemporary participants, who often described Indians as "white." See Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 142 n.121 (1998) (noting that witnesses in racial determination trials often "discussed someone [claiming Native descent] interchangeably as 'Indian' and 'white'"); see also *Hudgins*, 11 Va. (1 Hen. & M.) at 135 (describing, for the appellees, the plaintiffs alleging descent from American Indians as "perfectly white"). I do not imply that Anglo-Americans of the time regarded American Indians as their racial or cultural equals, but rather that such Anglo-Americans defined these American Indians as "white," in opposition to the "black" descendants of African Americans. See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1725 (1993) (describing the various legal meanings of whiteness). For a further discussion of the meaning of Indian "whiteness," see *infra* notes 346-50 and accompanying text.

¹³ See Gally, *supra* note 7, at 2-7 (describing the recent resurgence in historical attention to Indian slavery and its potential contributions, including the exploration of imperial relations and the internal dynamics of Indian tribes). Much of the historical literature on Indian slavery in North America is very recent, and the field is growing rapidly. A survey of the latest scholarship, as well as essays summarizing the development of Indian slavery in diverse regions is presented in INDIAN SLAVERY IN COLONIAL AMERICA, *supra* note 7. Other important recent works include JAMES F. BROOKS, *CAPTIVES & COUSINS: SLAVERY, KINSHIP, AND COMMUNITY IN THE SOUTHWEST BORDERLANDS* (2002); CARL J. EKBERG, *STEALING INDIAN WOMEN: NATIVE SLAVERY IN THE ILLINOIS COUNTRY* (2007); ALAN GALLAY, *THE INDIAN SLAVE TRADE: THE RISE OF THE ENGLISH EMPIRE IN THE AMERICAN SOUTH, 1670-1717* (2002); Brett Rushforth, *Savage Bonds: Indian Slavery and Alliance in New France* (2003) (unpublished Ph.D. dissertation, University of California-Davis) (on file with Van Pelt Library, University of Pennsylvania).

¹⁴ See, e.g., Gally, *supra* note 7, at 6 (noting, inter alia, that the existence of Indian slavery despite contrary laws "calls into question colonists' assertions that they lived under the 'rule of law,'" yet failing to pursue the implications of this assertion). Many of the essays in Gally's edited collection rely on legal materials, yet none explore in

claiming Indian descent, have received sustained analysis from legal historians as part of a larger literature on cases of racial determination in which the central and often sole legal issue was a person's racial status.¹⁵ In these instances, faced with the reality of a mixed-race society that rarely aligned with legal categories, courts turned to a variety of methods—appearance, ancestry, science, and reputation—to classify ambiguous individuals, thus laying bare to historical criticism the constructed and arbitrary nature of legal conceptions of race.¹⁶ *Robin* and its progeny, though, fit uneasily into this conceptual framework. First, as with American legal history more broadly, the current scholarship on racial determination focuses primarily on the period between independence and the Civil War.¹⁷ This periodization ignores the first

detail the cases grappling with the legality of Indian slavery described here. See, e.g., Everett, *supra* note 8, at 96-97 (discussing a 1705 case enslaving the Nanzatico tribe, but halting the narrative of Indian slavery in Virginia in the early eighteenth century); Alan Gally, *South Carolina's Entrance into the Indian Slave Trade* (using council records to describe the Indian slave trade in seventeenth-century South Carolina, but ending the account in the 1690s and omitting any discussion of the fate of enslaved Indians in Carolinian society in the eighteenth and nineteenth centuries), in *INDIAN SLAVERY IN COLONIAL AMERICA*, *supra* note 7, at 109, 138-40.

¹⁵ Such cases were relatively common in a legal system in which racial classification was ubiquitous: Ariela Gross identifies sixty-eight such cases in state supreme courts in the nineteenth-century South. Gross, *supra* note 12, at 120. An individual's race was legally relevant not only in evaluating a plaintiff's rights in freedom suits, but also in judging a witness's right to testify, as an element of the crime of miscegenation, in deciding whether a citizen was obligated to pay the tax on people of color, in determining the jurisdiction of the court, and in a host of other instances. See *id.* at 186-88 (sorting the sixty-eight cases based on the grounds of dispute and the outcome).

¹⁶ See *id.* at 123-55 ("In trials of racial determination, lawyers and litigants drew upon a variety of criteria and flexible definitions of 'race' to explain someone's essential blackness or whiteness."). For other discussions of the role of law in defining race in American history, see generally ARIELA J. GROSS, *WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA* (2008); IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (10th anniversary ed. 2006); Michael A. Elliott, *Telling the Difference: Nineteenth-Century Legal Narratives of Racial Taxonomy*, 24 *LAW & SOC. INQUIRY* 611 (1999); Jason A. Gillmer, *Suing for Freedom: Interracial Sex, Slave Law, and Racial Identity in the Post-Revolutionary and Antebellum South*, 82 *N.C. L. REV.* 535 (2004); Walter Johnson, *The Slave Trader, the White Slave, and the Politics of Racial Determination in the 1850s*, 87 *J. AM. HIST.* 13 (2000).

¹⁷ See Stanley N. Katz, *The Problem of a Colonial Legal History* (lamenting the continued dominance in the periodization of American legal history of Roscoe Pound's insistence that the antebellum period was the "formative era of American law" (quoting ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 3 (1938)), in *COLONIAL BRITISH AMERICA: ESSAYS IN THE NEW HISTORY OF THE EARLY MODERN ERA* 457, 469-74 (Jack P. Greene & J.R. Pole eds., 1984); see also Cornelia Hughes Dayton, *Turning Points and the Relevance of Colonial Legal History*, 50 *WM. & MARY Q.* 7, 7-9 (1993) (arguing for the importance of legal-historical transformations in the colonial period against scholars who emphasize the later period). In part, this bias stems from the dif-

two hundred years of racial construction in America, making cases such as *Robin* that grapple with the colonial legal legacy unintelligible. Second, *Robin* and its progeny were not racial determination cases; their outcomes hinged on the legal consequences of Indian descent, not on the plaintiffs’ racial identity—which both sides usually acknowledged as Indian.¹⁸ They were applications of racial ideology, rather than determinations of racial identity.

Since the literature on neither Indian slavery nor racial determination alone provides a complete account of *Robin* and its context, this Comment draws on both to understand fully the causes and significance of the doctrinal transformation in racial construction that the case epitomizes. In particular, this Comment argues that the racial formations of the antebellum United States cannot be understood without reference to its earlier colonial history. The black/white divide that emerged during the revolutionary period was neither natural nor organic. Rather, it represented a conscious repudiation of an earlier triracial era by a judiciary anxious to reinforce race-based slavery.

To support these contentions, this Comment is divided into four sections. Part I discusses the colonial history of Indian slavery and race in early America broadly and in Virginia specifically. Part II delves more deeply into *Robin* and its successors, examining the evolution of the courts’ reasoning on the legality of Indian slavery. Part III probes the various explanations for the decision to grant freedom to enslaved Indians. Finally, Part IV explores the legacy of these cases in the antebellum United States, as well as the implications for contemporary legal issues surrounding tribal recognition, tribal membership, and the Equal Protection Clause.

I. THE HIDDEN HISTORY OF INDIAN SLAVERY IN VIRGINIA

A. *The Origins of Indian Slavery in Early America*

The prevalence of African slavery in North America was not inevitable. The fantastic prosperity of Spanish South America rested on

faculty of working with the fragmented and largely unpublished court records of colonial America, compared with the much more organized system of court reporters established after the Revolution. See Katz, *supra*, at 468.

¹⁸ See *infra* Part II. The exception to the claim that these cases did not involve racial determination was *Hudgins v. Wrights*, 11 Va. (1 Hen. & M.) 134 (1806), where there was some doubt about the racial identity of the plaintiffs. However, that case, like *Robin*, was more about racial ideology—the implications of racial identity—than about determination of the plaintiffs’ race. See *infra* notes 204-17 and accompanying text.

forced Indian labor, although Spanish colonists employed labels other than “slavery” for these practices after the crown abolished Indian enslavement in the sixteenth century.¹⁹ Eyeing and envying Mexico and Peru, the first English theorists and colonizers envisioned freeing the oppressed Natives from Spanish tyranny.²⁰ These newly emancipated Indians, the English dreamed, would gladly work for them, helping create an English empire of prosperity.²¹ Yet the realities of Roanoke and Jamestown disappointed colonizers.²² Too weak to overawe the Algonquians they encountered, English settlers found themselves Indians’ dependents, not their masters. They were forced to rely on the tribes for food and basic survival.²³ Far from empires of wealth and power, the first English colonies were wards of Native hospitality.

These early encounters established the general pattern of interaction even after the settlers gained strength, as independent Native tribes resisted English efforts to reduce them to vassalage. Warfare, not enslavement, was the fate of most recalcitrant Natives, whose susceptibility to European diseases also made them a poor source of labor in English eyes.²⁴ Yet the desperate shortage of workers in a society whose wealth depended on manpower meant that colonists readily employed Native laborers, where available, in the seventeenth-century

¹⁹ See J.H. ELLIOTT, *EMPIRES OF THE ATLANTIC WORLD: BRITAIN AND SPAIN IN AMERICA 1492–1830*, at 97-100 (2006) (noting the abolition of all Indian slavery in the Spanish colonies after the promulgation of the New Laws in 1542, along with the subsequent establishment of *encomienda* and *repartimiento* systems to provide Indian labor to work the mines and *haciendas*).

²⁰ See EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* 6-24 (1975) (describing the English ambition of “bring[ing] freedom to the New World”); ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT* 300 (1990) (citing English thinkers who argued for the recognition of Native American rights).

²¹ See MORGAN, *supra* note 20, at 22-24 (describing the English’s expectation of willing Indian workers who would be motivated after seeing the “material comforts of civilization”).

²² See Edmund S. Morgan, *The Labor Problem at Jamestown, 1607–18*, 76 *AM. HIST. REV.* 595, 600 (1971) (comparing colonizers’ ideals to their precarious initial position in Jamestown).

²³ See, e.g., JAMES HORN, *A LAND AS GOD MADE IT* 59, 76 (2005) (describing Jamestown as a “depleted and sickly encampment” that was “dependen[t] on the Indians for food”); KAREN ORDAHL KUPPERMAN, *ROANOKE: THE ABANDONED COLONY* 72 (2d ed. 2007) (noting that the Roanoke colonists “were extremely dependent on Indian aid”).

²⁴ See THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619–1860*, at 21 (1996) (“[A]s far as Amerindians were concerned enslavement figured as only a marginal danger in the ruthless, bloody relationship with whites. Death rather than slavery was the more common prospect.”).

colonial economy.²⁵ Whether the colonists regarded these Indians as nominally free servants or as slaves is unclear and was largely irrelevant, because high mortality rates made such hazy distinctions meaningless. Indians, regardless of status, were bought and sold throughout the Chesapeake for the value of their labor.²⁶ But as life expectancy increased, the legal categories became clearer: by 1648, courts in Maryland were making reference to "Indian Slaves."²⁷

Indian slavery remained a small-scale institution localized in the Chesapeake until the late seventeenth century, when a series of conflicts resulted in its rapid expansion in the English colonies.²⁸ In the wake of King Philip's War in New England, for instance, colonists enslaved hundreds of defeated Algonquians, most of whom were quickly "sold and sent out of the country," primarily to the West Indies.²⁹ Virginia, too, witnessed a surge in Indian slaves after Bacon's Rebellion.³⁰ Yet the institution developed most dramatically in South Carolina, which was founded comparatively late, in 1670. There, in the closest

²⁵ See, e.g., J. DOUGLAS DEAL, *RACE AND CLASS IN COLONIAL VIRGINIA: INDIANS, ENGLISHMEN, AND AFRICANS ON THE EASTERN SHORE DURING THE SEVENTEENTH CENTURY 48-52* (1993) (describing the situation of Indian servants on Virginia's Eastern Shore in the seventeenth century).

²⁶ Some of these transactions involving Indian laborers have been preserved in seventeenth-century court records thanks to the legal disputes that ensued. See, e.g., Duke's Deposition, 4 Md. Arch. 392, 392 (1648) ("Mr. Sowth . . . desyred him to sell him an Indian. This Dep't answered him, he had none to sell. And then he desyred this Dep't to goe with him up to Wicocomoco, and gett him an Indian [girl], and hee would give him content." (alterations in Catterall) (footnote omitted)), *reprinted in 4 JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO* 8, 8 (Helen Tunnickliff Catterall ed., with additions by James J. Hayden, Negro Univs. Press 1968) (1926) [hereinafter 4 JUDICIAL CASES].

²⁷ A case's name provides evidence of this development. See *Indian Slaves*, 4 Md. Arch. 399, 399 (1648), *reprinted in 4 JUDICIAL CASES*, *supra* note 26, at 8, 8.

²⁸ See LAUBER, *supra* note 7, at 118-52 (recounting the capture of Indian slaves in a series of conflicts throughout the late seventeenth and early eighteenth centuries).

²⁹ *In re Indian Popanoocie*, 5 Plym. Col. Recs. 243, 244 (1677), *reprinted in 4 JUDICIAL CASES*, *supra* note 26, at 474, 474; see also JILL LEPORE, *THE NAME OF WAR: KING PHILIP'S WAR AND THE ORIGINS OF AMERICAN IDENTITY* 154 (1998) ("The sale of Indians into foreign slavery began early in the war . . . although widespread, systematic enslavement came only a year later, when large numbers of Indians surrendered or were captured."); Margaret Ellen Newell, *The Changing Nature of Indian Slavery in New England, 1670-1720* (noting that "New England armies, courts, and magistrates enslaved more than 1200 Indian men, women, and children in the seventeenth century alone" and that the "many hundreds of New England captives" from King Philip's War ended up "in the Wine Islands [Madeira, the Azores, and the Canaries], Spain, England, and Jamaica"), *in REINTERPRETING NEW ENGLAND INDIANS AND THE COLONIAL EXPERIENCE* 106, 107, 112 (Colin G. Calloway & Neal Salisbury eds., 2003).

³⁰ See *infra* text accompanying note 64.

parallel to the African slave trade in the Western hemisphere, English traders actively encouraged tribes to war against each other and enslave the captives, who were then sold, primarily to the ever-hungry Caribbean labor market.³¹ By the early eighteenth century, this Indian slave trade had become the colony's primary economic activity, with some 30,000 to 50,000 Indians enslaved.³² Only the devastating Tuscarora and Yamasee Wars of 1715–18 turned the colony to the less risky—although scarcely less violent—practice of plantation agriculture.³³

While the peace of the 1720s ended the long pattern of warfare and Indian enslavement, the legacy of the earlier era persisted. Although many enslaved Natives had been sold to the West Indies, many others remained in England's mainland colonies.³⁴ There, they blended with the far larger population of African slaves, which had grown dramatically in the late seventeenth and early eighteenth centuries with the expansion of the Atlantic slave trade.³⁵ On the new plantation complex, a society that defied easy racial categorization emerged, a hybrid of Native and African cultures.³⁶ While this *mélange* reflected the triracial world of its inhabitants, early American society behind the frontier moved toward a stark black/white division,

³¹ See GALLAY, *supra* note 13, at 288-314 (describing the “contours” of the trade in Indian slaves in the South, with particular focus on the Carolina-Caribbean connection).

³² See *id.* at 299 (estimating the number of “Amerindians captured directly by the British, or by Native Americans for sale to the British, and enslaved before 1715”).

³³ See *id.* at 286-87, 338-44 (discussing the repercussions of the Tuscarora and Yamasee Wars on South Carolina's economy and relations with Indians); see also PAUL KELTON, EPIDEMICS AND ENSLAVEMENT: BIOLOGICAL CATASTROPHE IN THE NATIVE SOUTHEAST, 1492–1715, at 161 (2007) (“The lethal germs that accompanied the Atlantic world's most pernicious commerce put South Carolina on a collision course with its own indigenous allies and resulted in the Yamasee War, the conflict that brought the Native slave trade to its climactic finish.”).

³⁴ See Newell, *supra* note 29, at 106 (“[T]ravelers' accounts, court records, newspapers, and diaries attest to the presence of Indian slaves and servants in New England during the colonial era . . .”).

³⁵ See Peter H. Wood, *The Changing Population of the Colonial South: An Overview by Race and Region, 1685–1790* (cataloguing the sharp increase in the population of Southern blacks from 1685–1790), in POWHATAN'S MANTLE: INDIANS IN THE COLONIAL SOUTHEAST 57, 60 (Gregory A. Waselkov et al. eds., rev. ed. 2006). For more detail on the growth of the transatlantic slave trade during this period, see generally PHILIP D. CURTIN, THE ATLANTIC SLAVE TRADE 126-62 (1969) (“The eighteenth century saw the peak of the Atlantic slave trade . . .”).

³⁶ See PHILIP D. MORGAN, SLAVE COUNTERPOINT: BLACK CULTURE IN THE EIGHTEENTH-CENTURY CHESAPEAKE AND LOWCOUNTRY 477-85 (1998) (explaining the “complex, pragmatic, and fluid” relationships between blacks and Indians in various regions of the South).

gradually making the descendants of enslaved Natives an anomaly in the eyes of Anglo-Americans.

B. *The Legal History of Indian Slavery in Virginia*

The legal status of all nonwhite servants and slaves in early seventeenth-century Virginia was vague. Because there were neither statutes nor common law doctrines defining enslavement, slavery existed without positive state sanction. Not until 1661 did the House of Burgesses enact the first statute that obliquely recognized the existence of slavery.³⁷ Despite this legal ambiguity, a flourishing trade in Indians existed in the Chesapeake by the 1640s, as the people whom the courts now labeled as "Indian Slaves" were bought and sold throughout Virginia and Maryland.³⁸ To the Indian laborers present in the colony from the beginning, the increasing tendency to label them slaves rather than servants was probably irrelevant, for coercion and force were always the realities of their existence, regardless of the law.³⁹ The first group of Indian servants mentioned in the Virginia records—a group of Caribs imported from the Caribbean—were ordered "hanged till they be dead" after they allegedly attempted to kill several Anglo-Virginians and then fled to the local tribes.⁴⁰ Unsurprisingly, the court thereafter required bond that Indians would not run away.⁴¹

These early slaves came from several sources. One was capture in war, the primary justification for enslavement in the seventeenth century.⁴² The authorizations of several military expeditions in Virginia

³⁷ See MORGAN, *supra* note 20, at 311 (noting that the 1661 law has been considered "the first official recognition of slavery in Virginia").

³⁸ See *supra* note 27 and accompanying text.

³⁹ See Owen Stanwood, *Captives and Slaves: Indian Labor, Cultural Conversion, and the Plantation Revolution in Virginia*, 114 VA. MAG. HIST. & BIOGRAPHY 434, 443-44 (2006) (noting colonists' tendency to disregard legal limitations and treat all Indians like slaves); see also DEAL, *supra* note 25, at 50 ("[L]ocal practices regarding Indian servants diverged sharply from the ideals promulgated by the colony's leaders.").

⁴⁰ *In re Carib Indians*, McIlwaine 155, 155 (Va. Gen. Ct. 1627), *reprinted in* 1 JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO 76, 76-77 (Helen Tunnicliff Catterall ed., Negro Univ. Press 1968) (1926) [hereinafter 1 JUDICIAL CASES].

⁴¹ See *In re Indian*, McIlwaine 116, 116 (Va. Gen. Ct. 1626) (requiring a bond of five hundred pounds of tobacco to ensure that an Indian would not flee), *reprinted in* 1 JUDICIAL CASES, *supra* note 40, at 77, 77.

⁴² See JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION, at Second Treatise § 24 (Ian Shapiro ed., Yale Univ. Press 2003) (1690) ("[T]he perfect condition of slavery . . . is nothing else but 'the state of war continued, between a lawful conqueror and a captive'"), *cited in* DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN WESTERN CULTURE 119-20 (Oxford Univ. Press 1988) (1966). For a gen-

and Maryland specifically provided that captured Natives would be the spoils of the financial backers.⁴³ Another was court-ordered slavery, often the result of Indians' inability to pay fines for their wrongdoing.⁴⁴ However, the evidence suggests that, most frequently, Indians were purchased from other Indians.⁴⁵ While this sometimes consisted of explicit sale into slavery,⁴⁶ often Native parents indentured their children to work as servants, usually for long terms.⁴⁷ In 1655, the Burgesses passed an act that legalized this process and allowed masters to agree with children's parents on the length of indenture.⁴⁸ Ostensibly the law was enacted to educate and assimilate Native children, but later enactments acknowledged the exploitative reality. In 1658, the Assembly noted that "sundry" colonists "have corrupted some of the Indians to steale and conveigh away some of the children of other Indians, and . . . others who pretending to have bought or purchased Indians of their parents . . . have violently and fraudulently forced them awaie, to the greate scandall of Christianitie and of the English nation."⁴⁹ It further proclaimed that "noe person or persons whatsoever shall dare or presume to buy any Indian or Indians (vizt.) from or of the English," upon pain of a substantial fine.⁵⁰ Other laws barred masters from "assign[ing] or transferr[ing]" their indentured Indian

eral discussion of the intellectual support for slavery among legal theorists of the seventeenth century, including Grotius, Locke, and Pufendorf, see DAVIS, *supra*, at 91-121.

⁴³ See 1 JUDICIAL CASES, *supra* note 40, at 63 (describing the authorization to take captives in an expedition to the eastern shore of Maryland (citing 3 Md. Arch. 282, 282-84)); W. Stitt Robinson, Jr., *The Legal Status of the Indian in Colonial Virginia*, 61 VA. MAG. HIST. & BIOGRAPHY 247, 255 (1953) (describing a 1668 letter from the governor of Virginia "authorizing war against the northern Indians with the expenses of the expedition to be paid by proceeds from the sale of war captives").

⁴⁴ See *Attorney Gen. v. Naughnongis*, 41 Md. Arch. 186, 186 (Dec. 1658) (condemning an Indian defendant to slavery as punishment for stealing items of clothing), *reprinted in* 4 JUDICIAL CASES, *supra* note 26, at 10, 10.

⁴⁵ See KELTON, *supra* note 33, at 111-25 (analyzing fragmentary evidence to conclude that late-seventeenth-century Virginia created an extensive system of long-distance slave trade involving other tribes).

⁴⁶ See Robinson, *supra* note 43, at 255 (recounting the king of the Weyanokes's sale of an "Indian boy" into slavery).

⁴⁷ See LAUBER, *supra* note 7, at 200-01 (describing the frequent conversion of Indian indenture in the colonies into slavery).

⁴⁸ Act I, An Induction to the Acts Concerning Indians (1655-1656), *reprinted in* 1 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, at 393, 396 (William Waller Hening ed., New York, R. & W. & G. Bartow 1823) [hereinafter 1 LAWS OF VIRGINIA].

⁴⁹ Act CXI, Against Stealing of Indians (1657-1658), *reprinted in* 1 LAWS OF VIRGINIA, *supra* note 48, at 481, 481-82.

⁵⁰ *Id.* at 482.

children "to any other whatsoever"⁵¹ and prohibited traders who imported "any Indians as servants" from "sell[ing] them for slaves [or] for any longer time than English of the like ages should serve by act of assembly."⁵² These statutes simultaneously acknowledged the existence of Indian slavery and attempted to redress it.

Despite these aspirations, the evidence suggests that these laws, rarely enforced, did little to remedy the rampant exploitation of Indian servants.⁵³ In one eighteenth-century case, for instance, a Maryland man named Andrews faced a complaint that he had "sold or otherwise disposed of an Indian Boy a Son of one of our Friend Indians."⁵⁴ The case revealed that James, the Indian in question, was not legally a slave, but rather a servant indentured in Virginia whose father had received a "Horse Bridle and Saddle and two Suits of Cloaths" in return for thirty years of his son's labor.⁵⁵ Andrews replied that "it is a Customary thing . . . in Virginia for the Indians to work among the Inhabitants and to indent with them for a Time or Term of years."⁵⁶ Although Andrews's claim failed to win over the Maryland court—Andrews was fined and imprisoned for a day—the case underscores that Virginian custom routinely flouted statutory prohibitions supposedly protecting indentured Native servants. Bought and sold in the open marketplace, consigned to servitude terms far longer than the five-year average for "English of . . . like ages,"⁵⁷ and rarely

⁵¹ Act XLVIII, Indians Not to Be Assigned Over (1657–1658), *reprinted in* 1 LAWS OF VIRGINIA, *supra* note 48, at 455, 455.

⁵² Act CXXXVIII, Concerning Indians (1661–1662), *reprinted in* 2 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 138, 143 (William Waller Hening ed., New York, R. & W. & G. Bartow 1823) [hereinafter 2 LAWS OF VIRGINIA].

⁵³ In some sense, this argument derives its force from a gap in the record, for many of the seventeenth-century Virginian court records were destroyed during the Civil War. Flaherty, *supra* note 6, at 113. However, no prosecutions appear in 1 JUDICIAL CASES, *supra* note 40, and my brief survey of the surviving order books in the Virginian state archives yielded no results. Moreover, *In re Andrews* suggests that Virginian custom, at any rate, did not follow the law. *See infra* notes 54–56 and accompanying text.

