It may be used, but not owned. It gives itself in response to love and tending, offers its seasonal flowering and fruiting. But we are tenants and not possessors, lovers and not masters. Cross Creek belongs to the wind and the rain, to the sun and the seasons, to the cosmic secrecy of seed, and beyond all, to time.[97]

97 Marjorie Kinnan Rawlings, *Cross Creek* (1996) 380.

Christopher M Curtis[*]

PARTUS SEQUITUR VENTREM:

Slavery, Property Rights, and the Language of Republicanism in Virginia's House of Delegates, 1831-1832

INTRODUCTION

In 1831, Virginia was the largest slaveholding-state in the Union. While the largest portion of the slave population was involved in the production or distribution of tobacco, the institution extended far beyond the tobacco fields. Virginians in every region of the state benefited, either directly or indirectly, from the produce of slave labour. But in August of that year, Nat Turner's insurrection in Southampton County shattered public confidence, undermined the myth of the 'contented slave', and generated open public debate about the future of slavery.[1] Public discussion culminated that winter in the House of Delegates where Thomas Jefferson Randolph, the grandson of his namesake, proposed a plan of emancipation *post nati*. After weeks of intense debate and political maneuvering, however,

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1 U.S. Census Office, *Fifth Census*, Tables [10]-[13]. The 1830 census listed Virginia's slave population at 469, 755. This was 38.7 percent of the state's total population. On slavery in nineteenth-century Virginia see: Joseph Clarke Robert, *Tobacco Kingdom: Plantation, Market, and Factory in Virginia and North Carolina, 1800-1860* (1938); Robert McColley, *Slavery in Jeffersonian Virginia* (Second edition, 1964); Ronald L Lewis, *Coal, Iron, and Slaves: Industrial Slavery in Maryland and Virginia, 1715-1865* (1979); Charles B Dew, *Bond of Iron: Master and Slave at Buffalo Forge* (1994); and Lynda J Morgan, *Emancipation in Virginia's Tobacco Belt, 1850-1870* (1992). On Nat Turner's insurrection: *The Confessions of Nat Turner* (1832); Hebert Aptheker, *Nat Turner's Slave Rebellion* (1966); and Stephen B Oates, *The Fires of Jubilee* (1976).

emancipationists failed to persuade a majority of delegates to abandon their traditional commitments to the sanctity of private property and thus failed to effect any antislavery legislation. In the end, the indecisive legislature passed a resolution that expressed a desire for the eventual removal of the state's entire black population but declared any 'action for the removal of slaves' inexpedient.[2] Accordingly, some have viewed the debate as the final opportunity for Virginia to end slavery on its own terms and have considered the event a turning point in the history of the slave South.[3]

Yet despite its historical significance, legal and intellectual historians have neglected the 1832 debate when assessing the transformation in nineteenth-

2 In the interests of clarity and brevity, extensive commentary on the legislative maneuvering is not made here. These aspects are more thoroughly treated in my MA thesis, 'Can These be the Sons of Their Fathers? The Defense of Slavery in Virginia, 1831-1832' (1997). See also Alison Goodyear Freehling, *Drift Toward Dissolution: The Virginia Slavery Debate of 1831-1832* (1982); and Joseph Clarke Robert, *Road From Monticello* (1941). The proslavery motion voted upon was the Select Committee report and the antislavery motion was the Preston Amendment to the report. The Bryce Compromise motion was approved by a vote of 65 delegates in favor and 58 opposed. Of course by upholding the *status quo ante* the compromise was a victory for the proslavery faction. Still, the House of Delegates managed to pass a bill appropriating money for the removal of Virginia's free blacks. The bill reflected the colonization proposal detailed by William Brodnax (see discussion below) during the debate and would have appropriated money for the next two years but it failed to get through the Senate. Not surprisingly, delegates were more successful in passing legislation that restricted the activities of free blacks and slaves. Bills were passed restricting black Virginians from attending nighttime religious assemblies and black preachers were outlawed from practicing. The state militia was strengthened as well and authorized to conduct nightly patrols throughout the eastern counties.

3 Joseph Clarke Robert, *The Road From Monticello* (1941); Theodore M. Whitfield, *Slavery Agitation in Virginia, 1829-1832* (1930); William Sumner Jenkins, *Proslavery Thought in the Old South* (1935); Clemont Eaton, *Freedom of Thought in the Old South* (1940) and Charles Ambler, *Sectionalism in Virginia from 1776 to 1861* (1901). In recent decades, revisionist scholars have rejected this view of the 1832 debate as a turning point or watershed. The major work of this school is Alision Goodyear Freehling, *Drift Toward Dissolution: The 1832 Virginia Slavery Debate* (1982); but for important qualifications and amplifications see as well: William Shade, *Democratizing the Old Dominion* (1997); William Freehling, *The Road to Dissunion: Volume I: Seccessionist at Bay, 1776-1854* (1990); Dickson Bruce, *Rhetoric of Conservatism* (1982); Larry Tise, *Proslavery: A History of the Defense of Slavery in America, 1701-1840* (1987) and Douglas Egerton, *Gabriel's Rebellion: The Virginia Slave Conspiracies of 1800 and 1802* (1993).

century conceptions of property.[4] This article will demonstrate that the accounts of the debate, as much as more commonly studied judicial proceedings and legal pamphlets, afford historians a rare opportunity to examine explicit statements about eminent domain, just compensation, and the origin and nature of property rights in a modern slave society. The intrinsic relation between slavery and property, not surprisingly, however, did attract the attention of contemporary legal commentators. In summarizing the events of the legislative session, eminent jurist and social theorist, Benjamin Watkins Leigh, noted that the recent effort to abolish slavery had constituted the beginnings of a direct attack upon the very principal of property itself. And he warned that this assault, if successful, signaled the end of republican government in Virginia.[5] Historians of the slavery debate have struggled to reconcile their interpretations with Leigh's contemporary analysis and, in the end, largely discounted his critique as a mere proslavery jeremiad. I will argue, however, a close examination of the speeches delivered during the legislative debate supports Leigh's basic premise that an effort was being made to re-conceptualize property. During the legislative debate, antislavery delegates rejected the traditional republican conception of property upon which government in Virginia had been founded, and instead, advanced a strict positivist idea of property as a mere social convention. This instrumentalist conception of property expressed in the antislavery rhetoric suggests a movement away from the fundamental tenets of Jeffersonian republicanism and signaled the embrace of an alternative liberal vision where the constitutive principle of political equality trumped that of civil liberty.[6]

