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This Species of Property: Slavery and the Properties of Subjecthood in Anglo-American Law and Politics, 1619-1783

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This Species of Property: Slavery and the Properties of Subjecthood in Anglo-American Law and Politics, 1619-1783

by

John N. Blanton

A dissertation submitted to the Graduate Faculty in History in partial fulfillment of the requirements for the degree of Doctor of Philosophy, The City University of New York

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Abstract

This Species of Property: Slavery and the Properties of Subejcthood in Anglo-American Law and Politics, 1619-1783

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John N. Blanton

Advisor: Dr. James Oakes

This Species of Property examines the development of the law and practice of slavery in the 17th and 18th century Anglo-American empire through analysis of common law court decisions in England, Massachusetts, and Virginia. The dissertation argues that there was a long and vibrant debate over the legitimacy of the chattel principle – the definition of enslaved persons as a type of property – and that enslaved people and their allies pushed for the recognition of the legal humanity or subjecthood of the enslaved in colonial and metropolitan courts. This antislavery legal tradition culminated in the famous Somerset decision, handed down by the Court of King’s Bench in 1772, paved the way for judicial abolition in revolutionary Massachusetts, and shaped the contours of early national American antislavery. Defenses of property-in-man that developed throughout the colonial period to answer these critiques, however, also remained potent, shaping the development of proslavery thought in Virginia and preventing concerted antislavery action during and after the American Revolution. By situating the development of colonial American slavery in an imperial context, This Species of Property illustrates the ways in which broader political, economic, and social developments throughout the empire influenced the development of slave law in specific jurisdictions, and how these local developments redounded back onto the metropole, shaping imperial policy and the place of slavery in the new American republic. It also
restores a *longue durée* chronological approach to colonial history, demonstrating how Anglo-American slavery developed over time in response to specific local and imperial contexts. Finally, the dissertation illustrates the myriad ways in which enslaved persons influenced the development of slavery by taking up the mantle of English and British subjecthood, making claims on the local and imperial state through the courts and forcing Anglo-Americans on both sides of the Atlantic to grapple with the contradictions inherent to property-in-man.
Acknowledgements

Completing a project like This Species of Property can be a particularly lonely process at times. As my friends, family, and colleagues can probably attest, there were times in the last three years where I spent far more time immersed in the minutiae of the English Civil War or the fine contours of early modern legal personhood than with the contemporary world that loomed just outside my office. Luckily, I was also linked to a number of amazing communities that kept me grounded, engaged, and (relatively) sane. Of course any flights of fancy or bouts of insanity in the work that follows are the sole burden of its author – no other persons named herein should be deemed responsible for any errors of fact or interpretation.

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Introduction – Slavery and the Properties of Subjecthood in Imperial Anglo-America

In May 1772, Francis Hargrave, a young English attorney with a bright future, stood before the Court of King’s Bench in Westminster Hall to present his arguments in the Somerset case – it was his first oral argument before an English court. The case concerned an enslaved man, James Somerset, who had escaped from his owner, Charles Stuart, while sojourning in London. Stuart claimed Somerset as his property, hoping to sell his erstwhile slave into hard labor and an early death in a Jamaica cane field. Hargrave’s task was to persuade the court that Somerset could not be held as a slave in England, to vindicate the old maxim that the air of England was too pure for slavery.

Drawing on over a century of legal precedent, Hargrave argued that English law “disapproves of slavery, and considers its operation dangerous and destructive to the whole community.” Proslavery advocates might argue that the law of servitude or villeinage allowed for slavery, but the antislavery lawyer pointed out that, although villeinage “had most of the incidents of slavery,” it did not imply the kind of property right Stuart claimed – an Englishman might own the labor of a servant or villein, but they could never own his or her person. Local laws in the colonies might countenance such a property relation, but Hargrave argued that these only “impliedly authorize the slavery of negroes in America; and it would be a strange thing to say, that permitting slavery there, includes a permission of slavery here.”¹ Though bound labor was certainly legitimate, and positive laws in the colonies might allow slavery in their own jurisdictions, no person could be a slave in England itself. Britons never could be slaves.

¹ 1 Lofft 1.
The core of Hargrave’s argument against slavery, one of the most dynamic and resilient institutions in human history, was his opposition to the chattel principle – the definition of enslaved persons as a species of property without separate legal personhood or rights of their own, mere extensions of their masters’ will.\textsuperscript{2} As Hargrave pointed out, the chattel principle was a construct, as are all the terms we use to define our world – property, personhood, rights, agency, law – and was thus, of necessity, a subject of continuous debate and negotiation. When James Somerset stood before the Court of King’s Bench in 1772, he was a living reminder of the instability of the chattel principle. He had demonstrated his personhood by resisting Charles Steuart’s will and asserting his independent agency, and now he sought to challenge the legitimacy of property-in-man by claiming the mantle of subjection and pressing his claims before the highest court in the British Empire. When Chief Justice Mansfield issued his decision in the \textit{Somerset} case, he stated in no uncertain terms that property-in-man was “odious” to English common law. The kind of dominion Stuart claimed over Somerset, a fellow British subject, was not “allowed or approved by the law of England” and therefore, whatever “inconveniences” it might cause, “the black must be discharged.” James Somerset walked out of Westminster Hall and into the free air of England.\textsuperscript{3}

Though the emancipatory decision they obtained from the King’s Bench in 1772 was certainly a watershed moment in the history of slavery, James Somerset and Francis Hargrave were not the first Britons to question the legitimacy of property-in-man –


\textsuperscript{3} 1 Lofft 1.
slavery had long been a subject of intense debate in the Anglo-American world. This debate, however, has been conspicuously absent from much of the scholarship on Anglo-American slavery. Historians have, quite rightly, focused extensive attention on the social construction of slavery in the early modern Anglo-American world, emphasizing the myriad ways in which the institution developed in distinct times and places. The field has benefited tremendously from this work. We know far more today about the lived experience of slavery, the often brutal technologies of labor extraction and physical control employed by slave owners, the modes of resistance and accommodation by which enslaved people forged meaningful lives in a system that denied their very humanity, and the social relations that gave rise to and sustained the peculiar institution than we did two generations ago when the social history revolution remade American historiography.

This massive body of scholarship, however, has often tended to downplay the importance of the broader legal structures and political institutions that gave form to

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4 Historians have recently lavished attention on the Somerset case and its implications for Anglo-American slavery. Most, however, take Somerset as a starting point for investigations of American or British imperial debates over the institution. In doing so, however, they often overlook the long debate over slavery in the British Empire that lay the groundwork for Somerset. The present study frames the Somerset case not as a starting point, but as the culmination of a centuries-long debate, constructing a political and legal genealogy of the pro- and antislavery arguments presented in Somerset. For an important recent contribution to the literature on Somerset, see the contributions from George Van Cleve, Daniel Hulsebosch, and Ruth Paley to the “Forum: Somerset’s Case Revisited,” Law and History Review, vol. 24, no. 3 (Fall 2006): 601-671.

colonial labor regimes, delimited and channeled enslaved agency, and shaped the relations between masters and slaves, opting instead for a close focus on the lived experience and practice of slavery at the local level. While the benefits of this deep scholarly attention are manifold, social history, and the cultural turn in American historiography it spawned, has left us with a number of analytical blind spots when it comes to the larger imperial structure of slavery, and the political debates that determined this structure.6