⁵⁴ *In re Andrews*, 25 Md. Arch. 390, 390 (1722), *reprinted in* 4 JUDICIAL CASES, *supra* note 26, at 33, 33. The claim that the Native in question was a "friend Indian" was the entire reason that the case was in court at all. Under colonial law, the enslavement of hostile tribes was acceptable. Fearful of harmful diplomatic consequences, however, colonial assemblies guaranteed friendly tribes protection against such abuse. *Cf.* 1 JUDICIAL CASES, *supra* note 40, at 67–68 (discussing the "friendly Indian"). *Re Andrews* was a rare effort to enforce this distinction. No similar Virginian cases survive.

⁵⁵ *In re Andrews*, 25 Md. Arch. at 390.

⁵⁶ *Id.*

⁵⁷ *See supra* note 52 and accompanying text.

protected by a weak and disinterested state, Indians such as James easily slid from servitude into slavery.

In the late seventeenth century, the colonial legislature attempted to clarify the ambiguities of Indian slavery by institutionalizing it. Previously, Indian bondage had existed largely outside the law; Indians who appeared before the courts were assumed to be servants, even if they routinely served thirty-year terms.⁵⁸ In 1670, the Burgesses, noting that “some dispute have arisen whither Indians taken in warr . . . are servants for life or terme of yeares,”⁵⁹ attempted to solve the conflict by creating two clear categories. All non-Christian servants who arrived in the colony “by shipping”—primarily Africans, but occasionally Indians arriving by sea—were decreed “slaves for their lives.”⁶⁰ Those who came “by land”—usually hostile Indians—would serve until the age of thirty or, if already adults, no longer than twelve years.⁶¹ This resolution distinguished the principle of Indian servitude from outright slavery, although savvy slave traders easily avoided its ambiguous provisions.⁶²

This solution did not last. In 1676, Bacon’s Rebellion triggered a paroxysm of violence and hatred against Natives.⁶³ To gain recruits, Bacon’s assembly proclaimed that “all Indians taken in warr [would] be

⁵⁸ One example of this is a 1688 Henrico County case in which a court denied an Indian mother’s petition to free her daughter. The court never questioned whether the daughter was a slave, rather than a servant consigned to a thirty-year term. See KATHLEEN M. BROWN, *GOOD WIVES, NASTY WENCHES, AND ANXIOUS PATRIARCHS: GENDER, RACE, AND POWER IN COLONIAL VIRGINIA* 224 (1996) (discussing this case and noting that “the court seems never to have entertained the notion that she could have been a slave”).

⁵⁹ Act XII, What Tyme Indians to Serve (1670), *reprinted in* 2 LAWS OF VIRGINIA, *supra* note 52, at 283, 283.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Anecdotal evidence suggests that a not insubstantial number of Native slaves arrived by sea, rather than by land. See, e.g., *Butt v. Rachel*, 18 Va. (4 Munf.) 209, 210, 213 (1813) (freeing the descendants of “a native American Indian” slave imported from Jamaica); *In re Carib Indians*, McIlwaine 155, 155 (Va. Gen. Ct. 1627), *reprinted in* 1 JUDICIAL CASES, *supra* note 40, at 76, 76-77 (involving the transportation of slaves from the Caribbean). Moreover, Indian slaves were often transported by boat *within* the Chesapeake, making it easy to follow the statute by bringing slaves “by shipping.” See *Cornwalleys v. Chandler*, 41 Md. Arch. 186, 186 (1658) (addressing a contract dispute over Indian slaves in which the plaintiff dispatched “a Boate and Three men as far as James River [in Virginia] to receive the sd. Indians”), *reprinted in* 4 JUDICIAL CASES, *supra* note 26, at 10, 10-11.

⁶³ See generally STEPHEN SAUNDERS WEBB, 1676: THE END OF AMERICAN INDEPENDENCE, at bk. 1 (Syracuse Univ. Press ed. 1995) (1984) (providing a narrative of Bacon’s Rebellion and stressing the role of Indian hatred in provoking the conflict).

held and accounted slaves during life."⁶⁴ Although this law was repealed along with all of Bacon's laws, the "legitimate" Assembly reenacted it three years later.⁶⁵ Finally, in 1682, the Burgesses, recognizing the chaotic and unstable coexistence of these contradictory laws, explicitly "repeal[d] a former law making Indians and others Free."⁶⁶ Instead, the Assembly declared that "all Indians which shall hereafter be sold by our neighbouring Indians, or any other trafficking with us as for slaves are hereby adjudged, deemed and taken . . . to be slaves to all intents and purposes, any law, usage or custome to the contrary notwithstanding."⁶⁷ At last the legislature had clarified the fraught legal status of Indian laborers. They would henceforth be slaves, not servants.

The law of 1682 was the last time the House of Burgesses legislated for Indian servants or slaves alone. Afterwards, laws addressed a single category of "negroes and other slaves."⁶⁸ Virginia's slave code of 1705 imposed numerous restrictions not only on enslaved Africans and Indians, but on free people of color as well. Statutes lumped them into a single category of any "negro, mulatto, or Indian,"⁶⁹ prohibited them from holding office,⁷⁰ owning slaves,⁷¹ or intermarrying with whites,⁷² and subjected them to thirty lashes for any resistance against whites.⁷³ Indians with distinct tribal identities and cultures

⁶⁴ Act I, An Act for Carrying on a Warre Against the Barbarous Indians (1676), *reprinted in* 2 LAWS OF VIRGINIA, *supra* note 52, at 341, 346.

⁶⁵ See 1 JUDICIAL CASES, *supra* note 40, at 61 (noting that the 1679 law "substantially re-enacted Bacon's law").

⁶⁶ Act I, An Act to Repeale a Former Law Making Indians and Others Free (1682), *reprinted in* 2 LAWS OF VIRGINIA, *supra* note 52, at 490, 490.

⁶⁷ *Id.*, *reprinted in* 2 LAWS OF VIRGINIA, *supra* note 52, at 491-92.

⁶⁸ BROWN, *supra* note 58, at 180.

⁶⁹ Ch. IV, An Act Declaring Who Shall Not Bear Office in This Country (1705), *reprinted in* 3 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, at 250, 251 (William Waller Hening ed., Philadelphia, Thomas DeSilver 1823) [hereinafter 3 LAWS OF VIRGINIA].

⁷⁰ *Id.*

⁷¹ Ch. XLIX, An Act Concerning Servants and Slaves § 11 (1705), *reprinted in* 3 LAWS OF VIRGINIA, *supra* note 69, at 447, 449-50.

⁷² Act XVI, An Act for Suppressing Outlying Slaves (1691), *reprinted in* 3 LAWS OF VIRGINIA, *supra* note 69, at 86, 86-87.

⁷³ Ch. XLIX, An Act Concerning Servants and Slaves § 34 (1705), *reprinted in* 3 LAWS OF VIRGINIA, *supra* note 69, at 447, 459; *see also* BROWN, *supra* note 58, at 215 ("For the rest of the eighteenth century, 'negro,' 'mulatto,' and 'Indian' composed a racial and ethnic triumvirate of legal disability, linking the fate of all free people of African and Indian descent."). The only hint of a legal distinction between Indians and Africans was a provision that the grandchildren and great-grandchildren of "Negroes" were legally mulattoes, while mulatto status for Indians extended to only the

continued to exist in the Virginian legal imagination, but only outside the confines of Anglo-American society, where they were the subject of statutes and treaties to regulate cross-cultural diplomacy and trade.⁷⁴ By contrast, Indians *within* English society, whether slave or free, were relegated to an undifferentiated underclass along with Africans and mixed-race peoples, where their race denied them the legal privileges of whiteness.⁷⁵ Consigned to increasingly marginal economic importance amid the ever-expanding numbers of African slaves, enslaved Natives blended into the plantation's "black" community.⁷⁶ Their presence created a mixed-race culture that diverged from the law's neat racial categories.⁷⁷ These Indians' descendants no longer represented a supposedly "pure" Native culture, but many of them retained a communal memory of their roots that would prove invaluable in their later struggles for freedom.

children of Indians. *Id.* This odd distinction suggests that Indian blood was considered less potent or harmful to its possessor.

⁷⁴ See LAWS OF THE COLONIAL AND STATE GOVERNMENTS, RELATING TO INDIANS AND INDIAN AFFAIRS, FROM 1633 TO 1831, INCLUSIVE 151-52 (Earl M. Coleman ed. 1979) (1832) (providing examples of such statutes). Professor Robinson has noted this point as well:

Indians in Virginia retained the status of tributaries and remained in a position quite distinct from other Indians located at a greater distance from the colony. . . .

Larger Indian tribes outside Virginia . . . continued as 'independent political communities' during the Colonial period. . . . Relations between the colony and these independent tribes were regulated through treaties.

Robinson, *supra* note 43, at 248-49.

⁷⁵ See MORGAN, *supra* note 20, at 337 ("Consolidated in a single pariah group, regardless of ancestry, language, religion, or native genius, [Negroes, mulattoes, and Indians] remained a small factor in Virginia's free society.").

⁷⁶ Scholars agree that Native slavery declined in economic importance in the eighteenth century, particularly compared to the dramatic rise of African slavery. See *id.* at 330 ("Indians, whether captured within the colony or brought from without, never became available in sufficient numbers to form a significant part of Virginia's labor force."); Stanwood, *supra* note 39, at 450-51 (providing evidence that "demonstrate[s] the economic marginality of native labor"); see also BROWN, *supra* note 58, at 213 ("By the eighteenth century, Indian slavery was less important to the Tidewater economy than it had been in the years immediately following Bacon's Rebellion.").

⁷⁷ For more information on the blending of Indian and African cultures, see MORGAN, *supra* note 36, at 477-85.

C. *Indians, Africans, and Colonial Conceptions of Race*

The concept of race as a fixed biological identity did not exist when Europeans settled in Virginia in the early seventeenth century.⁷⁸ The English of that era perceived the difference primarily as a matter of culture, society, and especially religion.⁷⁹ This tendency led them to regard Indians and Africans similarly as alien peoples with an odd and unfamiliar culture and, most fundamentally, as heathens.⁸⁰ Their paganism legitimated, in English minds, the enslavement of both Indians and Africans after their capture in a just war.⁸¹ This principle of the era's Eurocentric law of nations undergirded the transatlantic slave trade and the enslavement of Natives captured in Virginia's Indian wars.⁸²

⁷⁸ See, e.g., GROSS, *supra* note 16, at 17 ("In the earliest days of American colonization, when slavery was introduced, 'race' had yet to become a vitally important means of categorizing humanity. Before the mid-eighteenth century, most English speakers used 'races,' 'nations,' and 'peoples' interchangeably to describe groupings of individuals who shared a common language and geographic origins . . .").

⁷⁹ See KAREN ORDAHL KUPPERMAN, *INDIANS AND ENGLISH: FACING OFF IN EARLY AMERICA* 43 (2000) (arguing that early English colonists defined Natives in cultural and social, rather than racial, terms).

⁸⁰ See Kathleen Brown, *Native Americans and Early Modern Concepts of Race* (describing the similarities in initial English perceptions of Natives and Africans but noting greater levels of interest in Christianizing Native Americans), in *EMPIRE AND OTHERS: BRITISH ENCOUNTERS WITH INDIGENOUS PEOPLES, 1600–1850*, at 79, 88 (Martin Dauntton & Rick Halpern eds., Univ. of Pa. Press 1999) (1999); see also MORGAN, *supra* note 20, at 329 (recounting that Virginians regarded Indians and Africans similarly, since they were "both, after all, basically uncivil, unchristian, and . . . unwhite").

⁸¹ See Sally E. Hadden, *The Fragmented Laws of Slavery in the Colonial and Revolutionary Eras* (describing how the writings of early modern international law theorists, particularly Grotius, "developed the wide-ranging rationales needed to legitimate European aggression against their . . . victims" and thus "gained rapid acceptance among individuals seeking to enslave Africans or Native Americans"), in 1 *THE CAMBRIDGE HISTORY OF LAW IN AMERICA* 253, 256–58 (Michael Grossberg & Christopher Tomlins eds., 2008); see also MORGAN, *supra* note 20, at 233 (explaining that in the eyes of the colonists, the Indians were "not civil, not Christian, perhaps not quite human in the way that white Christian Europeans were," thereby justifying Indian slavery).

⁸² See Letter from George Wyatt to Francis Wyatt, Governor of Va. (1624), reprinted in J. Frederick Fausz & John Kukla, *A Letter of Advice to the Governor of Virginia*, 34 WM. & MARY Q. 104, 127 (1977) ("Your Game are the wilde and fierce Savages hauntinge the Desartes and woods. Some are to be taken in Nets and Toiles alive, reserved to be made tame and searve to good purpose."); Stanwood, *supra* note 39, at 439, 442 ("[M]ost slaves were vanquished military rivals, and forced labor for defeated combatants was an accepted facet of warfare . . . The English [viewed slaves as] captives of 'just wars.'"); see also MORGAN, *supra* note 20, at 328–29 ("Although Bacon was out to kill Indians, he was also out to enslave them. The June assembly in 1676 had given him . . . a slave-hunting license by providing that any enemy Indians they caught were to be their slaves for life . . ."). My thanks to Matthew Kreuer for directing me to the Wyatt letter.

Religion proved an unstable justification for slavery because enslaved Indians and Africans could negate English claims to their labor through conversion to Christianity, as they did in increasing numbers in the mid-seventeenth century.⁸³ Courts occasionally recognized this logic, as in one instance when an Indian sold into slavery secured release by citing his desire for baptism.⁸⁴ Such decisions led masters actively to discourage conversions among their slaves.⁸⁵ Concerned by this perverse disincentive to acculturate Africans and Indians, the Virginia Assembly in 1667 decreed that the “baptisme of slaves doth not exempt them from bondage.”⁸⁶ This statute allowed masters to Christianize their slaves without fear, but it also eliminated religion as the bright-line distinction between slavery and freedom.

The invention of race thus stemmed from the practical necessity for a sharp division between slavery and freedom that would endure even as Africans and Indians acculturated through the adoption of English language, culture, and religion.⁸⁷ The core of the racial idea—the belief in innate differences grounded in nature, not culture—first developed among the colonists towards the Indians during the frequent wars that plagued seventeenth-century Virginia.⁸⁸ Virgi-

⁸³ See MORGAN, *supra* note 20, at 331 (explaining that enslaved people were occasionally successful in acquiring freedom after baptism).

⁸⁴ See Order, Resolution of the Assembly (1661–1662), reprinted in 2 LAWS OF VIRGINIA, *supra* note 52, at 155, 155 (“[I]t is ordered that the said Indian be free, he . . . desiring baptism.”).

⁸⁵ See MORGAN, *supra* note 20, at 332 (“[M]asters, perhaps from a lingering uneasiness about holding Christians in slavery, were content to be served by pagans.”).

⁸⁶ Act III, An Act Declaring that Baptism of Slaves Doth Not Exempt Them from Bondage (1667), reprinted in 2 LAWS OF VIRGINIA, *supra* note 52, at 260, 260.

⁸⁷ This argument is not to suggest that the need for a stricter division between slavery and freedom was the *only* reason for the development of racial concepts, which has long been one of the most hotly debated topics in early American history. Although there is now general consensus that biological conceptions of racial difference arose over the seventeenth and eighteenth centuries in colonial America, many historians have advanced different causal accounts. See, e.g., Alden T. Vaughan, *The Origins Debate: Slavery and Racism in Seventeenth-Century Virginia*, 97 VA. MAG. HIST. & BIOGRAPHY 311, 344–54 (1989) (summarizing the scholarly debate about the origins of racism and its “chicken-and-egg” relationship with slavery in Virginia); see also MORGAN, *supra* note 20, at 328 (arguing that racism developed largely “to separate dangerous free whites from dangerous slave blacks by a screen of racial contempt”).

⁸⁸ See Gary B. Nash, *The Image of the Indian in the Southern Colonial Mind*, 29 WM. & MARY Q. 197, 220 (1972) (“After [the war of] 1622, the Indians’ culture was seldom deemed worthy of consideration. More and more abusive words crept into English descriptions of the Indian. . . . This vocabulary of abuse reflects not only the rage of the decimated colony but an inner need to provide a justification for colonial policy for generations to come. Hereafter, the elimination of the Indians could be rationalized far more easily, for they were seen as vicious, cultureless, unreconstructable savages . . .”); see also

nian elites quickly adapted it to support the growing institution of slavery by cultivating racial hostility against the Africans and Indians in their midst.⁸⁹ By the eighteenth century, a host of statutes legally enforced the separation between whites of whatever class and the non-whites at the bottom of society, whether slave or free.⁹⁰ The survival of Virginia's economy and society came to depend on this caste system, for it muted class conflict between planters and poor whites by uniting them as part of a common "race" of masters.⁹¹ At the same time, it isolated the dangerous mass at the bottom of society behind the supposedly unbridgeable racial divide.⁹²

The development of race had negative and positive implications for Virginia's Natives. Legally, Indians were an undifferentiated part of the racially stigmatized underclass.⁹³ Some free Native descendants persisted on the fringes of Anglo-Virginian society, occasionally amassing substantial land holdings and achieving economic success.⁹⁴ Still more Indian descendants remained in slavery, the legacy of Bacon's Rebellion.⁹⁵ But the development of race also made it increasingly difficult for Virginians to argue that Indians and Africans were the same.⁹⁶ In everyday encounters, Virginians distinguished between Indians and Africans and tended to view Natives more favorably.⁹⁷ Free

MORGAN, *supra* note 20, at 328 ("[T]he Englishmen who came to Virginia, of whatever class, learned their first lessons in racial hatred by putting down the Indians.").

⁸⁹ See MORGAN, *supra* note 20, at 331 ("By a series of acts, the assembly deliberately did what it could to foster the contempt of whites for blacks and Indians.").

⁹⁰ See BROWN, *supra* note 58, at 215-16 (describing the eighteenth-century enactment of statutes that separated Africans and Indians of whatever ancestry from their "all-white" counterparts"); see also A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 37 (1978) ("[B]y 1682 slavery [in Virginia] was placed squarely on a racial foundation.").

⁹¹ See MORGAN, *supra* note 20, at 386 ("[B]y lumping Indians, mulattoes, and Negroes in a single pariah class, Virginians had paved the way for a similar lumping of small and large planters in a single master class.").

⁹² *Id.*

⁹³ See *supra* notes 74-77 and accompanying text.

⁹⁴ See, e.g., BROWN, *supra* note 58, at 242-43 (describing the example of the Bass family, Indian descendants who managed to acquire "more than one hundred acres" and were among the "most successful free men of color in Tidewater Virginia").

⁹⁵ See MORGAN, *supra* note 36, at 479 (discussing Indian slavery in the late seventeenth century and the "intermixture" between Indians and blacks).

⁹⁶ See *infra* Section III.C (discussing the implications for Indians of colonists' increasing reliance on biological racism to justify slavery).

⁹⁷ As one scholar explained,

Laws emphasizing the similar legal condition of Afro-Virginians and Indians told only part of the story of the cultural meanings attached to the identity of each group. Although individuals of Indian descent suffered from many of

and enslaved Natives recognized this growing divide between the law, which continued to homogenize all people of color into a single racial underclass, and popular white perceptions, which regarded Indians more positively than Africans.⁹⁸ Natives exploited this gap by asserting their Indianness. Free descendants of Indians leveraged their identity into successful claims for land and respect.⁹⁹ For Indian slaves, the stakes were even higher: they sought to transform their ancestry into freedom.¹⁰⁰ For a long time they did not succeed, but in the late eighteenth century, the confluence of numerous factors finally allowed them to prevail.

II. *ROBIN V. HARDAWAY*, ITS PROGENY, AND THE LEGAL RECONCEPTUALIZATION OF SLAVERY

A. *Indian Freedom Suits and Racial Determination*

Slaves could not easily obtain legal freedom in colonial Virginia. The Assembly imposed ever-increasing restrictions on manumission; by the mid-eighteenth century, a master could free his slaves only for meritorious service as judged by the colony's governor and his council.¹⁰¹ Even then, a freed slave had to leave Virginia within six months, upon threat of a fine for the owner.¹⁰² These deterrents made manumission extremely rare in eighteenth-century Virginia, with only a few formal requests in any given decade.¹⁰³ Slaves who were freed illegally

the same legal disabilities as Afro-Virginians, they could and occasionally did use claims to Indianness to achieve some relief.

BROWN, *supra* note 58, at 243-44.

⁹⁸ See *id.* at 243 ("White views of free black people and Indians became disaggregated by the end of the eighteenth century . . . revealing the limits of the law's power to homogenize racial and ethnic meanings that derived from historically distinct relationships with white Virginians.").

⁹⁹ See *id.* at 242 (citing the example of one man's ability to withstand "legal scrutiny of his landholdings" by identifying himself as a Nansemond Indian).

¹⁰⁰ See *infra* Section II.A (discussing freedom suits and manumission).

¹⁰¹ See 2 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA, at app. note H, at 66 (St. George Tucker ed., Philadelphia, William Young Birch & Abraham Small 1803) [hereinafter 2 BLACKSTONE'S COMMENTARIES] ("In 1723, an act passed, prohibiting the manumission of slaves, upon any pretence whatsoever, except for meritorious services, to be adjudged, and allowed by the governor and council.").

¹⁰² MORRIS, *supra* note 24, at 393.

¹⁰³ See *id.* at 392-99 (examining Virginia as a case study of the rarity and difficulty of manumission); see also 2 BLACKSTONE'S COMMENTARIES, *supra* note 101, app. note H, at 66 (observing that, in eighteenth-century Virginia, "[t]he number of manumissions

faced seizure and forced sale by the county court.¹⁰⁴ In 1728, the church wardens of Northampton County petitioned the county court complaining that Tom "an Indian Boy Slave hath by the Last Will and Testament of Isaac Haggeman . . . been pretendedly set free contrary to the Act of Assembly."¹⁰⁵ Unable to seize the boy on their own, the wardens requested that a constable seize the boy so that "he may be disposed of as the Law directs."¹⁰⁶ The court granted the petition, and Tom was sold.¹⁰⁷ Such stories demonstrate concretely the impediments to manumission even when a master willingly gave up his valuable human property.

One legal avenue to liberty did remain open, however: the freedom suit. From the beginnings of slavery in Virginia in the seventeenth century, slaves could sue their masters in court and claim that their enslavement was unlawful.¹⁰⁸ If they were successful, they received their freedom, and often damages as well.¹⁰⁹ Compared with the strict requirements for manumission, these provisions seem generous, but they reinforced the slave system. They bolstered the notion that slavery rested on the rule of law, dividing slave from free and black from white.

under such restrictions must necessarily have been very few"); Hadden, *supra* note 81, at 270 (noting the difficulty of manumission under most North American slave codes).

¹⁰⁴ MORRIS, *supra* note 24, at 393.

¹⁰⁵ Church Wardens Petition to Have Freed Indian Slave, Tom, Taken Up (Feb. 1728) (on file with the Library of Virginia, Northampton County Free Negro and Slave Records).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ See EDLIE L. WONG, NEITHER FUGITIVE NOR FREE: ATLANTIC SLAVERY, FREEDOM SUITS, AND THE LEGAL CULTURE OF TRAVEL 3-5 (2009) (describing freedom suits as one of three options—the other two being escape and manumission—available to slaves seeking their freedom). The long-standing procedures allowing slaves to test their freedom were codified in 1795. An Act to Reduce into One the Several Acts Concerning Slaves, Free Negroes, and Mulattoes, and for Other Purposes, 1795 Va. Acts 16 [hereinafter 1795 Va. Slave Code]. The relatively liberal statute required the master to post bond equal to the value of the slave to guarantee the slave's court appearance and also provided for a proceeding in forma pauperis with court-appointed counsel to serve "without fee or reward." *Id.* §§ I-II; see also Christopher Doyle, *Judge St. George Tucker and the Case of Tom v. Roberts: Blunting the Revolution's Radicalism from Virginia's District Courts*, 106 VA. MAG. HIST. & BIOGRAPHY 419, 428 (1998) (discussing the development of freedom suits in forma pauperis in prerevolutionary Virginia). But the statute also penalized any nonslaves who aided or abetted an unsuccessful suit with a hundred-dollar fine and liability for damages caused the master. 1795 Va. Slave Code, *supra*, § III.

¹⁰⁹ See Robin Judgment, *supra* note 1 (awarding plaintiffs nominal damages for wrongful enslavement).