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4 Gregory Alexander, *Commodity & Propriety: Competing Visions of Property in American Legal Thought, 1776-1970* (1997); William Novak, *The People's Welfare: Law & Regulation in Nineteenth-Century America* (1996); William B Scott, *In Pursuit of Happiness: American Conceptions of Property from the Seventeenth to the Twentieth Century* (1977); and Morton Horwitz, *The Transformation of American Law*, 1780-1860 (1977).

5 Benjamin Watkins Leigh, *A Letter From Appomattox to the People of Virginia* (1832). This pamphlet was a publication of two letters to the editor written by Leigh to the *Richmond Enquirer* and printed on February 4 and 28, 1832. The letter of the 28th was a response to two rebuttals to his initial letter published in the February 16 edition. Bruce, *Rhetoric* offered a much less eccentric characterization of Leigh.

6 On Jeffersonian republicanism see Lance Banning, *The Jeffersonian Persuasion: Evolution of a Party Ideology* (1978); and Robert E Shalhope, 'Thomas

IDEAS OF PROPERTY AND SLAVERY IN THE EARLY REPUBLIC

Prior to the 1830s, the sanctification of private property rights served as the bulwark of the Virginia Republic. In fashioning an independent Commonwealth, Virginia's revolutionaries designed a constitution and set of laws that protected property from the encroachment of arbitrary power and thus safeguarded their neo-roman conception of liberty, which equated liberty with freedom from dependence.[7] Necessarily at the center of this neo-roman theory of liberty was an understanding of property not only as sufficiently productive to ensure independent subsistence but also as sufficiently protected from arbitrary legislation. The latter assumed the ownership of property was antecedent to the formation of government. In Revolutionary Virginia, this hegemonic understanding of property was manifested most expressly through the legal concept of the freehold. A freehold was a landed estate of real property, possessing characteristics of immobility and indeterminate duration, that was held in free tenure, and thus was alienable, for the life of the tenant. Within the historical context of the Virginia tobacco economy, the freehold encompassed, indeed, perhaps even necessitated, the ownership of property in slaves. Accordingly slaves, despite their statutory definition as chattel property, were understood to possess qualities of real property as well—a consideration that lent a persistent ambiguity to their legal status as property. Particularly in cases dealing with maintaining the productive capacity of freeholds for widows and minor children, slaves were associated with real property concerns.[8]

Jefferson's Republicanism and Antebellum Southern Thought' (1976) *Journal of Southern History* 529-536. For classical republicanism in general see J G A Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (1975); Gordon Wood, *The Creation of the American Republic, 1776-1787* (1969); Bernard Bailyn, *The Ideological Origins of the American Revolution* (1967); *cf.* Paul Rahe, *Republics Ancient and Modern, Inventions of Prudence: Constituting the American Regime* (1994) and Drew

7 McCoy, *The Elusive Republic: Political Economy in Jeffersonian America* (1980). Virginia Constitution of 1776 in William W. Henning (ed), *Virginia Statutes at Large, 1619-1792* (1823) 9: 109-110. On the neo-roman theory of liberty see

8 Quentin Skinner, *Liberty Before Liberalism* (1998).

See, *Rucker v Gilbert*, 3 Leigh 8 (1831), *Boyd v Cook*, 3 Leigh 32 (1831), *Wallace v Dold*, 3 Leigh 258 (1831), and *Summers v Bean* 13 Grattan 404 (1856) for examples.

During the constitution-making process, an ideological commitment to the freehold was expressed most clearly in making it the determining factor in qualifications for suffrage and representation. In 1776, Virginians defined a freeholder as someone possessing at least one hundred acres of land and this status entitled them to citizenship. During the ensuing decade, the freehold qualification was diminished to fifty acres and was coupled with legislation that, as part of an effort to reform property laws, abolished entail and primogeniture in real property, granted individual slaveholders the power of manumission, and abolished entail in slaves. This reformation of property law reflected an attempt to remove the feudal vestiges that persisted (and perhaps expanded) in the property relations of the late colonial period. It did so by expanding the legal rights of *dominium* and entrenching a legal basis of absolute property in a concerted effort to ensure republican government.[9]

In spirit and design then, a strong Harringtonian influence prevailed upon the ideological foundations of the Virginia Republic. Harrington's classic treatise, *The Commonwealth of Oceana*, had historicized specific arrangements of property relations and, influenced by civic humanist political thought, had assessed the property relations of seventeenth-century England in order to demonstrate the necessity of a property-based

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9 The best discussion of slaves as real property in found in Thomas D Morris, *Southern Slavery and the Law, 1619-1860* (1996) 61-80. See also Mark Tushnet, *The American Law of Slavery, 1810-1860: Considerations of Humanity and Interest* (1981) 158-169; David Brion Davis, *The Problem of Slavery in Western Culture* (1966) 248-251; and Jonathan A Bush, 'The British Constitution and the Creation of American Slavery' in Paul Finkleman (ed), *Slavery and the Law* (1997) 380.