The ways in which various Anglo-American settler societies chose to order their economic systems, political institutions, social relations, and legal regimes require close attention if we want to understand how they created, upheld, challenged, and ultimately destroyed systems of human bondage. As recent scholarship has conclusively demonstrated, slavery was a distinctly local institution shaped by peculiar local factors with widely varying potential structural and experiential outcomes in space and time.7 It was also, however, an imperial institution from its very inception.8 Anglo-American slavery developed on the shifting terrain of empire, where complex dialectical currents shaped relations between metropole and colony, sovereign and subject, master and slave. This reflexive relationship raised crucial questions of law and jurisdiction – local


7 Berlin, Generations of Captivity, emphasizes this point.

8 A comparative perspective is implicit in much of the work produced by scholars working in the social history tradition and, more recently, the field of “Atlantic” history. These works, however, often focus on comparing specific local conditions to an ahistorical “ideal type” of slavery, typically framed in terms of 19th century structures, and have been more concerned with demonstrating the varied nature of Anglo-American slavery in time and space than explaining why this was so. This study seeks to reframe the debate through close attention to imperial legal structures rather than fluid social or cultural identities and subjectivities.
concerns were imperial concerns, and metropolitan developments could have dramatic consequences for the colonial periphery. Questions raised in the colonies – what was the legal definition of slavery?; who could be a slave, or a subject?; what rights and duties did masters, slaves, and the state owe one another under law? – reflected back to imperial planners in London, where broader concerns beyond the institution of slavery itself contributed to policy decisions, often with profound consequences for the lived realities of enslavement. The answers to these questions mattered deeply to James Somerset and millions of enslaved men and women like him – they were the difference between life as a free subject of the English empire and death as a slave in a Jamaican cane field or Virginia tobacco plantation. Ultimately, the way Britons asked, answered, and debated these questions shaped the rise and fall of Anglo-American slavery. The purpose of this study is to recover this long debate over slavery in the early Anglophone empire.

The contours of this debate can be seen most clearly in the development of local and imperial slave law, broadly construed, as it was hashed out in courtrooms and legislative halls throughout the empire. Indeed, close attention to the law affords a number of unique vantage points from which to examine the struggle over slavery. Particularly in a society as law-minded as early modern England, legal forms and cultures mediated and shaped the articulation of social, economic, political, and cultural norms. Law, then, was neither a simple reflection of existing social realities, nor was it able

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entirely to determine those realities. Law embraces the structures and institutions of elite power and class control while also providing a forum from which subaltern members of society could challenge that power. As E. P. Thompson once noted, law was “a place, not of consensus, but of conflict.” It is this legal conflict that this study seeks to recover.10

A close focus on legal developments is also essential because, as Francis Hargrave and his antislavery predecessors recognized, the central problematic of Anglo-American slavery was the legal construct of property-in-man. What, precisely, this concept meant in practice in any given time and place, however, had always been hotly contested. What E. P. Thompson said of law generally is particularly true of slavery: “what was often at issue was not property, supported by law, against no-property; it was alternative definitions of property-rights.”11 Indeed, the concept of property itself carried (and still carries) multiple meanings. In the early modern Anglophone world, ‘property’ was understood both as an object of ownership and a quality or characteristic constitutive of a person or thing. The possession of specific properties, in both senses of the word, was among the elements that determined one’s place in early modern England’s social and political order.12

We might, then, call this bundle of attributes, traits, or possessions, and the rights and liberties they implied, the “properties of subjecthood” – access to this bundle of rights marked the boundary of inclusion and exclusion in the Anglo-American world.

11 Ibid.
While enslaved people pursued a number of strategies to assert and protect their personhood, making claims on the colonial and imperial state pressing for greater access to subjecthood was always prominent among them.\(^{13}\) For Anglophone slave owners, slavery was what made them who they were – their possession of one of the most valuable species of property in the Atlantic world and the economic returns they were able to wrest from their enslaved laborers made them weighty subjects, worthy of participation in the political life of their communities by virtue of their position in the social order. These colonial properties certainly set slave owners apart as a privileged political class in the English empire, and they consistently used their political and social power to protect and defend their ownership of other people.

But theirs were not the only properties of subjecthood that mattered – there were many personal traits that could qualify even non-property-owning persons as subjects. Whether or not they were among the small class of political subjects or citizens, all Britons were subjects simply by virtue of their birth within English dominions and the natural allegiance they owed their sovereign.\(^{14}\) In return, the state owed all subjects


\(^{14}\) Use of the term ‘subjecthood’ in place of ‘citizenship’ requires some explanation. Citizenship evokes ideals of active participation in the political life of the state and is, in many ways, a thoroughly modern concept. Throughout much of the period under consideration in this study, the vast majority of persons subject to a state’s jurisdiction were not direct participants in high politics or law-making. Numerous studies hold a modern ideal of active citizenship as their baseline for inclusion, thus overstating the extent to which specific groups were excluded from society. While most English and British subjects were not active citizens, all were bound by the law and could expect a degree of protection from the law.
protection and justice. As the venerable Sir Edward Coke said in his decision as Chief Justice of King’s Bench in *Calvin’s Case* (1607), sovereign and subject shared a “*duplex et reciprocum ligamen,*” a dual and reciprocal bond. This relationship was understood to be the natural result of birth within the sovereign’s dominions, and could never be broken.\textsuperscript{15} The exact boundaries of English subjecthood were, of course, a matter of debate, and the specific properties necessary for subjecthood changed over time, as did the specific rights subjects could claim. The concept of natural allegiance elucidated in Calvin’s Case, however, remained the basis of most understandings of English subjecthood down to the American Revolution and beyond.\textsuperscript{16} Might imperial slaves be accounted natural subjects under this rubric, and have access to at least some of the rights guaranteed to English men and women? Were enslaved people simply properties subject to the ownership of English masters, or might they also possess and enjoy some of the properties of subjecthood? The conflict over these essential questions is at the very heart of the history of Anglo-American slavery.

To early modern Britons, then, the opposite of slavery was not “freedom,” an amorphous and highly contested concept even in our own time, but subjecthood, access to the rights and protections the sovereign owed all persons living under English

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Reframing our analyses of slavery around the access of enslaved persons to the basic rights of subjecthood removes the ambiguity surrounding the amorphous discourse of “freedom,” always multivalent and difficult to pin down. Subjecthood, however, was a clear cut, if contested, reality. One either had access to the rights of subjecthood or they did not. There were, of course, gradations of subjecthood. The rights and liberties of English subjects were never absolute, and were often severely circumscribed. Only a relative handful of Britons attained the properties necessary to fit them for participation in the governance of the realm – not all subjects were citizens. Servants, apprentices, vagabonds, wives, children, and even short-term employees were “unfree” in some sense – their individual rights were limited under law and their labor power was seen as the “property” of their master, husband, father, or employer – but they remained subjects. The power of an individual head of household never entirely erased their legal personhood. Slaves, on the other hand, fell, almost by definition, outside of this rubric of basic rights and limited authority. Defined as property, enslaved people could claim no rights and had no way to limit the authority of masters, leaving them subject to the arbitrary power of slave owners.

For this reason, this study eschews the use of descriptors like “unfree labor” when discussing slavery, opting instead for the more precise “bound labor.” Indeed, when considered in light of Marxian definitions of “free” labor – where workers were understood to be doubly free: free to make contracts for the sale of their labor power, but also, crucially, freed from direct control over the means of production – slavery might reasonably be classed alongside indentured servitude, apprenticeship, and dependent family labor as an early variant form of free labor. See, for example, the contributions from Rodney Hilton and Eric Hobsbawm in Hilton, ed., The Transition from Feudalism to Capitalism (London: Verso Press, 1976); Robin Blackburn, The Making of New World Slavery: From the Baroque to the Modern, 1492-1800 (New York: Verso, 1997) and The American Crucible: Slavery, Emancipation, and Human Rights (New York: Verso, 2011). See also, Quentin Skinner, Liberty Before Liberalism (New York: Cambridge University Press, 1998).