In a strict legal sense, freedom suits were not about race. Since 1662, Virginia law had provided that slavery descended matrilineally,¹¹⁰ and therefore the dispositive issue was whether the petitioner's mother had been a slave. But in a society with few free Africans, the legal status of the mother almost always turned on her race.¹¹¹ The vast majority of freedom petitions, therefore, claimed that descent from a white woman made the petitioner's slavery illegal.¹¹² Resolving these cases was relatively simple: since by law whites could not be slaves, courts would subpoena knowledgeable locals.¹¹³ In 1732, for instance, Nanny Bandy proved that she was the mulatto child of a white woman.¹¹⁴ Deciding she had been "Illegally detain'd in Slavery," the court freed her children upon her petition the following year.¹¹⁵ However, even a favorable verdict did not guarantee manumission. The ambiguous line between black and white, slave and servant, meant that individuals legally entitled to their freedom often faced years of forced labor for masters who routinely disregarded indenture agreements and judicial decrees, well aware that the legal apparatus of society would rarely intervene to protect the rights of racial inferiors.¹¹⁶

¹¹⁰ See Act XII, Negro Womens Children to Serve According to the Condition of the Mother (1661–1662) (announcing that "all children borne in this country shalbe held bond or free only according to the condition of the mother"), reprinted in 2 LAWS OF VIRGINIA, *supra* note 52, at 170, 170.

¹¹¹ See BROWN, *supra* note 58, at 223 (noting that since the "laws that distinguished 'negroes,' 'mulattoes,' and 'Indians' from 'Christians' focused on birth and 'complexion,'" black petitioners seeking freedom emphasized the existence of "an English, white, or free mother").

¹¹² See *id.* (surveying black freedom petitions and noting that "many of [black petitioners'] requests for freedom mentioned an English [or] white . . . mother").

¹¹³ See Gross, *supra* note 12, at 139 (noting the prevalence in racial determination cases of "physical descriptions" by witnesses of "mothers and grandmothers who were not in the courtroom").

¹¹⁴ Nanny Bandy, Alias Judea, Petitions She Is Illegally Held as a Slave, County of Northampton (July 12, 1732) (on file with the Library of Virginia, Northampton County Free Negro and Slave Records).

¹¹⁵ *Id.*

¹¹⁶ See, e.g., Jane Webb v. Thomas Savage, The Humble Petition of Diana Manly Webb, County of Northampton (1727) (on file with the Library of Virginia, Northampton County Free Negro and Slave Records); Jane Webb v. Thomas Savage, The Humble Petition of Thomas Savage, County of Northampton (Feb. 1725) (on file with the Library of Virginia, Northampton County Free Negro and Slave Records); Jane Webb v. Thomas Savage, The Humble Petition of Jane Webb, County of Northampton (Jan. 1723) (on file with the Library of Virginia, Northampton County Free Negro and Slave Records). This series of cases chronicles an ongoing legal battle over the children of Jane Webb, a mulatto born of a white woman. Concerned that her children would be sold into slavery, she petitioned the court for relief. See Petition of Jane Webb, *supra*. Two years later, the master came to the court alleging that, as the "said Jane hath no

Enslaved Indians also sued for their freedom, although they rarely alleged white parentage.¹¹⁷ Instead, they claimed, as "Indian Will" did in his 1747 petition for freedom, that "the laws [of] your Country Is Intirly against free born Indians to be made Slaves."¹¹⁸ Such an argument begged the question, for given the ambiguity between Indian slavery and servitude that had existed in previous generations,¹¹⁹ determining who was "free born" was not straightforward. Given the commonality of racial mixing, appearance provided no solution, and documentation clarifying the legal status of a slave's mother was rare.¹²⁰ To solve this dilemma, the courts turned to communal memory. In the case of "Anne Williams Indian," for instance, the court dispatched Michael and William Christian to investigate Anne's claims to freedom.¹²¹ The Christians deposed almost twenty white community members about Anne's mother Jane. All the witnesses reiterated the same two points: they all "took the Sd. wench [Jane] to be an Indian," but they "knew nothing of her being free" and stated that she "Lived a Slave & Died as such as far as [they] Knew."¹²² Faced with the Christians' report, the court concluded that Anne had "no right to [her]

Visible means to Support the Said Children," he therefore "hath the best Right to the Said Children." Petition of Thomas Savage, *supra*. Two more years later, Webb's daughter, then free and married, sued complaining that Savage had not fulfilled the terms of their agreement. See Petition of Diana Manly Webb, *supra*.

¹¹⁷ This Comment does not seek to address the fraught question of whether those claiming Indian ancestry actually possessed something that could be characterized as an "Indian identity" or whether they were "real" Indians—a determination difficult even at the time, when most of those who claimed Native ancestry were several generations removed from tribal existence, see *supra* text accompanying notes 75 and 76, and nearly impossible at this historical remove. To avoid such difficult characterizations, this Comment treats "Indianness" and "Indian identity" as legal and discursive categories employed by various parties—plaintiffs, lawyers, judges—to assess and justify the validity of claims, rather than as innate characteristics that inhered in certain individuals. See Everett, *supra* note 8, at 69 ("Slave owners themselves recognized 'white' Indians, 'mulatto' Indians, and 'Negro' Indians as well as just plain 'Indians.'"). See generally Rogers Brubaker & Frederick Cooper, *Beyond "Identity,"* 29 THEORY & SOC. 1, 1-2 (2000) (stressing the hazards of employing the term "identity" as an analytical category).

¹¹⁸ Indian Will Illegally Held as a Slave, County of Northampton (Sept. 1747) (on file with the Library of Virginia, Northampton County Free Negro and Slave Records).

¹¹⁹ See *supra* Section I.B.

¹²⁰ Cf. BROWN, *supra* note 58, at 223 ("Lacking English indentures that limited terms of service, African laborers were particularly vulnerable to exploitation at the hands of white masters.").

¹²¹ See Northampton County Order Book No. 23, *supra* note 6, at 186. The process was repeated the following month for the Indian slave Robert, who made similar claims. See *id.* at 187.

¹²² Anne Williams, Indian Denied Freedom, County of Northampton (Sept. 1752) (on file with the Library of Virginia, Northampton County Free Negro and Slave Records).

Freedom.”¹²³ This outcome was not universal, as some Indians *did* successfully win their freedom in court.¹²⁴ But the court’s reliance on the opinion of the white community as proof set the odds against the Indians. As Indian Will argued in his petition, his mother was “very well known to be a free Indian by several [white] Inhabitants now dwelling in this county,” but they had kept silent, “not caring to curry ill will of [their] neighbour.”¹²⁵ In such instances, there was little reason besides honesty for whites to support Indians’ claims, but there was powerful incentive to oppose them.

Race played different roles in these Indian freedom suits and the more frequent cases alleging white ancestry. For slaves who claimed descent from whites, the presumption of freedom for Europeans made the race of the mother dispositive. These lawsuits thus hinged on determining the race of both the mother and the plaintiff.¹²⁶ In prerevolutionary Virginia, however, Indians could be slave or free. As in the case of Anne Williams, merely proving descent from an Indian carried no presumption of freedom. It was also necessary to establish the mother’s free status, a tricky proposition when few documents existed and the treatment of Indian laborers often amounted to slavery, whatever their formal legal status. Indian identity, in other words, continued to have an ambiguous legal meaning. Certainly, Natives were lumped with other people of color and therefore labored under significant legal disability.¹²⁷ But in the fundamental division between slave and free that structured Virginian society, Indianness was neither an inherent badge of slavery, like blackness, nor a badge of freedom, like whiteness. It was its own racial class, and it forced the courts to deal in particularities of status, rather than race-based generalizations.

B. Robin v. Hardaway: *The Beginning of the End*

Robin v. Hardaway was yet another Indian freedom suit.¹²⁸ Unlike earlier cases, though, the suit challenged the legality of Indian slavery itself, rather than litigating the plaintiffs’ particular circumstances.

¹²³ Northampton County Order Book No. 23, *supra* note 6, at 187.

¹²⁴ See, e.g., BROWN, *supra* note 58, at 241 (noting the successful freedom suit of “Indian Sarah,” who sued for her freedom in 1747 and was granted freedom four years later).

¹²⁵ Indian Will Illegally Held as a Slave, *supra* note 118.

¹²⁶ This well-established pattern continued into the nineteenth century. See Gross, *supra* note 12, at 123-32 (discussing nineteenth-century freedom suits that hinged on the racial determination of the plaintiff).

¹²⁷ See *supra* note 75 and accompanying text.

¹²⁸ 1 Jeff. 109 (Va. Gen. Ct. 1772); Robin Judgment, *supra* note 1.

The resulting decision heralded a watershed in the legal connection between race and slavery, as it began the process of judicially abolishing Indian slavery.

There were twelve plaintiffs in *Robin*, all slaves in Dinwiddie County who claimed "Trespass Assault Battery & False Imprisonment" against their owners for their illegal detention in slavery.¹²⁹ All were descended from Indian women,¹³⁰ a fact that went unchallenged at trial.¹³¹ The sole legal issue was the validity of the 1682 statute that provided for Indian enslavement.¹³² The question the lawyers addressed "therefore was, when that act was repealed, and whether it ever was?"¹³³

1. The Statutory Claims

George Mason argued on behalf of the plaintiffs that the Virginia Assembly had repealed the 1682 statute on three separate occasions: in 1684, 1691, and 1705.¹³⁴ Since his clients descended from Indians enslaved after 1705, they were legally entitled to freedom under any of these statutes.¹³⁵

Mason's arguments demonstrated subtle lawyering. He argued, for instance, that the reference to servants in the 1682 law could not apply to Indians, since "it is notorious there is no such thing as servitude known among any of the Indian tribes."¹³⁶ The only Indian slaves the legislature could have meant were those enslaved during Bacon's Rebellion, and since the Assembly had repealed all the laws enacted during Bacon's Rebellion in 1684, no Indians could have been enslaved after that time.¹³⁷

¹²⁹ *Robin* Judgment, *supra* note 1. The plaintiffs were "Robin, Hannah, Daniel, Cuffie, Isham, Moses, Pater, Judy, Autry, Silvia, Davy, & Ned." *Id.*

¹³⁰ *Robin*, 1 Jeff. at 109.

¹³¹ This fact might have been established in the lower court. That decision is unknown, since no pre-1791 court records from Dinwiddie County survive.

¹³² See *supra* notes 64-67 and accompanying text (describing the history and purpose behind the 1682 statute that recognized Indians as slaves).

¹³³ *Robin*, 1 Jeff. at 109.

¹³⁴ *Robin*, 1 Jeff. at 113. It is unclear how Mason became involved in the case. Given the likelihood that the proceeding occurred in forma pauperis, it is likely he was appointed. For a discussion of George Mason's views on slavery in their eighteenth-century context, see JEFF BROADWATER, *GEORGE MASON: FORGOTTEN FOUNDER* 34-38 (2006).

¹³⁵ While the court report notes that the slaves were imported "between the years 1682 and 1748," *Robin*, 1 Jeff. at 109, the court and the lawyers seem to have disregarded the possibility that such slaves were imported before 1705.

¹³⁶ *Id.* at 115.

¹³⁷ *Id.* at 113.

In case this logic did not persuade, Mason pointed to two other laws that repealed the 1682 Act. He insisted that an act of 1691 that allowed free trade with Indians also implied that the 1682 law had been repealed.¹³⁸ After all, he suggested, how could Indians peaceably trade if they were subject to enslavement? Such an “imputation . . . would do indignity to any legislature.”¹³⁹ Finally, Mason pointed to the provision of the 1705 Virginian slave code that proclaimed that all non-Christian servants “shall be accounted . . . slaves.”¹⁴⁰ Again, Mason insisted, Indians were not servants when they were imported, and since this law supplanted all earlier legislation on the subject, it repealed the 1682 law.¹⁴¹ Under the new law, Indians could no longer be servants or slaves.

Colonel Richard Bland, the prominent Virginia lawyer representing the owners, attacked Mason’s liberties with the statutory history. He noted that Indian and African slavery predated the 1682 law, and he demonstrated that that law was primarily intended to repeal the “glaring . . . absurdity” of the 1670 law’s distinction between servants who arrived by land and those who “came by sea.”¹⁴² He also castigated Mason’s interpretation of the 1691 Act ensuring free trade, which conflated laws “relative to slavery” with “those relative to trade.”¹⁴³ Finally, Bland compared the 1682 and the 1705 laws side by side and demonstrated that the language was nearly identical, suggesting that the legislature intended to reinforce, not repeal, the 1682 law.¹⁴⁴

Bland’s arguments were legally and historically stronger. Mason’s claim that servitude did not exist among Indians directly contradicted the Assembly’s understanding when it enacted the 1682 law.¹⁴⁵ Ma-

¹³⁸ *Id.* at 116-17.

¹³⁹ *Id.* at 117.

¹⁴⁰ *Id.* at 113 (quoting Ch. XLIX, An Act Concerning Servants and Slaves § IV (1705), reprinted in 3 LAWS OF VIRGINIA, *supra* note 69, at 447, 447-48) (internal quotation marks omitted).

¹⁴¹ *Id.* at 117-18.

¹⁴² *Id.* at 119; see also *supra* notes 59-62 and accompanying text (describing the ease with which colonists could manipulate this distinction to classify Indians as slaves, rather than servants).

¹⁴³ *Robin*, 1 Jeff. at 119.

¹⁴⁴ *Id.* at 121-22.

¹⁴⁵ Mason’s claim about Indian servitude reflects the dramatic shift in anthropological understanding of Natives in the eighteenth century, even as it substantially mischaracterizes history. In fact, in the 1682 Act, the Assembly demonstrated a different understanding of Indian practices, stating that “those Indians that are taken in warre or otherwise by our neighbouring Indians . . . are slaves to the said neighbouring Indians that soe take them, and by them are likewise sold to his majesties subjects here as

son's readings of the 1691 and 1705 acts were similarly mistaken. The Assembly probably did not intend the 1691 act to end Indian slavery, since the Burgesses drew a sharp distinction between friendly and hostile Indians.¹⁴⁶ As for the legislature that drafted the 1705 law defining slavery, it primarily had imported African slaves in mind, since the transatlantic slave trade was the colony's most vital source of labor.¹⁴⁷ But numerous other provisions of the slave code imposed disabilities on both Africans and Indians.¹⁴⁸

Most problematic for Mason's argument, though, was historical practice. Virginian officials continued to speak of and treat enslaved Indians as slaves even after the 1705 law; Mason's view invented a dramatic legal change that no one at the time observed or obeyed.¹⁴⁹ Thus Mason's history bore little resemblance to the actual evolution of Indian slavery in Virginia. This gap underscores the social transformation that had occurred in the colony since the beginning of the eighteenth century; Indian slavery had become so invisible that Mason

slaves." Act I, An Act to Repeale a Former Law Making Indians and Others Free (1682), *reprinted in* 2 LAWS OF VIRGINIA, *supra* note 52, at 490, 491; *see also supra* notes 64-67 and accompanying text (discussing laws that evince the legislature's clear intent to regard captured Indians as slaves). Thomas Jefferson, present and taking notes, was not particularly impressed by Mason's claims either. At one point in this argument, he recorded, "These arguments are so contradictory, that I can hardly suppose the plaintiff's counsel so used them: yet do my notes, taken while he was speaking, confirm them in so many places, that I can as little suppose the error in myself." *Robin*, 1 Jeff. at 116 n.*.

¹⁴⁶ *See Robin*, 1 Jeff. at 121 (providing Bland's argument that had legislators intended this law to repeal the 1682 act, "they would have done it in express terms, and not merely by a side wind, the effect of which they must have foreseen would at least occasion dispute"); *see also* 1 JUDICIAL CASES, *supra* note 40, at 65-66, 68-71 (describing the accuracy of Bland's argument, as well as the legislature's efforts to treat friendly and hostile Indians separately); *Robinson*, *supra* note 43, at 248-49 (contrasting Virginia's legal treatment of tributary Indians and "[l]arger Indian tribes outside Virginia").

¹⁴⁷ *See Wood*, *supra* note 35, at 60 (noting a nearly 400% increase in the number of blacks in tidewater Virginia between 1700 and 1715); *see also* IRA BERLIN, MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA 110 (1998) ("Nearly 8,000 African slaves arrived in the colony between 1700 and 1710, and the Chesapeake briefly replaced Jamaica as the most profitable slave market in British America. . . . By the turn of the [eighteenth] century . . . newly arrived Africans composed nearly 90 percent of the slave population . . .").

¹⁴⁸ The 1705 law specifically provided that "all servants imported . . . into this country, *by sea or land*, . . . shall be accounted and be slaves." Ch. XLIX, An Act Concerning Servants and Slaves § 4 (1705), *reprinted in* 3 LAWS OF VIRGINIA, *supra* note 69, at 447, 447-48. (emphasis added); *see also supra* note 73 and accompanying text (cataloguing the various legal restrictions imposed on Virginia's nonwhite colonial population).

¹⁴⁹ *See, e.g.*, Letter from the Surry Cnty. Court (Mar. 24, 1709) (on file with the Library of Virginia) (describing the "Examination of Severll Negro and Indian Slaves" involved in an alleged conspiracy involving "great Numbers of ye said Negroes and Indians Slaves").

could confidently argue that the institution had been outlawed three-quarters of a century earlier.

2. The Natural Law Claims

Mason's most radical arguments rested on natural law, not the Assembly's enactments. He asserted that the 1682 law legitimizing the enslavement of Indians violated God's law and was therefore invalid, since "all acts of legislature apparently contrary to natural right and justice, are . . . void."¹⁵⁰ This claim rested on the belief that positive law was subordinate to a more fundamental natural law, a widespread Enlightenment belief that gained particular salience in America with the prerevolutionary protests against British authority.¹⁵¹ As Mason argued, "[t]he laws of nature are the laws of God[,] whose authority can be superseded by no power on earth."¹⁵²

Mason described the settlement of America as an unwarranted invasion, as the colonists "by force . . . dispossessed [the Indians] of the wilds they had inhabited from the creation of the world."¹⁵³ Those Indians who acknowledged European authority did so through "solemn treaties" that preserved their freedom, not through the "servile submission of individuals to individuals."¹⁵⁴ This certainly precluded enslavement, as "[n]o instance can be produced where even heathens have imposed slavery on a free people, in peace with them."¹⁵⁵ As for hostile Indians, Mason rejected the standard "just war" argument legitimating the enslavement of captives. Regardless of who commenced hostilities, it was the Indians, he emphasized, who were fighting just

¹⁵⁰ *Robin*, 1 Jeff. at 114.

¹⁵¹ See, e.g., Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 859-65 (1978) (describing the importance of Enlightenment natural rights theorists, including Locke, Vattel, Grotius, Pufendorf, and others, in constructing American conceptions of a fundamental law invoked to justify resistance to the British).

¹⁵² *Robin*, 1 Jeff. at 114. Scholars have frequently cited this aspect of *Robin* in discussions of the impact of the natural rights tradition on the Founding and the drafting of the Constitution. See, e.g., Edward S. Corwin, *Marbury v. Madison and the Doctrine of Judicial Review*, 12 MICH. L. REV. 538, 554 n.44 (1914); Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 365, 399 n.108 (1929); David Deener, *Judicial Review in Modern Constitutional Systems*, 46 AM. POL. SCI. REV. 1079, 1081 n.13 (1952); Walter F. Dodd, *Extra-Constitutional Limitations upon Legislative Power*, 40 YALE L.J. 1188, 1192 n.20 (1931); Grey, *supra* note 151, at 881 n.181; Carl F. Tausch, *The Religious View of the Doctrine of Natural Rights*, 14 J. HIST. IDEAS 51, 62 (1953).

¹⁵³ *Robin*, 1 Jeff. at 113.

¹⁵⁴ *Id.* at 114.

¹⁵⁵ *Id.*

wars, since they were defending their lands against outside invaders.¹⁵⁶ In a final rhetorical flourish, Mason explicitly linked these debates over Indian slavery with the colonists' struggles against British assertions of sovereignty:

The Indians of every denomination [i.e., friendly and hostile] were free, and independent of us; they were not subject to our empire; not represented in our legislature; they derived no protection from our laws, nor could be subjected to their bonds. If natural right, independence, defect of representation, and disavowal of protection, are not sufficient to keep them from the coercion of our laws, on what other principles can we justify our opposition to some late acts of power exercised over us by the British legislature? Yet they only pretended to impose on us a paltry tax in money; we on our free neighbors, the yoke of perpetual slavery.¹⁵⁷

Mason thus argued that Indian slavery violated natural law's limits on sovereignty.

Such arguments were hazardous, for their logic threatened to undermine a society predicated on inequality and forced labor. In rebuttal, Colonel Bland disputed the premise that a court could simply disregard a law that it believed violated natural law.¹⁵⁸ Nonetheless, he argued, Indian slavery did not violate natural law.¹⁵⁹ Echoing slavery's later apologists, Bland relied on biblical and English history to demonstrate that natural law encompasses both hierarchy and slavery.¹⁶⁰ In particular, he addressed the much more economically important institution of African slavery. Put in proper perspective, Bland suggested, the laws enslaving Indians were "much less unjust than the laws making slaves of negroes, inhabitants of Africa."¹⁶¹ After all, the Indians had constantly attacked the English, and so the Virginians had enslaved the Natives based on the "principles of self-defence."¹⁶² By contrast, the Africans in Africa could "never injure our properties or disturb our peace . . . [y]et is no objection made to the validity of the negro laws on account of their injustice."¹⁶³ Bland called forth the

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 118.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* Note the similarity between Bland's discussion of African slavery here and Jefferson's critique of the transatlantic slave trade in the initial draft of the Declaration of Independence, where Jefferson accused George III of "wag[ing] cruel War against human Nature itself, violating its most sacred Rights of Life and Liberty in the Persons of a distant People who never offended him, captivating and carrying them into Slavery

specter of African slavery that loomed over all arguments over freedom and natural law in Revolutionary War–era Virginia.

Confronted with Bland's rebuttal, Mason's task mirrored the larger challenge that confronted all of Virginia's would-be revolutionaries: explaining why some people deserved to be naturally free (white colonists and Indians), while others deserved perpetual servitude.¹⁶⁴ Mason conceded his argument's implications for African slavery, but he insisted that it was "less unjust" than the enslavement of Indians.¹⁶⁵ "For the Africans are absolute slaves in their own country," he claimed, "none but the King being a freeman there."¹⁶⁶ African slavery only "continued a slavery which existed before, whereas, as to the Indians, the slavery is created by the acts."¹⁶⁷ Mason thus attempted to rehabilitate his natural law arguments through an appeal to his era's distinction between naturally free Natives and naturally depraved Africans. Slavery was fit for one, he implied, but not the other, and therefore his listeners should not hear in his words a coded argument for abolition.

Mason's natural law claims threatened to nullify statutes whenever a lawyer could compellingly argue for the fundamental law. They also dangerously exposed the capriciousness of slavery and its weak justification. The radicalism inherent in the revolutionary moment and the need for the colony's slaveholders to contain it acquired urgency in this argument over Indian slavery.

3. The Outcome and the Puzzle

The court's decision has survived as a single line: "The court adjudged that neither of the acts of 1684 or 1691, repealed that of 1682, but that it was repealed by the act of 1705."¹⁶⁸ The court declared the plaintiffs "free and not Slaves" and ordered that the defendants pay

in another Hemisphere, or to incur miserable Death in their Transportation thither." Thomas Jefferson, Declaration of Independence, July 4th, *reprinted in* 2 THE WRITINGS OF THOMAS JEFFERSON 42, 52 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1893).

¹⁶⁴ Both the Virginians and their critics were well aware of this contradiction between slavery and freedom, which Edmund Morgan has described as the "central paradox of American history." MORGAN, *supra* note 20, at 4. For instance, Samuel Johnson, hostile to the American independence, famously queried, "[H]ow is it that we hear the loudest *yelps* for liberty among the drivers of negroes?" JAMES BOSWELL, 2 LIFE OF JOHNSON 154 (Henry Frowde ed., Oxford 1904) (1791).

¹⁶⁵ *Robin*, 1 Jeff. at 122.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 123.

their costs, as well as one shilling in damages.¹⁶⁹ Their freedom won, the various plaintiffs thereafter vanished from the historical record, their brief encounter with momentous legal debates over. The decision itself left a greater legacy. Indian freedom suits no longer turned solely on the mother's status. Instead, except for a brief twenty-three-year window between 1682 and 1705 when sanctioned by law, Indian slavery was presumptively illegal in Virginia. Indian racial identity itself, like whiteness and unlike blackness, now offered a possible route to freedom.

The decision also left a puzzle. With no written opinion, the court gave no explanation for its rejection of Bland's well-reasoned arguments in favor of Mason's convoluted ones.¹⁷⁰ And since later opinions simply accepted *Robin's* conclusion that the 1705 act ended legal slavery for Indians, no satisfying account was ever provided. On their dramatic redefinition of Indians' status, the Virginian courts remained silent.

C. Robin's Progeny

The decision in *Robin* did not immediately abolish Indian slavery. First, no published account of *Robin* existed until 1829, so its direct legal influence was limited.¹⁷¹ Moreover, the case merely substituted a new test for freedom—whether a slave's Indian ancestor had been enslaved before 1705—for the older determination through reputation evidence of the legal status of the slave's mother. This new test was not necessarily more favorable to the descendants of enslaved Natives, because most Indian slaves in Virginia had been enslaved prior to 1705, and later enslavement was difficult to prove.¹⁷²

This reality quickly became apparent. After *Robin*, many slaves flocked to the courts to bring their suits. In October 1772, Paul Michaux advertised for Jim, a runaway slave who "pretends to have a

¹⁶⁹ Robin Judgment, *supra* note 1. One shilling was not an insubstantial amount of money at the time, but it was almost undoubtedly a nominal award.