Holly Brewer, "Entailing Aristocracy in Colonial Virginia: 'Ancient Feudal Restraints' and Revolutionary Reform" (1997) *William & Mary Quarterly*, Third Series 307-346. The notion of absolute property is somewhat out of vogue today. William Novak has described the concept as a myth that never actually existed in America. I suggest that it is significant that, even in Roman society where *dominium* was such that a patriarch could kill members of his household with impunity, his right was still circumscribed by the laws of the state. Thus to relegate the concept of absolute property or *dominium* to obscurity because it never existed in pure form seems to me to reduce by definition an otherwise useful theoretical category. Here I consider absolute property as that property that an individual could alienate freely and thus was situated well within the private realm. Richard Pipes, *Property and Freedom* (1999), 11 and Peter Stein, *Roman Law in European History* (1999).

Commonwealth.[10] Virginia's constitution-making exercise in 1776 might be said to have reflected a similar effort to bring the 'balance of government' into correspondence with the 'balance of property.' And the emphasis upon the freehold as the foundation for liberty supports this view and situates the formation of the Commonwealth squarely within the tradition of civic humanist political thought. But if the spirit of the republic was attributable to Harrington, the institutional and legal mechanisms implemented to ensure the sanctification of property were purely Lockean. The freehold, as the concept manifested itself in revolutionary Virginia, was premised upon an understanding that property originated in correspondence with natural law, from individual action and not from the state. Property rights were thus pre-political in their nature and, in fact, served as the catalyst for the formation of government. Governments were instituted by social contract principally to ensure these vested rights. If, by accident or necessity, government assumed or destroyed the vested property of its citizens then, both the law and common sense required compensation for such action. Both the 1776 Constitution and the corresponding Declaration of Rights sanctified property rights in this Lockean fashion.[11]

Evidence of this synthesis between Harrington and Locke's ideas of property into the legal foundation of Virginia's liberal Commonwealth can be seen clearly in two different, albeit intrinsically related sources. In the first place, this liberal republican conception of property was disseminated through Blackstone's *Commentaries on the Laws of England*, a text which, by the early nineteenth century, was standard reading for admittance to Virginia's bar. Blackstone's emphasis on issues of real property appealed to a landed ruling class that had established the freehold as a basis for citizenship. Furthermore, and perhaps most importantly, Blackstone

10 Pocock, *Machiavellian Moment* 383-400; *cf.* C B Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (1962) 160-193.

11 John Locke, *Two Treatises on Government* Peter Laslett (ed), (1960). *Cf.* Macpherson, 194-262; James Tully, *A Discourse on Property: John Locke and his Adversaries* (1980); Thomas L Pangle, *The Spirit of Modern Republicanism: the Moral Vision of the American Founders and the Philosophy of Locke* (1988); Gopal Sreenivasan, *The Limits of Lockean Rights in Property* (1995); and Laura Brace, *The Idea of Property in Seventeenth-Century England: Tithes and the Individual* (1998). Both Tully and Pangle discuss the compatibility of Lockean property theory with Republican political thought.

reconciled in law the theoretical difficulties of a Lockean natural right to property, which was the modern basis for *dominium*, with the practical realities of land titles existing through deed, inheritance and custom. He did so by suggesting that civil laws could and should reflect the law of nature.[12] Expressions of a liberal - republican synthesis also can be found in the writings of Thomas Jefferson, especially in his ideas on property and republican government. Jefferson's most often cited dictum on property, 'the earth belongs in usufruct to the living' has received its fair share of attention from many eminent Jeffersonian scholars. Both Lance Banning and Herbert Sloan have identified this one passage as the first principle of Jefferson's theory of property and thus 'a key text in the Jefferson canon.'[13] Indeed, this specific passage reveals much about Jefferson's ideas of property especially when understood in the context of Revolutionary France in which it was written.[14] But it must also be understood in conjunction with his efforts to abolish primogeniture and entail and, most especially, with Jefferson's life-long commitment to compensatory payments for slaveholders. As noted already, it was exceptionally difficult for Virginia's gentry to separate issues of land and labor and the two must be considered as intrinsically entwined in any effort to attribute to Jefferson a specific

12 William Blackstone, *Commentaries on the Laws of England*, a Facsimile of the First Edition of 1765-1769 with an Introduction by A W Brian Simpson (1979); Richard Schlatter, *Private Property: The History of an Idea* (1951). On Blackstone's influence on Virginia's legal culture see Richard Beale Davis, *Intellectual Life in Jefferson's Virginia, 1790-1830* (1964); A G Roeber, *Faithful Magistrates and Republican Lawyers: Creators of Virginia Legal Culture, 1680-1810* (1981); Bryson, William Hamilton, *Legal Education in Virginia* (1975).

13 Herbert Sloan, 'The Earth Belongs in Usufruct to the Living' in *Jeffersonian Legacies* Peter Onuf (ed), (1993) 281-315. Sloan detailed the essential Jeffersonian historiography, see 305, fn 5. Also see Lance Banning, *Jefferson & Madison: Three Conversations from the Founding* (1995), 27-55; *cf.* Alexander, 26-42.

14 Jefferson wrote this often cited letter on September 6, 1789 while in Paris. On August 4, the National Assembly had abolished feudal privileges and property rights launching a discussion as to what should be property in Revolutionary France. See Keith Michael Baker, *Inventing the French Revolution* (1990) and William Doyle, *Venality: The Sale of Offices in Eighteenth-Century France* (1996) for discussion. Jefferson's letter must be considered within this context of a discussion on feudal property law. Significantly, both Banning and Sloan suitably treat the historic context in their essays but Alexander does not. I am indebted to Judith Miller for directing me toward Doyle's fine work.

theory of property. Yet Jefferson's ideas of property, despite their apparent vagaries and complexities, generally can be understood as reinforcing the Blackstonian congruence between vested rights and positive laws.[15]