In a sense, this formulation bares a resemblance to Orlando Patterson’s formulation of slavery as “social death.” See Patterson, Slavery and Social Death: A Comparative Study (Cambridge, MA: Harvard University Press, 1982). Rather than locating the key site of exclusion in the social, however, this study seeks to explicate the exclusion of enslaved persons from the legal structures of civic life and, in so doing, restore the imapact of politics to the equation.
It is in this context that English opposition to the chattel principle must be understood. When Britons protested human slavery, they were not, for the most part, criticizing bound labor – most agreed that male heads-of-household should have power over their dependents and that, as long as it was bracketed by the rule of law, this authority was perfectly legitimate. What antislavery English men and women opposed was the concept of property-in-man. Not all subjects were entitled to direct political participation or even control of their own labor power, but all persons in English dominions, even strangers, were entitled to some basic protections under common law. In short, recognition of the legal personhood of the enslaved would make slavery simply another bound labor status among the myriad forms sanctioned by English law, not a property relation.\footnote{Robert J. Steinfeld, *The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350-1870* (Chapel Hill: University of North Carolina Press, 1991). Cf. Christopher Tomlins, *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580-1865* (New York: Cambridge University Press, 2010), which sees colonial slavery as rooted in the English law of servitude.}

Though it may ring hollow in our ears, attuned as they are to calls for more substantive freedoms, this fundamental assertion of legal personhood was, and remains, a radically moral position. Without the acceptance of this foundational proposition, calls for a more meaningful equality, for basic human rights, fall to pieces.

In this sense, the debate over slavery was inherently a political debate, touching as it did on basic questions of inclusion in a community of rights-bearing individuals. Clearly, not all Anglo-American debates over subjecthood concerned institutional slavery as it actually existed or was practiced in the empire. The rhetoric of ‘slavery’ and freeborn rights so often mobilized in Anglophone political discourse is often simply that – rhetoric.\footnote{For a classic statement of the limited meaning of “slavery” as a rhetorical trope, see Bernad Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, MA: Harvard University Press, 1967). For}
and resolved fundamental questions about the relationship between property, legal personhood, and access to subjecthood did have real consequences for the lived experience of countless enslaved Afro-Britons. Through a close examination of the development of slavery in two colonies – Massachusetts Bay and Virginia – and the dialectical relationship between the local and imperial law and practice of slavery, we will see how the answers to basic questions about personal and political authority, influenced by metropolitan concepts and concerns, resulted in distinctive and unique systems of human bondage in the Bay Colony and the Old Dominion.21

The long Anglophone debate over slavery developed in distinct ways across both time and space. Chronologically, the broad outlines of the debate follow many of the traditional markers and turning points of Anglo-American history – the beginnings of colonization and early ideals of empire, the English Civil Wars and Revolution, the Stuart Restoration, the Glorious Revolution, the ascendancy of the Walpole ministry, and the imperial crisis of the late-18th century all left their indelible mark on the institution. Each of these turning points, however, produced new political, economic, and legal contexts and lexicons in which the debate over slavery was conducted, bringing forth new arguments both for and against property-in-man and refining older ones in light of changing circumstances.

In the earliest days of English colonization and into the crisis of the mid-17th century, the debate over slavery was primarily framed in moral terms, shaped by the religious turmoil of the age. Linked to emerging discourses of international law and theological debates over the origins of the human race, most early English colonists viewed heathen Africans as legitimately enslavable “others” beyond Christian moral proscriptions on slavery, while others believed that the unity of all persons in God precluded a property claim in a fellow human. When the Civil Wars, the Restoration, and the Glorious Revolution moved the political and legal rights of English subjects to the center of Anglophone discourse, the debate over slavery followed suit, producing a critique of the arbitrary power of slaveholders linked to revolutionary ideologies of limited authority and the rights of the subject. The middle half of the 18th century saw the emergence of a new economic critique of imperial slavery, a response to the unprecedented wealth attained by slave owners and their mercantile allies. At each turn, imperial slave owners responded to these criticisms by constructing their own proslavery ideologies, mirroring the progression from moral to political to economic defense of their peculiar institution. While none of these arenas ever fully monopolized the debate over slavery – economic justifications of the institution can be found in the early colonial period, while moral and political criticisms certainly remained potent down to the American Revolution and beyond – in broad terms the debate over slavery progressed from a moral to a political to an economic basis, incorporating and refining earlier critiques to fit new contexts.

As these debates unfolded over time, they also took on particular inflections in differing jurisdictions, where local social, economic, political, and religious concerns
shaped their outcomes. Indeed, throughout the colonial period most imperial observers agreed that slavery was essentially a local institution, a creature of local, colonial law.  

The choice of Massachusetts and Virginia as case studies, then, is not incidental to the political and legal debates that shaped the empire and the place of slavery in it. In many ways, these two colonies can be read as simulacra of evolving Anglophone debates over slavery and empire. Puritanical Bay Colonists and Cavalier Virginians are not mere caricatures – they are representative archetypes of the very real conflict between extreme patriarchalist individualism and corporate civic humanist ideals, between an emphasis on vested property rights and the natural freedom of humanity. In the broadest terms, it was this central conflict that provoked the civil wars of the mid-17th century and impelled the English into two revolutions in a generation. The claims of the early Stuarts to absolute authority rested on their assertion that society represented an organic, divinely mandated order, a single body with the sovereign as its head. All legitimate power flowed from God through the monarch, and could be rightly exercised only in the king’s name.  

The demands of a modernizing state and expanding empire, however, required that practical authority be exercised by appointed magistrates and, increasingly, individual heads of household enacting the monarch’s sovereignty in loco parentis. With this “devolution of

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absolutism” came increasingly absolute claims to property and rights by male heads of household.24

Perhaps nowhere is this devolutionary process clearer than in early colonial Virginia, where petty plantation monarchs sought to rule as nearly absolute patriarchs over those subject to their authority. Enacting the king’s sovereignty through their colonial state and in their individual households, the planter elite of the Old Dominion crafted a system of slavery that defined enslaved persons as articles of property and severely restricted access to the properties of subjecthood. Though justifications for enslavement were myriad, all shared the assumption that, for slavery to be legitimate, it could only be applied to “strangers,” defined out of the community of rights bearing individuals that constituted the English nation by their heathenism, nativity outside the realm, or lack of allegiance to the sovereign. This is precisely how the first African slaves to arrive in Virginia were defined under law.25 Already a valuable commodity in the Atlantic basin, the “twenty and odd Negars” whose importation John Rolfe noted in 1619 were purchased and held as property – as strangers, masters had a legal claim not

24 The concept of “devolution of absolutism” is drawn from McKeon, Secret History of Domesticity, chapter 1.
only to the labor of the enslaved, as was the case with all English servants, but their persons as well.26

These lines of exclusion were porous and fluid, however. Heathen African slaves might convert to Christianity. Slave owners might free individual slaves. The children of enslaved African parents were born in the king’s dominions just like those of English settlers. Might the logic of natural subjecthood transform these strangers into subjects? To avert this possibility, local legislators and jurists systematically barred Afro-Virginians from access to even the most basic properties of English subjecthood, passing statutes explicitly defining slaves as a form of property under common law, precluding the possibility of emancipation through conversion to Christianity, breaking with English legal tradition and mandating that the status of enslaved persons follow the mother, and closely regulating access to manumission. The seventeenth century thus saw enslaved Afro-Virginians defined out of the organic social hierarchy upon which absolutist patriarchalism was based and made subject to the near total authority of slave owners.27

Stuart absolutism and Virginia slavery were natural bedfellows.