¹⁷⁰ See Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 624 n.194 (2009) (noting that "the one paragraph decision" in *Robin v. Hardaway* "gives no indication of why the judges accepted the tortured reasoning of the plaintiff as opposed to the more legally accurate reasoning of the defendant"); see also *infra* Section III.A (explaining why a satisfactory explanation for the decision cannot be found in statutory interpretation alone).

¹⁷¹ See 1 JUDICIAL CASES, *supra* note 40, at 65 (noting that "Jefferson's Reports of Cases determined in the General Court of Virginia was not published till 1829").

¹⁷² See *supra* Section I.B (detailing the history of Indian slavery in colonial Virginia).

Right to his Freedom” by virtue of his half-Indian descent.¹⁷³ “When he went away,” Michaux wrote, “I expected he was gone to the General Court to seek for his Freedom.”¹⁷⁴ Less than a year later, David, allegedly “of the *Indian Breed*,” also supposedly ran “down to the General Court . . . to sue for his freedom.”¹⁷⁵ If they made it to Court, these two slaves and many others were likely deeply disappointed. In June 1772, the court confronted a “multitude of cases”¹⁷⁶ filed by the descendants of Indian slaves but reiterated its verdict from *Robin* that the 1682 law remained in effect until 1705 and thus “gave judgment against many descendants of indians introduced and held as slaves between 1682 and 1705.”¹⁷⁷ The court, unwilling to interpret *Robin* as a blanket prohibition against Indian slavery, maintained its narrow interpretation.

Virginia’s highest court—recast as the Supreme Court of Appeals in the post-Revolutionary reforms of Virginia’s judiciary¹⁷⁸—finally revisited the legality of Indian slavery in 1787. In *Hannah v. Davis*,¹⁷⁹ John Marshall,¹⁸⁰ James Monroe,¹⁸¹ and others represented plaintiffs claiming descent from Bess, who a jury had determined was an Indian imported after 1705.¹⁸² The precedent of *Robin* had seemingly been

¹⁷³ Paul Michaux, Advertisement, *Run Away from the Subscriber*, VA. GAZETTE, Nov. 26, 1772, at 3. Unfortunately for Jim, his father, rather than his mother, was an Indian, but Jim was described as possessing “long black Hair resembling an *Indian’s*,” and so he may have thought he might convince the court otherwise. *Id.*; see also Peter Walenstein, *Indian Foremothers: Race, Sex, Slavery, and Freedom in Early Virginia* (discussing this advertisement), in *THE DEVIL’S LANE: SEX AND RACE IN THE EARLY SOUTH* 57, 62 (Catherine Clinton & Michele Gillespie eds., 1997).

¹⁷⁴ Michaux, *supra* note 173.

¹⁷⁵ William Cuszens, Advertisement, *Run Away from the Subscriber*, VA. GAZETTE, July 15, 1773, at 3.

¹⁷⁶ Gregory v. Baugh, 2 Leigh 665, 683 (1831), reprinted in 1 JUDICIAL CASES, *supra* note 40, at 92, 92.

¹⁷⁷ *Id.* (discussing the court’s decision in *Henry v. Attorney* (June 1772)), reprinted in 1 JUDICIAL CASES, *supra* note 40, at 92, 92. No independent record of *Henry v. Attorney* now exists.

¹⁷⁸ See A.G. ROEBER, FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE, 1680–1810, at 162–230 (1981) (describing the reforms of the Virginian legal structure).

¹⁷⁹ *Hannah v. Davis: Notes on Argument in General Court* (Richmond, April 20, 1787), reprinted in 1 THE PAPERS OF JOHN MARSHALL 218 (Herbert A. Johnson et al. eds., 1974) [hereinafter *Hannah*]. For a discussion of this case by St. George Tucker, see 2 BLACKSTONE’S COMMENTARIES, *supra* note 101, app. note H, at 47.

¹⁸⁰ Later Chief Justice of the United States Supreme Court. For a discussion of Marshall’s role in this case in the context of his later important jurisprudence on Natives, see R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 440–41 (Louisiana Paperback ed. 2007).

¹⁸¹ Later President of the United States.

¹⁸² *Hannah*, *supra* note 179, at 218.

forgotten, since *Hannah* relitigated the same legal question—when was the 1682 law allowing Indian slavery repealed?—with nearly the same arguments.¹⁸³ Plaintiffs' counsel echoed Mason's statutory claims, asserting that the 1682 act was "null & void" since it violated "the Law of God & the Law of nature to make Slaves of the . . . Indians."¹⁸⁴ The defendant's counsel countered that "[t]he Argument against Slavery applies equally to African as to Indian nations" and insisted that if the burden of proof were placed on the slaveholder, "it must be attended with almost universal Emancipation."¹⁸⁵ The result in the case was the same as in *Robin*—the court unanimously ruled that the 1682 Act "was absolutely repealed" in 1705.¹⁸⁶

Hannah's duplication of *Robin* still did not resolve the legality of Indian slavery, for like *Robin*, the case went unreported. Only five years after *Hannah*, another enslaved plaintiff faced the Supreme Court of Appeals in the case of *Jenkins v. Tom*.¹⁸⁷ Tom and other Northumberland County slaves introduced the affidavits of "antient people" to prove descent from two women who were "called *Indians*; and had a tawny complexion, with long straight black hair" when they allegedly arrived in Virginia in 1701.¹⁸⁸ When the defendant attempted to argue that Indian slavery was legal before 1705, the judge intervened and instructed the counsel that he had "mistated the law."¹⁸⁹ There had indeed been a law that permitted Indian enslavement "at some period in the last century," but it "was some time after repealed; from which period, no American Indian could be sold as a slave."¹⁹⁰ All the Indians enslaved after that point who had sued for freedom, he informed the counsel, "had uniformly recovered it."¹⁹¹ The lawyer, upset that this exchange had biased the jury, appealed and lost; the Supreme Court of Virginia affirmed without elaboration.¹⁹² What, then, was the

¹⁸³ *Id.* at 218-20.

¹⁸⁴ *Id.* at 218-19.

¹⁸⁵ *Id.* at 219.

¹⁸⁶ *Id.* at 220.

¹⁸⁷ 1 Va. (1 Wash.) 123 (1792).

¹⁸⁸ *Id.* at 123. Mary and Bess allegedly arrived by ship, *id.*, further demonstrating the problems with the distinction between servants who arrived by land and those who came by sea that appeared both in the 1670 statute and in Mason's argument in *Robin*. See *supra* notes 59-62, 148, and accompanying text.

¹⁸⁹ *Jenkins*, 1 Va. (1 Wash.) at 124.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 123. It is possible that the Court provided solid grounds for its affirmation. However, "the reporter was not in Court, when the opinion in this case was delivered"; thus the opinion did not survive. *Id.* at 124 n.*.

law on Indian slavery? The general framework of *Robin* survived—Indian slavery was legal at “some period,” illegal “some time after”—but the details, upon which the hopes of so many slaves rested, remained vague and thus invited further litigation.

The court did not have to wait long. The following year, it heard a similar case in which slaves had been declared free after the jury found that they were maternally descended from Judith, an Indian brought to Virginia “sometime after the year 1705.”¹⁹³ The appellant denied that the 1705 law outlawed Indian slavery but lost.¹⁹⁴ The appellee’s counsel also failed, though, for he could not convince the judges to adopt his sweeping assertion that “[w]hen . . . we speak of an *Indian*, unqualified by circumstances of any sort, we certainly speak of a freeman, as if an *Englishman* had been mentioned.”¹⁹⁵ The court instead introduced an odd new distinction between “American” Indians, who could no longer be enslaved after 1705, and “Foreign” Indians, who could.¹⁹⁶ Unable to decide whether Judith came by land or by sea, the evenly divided Court affirmed.¹⁹⁷ This lack of consensus revealed the ongoing confusion over the legal status of the descendants of enslaved Natives. Yet amid the imprecise distinctions and arbitrary dates, slaves exploited their Indian identity to achieve freedom: despite doctrinal ambiguity, the plaintiffs in these cases all prevailed and secured their freedom.

Clarity finally came more than a decade later in a pair of cases that established the precise date after which enslavement of Indians was no longer legal and that made explicit the long-latent presumption in favor of Indian freedom. The first issue was resolved in *Pallas v. Hill*, the freedom suit of numerous descendants of an “*American Indian* named *Bess*” brought to Virginia in 1703.¹⁹⁸ By this point, there was little doubt that Indian enslavement was illegal after 1705: when the appellee attempted to “controvert” what he regarded as this “erroneous” doctrine, the court refused permission, noting that the principle, “settled so long ago by the General Court,”¹⁹⁹ was “the law of the land confirmed by successive adjudications.”²⁰⁰ But since *Bess* was enslaved in 1703, this pronouncement was not dispositive. The real issue in the

¹⁹³ *Coleman v. Dick & Pat*, 1 Va. (1 Wash.) 233, 234 (1793).

¹⁹⁴ *Id.* at 234-35, 239.

¹⁹⁵ *Id.* at 235-36, 239.

¹⁹⁶ *Id.* at 239.

¹⁹⁷ *Id.*

¹⁹⁸ 12 Va. (2 Hen. & M.) 149, 149 (1808).

¹⁹⁹ *Id.* at 152.

²⁰⁰ *Id.*

case was a new discovery. St. George Tucker had found an identical manuscript copy of the 1705 law—enacted in 1691.²⁰¹ The judges, convinced of the law's authenticity, declared that henceforth, "no native *American Indian* brought into *Virginia* since the year 1691, could, under any circumstances, be lawfully made a slave."²⁰² The plaintiffs received a new trial²⁰³ that would undoubtedly find them free, and the window for the lawful enslavement of Natives shrank to a mere dozen years over a century earlier. The long and chaotic debate over the statutes defining Indian slavery ended at last.

Yet *Hudgins v. Wrights*,²⁰⁴ decided two years earlier, was the more important case, in which a straightforward question over the burden of proof reconfigured the legal meaning of Indian identity in Virginia.²⁰⁵ The slaves in *Hudgins*, about to be sold away from Virginia, quickly filed a freedom suit in the High Court of Chancery claiming descent from an Indian named Butterwood Nan.²⁰⁶ Chancellor George Wythe declared the plaintiffs wrongly enslaved and, "on the ground that freedom is the birth right of every human being, which sentiment is strongly inculcated by the first article of our . . . bill of rights," also placed the burden of proof in all freedom suits on the de-

²⁰¹ See *id.* at 150 ("The whole question depends upon an inspection of this manuscript."); see also 2 BLACKSTONE'S COMMENTARIES, *supra* note 101, app. note H, at 47 n.§ (describing Tucker's discovery of the 1691 Act). The history of these statutes was in fact more complicated than either Tucker or the rest of the court realized, doubtless because Jefferson's notes on *Robin* were unavailable. At one point, the appellees' counsel noted that he "thought it strange that the oldest Judges in the country should agree that the act of 1705, restricted the right of making slaves of *Indians*, if one of the same import had existed as early as 1691." *Pallas*, 12 Va. (2 Hen. & M.) at 151-52. In fact, the earlier judges had known about the 1691 law, for Tucker was conflating two different 1705 Acts: the act determining "who could be a slave"—the basis for the court's decision in *Robin*—and the act granting free trade with Indians, which all parties in *Robin* had recognized had been enacted in 1691. Tucker had thus "discovered" the very same 1691 Act that George Mason had claimed granted Indians' freedom in *Robin*, an argument the General Court had rejected. See *supra* text accompanying notes 138-39. Thanks to Tucker's confusion, Mason's argument ironically and unwittingly prevailed—thirty-six years after he first made it.

²⁰² *Pallas*, 12 Va. (2 Hen. & M.) at 160-61 (internal quotation marks omitted).

²⁰³ *Id.* at 161.

²⁰⁴ 11 Va. (1 Hen. & M.) 134 (1806).

²⁰⁵ See Gross, *supra* note 12, at 129 (describing *Hudgins* as "probably the most influential Southern precedent in setting the presumptions for slave/free status on the basis of race").

²⁰⁶ *Hudgins*, 11 Va. (1 Hen. & M.) at 134. This practice of selling or transporting slaves about to seek their freedom in court was not uncommon. See *Shaping Public Opinion: Slave or Free?*, LIBR. VA., http://www.lva.virginia.gov/exhibits/destiny/public_opinion/slaveorfree.htm (last visited Feb. 15, 2011) (recounting episodes in which masters moved slaves to prevent them from suing for their freedom).

fendant.²⁰⁷ On appeal, the Supreme Court of Appeals introduced a racial distinction into Wythe's sweeping holding. This, counsel for the appellees observed, was "not a common case of mere *blacks* suing for their freedom; but of persons perfectly *white*."²⁰⁸ Since, according to the Court, "[a]ll *white persons* are and ever have been FREE in this country," when "one *evidently white*, be notwithstanding claimed as a slave, the proof lies on the party claiming to make the other his slave."²⁰⁹ American Indians too, the court declared—without the hesitation one might expect after such a long and tortured history of conflicting case law—were "*prima facie* FREE."²¹⁰ The court thus approved Wythe's reasoning "so far as the same relates to white persons and native American Indians" but refused to extend his evidentiary principle to "native Africans and their descendants."²¹¹

The court recognized that these presumptions of status posed a significant challenge in application, since they raised the threshold issue of racial determination, which was often dispositive of freedom suits. But Judge Tucker, for one, believed that this difficulty could be resolved through common-sense racial stereotyping. The "distinction between the natives of Africa and the aborigines of America" was "[s]o pointed," he wrote, "that a man might as easily mistake the glossy, jetty cloathing of an American bear for the wool of a black sheep, as the hair of an American Indian for that of an African, or the descendant of an African."²¹² Such evidence affected which party bore the burden of proof, but it could also prove dispositive on its own. In *Hudgins* itself, for instance, "the long, straight, black hair" of Butterwood Nan's daughter helped establish her Indian identity.²¹³

Such crude stereotypes have prompted considerable scholarly attention,²¹⁴ but most freedom suits had long depended on the percep-

²⁰⁷ *Hudgins*, 11 Va. (1 Hen. & M.) at 134; see also Wythe Holt, *George Wythe: Early Modern Judge*, 58 ALA. L. REV. 1009, 1033-34 (2007) (discussing Wythe's views on slavery).

²⁰⁸ *Hudgins*, 11 Va. (1 Hen. & M.) at 135.

²⁰⁹ *Id.* at 139 (opinion of Tucker, J.).

²¹⁰ *Id.*

²¹¹ *Id.* at 144 (Lyons, P.J., concurring) (internal quotation marks omitted).

²¹² *Id.* at 140 (opinion of Tucker, J.).

²¹³ *Id.*

²¹⁴ See, e.g., ALAN HYDE, BODIES OF LAW 228-31 (1997) (citing *Hudgins* as "a key text in figuring the body as the location of human differentiation"); Adrienne D. Davis, *Identity Notes Part One: Playing in the Light*, 45 AM. U. L. REV. 695, 702-11 (1996) (noting that the judges in *Hudgins* "used the opportunity presented by the conflict to empower with the force of law a nascent taxonomy of phenotypic race"); Gross, *supra* note 12, at 129-31 (explaining that the judges in *Hudgins* "offered contrasting visions of the possibility of knowing race when one sees it"); Angela Onwuachi-Willig, *Multiracialism and the Social Construction of Race: The Story of Hudgins v. Wrights* (noting that "Judge Tucker allocated

tion of the racial identity of the plaintiff, albeit rarely so explicitly. The absence of written documentation and the widespread use of reputation evidence meant that popular understandings of race based primarily on physical appearance inevitably determined such cases, particularly when the slaves in question claimed descent from whites.²¹⁵ This had not been true for the descendants of Indians, however, whose status in the colonial era depended on their mothers' legal status, or even after *Robin* hinged on the date of their ancestors' enslavement. What was *new* in Tucker's opinion, therefore, was the suggestion that Indian identity alone made the plaintiffs "*prima facie* FREE."²¹⁶ Unconcerned with the dates and statutes that so preoccupied prior courts, Tucker did not delve into the complicated history of Butterwood Nan's importation.²¹⁷ It was enough for him that the plaintiffs looked the part. As the court's ruling made clear, blackness remained both the legal and the popular badge of slavery, while Indians would henceforth join whites in presumptive freedom.

Hudgins ended the long and complicated road that began with *Robin*. *Hudgins* was not the last Indian freedom suit; on at least two more occasions before the Civil War, the Supreme Court of Appeals clarified the legal framework it had elaborated.²¹⁸ But these cases turned on whether the slaves in question were actually Indians. In the fundamental divide between slave and free, black and white, that characterized antebellum Virginia society, Indians now enjoyed the liberty that had previously been the sole privilege of whiteness.

The incremental nature of this legal transformation obscured its radicalism. Each decision expanded the prohibition against Indian slavery only slightly. Yet the cumulative effect was dramatic and sweeping. In the space of a generation, the Virginia courts eliminated

the burden of proof depending on the physical appearance of the parties"), in RACE LAW STORIES 147, 159-63 (Rachel F. Moran & Devon Wayne Carbado eds., 2008).

²¹⁵ See *supra* notes 112-16 and accompanying text.

²¹⁶ *Hudgins*, 11 Va. (1 Hen. & M.) at 139 (opinion of Tucker, J.).

²¹⁷ This was not true for the case as a whole. As was common in Virginia legal practice of the era, the court issued two seriatim opinions. In his opinion, Judge Roane expressed general agreement with Tucker but did examine the particulars of Butterwood Nan's enslavement, only to conclude that she could not possibly have been enslaved prior to 1705. See *id.* at 141-43 (opinion of Roane, J.).

²¹⁸ See, e.g., *Gregory v. Baugh*, 25 Va. (4 Rand.) 611, 617-21 (1827) (opinion of Carr, J.) (refusing to admit as proof of Indian identity evidence that the plaintiff's maternal forbear had been reputed to be "entitled to her freedom" by the community); *Butt v. Rachel*, 18 Va. (4 Munf.) 209, 209, 214 (1813) (holding that the prohibition on Indian slavery after 1705 applied even though the ancestor of the slave in question had been imported from Jamaica and therefore had not been American).

an institution that had been widely accepted from the earliest settlement and that had existed without legal challenge for over a century. Indian identity became—gradually—a path to freedom. Haphazardly, Virginia’s highest court had judicially abolished Indian slavery.

This abolition contrasted sharply with Virginia courts’ inaction on African slavery. African slavery was obviously a far more economically and socially important institution than Indian servitude, but its existence raised even deeper anxieties among its practitioners.²¹⁹ Virginia’s elite realized that all perpetual bondage—whether of Indians or Africans—conflicted with the principles of natural law.²²⁰ Yet Virginia’s courts and legislature made only a few half-hearted efforts to ameliorate African slavery,²²¹ even as they boldly abolished the enslavement of Indians. This contrast raises the question, why did the abolition of Indian slavery occur at all?

III. WHY INDIANS COULD NO LONGER BE SLAVES

The reason Virginia’s courts abolished Indian slavery is less evident than it seems. This Part evaluates several possible explanations, including statutory interpretation, the influence of the American Revolution, and changing racial perceptions. It ultimately concludes that the abolition of Indian slavery occurred because it strengthened the institution of slavery in Virginia, rather than weakening it.

One threshold issue should be addressed and discarded. Indian slavery was economically marginal by the time of the American Revolution.²²² This development contrasted sharply with the African slave population, which nearly doubled in size between 1775 and 1800.²²³

²¹⁹ For a discussion of elite Virginians’ doubts and conflicts over slavery, see *infra* notes 270-75 and accompanying text.

²²⁰ We have already seen this discussion in *Robin*. Natural law critiques of Indian slavery quickly spilled over into a debate about African slavery, with which Mason demonstrated obvious discomfort. See *supra* text accompanying notes 161-63. The issue also arose with Wythe’s broad presumption in favor of freedom in *Hudgins*, which Tucker and the Supreme Court denied to those of African (but not Indians) origin. See *supra* text accompanying notes 207-13. Yet Tucker himself decried “the detention of so large a number of oppressed individuals among us” and outlined a complex plan for the gradual abolition of the “evil of slavery” in *Blackstone’s Commentaries*. 2 BLACKSTONE’S COMMENTARIES, *supra* note 101, app. note H, at 49-85. For discussions of Tucker’s ambivalent views on slavery, see Michael Kent Curtis, *St. George Tucker and the Legacy of Slavery*, 47 WM. & MARY L. REV. 1157, 1204-05 (2006), and Doyle, *supra* note 108, at 422-25.

²²¹ See *infra* Section III.B.

²²² See *supra* note 76 and accompanying text.

²²³ BERLIN, *supra* note 147, at 264.

Freedom for the descendants of Indians was thus certainly less costly than loosening African bondage. Finding for the plaintiff in a freedom suit, however, was not costless. Dozens of current slaves might be set free upon the determination that a single ancestor was wrongly enslaved, and masters received no compensation for their lost property.²²⁴ Indian emancipation had *fewer* social consequences than freeing African slaves, but not *none*; the courts granting Indian freedom were still consciously choosing to violate property rights on another normative basis. The rest of this Part seeks to unearth that basis.

A. Statutory Interpretation

The most straightforward explanation of why Virginian courts freed Indian slaves is the one the courts gave: they interpreted and applied the laws that the Assembly had enacted. The Assembly authorized Indian servitude in 1679 and again in 1682, but it repealed those laws in 1705, as originally thought, or in 1691, as the evolution of the court's knowledge suggested. Indian slaves were wrongfully held if they could prove descent from an ancestor enslaved after those dates; they deserved to go free as a matter of law. The line of cases from *Robin* to *Hudgins* reflected judges obeying their mandate to enforce the law while perfecting their understanding of the statutory history.

This account has much to recommend it. Although the courts' simplified story obscured a more complicated history,²²⁵ part of the function of the courts is to bring order to chaos, even at the risk of distorting past realities. There is also a danger in the arrogance of hindsight. A present-day reader cannot help but regard the decision in *Robin* on the strict facts as baffling,²²⁶ but a historical and cultural gulf separates us from the deciding judges, who were not limited to the details that have survived in the archive. Conversely, the modern-day chronicler can assemble sources unavailable to the actors themselves; the participants were unaware of now-obvious legal points.²²⁷ Finally, there is no evidence that the judges were insincere in their

²²⁴ See, e.g., *id.* at 281-82 (recounting a suit by 300 enslaved plaintiffs who successfully argued descent from Irish Nell, a white servant, and noting that further suits resulted in the freedom of additional slaves).

²²⁵ See *supra* Section I.B.

²²⁶ See *supra* subsection II.B.3.

²²⁷ The most striking example of this is Tucker's discovery of the 1691 law, whose existence is now well known to historians thanks to the diligent efforts of Hening and subsequent scholars to compile all of Virginia's statutes. Tucker also lacked the benefit of Jefferson's notes in *Robin*, which clearly demonstrated that Mason failed to convince the court that the 1691 law invalidated Indian slavery. See *supra* note 201.

professions of fidelity to the law; to interpret their opinions as masking their real motivations suggests either deep cynicism or great presumption on the part of the historian.

Yet even while we credit the judges' beliefs that they simply enforced the law, we must acknowledge that this explanation does not satisfactorily account for the legal shift. Even relatively straightforward statutes may admit multiple interpretations, so judges must evaluate them based on conformity to some outside or higher principle.²²⁸ In Indian freedom suits, there are particularly salient reasons to question whether statutes alone dictated the courts' decisions. The statutory history was conflicted, with little clear evidence of legislative intent and a strong argument based on plain language supporting Indian slavery. Even more compelling was practice. Indian slavery persisted in Virginia, both *de facto* and *de jure*, long after the Assembly passed the 1705 (or 1691) Act that "abolished" it. Until *Robin*, no court had held that Indian slavery itself was no longer legal after 1705 or any other point in Virginian history.²²⁹ *Robin* and its progeny overturned more than a century of legal precedent and accepted practice on the strength of a single statute that had existed for seventy years. The statute may have been a necessary precondition, but it alone is hardly sufficient to explain such a dramatic change in doctrine.

To explain the judicial abolition of Indian slavery adequately, we must move beyond the accounts the judges themselves proffered. While not incorrect, their opinions, constrained by the conventions of the common law, created an artificially autonomous realm of "law" divorced from social and political considerations. Yet law—particularly the highly charged law of race and slavery—never existed in such a vacuum. Here, the passage of time benefits us, for it allows us to appreciate the confluence of societal and legal trends that judges did not acknowledge at the time. Two important influences in society—the American Revolution and the shift in racial perceptions—were crucial to the judicial abolition of Indian slavery.

²²⁸ See generally RONALD DWORKIN, *LAW'S EMPIRE* 45-86 (1986) (discussing the possibility of multiple reasonable interpretations of the law in a given case and the need for a guiding outside principle to select among them).

²²⁹ This statement, of course, discards Mason's assertion that the General Court had similarly decided analogous cases earlier. Even granting the truth of that claim, however, it is clear that the doctrine asserted in *Robin* was of recent vintage and did not date back to 1705; it must, therefore, have developed well after the passage of the law. See *supra* note 6.