Jefferson's persistent commitment to the principle of *dominium*, particularly in the master-slave relation, thus illuminates his well-documented ambivalence toward slavery. Despite his occasional lamentations about the evils of the institution and ruminations on a plan of *post nati* emancipation, he never proposed legislation to abolish slavery despite the urgings of some of his closest friends. Jefferson argued that emancipation was effectively inhibited as a result of the financial burdens imposed by conditionally mandating emancipation upon both the removal of freedmen from Virginia and upon compensatory payments for slaveholders. The primacy of his commitment to the vested property rights of slaveholders as the *sine qua non* of the Republic also explains his inability to consider any scheme of emancipation that did not provide for just compensation to slaveholders for their loss of property. His grandson, William Jefferson Randolph, however, did not share these inhibitions and attempted to implement a plan of emancipation *post nati* during the 1831-32 session of the Virginia legislature.[16] Although similar to other proposals for gradual emancipation discussed by Jefferson and those implemented in some northern states, Randolph subverted this requirement for compensation and thus represented a departure from previous antislavery

15 Sloan, 294, 299 noted this congruence between Jefferson and Blackstone and neatly qualifies any claims to Jefferson's 'radicalism' citing the commonplaces of his views and a 'Burkean cast' to his usufruct letter.

16 *Richmond Enquirer*, December 17, 1831. See the characterization of Jefferson by William Brodnax. The *Enquirer* comprehensively covered both official and public discussions of slavery throughout the winter of 1831-32. Other newspapers did as well, see especially the *Norfolk Herald*, the *Lynchburg Virginian*, and the *Constitutional Whig*. Jefferson discussed his emancipation proposal on three separate occasions (1783 Draft Constitution for Virginia, *Notes on the State of Virginia*, and 1824 letter to Jared Sparks) but never as a comprehensive plan. The 'Jefferson industry' has posited a range of historical interpretations concerning Jefferson and slavery. The best treatments remain; Winthrop Jordan, *White Over Black* (1968); David Brion Davis, *The Problem of Slavery in the Age of Revolution, 1776-1823* (1976); and Thomas Miller, *The Wolf by its Ears* (1975). It should be mentioned that following the 1806 Manumission Act, the removal of freedmen was not only Jefferson's preference but was the law in Virginia.

efforts in Virginia. Randolph's proposal reflected the outgrowth of state-wide antislavery sentiment that appeared in the aftermath of the Southampton insurrection.

SLAVERY DEBATED, 1831-1832

In the months following Nat Turner's slave insurrection of 1831, expressions of anxiety, panic, and pessimism proliferated throughout the Old Dominion. County militias made urgent requests for muskets to the Governor's office while, on repeated occasions, residents of the slave rich Southside counties reacted to false alarms of insurrection by fleeing from their homes. Newspaper editorials reported a 'dark and growing evil at our doors,' and at least one young Virginia anxiously hoped that the Governor would 'recommend some important measures . . . [during] this momentous crisis . . . in the affairs of our State,' which was 'pregnant with symptoms of alarming decline.'[17] From across the state, Virginians petitioned the General Assembly to enact more strident restrictions on the black population. Some of these petitions called for the removal of the entire free black population from the state, and a few even suggested the abolition of slavery itself.[18] In December, when the delegates convened in Richmond, the legislature became the focus of this ongoing discussion over the future of slavery. Governor John Floyd inaugurated the session and detailed the events of the August insurrection. He recommended that the delegates strengthen existing slave codes, and he called for the appropriation of funds to deport the state's free black population. The reception of the numerous petitions and the content of the Governor's message inspired the creation of a special committee, the Select Committee on the Coloured Population, to specifically address the questions raised by the insurrection. Of the delegates initially appointed to this committee, eleven out of twelve were slaveholders, with the

17 *Richmond Enquirer*, December 17, 1831; Philip St. *George Cocke to General John Hartwell Cocke*, December 14, 1831, Cocke Family Papers, Alderman Library, University of Virginia.

18 Legislative Petitions, 1831-32, Library of Virginia. Request for muskets are found in the Governor's Papers, Library of Virginia, September-October 1831, as well as interesting accounts of the repeated panics in letters from: Leesburg, September 18, 1831; the Inhabitants of Chesterfield [N.D. Spetember 1831]; Samuel Diggs, September 26, 1831; and Benjamin Cabell, October 1, 1831 and October 19, 1831.

majority of them representing Tidewater and Piedmont counties where there existed the greatest density of slaves. The chairman of the committee, William Brodnax, was himself a slaveholder and, like most other delegates, believed that the removal of free blacks was an essential precondition to any plan of abolition. Accordingly, the Select Committee restricted their discussions to the possible removal of the free black population while tabling any discussion of emancipation.[19]

Conservative proslavery delegates, initially fearing that any legislative debate over slavery would only encourage further insurrections, attempted to confine any discussion of the issue within the closed-door sessions of the proslavery dominated Select Committee. Throughout December, they were largely successful in this effort except for a brief procedural debate over the reading of the legislative petitions. On January 2, however, delegate Charles Faulkner submitted a proposal for gradual emancipation of Virginia's slaves to the committee. Reports of Faulkner's proposal were leaked to the newspapers, probably by an antislavery faction of younger delegates from the western districts of which Faulkner was a member.[20] With the encouragement of the newspapers, the public discussion that had quelled with the convening of the legislature now erupted again with more force. Defenders of slavery became increasingly concerned that this public forum would only 'stimulate . . . fresh acts of violence' and they lashed out at the newspapers for disregarding 'the safety and property of others'.[21] For several days, proslavery conservatives continued a tirade against the newspapers and still were determined to suppress open debate in the legislature. Yet events seemed to conspire against them. By the end of a week, while rumors of emancipation schemes reached a crescendo in the newspapers, word of another attempted slave insurrection reached Richmond. Under these portentous circumstances, conservative proslavery spokesman, William Goode, moved to discharge the select

19 *Journal of the House of Delegates*, 1831-1832, 9-14. *Speech of William Brodnax, In the House of Delegates of Virginia on the Policy of the State with Respect to the Colored Population* (1832) 4-5.