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As the recurrent political crises that rocked seventeenth century England and its empire amply illustrate, however, the absolutist patriarchalism of Stuarts and slaveholders was far from hegemonic.\textsuperscript{28} Indeed, we might argue that the entire history of this tumultuous era is rooted in the fundamental conflict between Stuart absolutism and the corporate humanism of English Puritans and parliamentarians. Informed by the dissenting Protestant tradition and the revival of classical republican ideologies, English anti-absolutism was built on the twin concepts of consent and bracketed authority. Traditions of limited royal power and the participation of select subjects in the administration of the realm were augmented in the early seventeenth century by an emerging discourse of popular sovereignty and civic republicanism. This political discourse was further supported by similar principles of consent and limited authority undergirding the English dissenting Protestant tradition. Puritans and parliamentarians, united in their distaste for popish absolutism, were a real threat to the patriarchalist pretensions of the Stuarts.

To the opponents of Stuart regime, absolutism was illegitimate because it precluded the active consent of rights-bearing members of the community of subjects. At the household level, these magisterial reformers certainly espoused patriarchal hierarchy – children, women, and those of servile status lacked the properties necessary for the

exercise of authority – but absolutist patriarchalism as a political system made slaves of freeborn English men and women by subjecting them to authority without their consent.\textsuperscript{29}

Indeed, the whole purpose of government, these civic humanists argued, was to ensure the common good of the entire community – the common wealth – through the cooperation of all of its members, which could never be rightfully attained without the consent of at least some subjects. No authority, save perhaps that of God, could be absolute – to serve its true end, the power of the state must always be bracketed by the consent of the people, expressed in the common law of the realm.\textsuperscript{30}

When combined with elements drawn from the dissenting Protestant tradition, this political emphasis on consent and bracketed authority became a truly revolutionary force, with dramatic implications for the development of slavery in the American colonies.

Practically all dissenting Protestants agreed that consent was a critical element of any true church. Particularly among the more radical dissenters, like the Separatists and Puritans who settled New England, all legitimate civil and ecclesiastical authority required the consent, even if given virtually or indirectly, of those subjected to it. Just as ministers had no true calling without the consent of the congregation, magistrates had no legitimate authority without the direct consent of those they governed.\textsuperscript{31} All of these propositions were rooted in the fundamental dissenting Protestant belief in the equality of the saints, a


\textsuperscript{30} Pocock, \textit{Machiavellian Moment}, 361-400.

position that was difficult to square with human slavery, particularly if enslaved Africans converted to Christianity.

The peculiar combination of Mosaic and English common law that formed the basis of Massachusetts’ godly republic made the construction of slavery in the Bay Colony intensely problematic. The 1641 *Body of Liberties*, the foundational code of law for the Massachusetts Bay colony, declared that “there shall never be any bond slavery, villeinage or captivity among us” and, while it contained crucial qualifications that left the door open to the enslavement of “strangers,” even enslaved settlers would “have all the liberties and Christian usages which the law of God...doth morally require.”32 As long as lines of social inclusion and exclusion remained based primarily on Christian faith, the possibility of manumission and conditional assimilation gave the few Africans carried to the Bay Colony relatively open access to a form of imperial subjecthood. The core tenets of reformed Protestant antipatriarchalism took root in the stony soil of the Bay Colony, and provided an inhospitable environment for the development of chattel slavery. The air of early colonial New England was too pure for slavery.33


The fate of slavery in the early English empire, then, largely rested on the outcome of the decades-long struggle between Stuart absolutism and the civic humanism of the puritan parliamentarians. With the local development of slavery on the ground in the colonies largely beyond the direct control of metropolitan policies, decades of chaotic conflict in the mother country gave each settler society the space and flexibility to construct their own distinct legal and institutional bases for slavery. The outcome of the metropolitan struggle, however, also mattered tremendously for the colonies. The brief triumph of civic humanist republican ideals during the English Revolution introduced striking new ideals of consent, authority, and subjecthood, and produced what may be the first direct critique of human slavery in the English language. In a remarkable 1644 pamphlet, Henry Parker, a leading advisor to parliamentary radicals, argued that slave owners could never claim an absolute property right to persons without depriving "the Common-wealth, the Society of Mankinde, nay God himeslf" of their "publicke and sublime propriety" in the persons of subjects. The common weal demanded limitations on the dominion of masters. Though Parker acknowledged that slavery would be difficult to abolish "where it is established by publike authority," he argued that "where slaves are under the protection of other Laws than their lords wills, and where they are truly parts and members of the State, and so regarded; they cease to be slaves." Access to membership in the English nation – subjecthood – made slavery illegitimate.

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34 Henry Parker, *Jus Populi, or, A Discourse Wherein clear satisfaction is given, as well concerning the Rights of Subjects as the Right of Princes...* (London, 1644), 3-5, 6-8, 36-42. For a nuanced reading of Parker’s antislavery philosophy, see Mary Nyquist, *Arbitrary Rule: Slavery, Tyranny, and the Power of Life and Death* (Chicago: University of Chicago Press, 2013), 185-192. While I largely agree with Nyquist’s analysis of Parker’s work, I argue that she underestimates the broad appeal of the antislavery principles underlying *Jus Populi*, which were shared by many republican revolutionaries and political radicals during the Interregnum.
The triumph of radical Puritans and Parliamentarians in the English Civil Wars seemed to hold out the promise of a broader vision of subjecthood and the corporate protection of individual rights, but when Charles II was restored to the throne in 1660 and absolutist politics once again shaped English policy, slavery became increasingly central to the empire. The restored Stuarts plunged headlong into the trans-Atlantic slave trade, funneling state funds and their massive household wealth to the newly chartered Royal African Company. Headed by James, Duke of York – the future King James II – the RAC made large numbers of enslaved Africans available to Anglo-American colonists for the first time, with over 138,000 slaves delivered to English colonies during the Restoration. Defined as chattels by metropolitan courts and defined out of subjecthood by colonial legislatures, the enslaved Africans carried to the New World shored up the economic foundation of empire and guaranteed an independent source of revenue for the crown.

Many English subjects, however, chafed under the restored Stuarts’ absolutist pretensions, and some linked their domestic woes to the expansion of imperial slavery. Morgan Godwyn, an Anglican cleric who had served as a missionary in the colonies, argued that the basic problem with the chattel principle was that it put slaves to a “two-fold Use, first to *Brutifie* them; [then] to deprive them of all both *Temporal* and *Spiritual* Rights, which their Manhood, notwithstanding their being Slaves, would otherwise infer.” To make matters worse, arguments put forward by slave owners, who knew “no other *God* but *Money*, nor *Religion* but *Profit*,” made property-in-man a “universally owned

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“Principle” and allowed for “Inhumanities of the wrankest kind” to be visited upon the bodies and souls of enslaved Africans. The solution our commentator recommended was simple – “some wholesome and good Law” must be passed recognizing “that Right which we naturally have to be ranked within the Degree and Species of Men” and guaranteeing “that a Slave hath as good a plea and just claim to Necessaries, both for his Soul and Body, as his Master hath to his strength and industry.” Formerly enslaved persons would still inhabit a servile status, as many white subjects did, but the law would recognize them as persons, not property, and they would be restored to their basic natural rights. Critics like Godwyn linked the danger of political enslavement by Stuart absolutism to the moral evil of plantation slavery – taking a stand against the former implied a set of political and social ideals with the potential to destabilize the latter.