B. *Slavery and the Revolutionary Moment*

In contrast to the romanticized conception of a serene founding, the last quarter of the eighteenth century—the era of *Robin* and the subsequent decisions—was one of the most tumultuous and unstable periods of American history, as the leveling and emancipatory rhetoric of the American Revolution challenged long-standing institutions.²³⁰ Slavery, in particular, became the focus of considerable debate, as its blatant contradiction of the declared principles of liberty struck many observers. As newly minted Americans attempted to create new polities modeled on republican principles, they wrestled with methods to eliminate the institution from their midst.

One of the most important methods of challenging slavery was judicial. Slavery in the English colonies was born of expediency, not legal tradition.²³¹ For nearly two centuries, the Anglo-American law of slavery consisted of a hodgepodge of custom, local statute, and antiquated philosophizing used to justify preexisting facts on the ground, while control of slaves' daily lives rested in the private government of the plantation.²³² In the late eighteenth century, however, courts throughout the Anglo-American world began to challenge the haphazard justifications invoked to support chattel slavery and issued a number of opinions with profound emancipatory implications.

In 1772, at nearly the same moment when *Robin* brought suit in the General Court, another Virginian slave, James Somerset, also sought his freedom in English court.²³³ Somerset's master had taken Somerset to England, where he had attempted to run away.²³⁴ After

²³⁰ See generally GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 3-8 (1993) (arguing that the American Revolution was "radical" in its reshaping of monarchical colonial society into the republican and later democratic societies of the early republic).

²³¹ See Jonathan A. Bush, *Free to Enslave: The Foundations of Colonial American Slave Law*, 5 *YALE J.L. & HUMAN.* 417, 417-18 (1993) ("[I]n the critical first century of English colonial slavery, the common law had very little of importance to say about slaves . . . Early American slave law was largely reactive and, in particular, played little role when the choice was made in the seventeenth century to turn to slavery.").

²³² See *id.* at 425-28 (describing the "lack of systematic thinking about slavery" in the English colonies and the importance of "private 'rule-making'" on plantations (citing T.H. BREEN, *TOBACCO CULTURE: THE MENTALITY OF THE GREAT TIDEWATER PLANTERS ON THE EVE OF REVOLUTION* 85-86 (1985)); see also *supra* Section I.B (recounting the complex and contradictory legal history of slavery in seventeenth-century Virginia).

²³³ 2 JAMES OLDHAM, *THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY* 1228 (1992); see also STEVEN M. WISE, *THOUGH THE HEAVENS MAY FALL: THE LANDMARK TRIAL THAT LED TO THE END OF HUMAN SLAVERY* 1-11 (2005) (describing the events leading up to the *Somerset* case).

²³⁴ 2 OLDHAM, *supra* note 233, at 1228.

his recapture, his master passed him to a ship's captain for sale in Jamaica, but Somerset secured a writ of habeas corpus with the help of several abolitionists.²³⁵

The resulting case, *Somerset v. Stewart*,²³⁶ marked a watershed in English legal history.²³⁷ Lord Mansfield, the most eminent English jurist of the era, held that Somerset, while lawfully enslaved in Virginia, was not a slave in England.²³⁸ "The state of slavery is of such a nature," he reasoned, "that it is incapable of being introduced on any reasons, moral or political . . . [slavery i]s so odious, that nothing can be suffered to support it, but positive law."²³⁹ Concluding that no such enabling law existed in England, Mansfield ordered that "the black must be discharged."²⁴⁰

There are a number of striking similarities between *Somerset* and *Robin* beyond their near simultaneity. Both cases included extended natural law discussions of the justice of slavery.²⁴¹ In both instances

²³⁵ *Id.*

²³⁶ (1772) 98 Eng. Rep. 499 (K.B.).

²³⁷ See William M. Wiecek, *Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 U. CHI. L. REV. 86, 86-88 (1974) (describing *Somerset* as a "landmark opinion in Anglo-American jurisprudence" and a "fascinating milestone in Anglo-American legal history"). The *Somerset* case has attracted a great deal of scholarly attention. For background on the case and its significance for English law of the period, see HIGGINBOTHAM, *supra* note 90, at 333-68; see also Eliga H. Gould, *Zones of Law, Zones of Violence: The Legal Geography of the British Atlantic, Circa 1772*, 60 WM. & MARY Q. 471, 471-73, 508-10 (2003); George Van Cleve, *Somerset's Case and Its Antecedents in Imperial Perspective*, 24 LAW & HIST. REV. 601 (2006); Wiecek, *supra*. A popular narrative history of the case can be found in WISE, *supra* note 233.

²³⁸ *Somerset*, 98 Eng. Rep. at 510.

²³⁹ *Id.* There are several conflicting accounts of what Mansfield actually stated. The most meticulous examiner of this question has determined that the Lofft account, reprinted in the English reports, is largely correct, but that the most accurate version is a manuscript by one "Serjeant" Hill located at the Inns of Court. That manuscript presents the quotation above nearly identically, with the critical differences being its inclusion of a reference to introducing slavery "by inference," the substitution of "natural" principles for "moral" principles, and an additional statement that slavery is a condition that must be "construed strictly." 2 OLDHAM, *supra* note 233, at 1229-30 (quoting Hill MSS at Lincoln's Inn Library, London) (internal quotation marks omitted); see also Wiecek, *supra* note 237, app. at 141-46 (describing the different accounts of the case and arguing for the accuracy of the Lofft account).

²⁴⁰ *Somerset*, 98 Eng. Rep. at 510.

²⁴¹ See, e.g., *id.* at 500, 505 (recording the arguments of Hargrave, Somerset's counsel, attacking slavery based on human nature and the natural law principles of Grotius, Pufendorf, Locke, and others, as well as the arguments of Dunning, the opposing counsel, disputing whether liberty is a natural right); *supra* notes 150-67 and accompanying text (recounting the natural law arguments voiced in *Robin*); see also Van Cleve, *supra* note 237, at 636 ("Remarkably, Mansfield's decision adopted the 'rights of man' principle that English common law provided certain minimum levels of substantive

the court also sought to clarify an ambiguous and unsettled legal history through oversimplification.²⁴² Finally, both courts delivered narrow legal opinions largely limited to the facts of the cases: Mansfield interpreted his decision as applying only when a master sought to transport his slave out of the country.²⁴³ But subsequent opinions, as well as popular perceptions, soon gave *Somerset*, like *Robin*, a much broader reach—the case achieved canonical status as the decision that abolished slavery in England.²⁴⁴ This exaggeration occurred in large part because those most affected by the decision—slaves themselves—insisted on this interpretation, invoking the cases to justify their claims to freedom.²⁴⁵

The decision in *Somerset* became known almost immediately in America, where it reinforced the emancipatory rhetoric of the Revolution.²⁴⁶ Throughout the colonies, slavery's legal status was under attack. At Harvard's 1773 commencement, students debated whether

protection to anyone who came to England . . . This represented the emergence of a new English concept of legal freedom . . .").

²⁴² See Wiecek, *supra* note 237, at 88-95 (chronicling the prior decisions of the King's Bench and the Chancery on slavery in England and noting that, at the time of *Somerset*, "the [legal] problem of slavery in England . . . [was] far from settled").

²⁴³ See 2 OLDHAM, *supra* note 233, at 1221 ("Popular history often credits Lord Mansfield with freeing the slaves in England through his decision in the *Somerset* case. That he did not free the slaves is by now agreed and is a point featured in modern scholarship on slavery." (footnote omitted)); Wiecek, *supra* note 237, at 107 ("Despite the sweep and implications of its language, [the *Somerset*] opinion did not abolish slavery even in England itself, as Mansfield and others were later at pains to point out. . . . Mansfield had held merely that, whatever else the master might do . . . he could not forcibly send [the slave] out of the realm . . .") (footnote omitted)).

²⁴⁴ See Wiecek, *supra* note 237, at 108-12 (recounting subsequent cases that gave *Somerset* a "broad reading[]" and popular understandings of *Somerset* suggesting that slaves were "liberated once they set foot on English ground"). This view of *Somerset* persists, despite the efforts of legal historians to complicate the story. Consider, for instance, the subtitle of a recent popular history on the case, which hyperbolically describes *Somerset* as "The Landmark Trial That Led to the End of Human Slavery." WISE, *supra* note 233.

²⁴⁵ See DAVID WALDSTREICHER, *SLAVERY'S CONSTITUTION: FROM REVOLUTION TO RATIFICATION* 39-40 (2009) ("The Mansfield decision immediately set off a wave of speculation about the end of slavery in England, fanned by the black community there, who sought to make facts on the ground, and to a significant extent succeeded in doing so."); see also 2 OLDHAM, *supra* note 233, at 1238 (describing the actions of Dublin, Somerset's nephew, who ran away once acquainted with Mansfield's opinion).

²⁴⁶ As one scholar explained, "[t]he decision and the arguments in *Somerset* became known almost immediately in the mainland colonies." Wiecek, *supra* note 237, at 113. Moreover, "[t]he tension between slavery and natural law was one of the . . . chief legacies of Mansfield to the American law of slavery." *Id.* at 118; see also WISE, *supra* note 233, at 199 ("If anything, the Mansfield Judgment was even more influential in America.").

slavery was illegal because it violated natural law.²⁴⁷ *Somerset* and the American Revolution also inspired slaves in Massachusetts to initiate a number of freedom suits that almost always resulted in the plaintiffs' liberty.²⁴⁸ In 1783, a complicated legal battle involving Quock Walker, an enslaved African, confronted the Supreme Judicial Court of Massachusetts.²⁴⁹ Chief Justice William Cushing charged the jury that "whatever usages formerly prevailed or slid in upon us by the example of others on the subject," the advent of "the glorious struggle for our rights" had enshrined "[s]entiments more favorable to the natural rights of mankind . . . without regard to complexion" in the Massachusetts Constitution.²⁵⁰ Cushing therefore concluded, "slavery is in my judgement as effectively abolished as it can be by the granting of rights and privileges wholly incompatible and repugnant to its existence."²⁵¹ As in *Robin* and *Somerset*, the sweeping rhetoric belied a narrower and ambiguous holding whose emancipatory potential was li-

²⁴⁷ TWO CANDIDATES FOR THE BACHELOR'S DEGREE, A FORENSIC DISPUTE ON THE LEGALITY OF ENSLAVING THE AFRICANS, HELD AT THE PUBLIC COMMENCEMENT IN CAMBRIDGE, NEW-ENGLAND (Boston, Boyle for Leverett, 1773). The University of Pennsylvania had a similar debate five years earlier. See Wiecek, *supra* note 237, at 115 (citing 2 PA. CHRON. & UNIVERSAL ADVERTISER, Nov. 28–Dec. 5, 1768, at 394).

²⁴⁸ See Emily Blanck, *Seventeen Eighty-Three: The Turning Point in the Law of Slavery and Freedom in Massachusetts*, 75 NEW ENG. Q. 24, 27-28 (2002) ("By 1783, at least thirty men and women had sued their masters for their freedom, most during the Revolutionary period. Moreover, after 1763, only one plaintiff had lost his case after appealing to the Superior Court of Judicature." (footnote omitted)); Wiecek, *supra* note 237, at 115 ("These suits, according to a contemporary account, were uniformly successful." (citing Letter from Samuel Dexter to Dr. Belknap (Feb. 23, 1795), reprinted in 3 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY 384, 386 (5th ser. 1877))).

²⁴⁹ The Quock Walker "case" actually consisted of three separate cases, all of which hinged on whether Walker was legally a slave. The most important of these cases, referenced in the body text, was *Commonwealth v. Jennison*, a criminal case against Walker's alleged owner for battery against Walker. Walker's status was relevant because Jennison had the legal right to beat his own slave. See *Commonwealth v. Jennison*, Proc. Mass. Hist. Soc. 1873-75, at 293, 293-94 (1783), reprinted in 4 JUDICIAL CASES, *supra* note 26, at 480, 480-81. For more background on this complex set of cases, see HIGINBOTHAM, *supra* note 90, at 91-99; Blanck, *supra* note 248, at 24-31; John D. Cushing, *The Cushing Court and the Abolition of Slavery in Massachusetts: More Notes on the "Quock Walker Case"*, 5 AM. J. LEGAL HIST. 118 (1961); Robert M. Spector, *The Quock Walker Cases (1781-83)—Slavery, Its Abolition, and Negro Citizenship in Early Massachusetts*, 53 J. NEGRO HIST. 12 (1968); Arthur Zilversmit, *Quock Walker, Mumbet, and the Abolition of Slavery in Massachusetts*, 25 WM. & MARY Q. 614, 614-17, 623-24 (1968).

²⁵⁰ Cushing, *supra* note 249, at 133 (internal quotation marks omitted). Cushing obtained these quotations "from a manuscript notebook in the Harvard University Law Library, inscribed 'Notes of Cases decided in the Superior and Supreme Judicial Courts of Massachusetts from 1772-1789—taken by the Hon[orable] Wm. Cushing.'" *Id.* at 132 n.20.

²⁵¹ *Id.* (internal quotation marks omitted).

mitted because the unreported case that survived was half-forgotten.²⁵² But while historians debate whether the case abolished slavery as a matter of law,²⁵³ contemporary popular understanding credited it as "a mortal wound to slavery in Massachusetts,"²⁵⁴ which became the only state in the 1790 census with no slaves.²⁵⁵

Massachusetts was not the only state that abolished slavery after the Revolution. Above the Mason-Dixon line, where slavery was engrained but less economically vital, every state adopted some form of abolition.²⁵⁶ Unlike Massachusetts, however, other states adopted legislative plans that eschewed radicalism in favor of gradual emancipation.²⁵⁷ Pennsylvania, for instance, enacted the law abolishing slavery in 1780, but full emancipation did not occur until 1847.²⁵⁸ On the na-

²⁵² See Wiecek, *supra* note 237, at 124 ("The Quock Walker story can be seen as an American counterpart of *Somerset*, especially in its ambiguity and in the resultant misunderstanding about its impact."); see also Blanck, *supra* note 248, at 30 (noting that Cushing's opinion was unpublished, with the result that "it faded from memory for a time" and was referenced only obliquely in later cases until 1867).

²⁵³ For a discussion of whether the Quock Walker cases abolished slavery in Massachusetts, see HIGGINBOTHAM, *supra* note 90, at 91-98, and William O'Brien, *Did the Jennison Case Outlaw Slavery in Massachusetts?*, 17 WM. & MARY Q. 219, 219-41 (1960); cf. Blanck, *supra* note 248, at 24 ("In 1783, the Supreme Judicial Court of Massachusetts pronounced Quock Walker—and all other slaves in the commonwealth—free. In that stroke, the court transformed Massachusetts from the first colony to legalize slavery into the first state immediately to deny its citizenry the right to hold human property.").

²⁵⁴ *Queries Respecting the Slavery and Emancipation of Negroes in Massachusetts, Proposed by the Hon. Judge Tucker of Virginia, and Answered by the Rev. Dr. Belknap* [hereinafter *Queries*], in COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY FOR THE YEAR M,DCC,XCV 191, 203 (Boston, Samuel Hall 1795).

²⁵⁵ RETURN OF THE WHOLE NUMBER OF PERSONS WITHIN THE SEVERAL DISTRICTS OF THE UNITED STATES 3 (Philadelphia, J. Phillips 1793), available at <http://www2.census.gov/prod2/decennial/documents/1790a.zip>; see also Blanck, *supra* note 248, at 30 ("The degree to which Cushing's legal activism had been effective in ending slavery can be gauged by a couple of measures. First, in the 1790 census, not one citizen claimed to own a slave."). Although the 1790 census also lists Maine as having no slaves, Maine remained a subdivision of Massachusetts until 1820.

²⁵⁶ See David Menschel, Note, *Abolition Without Deliverance: The Law of Connecticut Slavery 1784-1848*, 111 YALE L.J. 183, 183 (2001) ("Between 1777 and 1804, all of the states north of Maryland did take steps that would eventually doom slavery within their borders.").

²⁵⁷ See BERLIN, *supra* note 147, at 228-55 (noting that, while the "American Revolution reversed the development of northern slavery," the institution's actual abolition "was a slow, tortuous process"); JOANNE POPE MELISH, DISOWNING SLAVERY: GRADUAL EMANCIPATION AND "RACE" IN NEW ENGLAND 1780-1860, at 84-119 (1998) (describing the process of emancipation in New England and its effect on race relations).

²⁵⁸ BERLIN, *supra* note 147, at 232-33; see also Menschel, *supra* note 256, at 183-84 ("But only in Massachusetts, Vermont, and New Hampshire were slaves emancipated relatively swiftly, and even in these states abolition measures were ambiguous and their implementation inconsistent. In Pennsylvania, New Jersey, New York, Connecticut,

tional level, the drafting of the new Constitution quickly implicated slavery: despite the efforts of antislavery Northerners, the resulting document allowed Southerners to invoke federal power to protect their slave property.²⁵⁹ The drafters euphemistically referred to slaves as “other Persons”²⁶⁰ or as “Person[s] held to Service or Labour,”²⁶¹ providing further evidence of the deep discomfort many of them felt.

In Virginia, where slavery was the center of the economy, the debate was particularly fierce. Virginians were well aware of the growing hostility toward slavery throughout the Anglo-American world and especially in the courts. News of the *Somerset* decision arrived in the colony in April 1772, the month *Robin* was decided; several months later, Virginia newspapers published a full transcript of Mansfield’s opinion.²⁶² Anglo-Virginians complained that the case led their slaves to “imagine they will be free” in Britain, “a Notion now too prevalent among the Negroes, greatly to the Vexation and Prejudice of their Masters.”²⁶³ In 1795, Virginian antislavery judge and treatise writer St. George Tucker dispatched a series of queries to Massachusetts regarding how the state had “wholly exterminated” slavery; the open letter he received in response stressed the role of the “judicial courts,” including the Quock Walker case, in abolishing the institution.²⁶⁴ At the same time that well-heeled Virginians learned that elite opinion in the

and Rhode Island, state legislatures adopted gradual abolition legislation, which dismantled slavery over a period of half a century.” (footnote omitted)). In Connecticut, more specifically, the legislature passed the law abolishing slavery in 1784, but the process was not complete until 1848. *Id.* at 185.

²⁵⁹ See U.S. CONST. art. IV, § 2 (“No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”).

²⁶⁰ U.S. CONST. art. I, § 2.

²⁶¹ U.S. CONST. art. IV, § 2; see also WALDSTREICHER, *supra* note 245, at 19 (“The debates and compromises over slavery played a central part in the creation of the U.S. Constitution, shaping the character and nature of the government it formed.”). For additional background on this topic, see *id.* at 3-19, 57-106.

²⁶² See Emma L. Powers, *The Newsworthy Somerset Case: Repercussions in Virginia*, COLONIAL WILLIAMSBURG INTERPRETER, Fall 2002, at 1, 1-6, available at http://research.history.org/Historical_Research/Research_Themes/ThemeEnslave/Somerset.cfm#n10 (discussing how news of the *Somerset* decision spread in Virginia); VA. GAZETTE, Aug. 27, 1772, at 3 (excerpting the opinion).

²⁶³ John Austin Finnie, Advertisement, *Run Away from the Subscriber in Surry County*, VA. GAZETTE, Sept. 30, 1773, at 3; see also Gabriel Jones, Advertisement, *Run Away the 16th Instant*, VA. GAZETTE, June 30, 1774, at 3 (seeking the recapture of Bacchus, who his master suspected would “attempt to get on Board some Vessel bound for *Great Britain*, from the Knowledge he has of the late Determination of *Somerset’s Case*”).

²⁶⁴ *Queries*, *supra* note 254, at 191-92, 202-03.

North and in Britain was turning against slavery, internal events of the Revolutionary War gave a new urgency to these doubts: the colony's royal governor issued a wartime proclamation offering liberty to any slaves who fought for the British, an act that led thousands of slaves to flee to British lines and caused alarm among Virginian planters.²⁶⁵

Motivated by the combination of fear and a genuine desire to reform, the Virginia elite sought to ameliorate slavery in the war's aftermath. In 1778, the legislature abolished the slave trade in an effort to slow the institution's growth in the state.²⁶⁶ It went one step further in 1782, when it liberalized the restrictive laws on manumission²⁶⁷ and allowed owners to free slaves without restriction as long as the slaves were of sound mind and of the right age to support themselves.²⁶⁸ Scholars debate the extent to which this law undermined slavery, but it produced a dramatic upsurge in Virginia's free black population.²⁶⁹

Behind such measures lay the hope of Virginia's liberal reformers that the new restrictions might lead to slavery's slow death.²⁷⁰ Nearly all of Virginia's political elite shared the growing distaste for bondage

²⁶⁵ See BERLIN, *supra* note 147, at 257-62 (describing the impact of the war and the royal governor's proclamation, in particular, on slavery in Virginia).

²⁶⁶ See An Act for Preventing the Farther Importation of Slaves, 1778 Va. Acts 80; see also EVA SHEPPARD WOLF, RACE AND LIBERTY IN THE NEW NATION: EMANCIPATION IN VIRGINIA FROM THE REVOLUTION TO NAT TURNER'S REBELLION 22-28 (2006) (discussing the debate over the slave trade in Virginia). As Wolf points out, the debate over the slave trade mixed idealism with material interests: particularly in eastern Virginia, the birth rate of slaves exceeded the death rate. See *id.* at 24 (noting that slave owners in the lowlands of the coastal plain had a surplus of slaves). The law had the effect of securing to slaveowners a monopoly over a valuable resource. See BERLIN, *supra* note 147, at 264 ("In condemning the international slave trade while embracing the interstate trade, Upper South planters could lament slavery as an evil that had been foisted upon them by their former British overlords while reaffirming their commitment to chattel bondage.").

²⁶⁷ See WOLF, *supra* note 266, at 39-42 (discussing "Virginia's experiment with manumission from 1782-1806"). For further discussion on manumission in Virginia, see *supra* notes 103-04 and accompanying text.

²⁶⁸ MORRIS, *supra* note 24, at 394. These restrictions demonstrated the legislature's concern that manumission might be used to disclaim responsibility for slaves no longer valuable to their masters, who might then become wards of the state. Cf. WOLF, *supra* note 266, at 30-34 (describing the 1782 law as similarly protective of white society as an earlier bill the restrictions of which sought to prevent emancipated slaves from becoming indigent).

²⁶⁹ See MORRIS, *supra* note 24, at 394-95, 397-98 (summarizing contending scholarly views on the significance of emancipation and concluding that "the law of 1782 did not open any floodgates holding back the hopes of Virginia planters to disengage themselves from slavery").

²⁷⁰ See 2 BLACKSTONE'S COMMENTARIES, *supra* note 101, app. note H, at 68-85 (outlining such a plan for the gradual abolition of slavery in Virginia); see also WOLF, *supra* note 266, at 12-14 (describing similar views among many Virginian elites).

manifest in the era's intellectual culture. They excoriated slavery for the injustice it did to the slave as well as for what they regarded as its deleterious effect on white morals.²⁷¹ Their racist ideology and disdain for Africans, however, made them deeply anxious about the presence of free blacks and the potential for racial mixing.²⁷² Caught in this dilemma, they penned vague and abstract plans for slavery to disappear through the power of demographics, even as the state's slave population increased.²⁷³ On a more concrete level, though, they maintained the racial boundaries that kept most blacks enslaved and the few free blacks marginalized and heavily regulated.²⁷⁴ In 1806, for instance, the legislature added a proviso to the liberal provisions for manumission enacted in 1782: freed slaves now had to leave the state within twelve months or their masters would have to pay a fine.²⁷⁵ Freedom was desirable only as long as the Virginians did not have to live with their former slaves.

This ambivalent commitment to freedom did little to undermine slavery in Virginia. Rather than dying a slow death, the institution remained crucial to the state's economy and society.²⁷⁶ If anything, the

²⁷¹ See Thomas Jefferson, *Notes on the State of Virginia, 1781-1787* (declaring that slavery had an "unhappy influence on the manners of our people" since the institution requires "a perpetual exercise of the most boisterous passions, the most unremitting despotism" on the part of whites), reprinted in THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA: WITH RELATED DOCUMENTS 79, 195 (David Waldstreicher ed., 2002) (1787) (declaring that slavery had an "unhappy influence on the manners of our people" since the institution requires "a perpetual exercise of the most boisterous passions, the most unremitting despotism" on the part of whites); see also GARY B. NASH, RACE AND REVOLUTION 11-20 (1990) (describing postrevolutionary support for abolition).

²⁷² See Jefferson, *supra* note 271, at 180-81 (noting that while the ancient Romans could free their slaves with impunity because the slaves were "whites," in Virginia a freed slave was "to be removed beyond the reach of mixture"). Jefferson, of course, long felt deeply ambiguous over the dilemma of slavery. Most famously, several years before his death, he stated, "[W]e have the wolf [slavery] by the ears, and we can neither hold him, nor safely let him go. Justice is in one scale, and self-preservation in the other." Letter from Thomas Jefferson to John Holmes (Apr. 22, 1820), reprinted in 10 THE WRITINGS OF THOMAS JEFFERSON 1816-1826, at 157, 157-58 (Paul Leicester Ford ed., New York, G.P. Putnam & Sons 1899). See generally JOHN CHESTER MILLER, THE WOLF BY THE EARS: THOMAS JEFFERSON AND SLAVERY 104-09 (Univ. Press of Va. 1991) (1977) (recounting Jefferson's role as a slavemaster despite his conflicted views on slavery).