20 Charles Ambler, ed. *The Life and Diary of John Floyd* (1918); see especially the entry for January 9, 1832. *Richmond Enquirer*, January 7, 1832. For discussion see Robert, 17 and Freehling, 123, 127-28.

21 *Richmond Enquirer*, January 19, 1832 [Speech of William Goode].

committee 'from the consideration of all petitions,' pertaining to emancipation.[22]

Ironically, Goode's motion launched the open debate on slavery that proslavery delegates had been trying to avoid. He justified the move to discharge the committee on the grounds that 'he believed that the Legislature of Virginia was now considering whether they would confiscate the property of the citizens—a question which it had no right to act upon or consider'.[23] He posited that just by discussing the subject of emancipation, the committee impaired the property value of slaves. Slaveholders, anticipating mandated emancipation, would suddenly flood the domestic slave market in a preemptive maneuver that would greatly increase the supply of slaves in the market and thus lower the price. He also suggested that other states, fearing an influx of slaves from Virginia, might prohibit the introduction of new slaves into their territory. Goode's comments evince the central tenets of the subsequent proslavery position and reveal a defense of slavery grounded upon an ideological commitment to the traditional republican theory of property that considered the master-slave relation outside of the public realm. Proslavery efforts to suppress discussion of emancipation had been motivated by the view that slave property was a matter of dominion, essentially a private institution, and that any public discussion threatened to erase the distinction between public and private spheres. This sharp distinction between public and private, according to proslavery arguments, was essential for the existence of republican liberty and independence. Paradoxically, then, Goode's motion inaugurated a legislative debate in order to refute legislative authority to engage in just such a debate. In this sense, Goode's comments framed the defense of slavery within the boundaries of a Polybian formulation that viewed government as constantly inclined toward corruption and thus the eternal enemy of individual liberty and virtue. These initial invocations of classical republican discourses in Goode's defense of slavery had profound ramifications for the proslavery position

22 Goode's motion is printed in the *House* Journal, 93. Information on the spoiled insurrection attempt can be found in Ambler, *Diary*, 174. John B Floyd, Executive Papers, January 9, 1832, Library of Virginia. Council Journal, January 11, 1832, Library of Virginia.

23 *Richmond Enquirer*, January 19, 1832.

throughout the legislative debate and for subsequent proslavery ideology as well.[24]

RANDOLPH'S PROPOSAL

Randolph proposed his plan of emancipation as an antithetical amendment to Goode's unexpected proslavery motion. Randolph's amendment mandated that the Select Committee on the Colored Population 'inquire into the expediency of submitting to the . . . voters' a plan of emancipation *post nati.* Under this plan, 'the children of all female slaves . . . born . . . on or after the 4th day of July, 1840, [would] become the property of the Commonwealth;' males when they turned twenty-one, and females at the age of eighteen. If these offspring were detained in Virginia until they came of age, they would 'be hired out until' they raised enough funds 'to defray the expense of their removal.' Randolph believed that his emancipation plan allowed abolition to occur on grounds favorable to slaveholders. Slaveholders would not forfeit any of their existing slaves. Nor would they lose any slaves born within the next eight years. Additionally, the proposal encouraged slaveholders to transfer or sell their slaves out of state prior to the mandated emancipation date.[25] Yet, despite invoking his grandfather's legacy, Randolph's proposal diverged significantly from Jefferson's ruminations in ways that reflected a sharp discontinuity from previous antislavery sentiments. Most significantly, Randolph circumvented Jefferson's problem of funding emancipation and removal by forgoing any consideration of compensatory payments to slaveholders. Another difference was the manner in which emancipated slaves would be disposed while pending removal. Jefferson had simply spoken of slaves being raised 'at the public expense'. Under Randolph's plan, emancipated slaves would work as the state's property until sufficient funds for their removal were raised. The state government would become an active agent in the emancipation process. It would serve as an intermediary between slavery and freedom.[26]

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24 Louisiana and Pennsylvania passed restricitve laws in the aftermath of Southampton, another similar one had been barely defeated in Kentucky. On classical republican discourses see *supra* n 6 roman liberty.

25 *House Journal*, 93. *The Speech of Thomas Jefferson Randolph, in the House of Delegates, on the Abolition of Slavery* (1832).

26 For discussion of Jefferson and slavery see: Winthrop Jordan, *White Over Black* (1968); David Brion Davis, *The Problem of Slavery in the Age of Revolution,*

These diverse aspects of the plan were recognized immediately by proslavery delegates. William Brodnax contended that 'were Mr. Jefferson now alive, I cannot for a moment believe, that he would approve... such a proposition as this.'[27] Brodnax argued that Jefferson's plan 'contained features essentially different from this,' and explained that he did not understand it 'to recommend that the off-spring of slaves should be torn from their owners without compensation.' Randolph's plan was 'fraught ...with incalculable mischiefs' that would 'subvert principles which have been constructed by the wisdom of ages, and break down every barrier with which [the] constitution and laws have fenced the security of private property.' In response to this radical plan, Brodnax submitted his own proposal for the removal and colonization of approximately six thousand people, the equivalent to the annual percentage of increase of the black population, to the colony of Liberia. He suggested that removal should begin with the free black population in order to avoid any conflicts over property rights. Slaveholders could, of course, at their own discretion, manumit slaves who would then be deported. He believed this plan was more consistent with Jeffersonian principles of antislavery and property than the one proposed by Randolph. Brodnax was not alone in his dissent. James Gholson called Randolph's proposal a 'monstrous and unconstitutional' violation of property rights while James Bruce declared it 'the most extraordinary doctrine that has ever broached this Hall.'[28]

Proslavery delegates decried Randolph's emancipation proposal because it failed to recognize the future progeny of slaves as vested property. They contended that the scheme of emancipation *post nati* ignored the common law dictum of *partus sequitur ventrem.* This dictum had survived as a remnant of feudal law and referred to the condition or status of the offspring naturally following the condition of the progenitor. In Virginia,

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1776-1823 (1976); and Thomas Miller, *The Wolf by Its Ears* (1975). Jefferson discussed emancipation *post nati* three times: in 1783 Draft Constitution for Virginia, *Notes on the State of Virginia*, and an 1824 letter to Jared Sparks. In his letter to Jared Sparks, February 4, 1824, Jefferson comments that the money for removal should come from the money paid by the Federal Government for the ceding of Virginia's western land claims.