When Parliament invited William of Orange, the Dutch stadtholder, and his wife Mary, daughter of James II, to ascend the English throne in 1688, it effectively destroyed the political and legal foundation of Stuart absolutism and opened the door to a more robust critique of colonial slavery. The Glorious Revolution and the settlement it wrought, drawing on ideals espoused and refined by antislavery Britons like Parker and Godwyn, delegitimized the patriarchalist ideals that had underpinned the early construction of colonial slavery. It even appeared, for a brief moment, that the revolutionary settlement might even remake the social basis of the empire, breaking up large estates and promoting a more diversified imperial economy. This moment of antislavery potential was marked most clearly by a series of remarkable decisions by the

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Court of King’s Bench, the highest court in the empire, led by Chief Justice John Holt. Drawing on English “revolution principles” that stretched back into the early-17th century, Holt declared that “as soon as a negro comes into England, he becomes free,” and established that Afro-Britons, at least those at the metropole, were entitled to basic legal protections since “the common law takes no notice of negroes being different from other men.”\(^{37}\) Though these decisions were limited to England itself, Holt exemplified the emancipatory potential of a corporate humanist reading of English revolution principles.

If the Glorious Revolution and the settlement it wrought finally destroyed the patriarchalist base of Stuart absolutism, it also brought into being a new dialectical tension within the “liberal” tradition. To many Britons, particularly those in the mercantile or independent artisan communities that constituted a nascent bourgeoisie, the principles so clearly adumbrated by John Locke and other revolutionary Whigs were perfectly compatible with human slavery – ownership of private property was, after all, the centerpiece of the liberal tradition, and who could doubt but that enslaved Africans throughout the empire were comprehended under this definition.\(^{38}\) Others, however, steeped in the long English tradition of corporate rights and emphasis on the common wealth, saw the Glorious Revolution as a vindication of limited authority and the natural rights of all mankind, a position far less hospitable to imperial slavery.\(^{39}\) It was possible,

\(^{37}\) Holt’s decisions came in *Chamberlain v. Harvey* (1697), *Smith v. Brown and Cooper* (1702[?]), and *Smith v. Gould* (1706). For the reports of *Chamberlain*, see 3 Ld. Ray. 129-133; 5 Mod. 92; 1 Ld. Ray. 146; 5 Mod. 186; 1 Carth 397. For *Smith v. Brown and Cooper*, see 2 Salk 666.


\(^{39}\) On the continuing salience of republican ideology in post-Revolution England, see Caroline Robbins, *The Eighteenth-Century Commonwealthman: Studies in the Transmission, Development and Circumstances of English Liberal Thought from the Restoration of Charles II until the War with the
of course, to craft both pro- and antislavery arguments from any of these political or ideological positions. Desire for economic gain, social advancement, or political power could easily drive Englishmen on both sides of the Atlantic, whatever their politics, to find justifications for colonial bondage. In general, however, throughout the 18th century proslavery Britons tended to mobilize a libertarian political and legal discourse privileging the individual rights of freeborn Englishmen to own and enjoy their property without state interference, while the antislavery argument often hewed closer to a corporate humanist understanding of ideal social order where all rights and duties were reciprocal, necessarily limited by their relational character and actively guarded by the state.

These debates between Stuart absolutists and Puritan antipatriarchalists, liberal individualists and corporate humanists, were never isolated to household governance and political authority, however – they were essentially a contest over the ideal structure of social relations, and therefore had tremendous implications for the political economy of England and its empire. The decline of feudal social relations in England itself during the 16th century unleashed forces that would ultimately transform not only England but the entire global economy. The enclosure of common lands and the rise of manufacturing called a growing landless class, alienated from direct control over the means of production, into existence. Alienated from control over the means of production, these laborers also became consumers, driving increases in agricultural and manufacturing productivity and creating ever greater demand for finished goods and exotic luxuries. It

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was in this context that the English empire came into existence, and the dictates of capitalist development at the metropole largely determined the structure of colonial slavery from the outset.\footnote{My thought on the development of Anglo-American capitalism is most deeply informed by Hilton, ed., \textit{Transition from Feudalism to Capitalism}; T. H. Aston and C. H. E. Philpin, \textit{The Brenner Debate: Agrarian Class Structure and Economic Development in Pre-Industrial Europe} (New York: Cambridge University Press, 1985). The foundational work on the link between capitalism and slavery remains Eric Williams, \textit{Capitalism & Slavery} (Chapel Hill, NC: University of North Carolina Press, 1994 [1944]). For a useful overview of the subsequent debate over the links between capitalist development, slavery, and antislavery, see Blackburn, \textit{American Crucible}, 99-120 and citations infra.}

Then as now, however, capitalism was no monolith, and the changing contours of global economic development had an asymmetrical impact in the Anglo-American world. From its initial agrarian phase where landlords wrung greater productivity from their estates, English capitalism quickly shifted to a more mercantile form, extracting surplus value through the transshipment of colonial commodities to serve metropolitan and continental demand. The very basis of the English imperial project, then, was rooted in the capitalist transformation at home – the American colonies were, in this sense, capitalist from birth. Alienated from direct control of the means of production, increasing numbers of Britons became consumers, and an emergent merchant class seized the opportunity to enrich themselves by marketing tobacco, sugar, and other New World “drug foods” on the home market. These merchants cared little who produced these commodities – the massive returns on colonial produce meant it made little difference whether they were cultivated by slaves, servants, or free laborers. Colonial planters, however, found that economies of scale meant higher profits, amassed huge estates, and sought out the least expensive and most exploitable labor force available in the Atlantic world – African slaves. Fundamentally agnostic when it came to social relations on the ground in the colonies, merchant capitalism nonetheless worked to concretize the trend
toward slave labor – in the 17th century, at least, slavery and capitalist development went hand in glove.\(^{41}\)

As the 18th century progressed, however, a clear critique of mercantile capitalist empire emerged, stressing internal development and free trade over territorial acquisition, commodities production, and mercantilist trade policy. This opposition political economy, linked to a rising bourgeoisie and espoused most forcefully by the Patriot Whigs of the mid-1700s and adopted by later free traders like Adam Smith, found value not simply in the transshipment of colonial produce, but in the labor that transformed those commodities into marketable goods. Rather than a closed mercantilist system, Patriot political economy hoped to make Britain the premier manufacturing power of the globe, exporting its finished goods through a system of open trade, drawing hard money into the British imperial economy and increasing Albion’s standing in the competition for European economic dominance. This position was clearly not a direct threat to the plantation complex – indeed the continuing need for raw materials in the manufacturing sector may even have reinforced slavery as a source of commodities – but its emphasis on productive labor and the diversification of colonial economies tilted in favor of an evolving free labor vision.\(^{42}\) Imperial debates over political economy and their relationship to the development of colonial slavery, then, must be viewed in light of this shifting and contested terrain. Early mercantile capitalism may have called a new form of colonial slavery into being but, as the imperial economy developed over the course of

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\(^{42}\) Steve Pincus, “Patriot Fever: Political Economy and the Causes of the War of Jenkins Ear,” unpublished MS. I thank Prof. Pincus for permission to cite this chapter from his forthcoming book.
the 18th century, capitalist dictates also provided fit tools for the destruction of human bondage.43