²⁷³ See 2 BLACKSTONE'S COMMENTARIES, *supra* note 101, app. note H, at 68-85 (offering one such plan); WOLF, *supra* note 266, at 101-09 (describing such elite plans for manumission).

²⁷⁴ See WOLF, *supra* note 266, at 85-129 (describing how fears of racial mixing largely undid liberal gains and also led to strong restrictions on free blacks).

²⁷⁵ *Id.* at 124-25.

²⁷⁶ See BERLIN, *supra* note 147, at 264 (noting that in the last quarter of the eighteenth century, the slave population in the Chesapeake, far from dwindling, nearly doubled).

reform measures reconciled slaveowners' humanitarian aspirations with the reality of slaveholding: what had been widely regarded as a pernicious but necessary evil was reconceived as a form of benevolent paternalism.²⁷⁷ Indeed, with the abolition of the transatlantic slave trade in 1808, Virginia became vital to the plantation complex of the entire South, as nearly 100,000 slaves were exported from the Chesapeake to new plantations in Kentucky, Tennessee, and the lower Mississippi.²⁷⁸ By the early nineteenth century, the revolutionary moment and the doubts it occasioned about slavery had largely passed.

Many of these well-intentioned men, whose efforts to end slavery in Virginia proved ineffectual, were members of Virginia's legal elite, part of the state's growing class of college-educated, professional lawyers. These men enjoyed national prominence and influence; among them were some of the foremost political leaders and legal scholars of the Early Republic.²⁷⁹ Many also played key roles in the Indian freedom suits: George Mason argued Indian slavery violated natural law;²⁸⁰ Thomas Jefferson recorded *Robin v. Hardaway*²⁸¹ and once represented a (supposedly white) plaintiff in a freedom suit himself;²⁸² John Marshall successfully represented plaintiffs claiming Indian descent in *Hannah v. Davis* and *Coleman v. Dick & Pat*,²⁸³ George Wythe, as Chancellor, pre-

²⁷⁷ See EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 50-51 (First Vintage Books 1976) (1974) (describing "the history of the South from the Revolution to secession" as the "glorious story of wise self-reformation at once conservative in its preservation of the social order and liberal in its flexible response to altered conditions—glorious, that is, from the point of view of the master class . . . [since it made] the South safe for slaveholders by confirming the blacks in perpetual slavery and by making it possible for them to accept their fate").

²⁷⁸ See Allan Kulikoff, *Uprooted Peoples: Black Migrants in the Age of the American Revolution, 1790–1820*, in SLAVERY AND FREEDOM IN THE AGE OF THE AMERICAN REVOLUTION 143, 149-52 (Ira Berlin & Ronald Hoffman eds., 1983); see also BERLIN, *supra* note 147, at 264-65 ("[T]he internal slave trade proved to be a source of enormous profit . . .").

²⁷⁹ See ROEBER, *supra* note 178, at 231-61 (describing the contribution of Virginia's legal class to early American legal and political culture).

²⁸⁰ See *supra* notes 150-67 and accompanying text.

²⁸¹ See *supra* note 145.

²⁸² Jefferson served as counsel in the freedom suit *Howell v. Netherland*, 1 Jeff. 90 (Va. Gen. Ct. 1770), decided only two years prior to *Robin*. For context and discussion of the case, see Aaron Schwabach, *Thomas Jefferson as an Unsuccessful Advocate for Freedom in Howell v. Netherland*, 20 T. JEFFERSON L. REV. 137 (1998).

²⁸³ See *Coleman v. Dick & Pat*, 1 Va. (1 Wash.) 233, 236-37 (1793) (reporting Marshall's argument); *supra* note 180 and accompanying text (referencing Marshall's role in *Hannah v. Davis*).

sided over the first trial of *Hudgins v. Wrights*,²⁸⁴ and St. George Tucker penned the Supreme Court opinions in *Pallas* and *Hudgins*.²⁸⁵

Indian slavery, like African slavery, laid bare to Virginia's legal elite the dissonance between their ideals and their practice. They connected the judicial abolition of Indian slavery with the revolutionary rhetoric of freedom and the effort to eliminate African slavery gradually. George Mason's arguments in *Robin* noted that the same principles that justified the "opposition to some late acts of power" by the British also rejected the power to enslave Indians—who, like the colonists, were naturally free and independent, lacked representation, and existed outside the jurisdiction of the legislature.²⁸⁶ He also caught the irony that occurred when colonists claimed that they had been enslaved by Parliament's imposition of a "paltry tax in money" even as they inflicted the actual "yoke of perpetual slavery" on their "free neighbors."²⁸⁷ George Wythe, in turn, used Mason's Revolution-inspired Virginian Declaration of Rights²⁸⁸ to declare a presumption of freedom for all plaintiffs in freedom suits.²⁸⁹ Indian slavery, like African slavery, was therefore part of the larger issue of the persistence of bondage in a society that proclaimed itself free.

In cases involving Indian slavery, however, Virginian lawyers and judges could act on their higher principles with relatively few consequences. Given the economic marginality of Indian slavery, there was no slippery slope, no deep anxiety that freedom for Natives might undo African slavery, the state's most vital economic institution. Since slaves who wished to bring freedom suits still faced high hurdles—the difficulty of proving maternal descent, the challenge of presenting petitions in the proper legal form, the need to obtain the patronage of a sympathetic white lawyer—the proclamation of Indian liberty could free a few hundred slaves at most. Nonetheless, even a limited emancipation served an important psychological and rhetorical purpose; it reassured anxious Virginians that, despite failing to eliminate African slavery, their society was committed to emancipatory principles. It also

²⁸⁴ See *supra* note 207 and accompanying text.

²⁸⁵ See *supra* notes 201, 212-13, and accompanying text.

²⁸⁶ *Robin v. Hardaway*, 1 Jeff. 109, 114 (Va. Gen. Ct. 1772); see also *supra* text accompanying note 157 (quoting Mason's argument).

²⁸⁷ *Robin*, 1 Jeff. at 114.

²⁸⁸ The Virginia Declaration of Rights, reprinted in 1 THE PAPERS OF GEORGE MASON, 1725-1792, at 274, 274-91 (Robert A. Rutland ed., 1970).

²⁸⁹ See *Hudgins v. Wrights*, 11 Va. (1 Hen. & M.) 134, 134 (1806) (noting that the lower court's ruling relied "on the ground that freedom is the birth right of every human being"); see also *supra* notes 205-11 and accompanying text (discussing *Hudgins*).

rehabilitated the law from its messy but inevitable entanglement with the violence and cruelty of slavery. Lawyers could comfort themselves that the unsavory elements of old slave codes were the unfortunate but necessary holdovers of an archaic past. In the new state, the rule of law would be the protector of liberty, with lawyers and judges as its guardians. The judicial abolition of Indian slavery, in short, reinforced the self-image that Virginia's revolutionary legal elite had carefully crafted: humane, just, and committed to the expansion of freedom.

But these factors alone cannot fully explain the decision to free enslaved Natives. Virginia's legal elite had similar good intentions to end African slavery, but even measures that indirectly eroded the racial divisions in Virginian society—freeing the restrictions on manumission, for instance²⁹⁰—were met with hostility and quickly curtailed.²⁹¹ The consequences of the abolition of Indian slavery thus included not simply the minimal economic costs, but a potentially much greater threat—that the legal justification employed could be deployed against African slavery and the racial caste system. This prospect haunted the opponents of Indian emancipation, as Bland's rebuttal to Mason's natural law claims and the *Hudgins* court's rejection of Wythe's broad principles of freedom suggest.²⁹² The reformers' success in enacting the liberal principles of the Revolution therefore hinged on the distinction between Indian and African slavery. The statutory history, with its specific references to Indians, provided some restraint, but the seventeenth-century legislation on Africans was similarly confused and might yield dangerous results if scrutinized too closely.²⁹³ The shift in Virginians' racial attitudes toward Africans and Indians provided an essential social backstop for the abolition of Indian slavery by the courts.²⁹⁴ By demonstrating that Indians, unlike Africans, were entitled to some of the privileges whites enjoyed, the liberal policies toward Indian slavery could be made safe.

²⁹⁰ It is worth pointing out that allowing owners to manumit their slaves did not necessarily oppose slaveowners' economic interests. See MORRIS, *supra* note 24, at 398 (“[T]he law [facilitating emancipation] was also congenial to the notion that one ought to be able to do what one wished with one's own property, and that accommodated the ‘intention’ of the individual property owner in a liberal capitalist world.”).

²⁹¹ See *supra* notes 272-78 and accompanying text.

²⁹² See *supra* notes 158-63, 211-13 and accompanying text.

²⁹³ See *supra* Section I.B.

²⁹⁴ See *supra* notes 97-98 and accompanying text (discussing the societal development of race as a means by which Virginians differentiated between Indians and Africans).

C. Making Indians “White” and Free

Anglo-Virginians had long used race instrumentally to stigmatize enslaved Africans and Indians.²⁹⁵ In the late eighteenth century, though, the racial ideology hardened. Before that point, Virginians justified slavery, to the extent they gave the matter any thought, with reference to the just war doctrine and claimed that they simply availed themselves of the conflicts of others.²⁹⁶ This rationale reflected earlier consensus, but Virginia’s burgeoning legal class knew that the dominant eighteenth-century treatises, steeped in Enlightenment humanism, rejected the claim that war alone provided a right to hold other human beings as property.²⁹⁷ Instead, Virginians turned increasingly to biological racism, based on an emerging science of race that stressed innate physical differences between races.²⁹⁸ Virginia slave-owners came to rely on the assumption of black incapacity to justify their practices.²⁹⁹ Race alone provided sufficient reason for white freedom and black bondage.

This racial justification for slavery required coherent and easily classifiable categories; black and white had to map onto slave and free. Yet racial differences never remained as pure as white planters hoped. Racial mixing thus became a constant fear of late eighteenth-century whites, who sought to control it through restrictive legislation.³⁰⁰ Despite these harsh laws, though, interracial sex remained common, pos-

²⁹⁵ See generally MORGAN, *supra* note 20, at 330 (describing the conscious seveneenth-century development of racism by the white elite as a method “to lump [non-whites] together in a lowest common denominator of racist hatred and contempt”).

²⁹⁶ See *id.* at 297 (“But to establish slavery in Virginia it was not necessary to enslave anyone. Virginians had only to buy men who were already enslaved . . .”); see also *supra* notes 42, 81 and accompanying text (discussing justifications for slavery based on the principles of just wars).

²⁹⁷ See, e.g., 3 E. DE Vattel, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS* §§ 152, 201 (Charles G. Fenwick trans., Carnegie Inst. of Wash. 1916) (1758) (arguing that the law of nature does not provide a right to enslave conquered peoples perpetually).

²⁹⁸ See Jefferson, *supra* note 271, at 175-77 (explaining some of the perceived biological differences between blacks and whites).

²⁹⁹ See GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 538-39 (2009) (“[T]he South now needed to justify slavery. . . . [S]ome began to suggest that the characteristics of the African slaves might be innate and that in some basic sense they were designed for slavery.”).

³⁰⁰ See JAMES HUGO JOHNSTON, *RACE RELATIONS IN VIRGINIA & MISCEGENATION IN THE SOUTH, 1776–1860*, at 165-216 (1970) (detailing legislative efforts to control the intermixture of races in the colonial and antebellum periods).

ing legal as well as practical difficulties.³⁰¹ The status of offspring of the frequent rape by white masters of black slaves was resolved through redefinition of the word "Negro" to include mulattoes, who were now described as any person with at least "one-fourth part or more of Negro blood."³⁰² More problematic was sex between black men and white women, which triggered especially harsh penalties, including the possible enslavement of the offending woman.³⁰³ Their offspring, legally entitled to liberty, filled the dockets of colonial and post-Revolutionary courts with freedom suits, disproving planters' pious rhetoric about the separation of the races and the chastity of white women.

This racial *mélange* was made more complicated by the existence of *three* races in Virginia: whites, blacks, and Indians. The legal and popular lumping of Natives and blacks into a common racial underclass blurred the racial lines between blacks and Indians. As both runaway ads and the freedom suits proved, many slaves had some Indian blood in them.³⁰⁴ Moreover, slaves often ran away to the few remaining Indian reservations, where they intermingled with the inhabitants.³⁰⁵ These mixed categories challenged the ideology of coherent

³⁰¹ See *id.* at 215-16 ("These laws failed to accomplish their object and in unknown numbers of cases the blood of the proscribed races found its way into the veins of many white families."); see also MORGAN, *supra* note 20, at 336 ("It would appear that black men were competing all too successfully for white women, even in the face of the severe penalties. The result of such unions could be a blurring of the distinction between slave and free, black and white.").

³⁰² An Act Declaring What Persons Shall Be Deemed Mulattoes, 1778 Va. Acts 61. Note that, while the children of Indians had been included in the 1705 definition of mulatto, they were absent from this revision. Note also that, although *fewer* African descendants were now labeled as mulattoes than in 1705, the definition was in the form of blood, not ancestry. See *supra* notes 68-75 and accompanying text (detailing provisions of Virginia's slave code of 1705).

³⁰³ See JOHNSTON, *supra* note 300, at 175-79 (discussing colonial Virginia court cases prosecuting white women for their involvement with black men).

³⁰⁴ See, e.g., Cuszens, *supra* note 175 (seeking a mulatto slave who "says he is of the Breed"); Michaux, *supra* note 173 (seeking a runaway "mulatto" slave with an Indian father); Peter Pelham, Advertisement, *Committed to the Public Jail*, VA. GAZETTE, Sept. 24, 1772, at 2 (describing a captured slave who "by her Complexion would pass for one of the *Indian Race*"); see also Jefferson, *supra* note 271, at 146-47 (describing Virginian Indians who had "more negro than Indian blood in them").

³⁰⁵ See David Scott, Advertisement, *Run Away from the Subscriber*, VA. GAZETTE, Aug. 27, 1771, at 3 (seeking Frank, a slave whose master suspected him to have been "skulking about *Indian Town on Pamunkey* among the *Indians*, as in one of his former Trips he got himself a Wife amongst them"); Robert Walker, Advertisement, *Five Pounds Reward*, VA. GAZETTE, Nov. 26, 1772, at 2 (attempting to recover Dick, "a light Mulatto Slave" who was supposed to have fled to "the *Indians on Pamunkey*").

racial boundaries that imagined the division between free and slave as well defined and easily ascertainable.

The intellectual response to such ambiguities was to revise earlier tendencies to lump nonwhites together and instead exaggerate the “essential” divisions between races. The emerging doctrine of scientific racism provided a convenient rationale here as well, since it posited that Indians constituted a distinct and more advanced race than Africans.³⁰⁶ For Virginians, this reevaluation of Indians’ relative advancement was possible only because of the demographic transformation that occurred over the course of the eighteenth century. Indians, who had been so prominent in the seventeenth century, largely vanished from eastern Virginia: they died from disease or warfare, blended into the black slave underclass, or fled westward under pressure from expanding settlement.³⁰⁷ Only a handful of Indians remained on state-created reservations, where their supposed abandonment of their traditional culture and intermarriage with non-Natives compromised their identity in Anglo-Virginian eyes.³⁰⁸ This shift meant that, to whites, most Indians now lived beyond the frontier, their affairs a diplomatic issue that did not affect day-to-day life in the colony.³⁰⁹ Now that they no longer threatened the colony, Natives rose in the estima-

³⁰⁶ Carl Linnaeus, the famous eighteenth-century naturalist, for example, divided humanity into five different races. Europeans he described as “gentle, acute, inventive,” and “[g]overned by laws”; “Americans”—Indians—were “obstinate, content, free,” and “[r]egulated by customs”; Africans, though, were “crafty, indolent, negligent” and ruled “by caprice.” Carl von Linné, *The God-Given Order of Nature, in RACE AND THE ENLIGHTENMENT: A READER* 10, 13 (Emmanuel Chukwudi Eze ed., 1997).

³⁰⁷ See Wood, *supra* note 35, at 60 (recording the decline in the Indian population of Virginia east of the Appalachian Mountains from 2900 in 1685 to 200 by 1775, even as the white and black populations increased spectacularly).

³⁰⁸ See 2 BLACKSTONE’S COMMENTARIES, *supra* note 101, app. note H, at 66 (“The number of Indians and their descendants in Virginia, at present, is too small to require particular notice.”); Jefferson, *supra* note 271, at 142-52 (describing what he regarded as the remnants of Virginian Indian tribes, many of whom he believed were no longer “pure” and had “lost their language[s]”); Helen C. Rountree, *The Termination and Dispersal of Nottoway Indians of Virginia*, 95 VA. MAG. HIST. & BIOGRAPHY 193, 197-99 (1987) (describing the decrease in the Nottoway land base and population in the late eighteenth century). *But see* HELEN C. ROUNTREE, POCAHONTAS’S PEOPLE 162-86 (1990) (“Many Algonquian reservation groups faded away or were legislated away, but others hung onto their land and their Indian identity.”).

³⁰⁹ See, e.g., FRED ANDERSON, CRUCIBLE OF WAR: THE SEVEN YEARS’ WAR AND THE FATE OF EMPIRE IN BRITISH NORTH AMERICA, 1754-1766, at 11-21 (2000) (discussing Virginia’s eighteenth-century efforts at diplomacy with Indian tribes well beyond the borders of the colony).

tion of Anglo-Virginian intellectuals.³¹⁰ The elite resurrected the myth of the "noble savage," predicated on a romantic reconceptualization of essential Native characteristics.³¹¹ Indians' purported deficiencies—their unwillingness to assimilate and their apparent (and mythical) choice of extermination over slavery—were reconfigured as a demonstration of their commitment to liberty.³¹² One elite Virginian even went so far as to lament the rarity of white/Indian intermarriage, a striking contrast to the society's haunting fears of white/black mixing.³¹³

White Virginians' positive reevaluation of Natives depended on the invidious comparison to the Africans. The contrast between the two races received its strongest articulation in Jefferson's *Notes on the State of Virginia*, written at the end of the eighteenth century.³¹⁴ Jefferson praised the eloquence, fecundity, and courage of the Indians, while explaining away their supposed shortcomings by observing the similar primitiveness of European culture in ancient times.³¹⁵ By contrast, blacks' "physical distinctions" from whites were "fixed in nature" and proved "a difference of race."³¹⁶ Jefferson catalogued Africans' numerous supposed deficiencies—in intellect, emotions, and even scent—and emphasized that, unlike Indians, Africans had been exposed to culture, literature, and the arts but had failed to produce any worthy achievements of their own.³¹⁷ In drawing this contrast between

³¹⁰ See Nash, *supra* note 88, at 222 (noting that, as "the precariousness of the English position was eliminated as a significant factor in Anglo-Indian relations," colonists developed a more favorable image of Natives).

³¹¹ See BERNARD W. SHEEHAN, SEEDS OF EXTINCTION: JEFFERSONIAN PHILANTHROPY AND THE AMERICAN INDIAN 87-116 (1973) (discussing the development of a "noble savage" myth by Jefferson and his contemporaries); cf. Nash, *supra* note 88, at 222 (noting that, "[u]nlike later writers," southerners of an earlier era did not romanticize Indians, because they knew of Indian life "from firsthand experience as missionaries, provincial officials, and fur traders").

³¹² Consider in this context Mason's argument in *Robin*, emphasizing the Indians' freedom and independence from the colonists. See *supra* notes 153-63 and accompanying text.

³¹³ See ROBERT BEVERLEY, THE HISTORY AND PRESENT STATE OF VIRGINIA 38-39 (Louis B. Wright ed., Univ. N.C. Press 1947) (1705). Beverley was not the only eighteenth-century Virginian who advocated intermarriage between English and Indians. See, e.g., BROWN, *supra* note 58, at 243 (describing the appearance of a similar idea in the writings of William Byrd II, as well as in a postrevolutionary legislative proposal from Patrick Henry "encouraging white-Indian intermarriage"); Nash, *supra* note 88, at 227-28 (placing Beverley alongside several other Virginians who advocated intermarriage in the same era).

³¹⁴ Jefferson, *supra* note 271.

³¹⁵ *Id.* at 124-25.

³¹⁶ *Id.* at 175-76.

³¹⁷ *Id.* at 176-78. Jefferson was well aware of the existence of black literature, but he anticipated this counterexample by dismissing it. He wrote, for instance, that the

noble, if primitive, Indians and degraded Africans, Jefferson reflected the views of the era's educated classes and demonstrated how far Virginian racial attitudes had evolved from the seventeenth century. Far from lumping Natives and Africans together, eighteenth-century Virginians distinguished between what they now termed the two "races," invidiously comparing black incapacity with Indian achievement.³¹⁸

The rise of racial essentialism allowed white Virginians to separate Indian from African slavery. The enslavement of Indians became, in the words of Jefferson, "[a]n inhuman practice" that "once prevailed in this country,"³¹⁹ while Africans' alleged natural depravity was believed to justify their enslavement.³²⁰ Virginians now constructed a racial justification for the abolition of Indian slavery that would not affect the hundreds of thousands of Africans held in bondage. Although unimaginable a century earlier, when all people of color were lumped together into a single category, Virginia had evolved into a society in which Indian freedom did not imply African freedom.

In fact, just as black slavery had helped create white freedom, Indian freedom reinforced African bondage. Virginian planters could not undo a century and a half of racial mixing, but they could eliminate the antiquated and dissonant elements that now violated their racial ideology—namely, the presence of a race they no longer believed deserved slavery in the midst of a race that did. The judicial abolition of Indian slavery allowed whites to perpetuate the myth that blackness was a necessary component of servitude. In the process, they effaced the remnants of Virginia's complex triracial past and divided their society firmly into white and black. Although they never regarded Natives as their equals,³²¹ elite Virginians made Indians "white" to maintain their racial ideology and strengthen African enslavement.

black poet Phyllis Wheatley was the product of religion and snobbishly pronounced the "compositions published under her name" (raising doubts about their true authorship) as "below the dignity of criticism." *Id.* at 178.

³¹⁸ See GROSS, *supra* note 16, at 20-23 (summarizing the contrast drawn by eighteenth-century colonists between Africans, described as "members of a degraded, enslaved race," and Indians, depicted as "strange but admirable").

³¹⁹ Jefferson, *supra* note 271, at 122.

³²⁰ See *id.* at 175-81 (cataloguing the alleged inferiorities of blacks).

³²¹ See Nash, *supra* note 88, at 230 ("For the Indian the limited respect of European colonizers had come too late to halt the process of cultural change which would leave his image impaired and his power to resist further cultural and territorial aggrandizement fatally weakened.").

D. *The Enslaved Plaintiffs*

This confluence of statutes, revolutionary liberalism, and evolving racial ideology explains why Virginian lawyers and judges decided in the late eighteenth century that the descendants of Indian slaves deserved freedom. There was, however, a fourth and equally vital factor: the actions of the slaves themselves. Their voices do not survive in the archive unmediated. Instead, they are filtered through the lawyers who drafted their petitions and the judges who decided their cases. But their actions alone suggest their role in forcing the abolition of Indian slavery.

Many historians have interpreted slaves' actions as acts of resistance, and, like slave rebellions or the decision to run away, freedom suits demonstrated slaves' deep dissatisfaction with and hostility to the institution of slavery.³²² But claiming freedom in a court demonstrated a more complicated relationship to white dominance than outright rejection; such claims hint at the existence of slaves' own legal consciousness, distinct from that of the masters and the courts.

Slaves certainly were aware of legal change. Consider, for instance, the testimony presented in *Hudgins* that the "people in the neighborhood" told Hannah, the forbearer of the plaintiffs, that "if she would try for her freedom she would get it."³²³ A parallel situation occurred in a later case, in which "it was currently said, and believed in the neighbourhood" that Sibyl, the maternal ancestor of the plaintiffs, "was entitled to her freedom."³²⁴ In another instance, knowledge of the General Court's decision in *Robin* evidently quickly spread to the two runaways who supposedly fled to Williamsburg to file suit, along with the "multitude" of other slaves who claimed Indian descent after the ruling.³²⁵ These episodes highlight the informal informational networks that disseminated legal news to slaves and connected such slaves to each other and to the broader society.

The actions of these runaways further complicate the simple portrayal of slave resistance. Running away was itself illegal; the suggestion that slaves would then attempt to file a court claim suggests not opposition to the institution of slavery itself—since they might just as

³²² See generally GERALD W. MULLIN, FLIGHT AND REBELLION: SLAVE RESISTANCE IN EIGHTEENTH-CENTURY VIRGINIA 34-38 (1972) (describing the various methods of slave resistance in Virginia during this period).

³²³ *Hudgins v. Wrights*, 11 Va. (1 Hen. & M.) 134, 142 (1806) (opinion of Roane, J.) (internal quotation marks omitted).