27 *Speech of Brodnax*, 17.

28 *Speech of Brodnax*, 6, 17, 26-34; *Richmond Enquirer*, January 21, 1832 [Gholson] and January 26, 1832 [Bruce].

since the seventeenth century, the condition of an offspring was determined by the status of its mother. Upon this legal understanding of status, proslavery delegates grounded their rejection of emancipation *post nati*. James Gholson, paraphrasing Blackstone, explained the proslavery position simply and harshly. 'The owner of land had a reasonable right to its annual profits; the owner of orchards, to their annual fruits; the owner of brood mares, to their product; and the owner of female slaves, to their increase.' Brodnax noted that such a 'probability of increase [was] an essential constituent in the value of the female slave' and posited that *partus sequitur ventrem* was not simply a rule of common law but a 'dictate of common reason and common sense.' Delegate James Bruce added that if *partus sequitur ventrem* was not a rule of law and if slaveholders had 'no property in the future increase of their slaves,' then they certainly had no claim to those now living because 'the property in both must necessarily be derived the same way.' And he concluded by gently reminding the assembly that from 'that increase consist much of our wealth.'[29]

But beyond the common law, proslavery delegates also charged that Randolph's proposal flagrantly violated property rights explicated in statutory and constitutional laws. They explained that 'the charter' by which they held their slaves was 'founded on the immutable principles of justice, which existed before the formation of political societies' and they asserted that this universal principle was specifically incorporated into the philosophy of the Revolution. Accordingly, under the laws of the Commonwealth, slavery had acquired exactly the same guarantee . . . as any other property,' and could not be regarded in any other light, 'legally or morally.' Adhering to Blackstonian notions that considered well-reasoned and prudent positive laws a reflection of natural law, proslavery delegates considered Randolph's effort to 'confiscate' property a dangerous and radical proposition that would undermine the natural order and, in the end, would only lead to tyranny. Constitutions and laws, they contended, existed to protect the rights of minorities from the encroachment of the majority. Randolph's proposal subverted the sanctity

29 *Richmond Enquirer*, January 21, 1832 and January 26, 1832. *Speech of Brodnax*, 13-14, 22. *Partus sequitur ventrem:* For the origins of this dictum and its application to slavery see: Thomas Morris, *Southern Slavery and the Law* (1996) 43-49. Blackstone, *Commentaries* 2:94.

of property rights and correspondingly, the spirit of the Constitution and the Republic.[30]

Defenders of slavery explained that Randolph's plan was subversive because it 'proposed . . . the appropriation of private property . . . *without just compensation*.' They acknowledged that government could assume private property in only one instance, 'and that was founded in absolute necessity . . . When the public safety and prosperity, obviously required the deprivation of private property.' However, even then, such appropriation required just compensation. To appropriate without compensation would tear down the institutional mechanism of private property designed to preserve republican government. It would also violate custom. As an example they noted that the assembly already had compensated slaveholders for slaves executed during the recent insurrection. They further cited guarantees of just compensation not only in state law and custom, but also in the Fifth Amendment of the Federal Constitution. Like Jefferson, the proslavery delegates' unyeilding commitment to the principle of just compensation reflected the primacy of a conception of private property as a vested, absolute right. But also like Jefferson, this absolute right could be circumscribed for the common benefit in cases of necessity. James Gholson evoked these republican sensibilities challenging emancipationists to prove such necessity, claiming that if 'the salvation or existence of this society depends on' Randolph's proposal, 'I will cry *Salus populi Suprema est Lex*.' But even then, property rights must be respected and compensation must be paid. Brodnax summarized their position, concluding 'that whether the public necessities require the surrender of our property or not, it comes to the same conclusion. It cannot be taken against our consent, but on paying to us its value.' Stridently professing their faith in the sanctity of the just compensation principle, proslavery delegates argued that they were not merely defending slavery, but defending the inviolability of private property and thus the legal principle of *dominium* upon which Virginia's republic had been founded and sustained.[31]

Accordingly, Randolph's plan for emancipation failed because it contradicted the traditional republican conception of property that

30 *Speech of Brodnax*, 13. *Richmond Enquirer* January 21, 1832.

31 *Speech of Brodnax*, 23, 13-14; and Gholson's speech in the *Richmond Enquirer*, January 21, 1832.

essentially understood the ownership of private property as originally resting on a pre-political and subsequently vested right. If enacted, government imposed emancipation would have breached the dominion of slaveholders by confiscating the children of slaves. Additionally, slaveholders would forfeit a portion of their property without compensation. Within Virginia's prevailing liberal republican conceptions of government, any public confiscation, without compensation, contradicted the very premises of government. In the words of Brodnax, property was:

> the very ligament which [bound] society together . . . once severed, society itself was no longer worth preservation—a state of nature would be desirable . . . . Without this principle, there was no civilization—no government.'

Delegate James Bruce eulogized Randolph's proposal by stating that 'its glaring . . . defects serve to show us the difficulty, or rather the impossibility, of devising any scheme of emancipation which shall be practicable, and not at the same time' directly violate 'the rights of property.'[32] If the Virginia legislature wanted to end slavery, it would have to transgress the property rights of slaveholders.