Virginia and Massachusetts Bay were, from their very inception, extremely different in this regard. Huge estates and the monopolization of social and political power by a tiny planter elite closely connected to the crown typified absolutist patriarchal Virginia. The early adoption of tobacco monoculture and commodities exports as the basis of the Old Dominion’s economy was a direct result of, and greatly reinforced, the political economic imperatives of absolutist patriarchalism. When civil war and revolution shook this foundation, Virginia’s planter elite turned to the “revolution principles” of 1688, particularly the liberal individualist claims to the sanctity of property and the inviolability of the rights of freeborn English subjects, to protect their investment in chattel slavery. As metropolitan capitalism continued its development, it concretized the social relations underpinning commodities production in the colonies – where the master/slave relation was obviously of crucial importance – reaping substantial profits for slaveholders while limiting economic opportunity for smallholders and preventing economic diversification, resulting in near-total reliance of the local economy on the institution of slavery. Though metropolitan planners, along with a few isolated

43 Historians of 19th century American slavery have recently been drawn into a complex and fruitful debate over the connections between slavery and capitalism. While specific conclusions differ in many significant regards, an emerging consensus, drawing heavily on the Williams thesis, argues that human slavery was essential to the development of modern capitalism, providing the raw materials necessary to early industrialization. See Walter Johnson, River of Dark Dreams: Slavery and Empire in the Cotton Kingdom (Cambridge, MA: Harvard University Press, 2013); Edward Baptist, The Half Has Never Been Told: Slavery and the Making of American Capitalism (New York: Basic Books, 2014); Sven Beckert, Empire of Cotton: A Global History (New York: Alfred A. Knopf, 2014). Cf. Drescher, Abolition; Robin Blackburn, The Overthrow of Colonial Slavery, 1776-1848 (New York: Verso, 1988). For a fine critique of this recent literature, see John J. Clegg, “Capitalism and Slavery,” Critical Historical Studies, vol. 2, no. 2 (September, 2015): 281-304. This study seeks to problematize the ongoing debate over the relationship between slavery and capitalist development by broadening its temporal boundaries and giving close attention to how capitalist social relations were articulated through law and politics in specific jurisdictions throughout the colonial period.
colonists, attempted to alter this system at a number of points in the colonial period, the system of slavery and the socio-political base that supported it proved remarkably resilient in colonial Virginia.

In Massachusetts, of course, the social and economic bases of colonial life were far removed from those of the Old Dominion. Bay colonists, informed by their belief in the essential equality of Puritan saints, practiced partible inheritance from the very outset of colonization, subdividing estates with each generation. This system ensured that Massachusetts estates remained relatively modest, promoting economic diversification and precluding the kind of economies of scale that made plantation slavery so profitable. Rather than constructing their local economy on commodities production, Massachusetts settlers turned to the carrying trades and local manufacturing from a very early date – Boston and its surrounding port towns were already important centers of shipbuilding by the 1650s, and much of the labor needed for support industries came from wage laborers by the end of the 17th century. The Bay Colony, then, imported few servants, and fewer slaves, largely because they local political economy they created had no need for bound labor. Indeed, Massachusetts settlers placed high value on labor and sought to regulate local and colonial labor markets to benefit all participants – master and servant, employer and wage earner, father and children were all seen as interdependent elements of the ideal Puritan society.44 Slavery certainly existed in the Bay Colony from an early date, and

only grew in importance as the colonial period progressed, but its foundation was distinctive and always contested.

A full appreciation of the shifting and contested contours of slavery, then, requires renewed attention to the legal and political history of the institution at both the local and imperial levels, as well as an analysis of how the debate over the legitimacy of property-in-man was linked to broader political, economic, and social transformations. This dissertation seeks to point the way toward such an understanding. Though the debates that follow may at times seem far removed from the lived experiences of enslaved Afro-Britons, the ways in which English subjects thought about legitimate political authority, distribution of resources and labor, and ideal social relations directly shaped emerging pro- and antislavery ideals and largely determined the meanings of slavery and freedom in colonial America. Nor were the ways in which enslaved persons themselves navigated their enslavement ever far from these broader issues – through acts of rebellion large and small, negotiations with individual masters and claims on the colonial and imperial state, enslaved Afro-Britons attempted, sometimes successfully, to shape the terms of the long Anglophone debate over slavery.

All of these issues – slavery and subjecthood; the nature of authority and rights; ideal forms of social and political-economic organization – ran through the American Revolution and beyond to shape the institution of slavery in the British Empire and the new United States. When Britons turned against the slave trade in the 1780s and ‘90s, and eventually destroyed slavery itself in the early 19th century, they had a long and vibrant antislavery tradition to draw on. Early republican abolitionists in the United States also drew on elements of the long English debate over slavery during the so-called
“First Emancipation” that created a free soil North, which in turn gave rise to a new abolitionist movement by the 1830s. Anthony Benezet, Thomas Clarkson, William Wilberforce, William Lloyd Garrison, and Abraham Lincoln all owed much to the centuries-old debate over the legitimacy of property-in-man in the Anglophone world. Just as this debate laid the foundation for British and American abolition, however, it also provided slave owners and their allies with formidable weapons to oppose emancipation and retain their iron grip on their human property – Andrew Jackson, John C. Calhoun, and Jefferson Davis were also heirs to a long and storied English tradition. The long Anglo-American debate over slavery was certainly not settled by the turn of the 19th century, then, but it had largely determined the contours of the climacteric struggle yet to come. The study that follows seeks to restore this long debate to its rightful place in the histories of the British Empire and the American republic it spawned.


Chapter I – Colonial Slavery, Imperial Subjecthood: The Problem of Freedom in Early English Colonization, 1547-1641

The case began with an assault. In 1569, one Mr. Cartwright publically and brutally beat his Russian slave. When hauled before local magistrates on charges of assault and battery, Cartwright asserted a right commonly claimed by slave owners. He argued that, since the slave was his personal property, he could use whatever form of discipline he thought best to enforce his will. We know nothing of Cartwright's slave other than that he or she had been brought from Russia and was claimed as the property of an Englishman. Male or female, old or young, European or African, Christian or heathen – like millions of Africans who would be sold into Atlantic slavery, we can glimpse Cartwright's slave only obliquely through unofficial, uncorroborated, apocryphal sources. Yet, for some reason, this particular slave's encounter with the English courts evoked a full-throated assertion of the almost miraculous nature of English liberty.

Though there are no extant written records of the trial, later commentators all repeat one phrase in association with Cartwright's case – "That England was too pure an Air for Slaves to breathe in."1 While rarely cited as precedent, this simple phrase encapsulates a strong and resilient antislavery sentiment in England that would continue to inform debates over slavery and subjecthood in the Anglo-American world for centuries.

1 Perhaps not coincidentally, one of the first references to Cartwright's case came in the trial of the radical Leveller John Lilburne in 1639. The emergence of this quote during the first stirrings of civil war illustrates the widespread English counterpoising of slavery and subjecthood. Lilburne, popularly known as "Freeborn John," allegedly cited Cartwright's case to protest the excessive whipping to which he had been sentenced by Charles I's prerogative Court of Star Chamber. Such a punishment, Lilburne argued, especially when meted out by an unaccountable royal body like Star Chamber, was "illegal, and most unjust, against the liberty of the Subject, and the Law of the Land." Tellingly, Lilburne mobilized the apocryphal quote from Cartwright's case to advocate the "liberty of the Subject," not a nebulous or undefined "freedom." Quoted in John Rushworth, Historical Collections of Private Passages of State, vol. 2 (London: 1721), 461-481.
Despite this popular assumption about the incompatibility of slavery and English liberty, England also went on to construct an empire that owed its vitality and profitability, in no small measure, to the violent enslavement of millions of Africans. Already in the mid-16th century there were ominous signs that slavery could exist in English air. Even at the time of *Cartwright's case*, a short-lived Tudor statute had only recently sanctioned the use of slavery as a punishment for the early modern English poor. In 1547, during the short reign of Edward VI, *An Act for the Punishing of Vagabonds* stated that those who refused to work “shall be condemned as a slave to the person who has denounced him as an idler.” Masters would have coercive power to “feed [the] slave on bread and water,…[and] force him to do any work, no matter how disgusting, with whips and chains.” In addition, a master could “sell him, bequeath him, let him out on hire as a slave, just as he can any other personal chattel or cattle.” Slaves, this statute flatly stated, were a species of property – their labor could be coerced with extreme violence; they could be bought and sold as any other private property. Not only could slavery exist in English air, Britons themselves could be slaves.