³²⁴ *Gregory v. Baugh*, 25 Va. (4 Rand.) 611, 614 (1827) (opinion of Carr, J.).

³²⁵ See *supra* notes 173-77 and accompanying text.

easily have attempted to flee altogether, as most slaves did—but a belief in a legal right to freedom. Freedom suits resulted, then, from slaves' insistence that the law backed their claims, not those of their masters.³²⁶ The other snippets suggest that *Robin* and its progeny inspired a similar rights consciousness in other slaves. After Hannah's brother brought suit to recover his freedom, Hannah evidently "made an almost *continual claim* as to her right of freedom, insomuch that she was threatened to be whipped by her master for mentioning the subject."³²⁷ Her descendants, who quickly filed their petition when they were to be taken from the country,³²⁸ apparently also believed they enjoyed a legal right to freedom. In these instances, slaves did not resist the law slaveowners created and imposed upon them, but they modified it to craft their own legal understandings and justifications that cast them, and not their owners, as the lawful members of society.³²⁹

Yet slaves who claimed descent from Indians did not simply acquiesce in the hegemonic legal order; they helped create the legal doctrine that led to their freedom.³³⁰ The slaves who perceived the possibility of freedom forced judges to confront the issue of Indian slavery, filing lawsuit after lawsuit. Their persistence widened what had been a narrow legal exception into a general presumption for Indian freedom.³³¹

³²⁶ This situation is similar to the naïve monarchialism and rumors of royal emancipation that many scholars have observed preceded slave rebellions. The key parallel is that slaves believed that their actions, and not those of their masters, were legally justified. See STEVEN HAHN, *A NATION UNDER OUR FEET: BLACK POLITICAL STRUGGLES IN THE RURAL SOUTH FROM SLAVERY TO THE GREAT MIGRATION 127-59* (2003) (discussing the role of rumors in triggering slave resistance).

³²⁷ *Hudgins*, 11 Va. (1 Hen. & M.) at 142 (opinion of Roane, J.).

³²⁸ *Id.* at 134.

³²⁹ Note the similarities here to the justifications colonists employed in the lead-up to the American Revolution. See Jack P. Greene, *Law and the Origins of the American Revolution* ("Displaying a tough law-mindedness, [colonial spokesmen] had no doubt that the law . . . could be marshaled in their favor and, for that reason, never hesitated to make law the foundation for their view of the constitutional organization of the empire."), in 1 *THE CAMBRIDGE HISTORY OF LAW IN AMERICA*, *supra* note 81, at 447, 481.

³³⁰ Other scholars working in different contexts have argued that slaves played a similar role in constructing, rather than simply obeying or defying, the law. See Alejandro de la Fuente, *Slave Law and Claims-Making in Cuba: The Tannenbaum Debate Revisited*, 22 *LAW & HIST. REV.* 339, 342 (2004) ("I imply that it was the slaves, as they made claims and pressed for benefits, who gave concrete social meaning to the abstract rights regulated in the positive laws.").

³³¹ See Wallenstein, *supra* note 173, at 68-69 ("Emancipation . . . rather than resulting from initiatives taken by slaveholders large or small, had its roots in resistance by slaves against those masters. In these cases, emancipation resulted from actions taken not by owners but by their slaves *against* those owners.").

We have at last the full account of why a series of court cases in late-eighteenth-century Virginia judicially abolished Indian slavery, an institution that a century earlier had been nearly as prevalent and important as African slavery.³³² The emancipation of the descendants of Indian slaves resulted from the confluence of a contradictory and malleable statutory history, postrevolutionary emancipatory principles, shifting racial attitudes, and slaves' own legal consciousness and insistence upon their rights. The effect of this transformation extended beyond the immediate consequence of freedom for the plaintiffs and their descendants. The Virginian cases helped reconfigure the racial order and raised issues that continue to resound in debates over race and identity today.

IV. WHITE AND BLACK INDIANS AND THE ERASURE OF THE TRIRACIAL PAST

A. *Outward from Virginia*

The effects of Virginia's debate over the legality of Indian slavery soon spread beyond the state's borders. This expansion was in part a direct effect: as Virginia exported many of its slaves throughout the South, it exported its thorny legal issues as well. In *Vaughan v. Phebe*,³³³ for instance, a Tennessee slave imported from Virginia claimed descent from an Indian—ironically, a slave owned by Thomas Hardaway, the defendant in *Robin*. Plaintiff's counsel argued that the evidentiary law of Virginia—which would have allowed the plaintiff to prove her Indian descent by hearsay—should control or else “a person, as free as any of us, [would be] transformed to a slave by the wonderful magic of crossing a state line.”³³⁴ The court agreed with plaintiff's counsel. It noted that as a matter of substantive Virginia law, “all American Indians, and their descendants, are *prima facie* free” and held that Virginia's evidentiary law applied to the case before it.³³⁵ In short, as Virginia's slaves diffused throughout the South, the racial and legal

³³² See KELTON, *supra* note 33, at 125 (“Anecdotal evidence . . . suggests that on any given Virginia plantation African slaves were likely to be found working side by side with indigenous peoples.”); MORGAN, *supra* note 20, at 330 (describing the prevalence of Indian slaves in Virginian settlements).

³³³ 8 Tenn. (Mart. & Yer.) 5, 6-7, 16 (1827). The case overturned a jury verdict that had awarded an enslaved Indian her freedom, but it allowed the plaintiff to retry her case. *Id.* at 25-26.

³³⁴ *Id.* at 11.

³³⁵ *Id.* at 18 (citing *Hudgins v. Wrights*, 11 Va. (1 Hen & M.) 134, 139 (1806) (opinion of Tucker, J.)).

ideology that made Indians “as free as any of us [whites]” traveled with them. The legacy of *Robin*—literally, in this instance—moved westward and southward as new areas opened to slavery.

The influence of Virginia’s freedom cases also stemmed from the legal debate they occasioned in other states over the legality of Indian slavery. In some places, including New Jersey and Louisiana, courts explicitly rejected the lawyers’ claims that “proof of being an Indian is equivalent to proof of freedom,” even though the court admired the Virginian “doctrines” on Indian slavery because they were “liberal, and honourable to the respectable judges by whom they have been delivered.”³³⁶ Yet elsewhere, states either explicitly or implicitly followed Virginia’s lead and declared Indian slavery illegal.³³⁷ In 1847, the Supreme Court of South Carolina overturned a case in which the trial judge had instructed the jury that there were only two races in the state, whites and blacks,³³⁸ and held that as a matter of law and “human sentiment,” Indian slavery could no longer exist.³³⁹ The opinion depicted the “free born savage[s]” as a vanished people who “once . . . roamed independently through his own forest.”³⁴⁰ Holding the “sparse remnants of the red man” in bondage would be cruel.³⁴¹ As for the law, the court stressed the need for “comity with our sister States,” especially “the ‘ancient dominion’ of Virginia.”³⁴² This opinion underscores that the legacy of *Robin* persisted well into the nineteenth century and diffused throughout the courts of the antebellum United States, both directly through judicial precedent and indirectly through racial ideology.

The legal problem of deciding where Indians fit in a society divided between blacks and whites recurred outside the context of Indian slavery. A contemporaneous case from Ohio addressed the ques-

³³⁶ *State v. Van Waggoner*, 6 N.J.L. 374, 375-76 (1797); see also *Seville v. Chretien*, 5 Mart. (o.s.) 275, 287-91 (La. 1817) (holding that Indians enslaved during French rule could legally remain in slavery and citing Tucker’s discussion of Virginia as similar precedent in English America).

³³⁷ See, e.g., *Wilson v. Hinkley*, 1 Kirby 199, 201-02 (Conn. Super. Ct. 1787) (freeing an Indian held in slavery in Connecticut); *Marguerite v. Chouteau*, 3 Mo. 540, 552-54, 571-72 (1834) (citing Virginia’s Indian freedom suits as support for its holding that the descendant of a female Natchez Indian captured by the French was not legally a slave); see also Stephen Webre, *The Problem of Indian Slavery in Spanish Louisiana, 1769–1803*, 25 J. LA. HIST. ASS’N 117, 134 n.51 (1984) (noting inconsistent outcomes in Louisiana and Missouri courts on the question of Indian slavery).

³³⁸ *State v. Belmont*, 35 S.C.L. (4 Strob.) 445, 447-48, 452-53 (1850).

³³⁹ *Id.* at 452-53.

³⁴⁰ *Id.* at 452.

³⁴¹ *Id.*

³⁴² *Id.*

tion of whether the descendants of Indians could vote in a state that limited the franchise to whites.³⁴³ Since the state's constitution established only three racial categories—"whites, blacks, and mulattoes"³⁴⁴—the court, after noting that Indian offspring served as clerks of court and were members of the bar in Ohio, determined that "all nearer white than black, or of the grade between the mulattoes and the whites, were entitled to enjoy every political and social privilege of the white citizen."³⁴⁵ The Ohio Supreme Court thus faced the same problem that confronted the Virginian courts and resolved it in the same fashion. Although Indians were not whites' social equals, their ambiguous existence in between whites and blacks impelled courts to legally classify them as "whites" to uphold the racial caste system.

B. Robin's *Lasting Legacy*

Whiteness is so often asserted as a privilege in American society that it is easy to assume that the racial redefinition *Robin* began was a boon to Indians.³⁴⁶ But Indian "whiteness" was a limited and contingent right that did not imply racial equality with whites. It coexisted with the emerging conception among Anglo-Americans and Natives that Indians were the "red" members of a separate race.³⁴⁷ It also did

³⁴³ *Jeffries v. Ankeny*, 11 Ohio 372, 372-75 (1842) (granting an Indian defendant the right to vote).

³⁴⁴ *Id.* at 375.

³⁴⁵ *Id.*

³⁴⁶ With the rapid growth of whiteness studies, the emphasis on white privilege has grown. Some recent examples include JOE FEAGIN & EILEEN O'BRIEN, *WHITE MEN ON RACE* 67-95 (2003); ROBERT JENSEN, *THE HEART OF WHITENESS* 45-66 (2005); FRANCES E. KENDALL, *UNDERSTANDING WHITE PRIVILEGE* 61-78 (2006); SHANNON SULLIVAN, *REVEALING WHITENESS* 63-93 (2006). Recent historians of immigration have also argued that for many European immigrants, the assertion of "white" identity, often at the expense of racial minorities, provided the central route to acceptance in American society. See, e.g., NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* 2-3 (1995) (arguing that Irish American advanced socially largely because of their efforts to distance themselves from African Americans); DAVID R. ROEDIGER, *THE WAGES OF WHITENESS* 7-11 (1991) (arguing for the central role of racism in forging American working-class identity).

³⁴⁷ A good overview of the development of the view of Indians as a separate race marked by "red" skin can be found in Alden T. Vaughan, *From White Man to Redskin: Changing Anglo-American Perceptions of the American Indian*, 87 AM. HIST. REV. 917 (1982). Vaughan describes Anglo-Americans' views on Indians' race around the time of the Revolution as follows:

That the Indian was, in fact, inherently darker than the European, and that his pigmentation was the sign of a separate branch of mankind, had become axiomatic by the outbreak of the American Revolution. What remained for the Jeffersonian generation and its early nineteenth-century successors was to determine the Indians' proper color label and to reach a rough consensus on

not prevent centuries of race-based hostility that marginalized Indians as inferior.³⁴⁸ Indian “whiteness” was defined primarily as a negative: Indians were not black.

Even this limited grant of “whiteness” had pernicious long-term consequences for Indians. Although the ideology of *Robin* granted freedom to slaves who could prove Native ancestry, it also suggested that Indians, unlike blacks, were close enough to whites to be assimilable. Anglo-Americans enacted this dogma by attempting to erase a distinct Indian identity.³⁴⁹ The primary agent in this policy was the federal government, which sought for most of American history to force Indians to conform to the conventions of white culture.³⁵⁰ The results for tribes were disastrous, eroding sovereignty and cultural identity.

In the late eighteenth and early nineteenth centuries, this attempt consisted largely of the “Civilization Policy,” a concerted effort to turn tribes away from their traditional economies and convert them into sedentary farmers.³⁵¹ The 1887 Dawes Act³⁵² forcibly imposed this goal on Indians living on reservations by parceling communal tribal land into individual farming plots and selling off the “excess,” with the aim of

the implications of a racial status that was clearly inferior to the white man’s but also superior to the black’s.

Id. at 948.

Nancy Shoemaker presents a complimentary account that stresses Natives’ role in defining themselves as “red.” See Nancy Shoemaker, *How Indians Got to Be Red*, 102 AM. HIST. REV. 625, 643 (1997) (“By the end of the [eighteenth] century . . . the Cherokees described the origins of difference as being innate, the product of separate creations, and they spoke of skin color as if it were a meaningful index of difference.”).

³⁴⁸ See Berger, *supra* note 170, at 594-95 (describing instances of racism against American Indians).

³⁴⁹ See *id.* at 593-94 (noting that racism against Indians has rarely consisted of segregation, but that rather “[t]hroughout the most oppressive periods of Indian policy . . . policymakers continued to emphasize the need to encourage Indians to leave their tribes and assimilate with white society”).

³⁵⁰ The federal government assumed this role largely because of the considerable power the Constitution grants it to regulate Indian affairs. See U.S. CONST. art. I, § 8 (granting Congress the power “[t]o regulate Commerce . . . with the Indian Tribes”); see also *Lone Wolf v. Hitchcock*, 187 U.S. 553, 567-68 (1903) (affirming Congress’s plenary power over Indian tribes).

³⁵¹ See SHEEHAN, *supra* note 311, at 119-23 (describing the civilization program of the early nineteenth century); see also CLAUDIO SAUNT, A NEW ORDER OF THINGS: PROPERTY, POWER, AND THE TRANSFORMATION OF THE CREEK INDIANS, 1733-1816, at 143-62, 249-72 (1999) (charting the civilization policy and its effect on the Creeks, which included provoking a civil war).

³⁵² General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (codified as amended in scattered sections of 25 U.S.C.), *repealed in part by* Indian Land Consolidation Act Amendments of 2000, § 106(a)(1), Pub. L. No. 106-462, 114 Stat. 1991, 2007.

undermining tribal identity.³⁵³ This policy was reinforced by the common practice of forcing Indian children into boarding schools to "[k]ill the Indian . . . and save the man"³⁵⁴ and by a series of Supreme Court cases affirming federal plenary power to regulate tribes' internal affairs even in violation of treaties that granted tribal sovereignty.³⁵⁵ Although in the 1930s the Indian New Deal's restoration of Indian self-determination rectified some of the damage these nineteenth-century policies caused, after the Second World War the federal government returned to a policy of acculturation known as "Termination," by which it sought (largely unsuccessfully) to end its relationship with tribes and encouraged Indians to move to large cities in the hope that they would assimilate.³⁵⁶ Courts have recognized Indian rights to self-government and cultural autonomy only since the 1970s.³⁵⁷

It is not so easy to escape history, however. The legal definition of Indian status remains a contested judicial and political issue—no longer because it confers freedom from slavery, but because enrollment in a federally recognized tribe determines jurisdiction and taxation, confers the right to healthcare and other federal services, and occasionally provides substantial revenue from tribal income.³⁵⁸ *Robin's* legacy persists here, too. By defining Indians as equivalent to whites, *Robin* implied that Indians could not simultaneously be black. This separation of Natives and Africans made the possession of mul-

³⁵³ See Berger, *supra* note 170, at 629 (recounting lawmakers' aims to destroy tribal identification).

³⁵⁴ *Id.* at 629 (quoting Richard H. Pratt, *The Advantages of Mingling Indians with Whites*, in AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE "FRIENDS OF THE INDIAN," 1880–1900, at 260, 261 (Francis Paul Prucha ed., 1973)) (internal quotation marks omitted).

³⁵⁵ See *Lone Wolf*, 187 U.S. at 565 ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."); *United States v. Kagama*, 118 U.S. 375, 382-84 (1886) (affirming the congressional power to regulate crimes that Indians committed on the reservation since Indians were not sovereign). See generally BLUE CLARK, *LONE WOLF V. HITCHCOCK: TREATY RIGHTS AND INDIAN LAW AT THE END OF THE NINETEENTH CENTURY* 95-106 (1994) (discussing *Lone Wolf's* legacy).

³⁵⁶ See Berger, *supra* note 170, at 639-46.

³⁵⁷ See *id.* at 646-47.

³⁵⁸ See RENÉE ANN CRAMER, *CASH, COLOR, AND COLONIALISM: THE POLITICS OF TRIBAL ACKNOWLEDGMENT* 5-8 (2005) (discussing the meaning of "federal acknowledgment" or "federal recognition" (internal quotation marks omitted)); see also Alva C. Mather, *Old Promises: The Judiciary and the Future of Native American Federal Acknowledgment Litigation*, 151 U. PA. L. REV. 1827, 1832-37 (2002) (outlining the "three main advantages" of federal recognition: "acknowledgment of Indian sovereignty," "receipt of federal services and protections," and "prestige and honor").

multiple legal identities impossible, despite the existence of numerous intermixed groups of “black Indians” throughout the United States.³⁵⁹ Two present-day legal struggles—one in Virginia, the other in Oklahoma—underscore the significant implications this doctrine has had for modern determinations of Indianness.

1. The Virginia Tribes and the Ongoing Struggle for Federal Recognition

Although Virginia elites assumed after *Robin* that Natives had disappeared from their society,³⁶⁰ Indians hid in plain sight, subsumed into the free black population of the state.³⁶¹ Despite significant intermixing, the law maintained a strict division between Indians and blacks: only Natives with less than one-quarter African blood were considered “Indians,” while the rest were labeled “colored.”³⁶² The descendants of Indians even possessed court-issued certificates that testified to their Native ancestry and protected them from the numerous legal restrictions imposed upon free blacks.³⁶³ The need for such documents suggests that Virginian Indians appeared physically indistinguishable from their African-American neighbors in the eyes of whites. In the 1920s, eugenicists even concluded that the remnants of the Virginian tribes could not possibly be “true” Indians since they looked black.³⁶⁴ The response was a series of so-called Racial Integrity

³⁵⁹ See Ariela Gross, “Of Portuguese Origin”: *Litigating Identity and Citizenship Among the “Little Races” in Nineteenth-Century America*, 25 LAW & HIST. REV. 467, 468, 470 (2007) (noting that “up and down the eastern seaboard, there were clusters of people who shared African, European, and Indian ancestry” and arguing that “Indians were offered full civil rights in the U.S. polity only to the extent that they abandoned their self-governance and distanced themselves from people of African descent”).

³⁶⁰ See *supra* note 308 and accompanying text (describing white views that Natives had vanished from Virginia).

³⁶¹ See ROUNTREE, *supra* note 308, at 187-218 (describing the Powhatan Indians as “People Who Refused to Vanish”).

³⁶² See Act of Feb. 27, 1866, ch. 17, 1866 Va. Acts 84-85; see also FORBES, *supra* note 6, at 257-58 (describing this law and noting the unsuccessful attempts by Indians to “resist the ‘colored’ category”).

³⁶³ See, e.g., Norfolk County, Affidavits Certifying Individuals Are of Indian Ancestry and Are Not Free Negroes (1833-1860) (on file with Norfolk County Free Negro and Slave Records, Library of Virginia) (containing certifications by the county court that “upon satisfactory evidence of white persons produced before it” various individuals “are not free negroes or mulattoes, but are of Indian descent”).

³⁶⁴ The key official behind the movement, Virginia state registrar of the Bureau of Vital Statistics, Dr. Walter Ashby Plecker, “believed there were no real native-born Indians in Virginia and anybody claiming to be Indian had a mix of black blood.” Peter Hardin, *‘Documentary Genocide’—Families’ Surnames on Racial Hit List*, RICHMOND TIMES-DISPATCH, Mar. 5, 2000, at A1, available at 2000 WLNR 1181452; see also ROUNTREE,

Laws that, among other provisions, excluded anyone with more than one-sixteenth Indian blood from being "white,"³⁶⁵ and Indian identity was finally erased from Virginian records.³⁶⁶ Legally, all Virginians became either black or white. Virginia had at last completed the long process *Robin* began of dismantling Indians' ambiguous racial status; it had obliterated the state's triracial past from its laws.

Although repealed, the Racial Integrity Acts continue to have pernicious consequences for Virginia's Indians in the present.³⁶⁷ To achieve federal recognition, tribes must meet seven separate criteria, the first of which is proof of continuous existence since 1900.³⁶⁸ With all mention of them absent from the state records after 1924, Virginia's tribes could not achieve recognition through the standard method of petitioning the Office of Acknowledgment within the Bureau of Indian Affairs (BIA).³⁶⁹ The sole alternative is federal legislation, which

supra note 308, at 219-42 (describing the impact of the racial integrity movement on Virginia's Indians).

³⁶⁵ See, e.g., An Act to Preserve Racial Integrity, ch. 371, § 5, 1924 Va. Acts 534, 535; see also J. Douglas Smith, *The Campaign for Racial Purity and the Erosion of Paternalism in Virginia, 1922-1930: "Nominally White, Biologically Mixed, and Legally Negro,"* 68 J. S. HIST. 65, 78-106 (2002) (describing the enactment of these laws and their impact). The original proposal had classified anyone with even *less* Indian blood as "colored," but it had outraged elite Virginian families who traced their descent to the storied marriage of Pocahontas and John Rolfe. Richard B. Sherman, "*The Last Stand*": *The Fight for Racial Integrity in Virginia in the 1920s*, 54 J. S. HIST. 69, 77, 85-86.

³⁶⁶ Much of the opposition to the law stemmed precisely from the struggle over Indian classification, reinforcing the early struggles to separate Indian and black identities. One Pamunkey supposedly exclaimed, "I will tie a stone around my neck and jump in the James River rather than be classed as a Negro." Sherman, *supra* note 365, at 88 (internal quotation marks omitted).

³⁶⁷ These laws had a significant legal afterlife in another context as well: their antimiscegenation provisions were struck down in the seminal case of *Loving v. Virginia*, 388 U.S. 1 (1967). See Paul A. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to Loving v. Virginia*, 21 U.C. DAVIS L. REV. 421, 422-25 (1988) (discussing the role of eugenics in the original passage of the Racial Integrity Acts and the lead-up to *Loving*).

³⁶⁸ 25 C.F.R. § 83.7 (2010); see also Mather, *supra* note 358, at 1837-40 (describing in detail the process of obtaining federal recognition).

³⁶⁹ A 2008 press release highlighted this problem:

Virginia's unique history and its harsh policies of the past have created a barrier for Virginia's Native American Tribes to meet the BIA criteria . . . In 1924, Virginia passed the Racial Integrity Law, and the Virginia Bureau of Vital Statistics went so far as to eliminate an individual's identity as a Native American on many birth, death and marriage certificates. The elimination of racial identity records had a harmful impact on Virginia's tribes, when they began seeking Federal recognition.

Press Release, Sen. Jim Webb, Webb Testifies Before Senate Committee on Indian Affairs Hearing to Push for Passage of Bill to Federally Recognize Virginia's Indian Tri-

offers its own challenges. Congress is often reluctant to interfere in a matter it believes best left to the BIA,³⁷⁰ and the process of recognition often devolves into politicized struggles over Indian gaming and land rights.³⁷¹ Six Virginia tribes have sought federal recognition through congressional legislation since 2000, but they have only recently made progress after they accepted provisions barring casinos.³⁷² Still, recognition is not assured. A bill to grant federal recognition to the six tribes passed the House in both the 110th and the 111th congressional sessions.³⁷³ The Senate Indian Affairs Committee approved a Senate version of the House bill in the first session, but the version failed to pass before the recent adjournment.³⁷⁴ Given the support of Virginia's congressional delegation, it seems likely that the Virginia tribes will at last achieve federal recognition, albeit only after great difficulty. Their situation, however, is not unique; other tribes have faced similar hurdles to recognition because states classified them as "white" or "black" rather than as Indians. The Lumbee of North Carolina have petitioned repeatedly but unsuccessfully for federal recognition since 1870.³⁷⁵ The Shinnecock on Long Island finally received federal rec-

bes (Sept. 25, 2008), *available at* <http://webb.senate.gov/newsroom/pressreleases/2008-09-25-01.cfm> (quoting Senator Webb's prepared opening statement) (internal quotation marks omitted).

³⁷⁰ See, e.g., *id.* ("I understand the reluctance from Congress to grant any Native American tribe federal recognition through legislation rather than through the BIA administrative process. I have not taken this issue lightly, and agree in principle that Congress generally should not have to determine whether or not Native American tribes deserve federal recognition." (quoting Senator Webb's prepared opening statement) (internal quotation marks omitted)).

³⁷¹ See generally CRAMER, *supra* note 358, at 31-35, 37-65, 85-103 (describing the politics of tribal recognition, gaming, and land rights).

³⁷² See Caleb Soptelean, *Va. Tribes Nearing Recognition, Queen Comes to Peninsula for Healing Services*, EXAMINER.COM NORFOLK (June 7, 2009, 9:33 PM), <http://www.examiner.com/newport-news-conservative-in-norfolk/va-tribes-nearing-recognition-queen-comes-to-peninsula-for-healing-services> (describing the compromise between tribal officials and Congress, which resulted in the passing of the House bill).