SLAVERY, EMANCIPATION AND PROPERTY RIGHTS

Had antislavery delegates facing this predicament simply 'sat down in silent despair,' the slavery debate would have ended then and there. But they did not. Virginia's emancipationists understood that for slaveholders 'to contend that *full value* shall be paid for slaves . . . [was] to deny all right of action upon this subject whatsoever.'[33] They thus attempted to subvert the property-based proslavery justification by advancing a new and more radical argument grounded in a strict positivist conception of property rights. Their new discourse emphasized the government's right of eminent domain and its inherent police powers. They argued that when a species of property became so harmful that it threatened the public safety, the state

32 *Speech of Brodnax*, 13; *Richmond Enquirer*, January 26, 1832.

33 *The Speech of Charles Jas. Faulkner (of Berkeley) in the House of Delegates of Virginia on the Slave Question* (1832) 15.

had a superior responsibility to confiscate or destroy that property. Instead of acknowledging that property was either a natural or vested right, emancipationist delegates declared that property rights were created only through positive laws and were sanctified through social convention. Charles Faulkner referred to property as a 'creature of civil society,' and explained that slaveholders held their slaves 'not by any law of nature . . . but solely by . . . the acquiescence and consent of the society in which they live.' William Ballard Preston, speaking on behalf of a new motion calling for abolition, proclaimed that the power possessed by the Legislature in 'declaring what *shall be* property, also enables it to declare what *shall not* be property.' Preston noted that the Virginia Constitution did not specify slaves as property and he claimed that the constitutional provision that guaranteed property referred exclusively to the common law definition of property. Slaves, however, were an exception because they 'were not property by common law but were made so by statutory enactments.' As an example he furnished that 'there is no statute by which your horse or your ox is declared to be property.' He admitted that, in Virginia, slaves were property but that they were made so by statute and not by either constitutional authority or the common law. Accordingly, he posited that slavery could be abolished during this very 'session of the General Assembly simply by repealing the existing statutes that upheld slavery.'[34]

Antislavery delegates also challenged the proslavery mandate for compensation by rejecting the Lockean notion that governments existed to ensure property. Delegate James McDowell reaffirmed that both 'the rights of private property and of personal security existed under every government, but they were not *equal*.' He argued that 'security [was] the primary purpose for which men entered into government; property . . . [was] only secondary.' Both Faulkner and McDowell allowed that as long as a 'property was not dangerous to the good order of society, it . . . would be tolerated.' But if a property became pernicious and jeopardized the social tranquility then 'the right by which [individuals] held their property was gone. Society ceased to give its consent.' This was 'the supreme law of society—a law above and paramount to all other laws.' Preston specifically rejected the notion that slave property was protected by the just compensation clause of the Fifth Amendment to the United States

34 *Speech of Faulkner*, 14; *Richmond Enquirer*, February 9, 1832.

Constitution. He contended that the amendment applied only to cases in which the Federal Government confiscated property in the 'exercise of her powers . . . within the sphere of her constitutional rights.' In so arguing, Preston foreshadowed the Marshall Courts' opinion in *Barron v Baltimore* (1833), that the Federal compensation clause was 'a *rule of action* for that Government, not a *charter of rights* to citizens of the States.' Thus, these more radical antislavery delegates claimed that when property was 'ascertained to be a positive wrong to society,' there was no existing legal requirement for compensation.[35]

In challenging these tenets of republican orthodoxy, the rhetoric of Virginia's emancipationists reflected the influence of previous criticisms of natural law property theory. In this sense, their effort can be considered within the context of a larger intellectual endeavor to legally re-conceptualize property, which occurred throughout the emerging industrial economies of the nineteenth century. In particular, the ideas of Jean-Jacques Rousseau and Jeremy Bentham were prevalent in the reactionary antislavery speeches of Faulkner, McDowell, and Preston. Rousseau's influence was manifested in the emancipationist critique that any right to property necessarily devolved exclusively from the consent of society, and not from a natural or pre-political right. Rousseau distinguished between mere possession and property by suggesting that property, as a right, implied the privileges of extended use. In contradistinction to the Lockean labor theory of property, Rousseau maintained that labor could only legitimate possession. The privileges of extended use inherent in a property right mandated that such a right could only be legitimated by the consent of the *volonte generale*.[36] In a jurisprudential context then, Rousseauian property theory logically inferred that property could only

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35 *Speech of James M'Dowell of Rockbridge in the House of Delegates of Virginia, on the Slave Question: January 21, 1832* (1832) 15. *Speech of Faulkner*, 14. *Richmond Enquirer*, February 9, 1832. On *Barron v Baltimore* see 7 Peters 243 (1833) and my forthcoming article 'A Question of Great Importance:' Nullification, Slavery, and *Barron v Baltimore*.

36 Jean-Jacques Rousseau, *Discours sur l'origine et les fondements de l'inegalite parmi les hommes* (1755; republished by Aubier Montaigne, Paris: 1973) 71-72, 94, 114. An excellent historiographical discussion of the literature concerning Rousseau's political and social thought is found in Peter Gay's introduction and postscript to Ernst Cassirer, *The Question of Jean-Jacques Rousseau* (1989).

exist as a product of positive laws. Rousseau's positivism therefore augmented Jeremy Bentham's utilitarian principal that government should provide for 'the greatest happiness for the greatest number of people.' This principal guided Bentham's published criticism of Blackstone's *Commentaries*, a critique that, not surprisingly, resonated throughout the emancipationists' arguments during the debate.[37] Indeed, a persistent thread of utilitarian thought was evident not only in the antislavery critique of Blackstonian property law, but appeared in most of their indictments against the economics and morality of slavery as well.[38] Bentham's utilitarianism, founded upon a majoritarian consensus, encouraged democratic ideals and a theory of legal positivism that embraced an instrumentalist conception of law far different from that of Virginia's common law tradition.[39]