Bound labor, however, was common in late medieval and early modern England. As feudal serfdom declined, apprenticeship, penal labor, and various forms of servitude became the norm for many English workers. The masters of these servile laborers also had vast coercive powers to enforce compliance. Under a statute passed in 1530, for example, vagabonds displaced from their fields by enclosure and without employment, were to be “tied to the cart-tail and whipped until the blood streams from their bodies, and then they are to swear on oath to go back to their birthplace…and to put themselves

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2 1 Edward VI, c. 3.
to useful labor.” The punishment for a third offense was death. One source states that “72,000 great and petty thieves were put to death” during the reign of Henry VIII alone.⁵ Even putatively free laborers who entered into short-term employment agreements were subject to physical and legal coercion by employers. With traditional rights to common lands disappearing through enclosure and access to freeholds severely limited, the vast majority of Englishmen had few economic options – enter into an indenture or apprenticeship; take to the roads in search of wage work on farms or in emerging manufactories; turn to a life of crime and survive by any means necessary – and all were fraught with very real dangers. Primitive capital accumulation indeed.

Brutally extracted forced labor, however, is not the same thing as slavery. Servants, apprentices, wives, children, and even short-term hired laborers may have been compelled to labor by male heads-of-household, with force if necessary. Subordinate household members were not paid wages directly, and even hired laborers were usually only paid at the end of an agreed term of service, and often in kind rather than in cash. According to the common law, masters "had a property in" their servants' labor. If a servant absconded, misbehaved, or did not complete the agreed term of service, masters had recourse to the English common law court system to force compliance or gain restitution for lost labor output.⁴ English law already granted masters far-reaching physical and legal power over their servants in mid-16th century England – what more, then, could the 1547 vagabondage statute really have done? None of these other bound

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labor statuses conferred a property right in the person of a laborer. Unlike servants, whose labor was owned by a master, defining enslaved vagabonds as "personal chattel" conferred ownership over his or her person. This is a fine distinction, to be sure, but a meaningful one nonetheless. Had the 1547 statute stood, slavery, an anomalous status in Western Europe for centuries, would have had a legal foothold on English soil, providing a statutory exception to popular assumptions about the free air of fair Albion.

This short-lived Tudor statute, however, was the exception that proved the rule – Britons never would be slaves. Certainty that they could not be reduced to mere articles of property did not prevent Englishmen from worrying intently about their political enslavement though, and the property-owning male heads of household who made up the political nation engaged in a long contest over the balance between the legitimate exercise of authority and the rights of subjecthood. If stripped of their cherished English liberties, any subject might be reduced to slavery, compelled to act against their will by some arbitrary power. The rights of subjects, then, must be jealously guarded to ensure that English men and women were not enslaved. How for these rights would extend, and who might lay claim to them, remained an open question, the subject of continuous debate.

For early modern Britons, then, the opposite of slavery was not freedom, a nebulous concept even in our modern world, but subjecthood, access to the rights, duties, and protections that adhered to all persons born within the English sovereign's dominions.

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5 Steinfeld, Invention of Free Labor, chapter 2. While English servants and African slaves may have faced similar treatment at the hands of colonial masters, the legal definition of slaves as property and servants as persons.

From the very outset of colonization, enslaved people were commonly denied access to English subjecthood. Defined as property, enslaved persons could have no recognizable legal rights. English common law is divided into two basic and largely separate strands—the law of persons and the law of property. Enslaved people—obviously persons but defined as articles of property—problematized this neat division and forced imperial Britons to reckon with the limits of subjecthood. This issue became particularly acute when enslaved people gained their liberty. In the interstices of the early English empire, legal space existed where the “charter generation” of African slaves could gain freedom and make claims to English subjecthood. The decentered nature of the early corporate empire created a patchwork of legalities, each suited to the peculiar circumstances of an individual colony, and allowed local law to diverge in critical ways from English common law. These divergences laid the foundation for centuries of African slavery in New World colonies like Virginia, where the first Anglo-American slaves were imported in 1619. Virginians assumed their bound African laborers to be slaves from the outset, but early slave law also held out the possibility of freedom and subjecthood to enslaved people. In England’s first New World colony, slavery was simple—Afro-Virginian freedom and subjecthood were the problem.

This same loose imperial structure, however, allowed for the development of a very different system of slavery in colonial New England. Motivated by fervent religious belief and a desire for cultural uniformity, Bay Colony settlers crafted a system of slavery based on a set of premises wholly different from those of their Virginia cousins. In 1641,

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Massachusetts Bay became the first English mainland colony to explicitly recognize slavery in statutory law, albeit in a rather tortured, roundabout way. The *Body of Liberties*, the first comprehensive code of laws enacted in Massachusetts, outlawed “bond slaverie, villeinage, or captivitie” among the settlers, yet maintained the status of slavery for “lawful captives taken in juste warres, and such strangers as willfully sell themselves or are sold unto us.” The statute also guaranteed that “servitude” would still be available as punishment for those “who shall be judged thereunto by Authoritie.” Drawing on Mosaic law, however, Puritan colonists decided that even those lawfully held in bondage “shall have all the liberties and Christian usages which the law of God established in Israell concerning such persons….”

The *Body of Liberties* may have created slavery in the Bay Colony, but it was a peculiar institution from the start.

In Massachusetts, despite the statutory legitimation of slavery in 1641, the institution did not harden into a racially exclusive form of hereditary bondage as it did in Virginia. In fact, the evidence seems to suggest that early Puritan slavery was meant to bring strangers more fully into the community of saints. The utopian logic of Puritan colonization dictated a relative equality among settlers, and Africans were apparently included in this formula. For Massachusetts Bay colonists, slavery was a tool to enforce and promote cultural homogeneity. Once slaves served their penance and committed to Massachusetts' strict Puritan morality, they would be freed and accounted full subjects. Far from being somehow “preset” for racism, Puritan theology actually worked to

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moderate the law and practice of slavery in early Massachusetts, making ‘slaves’ in the colony far more like English servants than enslaved persons in Virginia.⁹

In the crucible of early English colonization a number of distinct factors combined to produce, by the time of the English Civil War, a legal foundation for slavery in mainland North America. Chief among these were the political constitution of the early English empire, the development and adaptation of English common law to novel frontier conditions, and debates over the rights of English subjects (and the English sovereign) both in the British Isles and in their fledgling colonies. These forces, however, operated unevenly across colonial jurisdictions, with local variations in social structure, legal institutions, religious and political ideology, and economic imperatives producing divergent systems of slavery in Virginia and New England.