³⁷³ Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2009, H.R. 1385, 111th Cong. (2009); Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2007, H.R. 1294, 110th Cong. (2007). For further discussion of this legislation, see Jim Nolan, *Va. Tribal Recognition Passes in U.S. House—Legislation for Formal Status for Six Tribes Now Heads to Senate, Where It Died Last Year*, RICHMOND TIMES-DISPATCH, June 4, 2009, at B-1, *available at* 2009 WLNR 11481516.

³⁷⁴ Indian Tribes of Virginia Federal Recognition Act of 2009, S. 1178, 111th Cong. (2009); Press Release, Sen. Jim Webb, Senate Indian Affairs Committee Approves Webb Indian Recognition Bill: Bill Now Primed for Final Vote on Senate Floor (Oct. 22, 2009), *available at* <http://webb.senate.gov/newsroom/pressreleases/2009-10-22-01.cfm>.

³⁷⁵ See *Lumbee Recognition Act: Hearing on S. 660 to Provide for the Acknowledgment of the Lumbee Tribe of North Carolina Before the S. Comm. on Indian Affairs*, 109th Cong. 28-29 (2006) (statement of Jack Campisi, Anthropologist Consultant, Lumbee Tribe of

ognition in 2010 after a long wait, in part because they appear African American to outsiders.³⁷⁶ In its insistence that Indians and blacks are separate peoples and its erasure of the triracial past, the doctrine of *Robin* continues to undermine tribes' ability to achieve federal recognition.

2. The Oklahoma Tribes and the Legal Battle over Tribal Membership

Tribes have also wrestled with the historical legacy of Indian "whiteness" in controversies over membership. Federally recognized tribes have the power to establish their own criteria for tribal membership.³⁷⁷ In 1975, the Cherokee Nation enacted a provision restricting membership to descendants of individuals labeled as Cherokee on the Dawes Commission Rolls, which were compiled in the 1890s to allot land under the Dawes Act.³⁷⁸ While such descent provisions are common among Indian tribes,³⁷⁹ in the Cherokee instance, this restriction had significant racial consequences. When federal officials compiled the Dawes Rolls, they subscribed to the notion that Indians could not be black, and vice versa.³⁸⁰ They therefore divided the Cherokee into those whom they considered actually "Indian," labeling them as Cherokee, and those they perceived as "black," whom they labeled freedmen.³⁸¹ Many of the freedmen had been slaves of the Cherokee and possessed significant amounts of Cherokee blood, but they were regarded as ineligible for Cherokee identity because of their racial identity.³⁸² By limiting tribal membership to those labeled Cherokee on these documents, the Cherokee Nation excluded most descendants of

North Carolina) (describing the history of the Lumbee in the context of their efforts to obtain recognition).

³⁷⁶ See Ariel Levy, *Reservations*, NEW YORKER, Dec. 13, 2010, at 40, 46-47 (noting that "[a]nxiety about being perceived as insufficiently Indian was one of the reasons that it took the Shinnecocks so long to gain federal recognition" and recounting that the Shinnecocks, viewed primarily as black, are still sometimes referred to locally as "monigs," meaning "more nigger than Indian").

³⁷⁷ See Mather, *supra* note 358, at 1833 ("Tribal sovereignty encompasses the ability to . . . determine membership . . ."). See generally General Allotment (Dawes) Act, *supra* note 352.

³⁷⁸ GROSS, *supra* note 16, at 170-71; see also *infra* note 380 and accompanying text (discussing the Dawes Rolls).

³⁷⁹ See Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1, 12 (2006) (discussing various tribes' treatment of "mixed-bloods").

³⁸⁰ See GROSS, *supra* note 16, at 153-60 (detailing the process by which the Dawes Commission formulated rolls for various tribes).

³⁸¹ Editorial, *An Unjust Expulsion*, N.Y. TIMES, Mar. 8, 2007, at A22; see also *id.* at 153 (describing this labeling process).

³⁸² GROSS, *supra* note 16, at 157.

Cherokee slaves, as well as many others who seemed to the 1890s classifiers to be more black than Indian.³⁸³

The question of Cherokee identity has become an ongoing legal battle. In 2006, the Cherokee Supreme Court overturned the restriction on membership and required the admission of the freedmen.³⁸⁴ Less than a year later, a popular referendum amended the nation's constitution to reinstate the restrictive membership language.³⁸⁵ The Cherokee district court, however, recently struck down that amendment.³⁸⁶ At the same time, the dispute has proceeded in federal court, where the plaintiffs have alleged that the restrictive membership requirements violate an 1866 treaty between the United States and the Cherokee, which guaranteed freedmen tribal membership.³⁸⁷ The latest ruling by the D.C. Circuit in 2008 addressed questions of tribal sovereignty and allowed the suit to continue, but the final outcome remains uncertain.³⁸⁸

Other tribes—notably the Seminole—have included similar restrictions that exclude “black” members, which have also resulted in litigation.³⁸⁹ Such conflicts are the product of history in a double

³⁸³ See *An Unjust Expulsion*, *supra* note 381 (noting that the distinction between the rolls effects de facto segregation).

³⁸⁴ *Allen v. Cherokee Nation Tribal Council*, 9 Okla. Trib. 255, 268 (Cherokee 2006).

³⁸⁵ See *Slave Descendants Lose Tribal Status*, N.Y. TIMES, Mar. 4, 2007, at 24 (reporting that “Cherokee Nation members voted . . . to revoke the tribal citizenship of an estimated 2,800 descendants of the people the Cherokee once owned as slaves”); see also Evelyn Nieves, *Putting to a Vote the Question ‘Who Is Cherokee?’*, N.Y. TIMES, Mar. 3, 2007, at A9 (discussing the vote on whether to amend the Cherokee Nation Constitution).

³⁸⁶ See *Nash v. Cherokee Nation Registrar*, No. 07-0040, at 3 (Cherokee Dist. Ct. Jan. 14, 2011) (order striking down the amendment), available at <http://www.cherokeecourts.org/DistrictCourt/FreedmenCase.aspx> (follow “58-order” hyperlink) (“The Cherokee Constitutional Amendment of March 3, 2007, by virtue of the provisions of the Treaty of 1866 and subsequent actions taken in furtherance thereof, are [sic] hereby determined to be void as a matter of law.”), stayed pending appeal, No. 07-0040 (Cherokee Dist. Ct. Feb. 25, 2011), available at <http://www.cherokeecourts.org/DistrictCourt/FreedmenCase.aspx> (follow “64-order” hyperlink).

³⁸⁷ See *An Unjust Expulsion*, *supra* note 381 (discussing the conflict with the “140-year-old federal treaty”).

³⁸⁸ See *Vann v. Kempthorne*, 534 F.3d 741, 749-50 (D.C. Cir. 2008) (upholding tribal sovereign immunity but declining to extend it to tribal officials, thus allowing the plaintiffs’ suit to proceed upon remand to the district court).

³⁸⁹ See *Davis v. United States*, 343 F.3d 1282, 1285, 1295-96 (10th Cir. 2003) (affirming the district court’s judgment denying relief against the federal government’s refusal to issue “Certificates of Degree of Indian Blood” to the plaintiffs, who descended from escaped African slaves who resided among the Seminoles); see also GROSS, *supra* note 16, at 170-75 (“In 1996, Sylvia Davis . . . brought suit . . . to protest the refusal to issue CDIB cards . . . to Black Seminoles.”). The Seminole decision is particularly ironic, given that the tribe was explicitly multiracial from its moment of creation as a splinter of the Creek Confederacy in the early nineteenth century and was well known

sense. Most obviously, they stem from the Dawes Rolls' assumption, grounded in the racial ideology of *Hudgins*, that Indians and Africans are distinct races with different essences.³⁹⁰ But the restrictions also suggest the adoption of a version of this ideology by Natives themselves. Although proponents of the membership restrictions have insisted that they seek only to preserve tribal rights to self-government,³⁹¹ there is significant evidence that racial animus was at least a partial motive for the restrictions.³⁹² Such hostility should be viewed in its historical context. From *Robin* onward, what few privileges Natives could secure—freedom from slavery, ability to vote, or the right of self-government—came by distancing themselves from African Americans in Anglo-American conceptions.³⁹³ Modern tribes' insistence on their separateness is understandable, given this history. Once employed by Virginia's courts to claim that Indian freedom did not threaten African slavery, Native "whiteness" now excludes Afro-Native descendants from the present-day privileges of Indian identity.

3. Indians, Equal Protection, and the Black/White Paradigm

The role of race in Indian law remains ambiguous. The Supreme Court determined in 1974 that legal classification of a person as an "Indian" is a political, not a racial, classification, based on tribal affiliation and the historic trust relationship between the United States and tribes.³⁹⁴ After this determination, Equal Protection Clause challenges to statutes granting special privileges to tribal members were dismissed.³⁹⁵ Such decisions protect tribes, since the strict scrutiny ap-

for harboring runaway slaves—a significant cause of the Seminole Wars of the period. See MARY FRANCES BERRY, *BLACK RESISTANCE/WHITE LAW* 35-37 (1971) (describing the integration of blacks into the Seminole tribe and calling the Seminole Wars a "black freedom movement").

³⁹⁰ See *supra* notes 204-18 and accompanying text.

³⁹¹ See CHEROKEE NATION, *WE ARE CHEROKEE* 3 (2007), available at <http://freedmen.chokeee.org/Portals/13/Docs/Diversity-Hi.pdf> ("[N]o right is more integral to a tribe's self-governance than its ability to establish its membership." (quoting *Nero v. Cherokee Nation of Okla.*, 892 F.2d 1457, 1463 (10th Cir. 1989))).

³⁹² See Berger, *supra* note 170, at 653 (noting a "powerful argument" that racism was a factor in the Cherokee action).

³⁹³ See Gross, *supra* note 359, at 511-12 ("In every case, when racially ambiguous groups [of partial Native descent] came before courts or legislatures, the state demanded that they exercise their claims to citizenship through the rejection of blackness. . . . Ultimately, the lesson of Jim Crow America was that citizenship meant whiteness, measured in distance from blackness.").

³⁹⁴ *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974).

³⁹⁵ See Ralph W. Johnson & E. Susan Crystal, *Indians and Equal Protection*, 54 WASH. L. REV. 587, 587-88 (1979) (describing the defeat of challenges to statutes that, inter

plied to racial classifications would prove fatal to the numerous rights and privileges that rest entirely on an individual's Indian status.³⁹⁶ Indian status continues to possess a racial component, however. Some tribes continue to use blood quantum to define membership—the same technique that Virginia lawmakers used in the eighteenth century to determine who was white, black, and mulatto.³⁹⁷ Federal common law and statutory definitions of who is an Indian often rely on ancestry or blood, as well as tribal membership.³⁹⁸

This ambiguity between political and racial identity perpetuates the confusion over Indian status long present in American history. Many scholars of Indian law have argued for the elimination of the racial component of Indian identity. They argue that the jurisprudence of race law, developed in the context of the black/white binary, does not apply to the unique historical and legal position of American Indians.³⁹⁹ They have also suggested that the Founders' understanding of Natives, enshrined in the Constitution, was as separate sovereigns outside the American polity with whom the federal government had a political relationship.⁴⁰⁰ The history presented in this Comment both

alia, limited the right to vend Indian art to members of an enrolled tribe and exempted Indians from fishing fees).

³⁹⁶ Cf. David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759, 760-61 (1991) (describing the worry that the racial component of Indian law violates Fifth Amendment due process).

³⁹⁷ See Spruhan, *supra* note 379, at 1-5.

³⁹⁸ See, e.g., Indian Reorganization Act, 25 U.S.C. § 479 (2006) (defining Indians to include both descendants of members of federally recognized tribes and "all other persons of one-half or more Indian blood"). For the purposes of federal criminal law, the controlling test to determine who is an Indian derives from *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846), which requires both recognition by a tribe or the federal government and some Indian blood. See *id.* at 572-73 (holding that "a white man who at a mature age is adopted in an Indian tribe does not thereby become an Indian"); see also *United States v. Szymiest*, 581 F.3d 759, 762 (8th Cir. 2009) (applying the "generally accepted" *Rogers* test to the defendant in the case), *cert denied*, 130 S. Ct. 2364 (2010) (mem.); Bethany R. Berger, "Power over This Unfortunate Race": *Race, Politics and Indian Law in United States v. Rogers*, 45 WM. & MARY L. REV. 1957, 1960-65 (2004) (providing context for *Rogers*).

³⁹⁹ See, e.g., Berger, *supra* note 170, at 592 ("[T]his paradigm [of black-white racism] . . . is particularly inadequate with respect to Indian-white [race] relations . . ."); Matthew L.M. Fletcher, *On Black Freedmen in Indian Country* (arguing for the inappropriateness of the application of "race law" to federal Indian law given the "divergent legal histories" of Natives and African Americans), in *AFRICAN AMERICAN CULTURE AND LEGAL DISCOURSE* 57, 60-67 (Lovalerie King & Richard Schur eds., 2009).

⁴⁰⁰ See Matthew L.M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 ST. JOHN'S L. REV. 153, 165-70 (2008) ("The statements of the Founders . . . made clear that the United States would deal with Indian affairs through *Indian tribes and not through individual Indians.*"). David Williams echoes this argument by de-

affirms and contextualizes these claims. As *Robin* and its progeny demonstrate, the black/white paradigm that has long dominated American understanding of race applies poorly to Natives precisely because its creation rested on the implicit erasure of an earlier tri-racial history; it could exist only when Indians had "disappeared" from Anglo-American society.⁴⁰¹ This amnesia also allowed the Founders to understand Indians primarily as sovereign tribes outside the government of the United States, since in their minds Indians behind the frontier had largely vanished.⁴⁰² Those who still claimed Indian identity within Euro-American settlements were either ignored or regarded, as Jefferson's descriptions of the Virginia tribes illustrate, as something less than "real" Indians because they no longer looked or acted as Indians should.⁴⁰³

scribing Indians on reservations as "partially 'foreign,' still partially beyond the reach of even the most fundamental federal law." Williams, *supra* note 396, at 762.

⁴⁰¹ One striking example of this argument appears in Justice Taney's opinion in *Dred Scott*, which was perhaps the most blatant effort to solidify the black/white divide into law. In arguing that blacks were not entitled to citizenship, Taney differentiated African descendants from what he termed "the Indian race." *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 403 (1857). Natives, he asserted, "formed no part of the colonial communities, and never amalgamated with them," and were therefore treated as foreign nationals, unlike blacks. *Id.* This imagined history, in which Indians lived only outside white society, thus once again reinforced the invidious comparison between Natives and Africans and allowed Taney to use the myth of the disappearing Indian to suppress African American claims to freedom.

⁴⁰² Virginia Indians played an important role in this founding-era shift toward regarding *all* Indians as outside Anglo-American society, a transformation evident in the transition from the Articles of the Confederation to the Constitution. The Articles granted the Continental Congress the power to regulate trade and manage "all affairs with the Indians," as long as they were "not members of any of the States" and "provided that the legislative right of any State within its own limits be not infringed or violated." ARTICLES OF CONFEDERATION of 1781 art. IX. The debates over the Articles reveal that the drafters had in mind limiting congressional power over "such Indians as are tributary to any State," since, in particular, "[s]everal Nations are tributary to Virginia." 6 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 1077 (Worthington Chauncey Ford ed., 1906). Thomas Jefferson then explained to the non-Virginians that this meant "Indians who live in the Colony" who were "subject to the laws." *Id.* at 1078. The new Constitution eliminated these qualifications and simply granted the federal government power to regulate commerce "with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. Madison regarded this change as a substantial improvement over the previous language since it eliminated the tricky question of which "Indians are to be deemed members of a State." THE FEDERALIST NO. 42, at 269 (James Madison) (Clinton Rossiter ed., 1961). But while it was undoubtedly clearer law, the rewrite also made Indian tribes quasi-"foreign," U.S. CONST. art. I, § 8, cl. 3, thereby effacing the earlier, more complicated history enshrined in the Articles of Confederation.

⁴⁰³ See Jefferson, *supra* note 271, at 142-52 (describing what Jefferson believed were the "last vestiges" of Indian culture in Virginia, and noting that several tribes had "more negro than Indian blood in them").

Modern scholars reject the trope of the disappearing Indian, but they have embraced this version of the history of Indians as quasi-outsiders because it serves important political and legal ends. Emphasizing Natives' separateness from the political and legal institutions of the United States provides a valuable counternarrative to thwart ongoing efforts to reduce tribal sovereignty and self-governance.⁴⁰⁴ Yet there are costs to following the path of *Robin* and ignoring the triracial past, in which the descendants of American Indians—often oppressed, marginalized, or enslaved—*did* live within Anglo-American society. Assuming Natives' outsider status plays into longstanding views of Indians as peoples of the past who are still not truly part of American society.⁴⁰⁵ Most American Indians no longer live on reservations,⁴⁰⁶ but the fixed sense that Natives have *always* lived apart means that for most twenty-first-century Americans, as for the jurists of eighteenth-century Virginia, the Indians who live among them are invisible.

Depicting the status of American Indians as *sui generis* also blinds us to the broader commonalities between Natives and other minorities. Placed in perspective, the complex history of Indians and their racial status before the law presented here is actually quite typical. After all, Natives were not the only group in a legally nebulous area be-

⁴⁰⁴ For scholarly commentary arguing that the courts, particularly the Supreme Court, have been hostile to Native sovereignty in recent years, see ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* 135-96 (2005), and Berger, *supra* note 170, at 647-48.

⁴⁰⁵ See PHILIP J. DELORIA, *INDIANS IN UNEXPECTED PLACES* 230-31 (2004) (noting historical examples of American Indians who "leapt quickly into modernity" and participated in American popular culture, thus confounding white expectations of Indian primitivism which "continue to be mobilized today to structure and constrain the social, political, and economic lives of Indian people"). An example of such a reading of Indian identity occurred in the recent case *Pro-Football, Inc. v. Harjo*, in which a federal district court judge found in an action challenging the trademark of the Washington Redskins that insufficient evidence had established that "redskin" was disparaging to Native Americans. 284 F. Supp. 2d 96, 99, 136-37 (D.D.C. 2003). Leaving aside the merit of this conclusion, it is difficult to imagine that similar race-based epithets would be deemed acceptable for groups considered to be an integral part of modern American society. See DELORIA, *supra*, at 225 ("War chants . . . underpin the many ways non-Indian Americans blithely ignore the requests, opinions, and assertions of Native people. ('The tomahawk chop and the mascot are meant to honor you [Indians]. We [whites] *don't care* if you don't feel honored.')").

⁴⁰⁶ See STELLA U. OGUNWOLE, U.S. CENSUS BUREAU, *WE THE PEOPLE: AMERICAN INDIANS AND ALASKAN NATIVES IN THE UNITED STATES* 14 (2006), available at <http://www.census.gov/prod/2006pubs/censr-28.pdf> (reporting that sixty-four percent of those identified as Indians on the 2000 Census lived outside "tribal areas").

tween black and white. Hispanics,⁴⁰⁷ Asians,⁴⁰⁸ and even Irish, Italian, and Jewish immigrants⁴⁰⁹ have had similar experiences. These parallels reinforce a point legal scholars have increasingly emphasized—the diverse nature of American society and the obsolescence of the black/white legal paradigm.⁴¹⁰ The history presented here shows that the legal division of society into black and white has always been artificial: courts and legislatures *manufactured* this separation and imposed it on a much more complicated racial reality. The recognition that Indians played as fundamental a role in the construction of early American racial ideology as Africans did helps us to recognize that modern American diversity and its legal challenges is actually one of the country's oldest historical legacies.

The lessons of this history are complex and do not lend themselves readily to policy pronouncements for the future. But these examples of the present-day impact of *Robin* do suggest several conclusions. The first is the lasting damage done by the racial ideology that insists that a person has but a single racial identity—that Indians cannot also be black, for instance. In 2000, the U.S. Census allowed participants to check off more than one box for "race" for the first time, but officials continued to assign respondents to a single race.⁴¹¹ As the Virginia and Oklahoma litigation suggests, such classifications can have a long and pernicious afterlife. The law should reflect the ways people self-identify more closely and prevent official but ill-informed categorizations from hardening into firm, judicially enforced boundaries. The second conclusion concerns judicial application of the Equal Protection Clause.⁴¹² The vast literature on this constitutional provision and its application to issues of race and discrimination is

⁴⁰⁷ See Ariela J. Gross, Comment, *Texas Mexicans and the Politics of Whiteness*, 21 LAW & HIST. REV. 195, 305 (2003) (noting the "second-class" treatment of Mexican American schoolchildren and criminal defendants by the Texas courts).

⁴⁰⁸ See Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241, 1267 (1993) ("[C]ritical race scholarship tends to focus on the black-white racial paradigm, excluding Asian Americans and other racial minorities.").

⁴⁰⁹ See ROEDIGER, *supra* note 346, at 13-14 (noting that immigrants like the Irish distinguished themselves from blacks, "even as [their] 'whiteness' was under dispute").

⁴¹⁰ See Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CALIF. L. REV. 1213, 1215 (1997) (arguing that the paradigm "operates to exclude Latinos/as from . . . racial discourse" and "perpetuate[s] . . . negative stereotypes" (footnote omitted)).

⁴¹¹ See Naomi Zack, *American Mixed Race: The U.S. 2000 Census and Related Issues*, 17 HARV. BLACKLETTER L.J. 33, 36-37 (2001) (noting that Clinton Administration officials decided to assign mixed-race respondents to a catchall "minority" category).

⁴¹² U.S. CONST. amend. XIV, § 1.

beyond the scope of this Comment. But it is worth considering one implication of the long history presented here. One key criterion courts have applied in determining whether a law employs a “suspect classification” is whether the class has faced a history of discrimination, the paradigmatic instance being African Americans’ experiences with slavery and segregation.⁴¹³ This perspective suggests that the more easily a group’s past can be analogized to that of blacks, the more deserving that group is of protection. But the experience of Indians suggests that being declared “white”—and being subjected to forced assimilation—could constitute just as profound an experience of discrimination. Many minorities in American history—most notably, given recent legal struggles, gay men and women⁴¹⁴—have faced profound persecution that pressured them not to separate from mainstream society, but to conform to it.

CONCLUSION

None of the participants in *Robin v. Hardaway* knew they were transforming the legal ideology of race in eighteenth-century Virginia. The plaintiffs saw only a potential avenue toward freedom; the judges saw only an intricate legal question that required careful statutory interpretation. Only when set against the larger context of what came before and after does it become clear that *Robin* marked an important transition. It would be too much to claim that *Robin* alone caused the shift from a legally triracial to a biracial society. The course of history was never that straightforward. Freedom came to enslaved descendants of Natives only after the Revolution spread an emancipatory ideology, a demographic shift triggered the reevaluation of whites’ conceptions of Indians, and the enslaved plaintiffs’ own persistence forced Virginia’s legal elite repeatedly to confront the issue.

Yet once Virginia had judicially abolished Indian slavery, its precedent spread quickly to other states. Virginia’s actions were thus emblematic of a moment of larger racial transition, one that cast Indians as simultaneously assimilable and vanishing and African Americans as inherently inferior. Neither of these racial definitions proved advantageous for these groups. African Americans faced years of en-

⁴¹³ See *Frontiero v. Richardson*, 411 U.S. 677, 683-86 (1973) (plurality opinion) (outlining a history of discrimination as a key factor in determining whether a classification is suspect).

⁴¹⁴ GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKINGS OF THE GAY MALE WORLD, 1890–1940*, at 12-13 (1994) (noting that most gay men historically conformed to conventional conceptions of masculinity).

slavement and segregation, but Indians—selectively granted the “privileges” of whiteness—endured insistent and violent efforts to recast them as Anglo-Americans and redescription as “fake” or “black” Indians when they failed to comply.

The twenty-first-century United States is very different from eighteenth-century Virginia, but it retains traces of *Robin's* legacy. By separating Indians from blacks, a stubbornly persistent racial ideology still confounds tribal efforts to achieve federal recognition and mixed-race struggles to achieve tribal membership. It has also helped to reify the legal separation between black and white and to obliterate a more complex colonial past.

One of the most striking parallels between then and now, though, is indirect. This Comment has argued that law and society are interwoven: the abolition of Indian slavery was impossible without the broad shift in white Virginians' racial ideals. Moreover, the judicial change chronicled here did not come simply from the top down. Virginia's highest judges decided that the law should change, but it was the slaves who forced the judges' hands by insisting upon their legal rights and continually bringing freedom suits before the courts. In this historical case, at least, it was the lowliest members of society who helped create and define judicial doctrine. Twenty-first-century Americans are participating in a similar moment of racial reconfiguration. For the past sixty years, society and the courts have sought to undo the prejudices of three-and-a-half centuries, even as American society has become more diverse than ever. Race and racial prejudice have not vanished from America or from our legal system, but *Robin's* example suggests that persistent struggle by those on the margins can and did effect dramatic change.