CONCLUSION

In the aftermath of Nat Turner's insurrection, the emancipationists' call for radical action and the effort to re-conceptualize property along instrumentalist lines possessed political viability. They argued that 'so great and overshadowing [were] the evils of slavery' that the immediate removal of the entire slave population was justified by 'the great law of state necessity.' Consequently, antislavery delegates posited that Randolph's emancipation *post nati* proposal represented the most reasonable compromise available to proslavery delegates. Delegates who defended slavery should willingly accept this compromise because it deferred emancipation and guaranteed slaveholders their current slave property. Charles Faulkner declared that Randolph's plan did not 'violate any such right of property, as is incumbent upon this body to respect under

37 Jeremy Bentham, *A Fragment on Government; or A Comment on the Commentaries* (1776).

38 See the Speech of Philip A Bolling (of Buckingham). In the House of Delegates of Virginia, on the Policy of the State with respect to Its Colored Population, January 11, 1832 (1832); and the Speech of Samuel Moore in the *Richmond Enquirer*, January 19, 1832 for examples.

39 Jeremy Bentham, *Codification Proposal to all Nations Professing Liberal Opinions; or the Idea of a Proposed All-Comprehensive Body of Law, with an Accompaniment of Reasons, Applying All Along to the Several Proposed Arrangements*, 1822.

the existing pressure of public danger in this commonwealth'. He posed the question that if slavery was 'conceded to be an evil,' and he reminded the assembly that 'no one had yet asserted otherwise,' then he asked, 'can the equity of such a compromise be questioned?'[40]

Proslavery delegates responded to this radical antislavery challenge by proclaiming that slavery, as it existed in Virginia, was not evil. Delegate Alexander Knox argued that 'on the contrary,' slavery was 'indispensably requisite in order to preserve . . . Republican Government.' He evoked the grandeur of classical Greece and Rome as examples of magnificent republics that had flourished by slave labor. Additionally, Knox asserted, 'the slave in Virginia, reared as he is to the knowledge of moral principle, is in a more happy condition than the African, wandering as he does in ignorance and wretchedness.' Delegate John Thompson Brown, who, at the outset of the session, had referred to slavery as the greatest evil of an 'angry Providence' now argued that emancipation and colonization could only be considered a cruel alternative. He pleaded to let the slaves remain in bondage, in Virginia since 'they are happier than they would be in any other situation.' Brown also emphasized the paternalistic qualities of the master-slave relation and, ironically, argued that only quixotic condemnations of slavery had caused the slaves to forsake their otherwise contented station and rise in rebellion.[41] Following the legislative debate, the content and themes of these speeches were incorporated into the widely disseminated essays of Benjamin Watkins Leigh and Thomas Roderick Dew.[42] Both of these writers evoked discourses that considered private property essential for the liberty and virtue requisite for republican government, championed a Blackstonian interpretation of property rights, and posited the master-slave relationship as a sphere for the exercise of virtue. Accordingly, they chastised antislavery delegates for advancing their heresies that could only lead to social and political ruin.

In this light, Benjamin Watkins Leigh's protest appears as much more than the ravings of a proslavery eccentric, although a zealous defense of slavery was central to his argument. Leigh's expressed fears of majority tyranny,

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40 Preston Amendment, *House Journal*, 99. *Speech of Faulkner*, 15.

41 *Richmond Enquirer*, February 11, 1832. Knox was the junior delegate from Mecklenburg County. *The Speech of John Thompson Brown, in the House of Delegates, on the Abolition of Slavery* (1832) 20-23, 30-31.

42 Leigh, *Letter of Appomattox*; Dew, *Review of the Debate in the Virginia Legislature.*

the corruption of virtue, and the loss of liberty must be considered within the context of an overt challenge to the liberal republican political vision upon which Virginia's slaveholders had founded the Commonwealth and legitimated their rule. The emancipationist proposals and arguments advanced during the 1832 debate represented something more than the extension of previous antislavery sentiments. Their position signaled a divergence from the ideological orthodoxy of property and government that had characterized the Virginia Republic since the American Revolution. Within their positivist conception of property, property rights had no foundation outside of the political sphere and accordingly could not ensure the freedom from dependence requisite for the existence of neo-roman liberty and the exercise of virtue. Property, which derived exclusively from the consent of society, could only be legitimated through the force of the majority. Significantly, the antislavery movement did not stand alone, but was part of a larger intellectual trend to legally re-conceptualize property evident in other industrializing and democratizing societies. But in Virginia, this intellectual movement met resistance from a slaveholding ruling class that understood that any change in the idea of property signaled an effort to re-conceptualize liberty as well, and that Bentham's redefinition of liberty as freedom from coercion reflected a transformation in liberal thought.[43]

Accordingly, the grounding of the proslavery argument upon a republican conception of property had profound ramifications for future political and social thought in antebellum Virginia. The proslavery reaction reflected a growing ambivalence toward modernity and its dogmas of political equality and economic progress that suggests an increasing tension between the doctrines of liberalism and slavery.[44] Where previous justifications for slavery often had acknowledged the potentially corrupting characteristics of the master-slave relation, the speeches of Brown and Knox and the essays of Leigh and Dew revealed an emergent proslavery

43 Douglas G. Long, *Bentham on Liberty: Jeremy Bentham's idea of liberty in relation to his utiliatrianism* (1977).

44 *Eugene Genovese, The Slaveholders' Dilemma:Freedom and Progress in Southern Conservative Thought, 1820-1860 (1992); David Brion Davis, The Problem of Slavery in Western Culture (1967) and The Problem of Slavery in the Age of Revolution, 1776-1823 (1975).*

discourse founded upon an agonistic defense of a republican conception of property as the guarantor of virtue. This argument that slavery ensured virtue was not original. It had appeared in scriptural justifications for slavery for decades. But, during the winter of 1832, for Virginia's defenders of slavery it had become the only tenable argument in the face of antislavery arguments advocating a positivist conception of property and an instrumentalist view of law.