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The English were no strangers to the concept of slavery when they set out to colonize the New World. They may have been nearly a century behind the Iberian powers when they set out into the Atlantic World, but Britons were keen observers of Spanish and Portuguese forays into Africa and the Americas, and what they saw shocked them. English observers and imperial boosters emphasized the barbarity of Spain’s Catholic empire, constructing the so-called “black legend” of Spanish cruelty toward indigenous Americans and enslaved Africans. Associated as much with anti-Catholicism as with real concern for Native Americans or Africans, the “black legend” reinforced religious belief as central to cultural inclusion and exclusion, a tendency reinforced by the burgeoning travel literature of the late-16th and early-17th centuries. A growing body of

⁹ On Puritanism as “preset” for racist exclusion, see Paul R. Griffin, *Seeds of Racism in the Soul of America* (Cleveland, OH: Pilgrim Press, 1999), 5-17.
international law also grappled with the question of slavery and, drawing on these religious lines of exclusion, began to legitimize the enslavement of non-Christian heathens. This theistic legitimation of slavery also dovetailed with emerging biblical exegeses stressing the origins of racial difference in the curse Noah placed on Ham and his descendants in the book of Genesis. In the English mind, however, slavery was not yet a strictly racialized institution, and not simply because England lacked contact with Africa and Africans – Britons, after all, had only recently experimented with the enslavement of their fellow Christian subjects. Slaves from throughout the Atlantic world would up in late-16th and early-17th century England, forcing English courts to grapple with the tricky issues of property-in-man and rightlessness.

As Englishmen set out into the wider world with greater frequency in the late 16th century, then, they could not help but notice the ubiquity of human bondage in other societies. And though they were certainly familiar with forms of unfree labor at home, what English explorers saw in the Spanish colonies, or at least what they related to the English public, was shocking. Not only did the Spanish doom Native American souls to hell by converting them to the false Catholic faith, they continued to hold converted Indians as slaves, working them to death in hellish mines. As numerous scholars have shown, this "black legend" of Spanish cruelty was widespread in England, and its image of the dual enslavement of Native Americans provided a justification for an increased English presence in the Americas.10 The reality of slavery in the Spanish American colonies was far more complex. Objections from the Catholic Church and colonial

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missionaries like Bartolome de las Cases led the Spanish crown to officially ban the enslavement of Christianized Indians in 1542. Spanish civil law also provided a number of routes to freedom for enslaved persons, leading to the construction of free African communities throughout the Spanish empire.¹¹ English observers could not have failed to notice the conspicuous presence of both enslaved and free Africans in Spain's New World empire.

The few early English adventurers who found their way to the Spanish colonies also worried about their own personal freedom. Tales of Englishmen forced into slavery in Spanish galleys were widespread.¹² The Mediterranean world was also fraught with danger – Christian captives in the Ottoman empire were often enslaved and, worse yet, encouraged to convert to Islam. English enslavement in the Muslim world was widespread enough to require a response from the throne. Public charitable drives to raise money and emancipate captive Englishmen were common in Elizabethan England, and by the early 17th century the crown regularly issued proclamations calling for donations for favored individual captives. As late as 1624, James I initiated a massive fund raising drive for “fifteen hundred of our loving Subjects, English men, remaining in miserable servitude” in North Africa.¹³

Most English subjects, of course, would have no first-hand experience of slavery or empire. They could glimpse the wider world, however, through the burgeoning travel

¹³ Quoted in Guasco, Slaves and Englishmen, 143.
literature of late Tudor and early Stuart England. Slavery played a prominent if ambiguous role in this body of literature. Richard Hakluyt makes numerous offhand references to slavery in *Principall Navigations*, his 1582 collection of European travel narratives. A central figure in the construction of the 'black legend', Hakluyt envisioned an empire that would empower the English nation at the expense of the Spanish, and slavery played an important part in this imperial vision. In a memorandum to Elizabeth I, Hakluyt argued that Indians and Africans in the Spanish colonies would gladly "joyne with us...most willinglye" in overthrowing the "intollerable yoke" of Spanish slavery.

Africans also appear prominently in this early imperial literature, often as slaves but also as merchants, rulers, and potential allies. Despite small-scale forays into the African slave trade in the 1590s, many English travelers continued to eschew the practice, protesting that the English "did not deale in any such commodities, neither did [they] buy or sell one another, or any that had our owne shapes." The competing visions of empire presented in this early travel literature uniformly stressed the liberating potential of English colonial expansion, and typically presented Native Americans and Africans as potential allies in this venture rather than commodities for trade.

Increased European competition in the New World also accelerated the development of a new body of international law, and the English were active participants

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in this process.\textsuperscript{17} Alberico Gentili, an Italian Protestant who fled the Inquisition and settled in England where he became Regis Professor of Civil Law at Oxford in 1580, considered the legality of slavery in his \textit{De Iure Belli Libri Tres}, first published in 1582. Like most early modern commentators, Gentili found the origin of slavery in the taking of captives in just wars, but limited enslavement to heathens, arguing that "in the wars of the Christians there was no slavery." Christian wars were "more than civil" and thus prisoners could "not be held captive perpetually." Wars against non-Christians, however, were another matter. Captives taken in these wars would "remain a slave continually, even when the war was ended, if there was no provision" freeing them in peace treaties. For Gentili, as for most English commentators, slavery was a fate that only outsiders could legally suffer. Still, slavery was "among the greatest ills" a person could be subjected to – slaves were "reduced to the condition of a beast," transformed into "a chattel instead of a person." Slavery, in Gentili's formulation, was "all but death."\textsuperscript{18}

Despite his negative portrayal of slavery, Gentili realized that the institution was widespread, "common to Christians and infidels," and must therefore be recognized as "belong[ing] to the law of nations." Because of its widespread usage, slavery must be, to some extent, "in harmony with nature." Arguing against continental jurists like Jean Bodin who argued that slavery was contrary to natural law, Gentili asserted that "we are not created free by nature so absolute that very many of us may not be made slaves." The prevalence of slavery in the practice of nations proved that it was a natural institution – "a

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thing is natural which is wont to happen always and everywhere."  

Indeed, experience had proved that even the English could be enslaved once outside the free air of the British Isles. Despite the recognition that slavery existed in the practice of nations, under the early modern European law of nations it was a fate reserved for pagans, heathens, and strangers.

Connections between English Protestantism and ideas about slavery and race, however, were fraught with ambiguity. As numerous historians have recently noted, early modern European biblical exegetes provided many religious justifications for slavery. The Pauline epistles, after all, called on servants to be obedient to their masters, even unto death, and held that all true Christians were, in a sense, slaves to Christ.

Slavery itself is never denounced directly by Christ in the gospels, and the Old Testament included explicit sanction for the enslavement of strangers. Some exegetes also argued that the biblical ‘Curse of Ham’ specifically sanctioned the enslavement of Africans. Often used by early modern commentators to explain the origins of human racial difference, the Curse of Ham is drawn from the story of the flood in the book of Genesis. Ham, one of Noah's sons, shamed his father, who had fallen asleep drunk in a tent, by exposing his nakedness. In response, Noah placed a curse on Ham’s son Canaan – "a

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19 Ibid.
22 Alternative exegeses claimed that Ham provoked the curse either by fondling and enchanting his father's genitals while he slept, or by castrating him. Both explanations of the curse stressed Ham's inability to contain his libidinous urges, a charge often later leveled at Africans. See Andrew Willett, Hexapla in Genesin & Exodum: that is A Sixfold Commentary upon the two first bookes of Moses, being Genesis and Exodus... (London: John Haviland, 1633).
servant of servants shall he be unto his brethren." Originally meant to explain the subjugation of Canaan to the Israelites, early modern commentators faced with the growth of the trans-Atlantic slave trade increasingly came to identify Africans with the curse.

Connections between the Curse of Ham and Africans first emerged in England in the late-16th century, as travel literature describing Africa began to hit English bookshelves. George Best, a companion of Martin Frobisher on his early voyages, wrote that God made "a spectacle" of Ham's disobedience by making his son Chus [Cush] "black and loathsome," and from this curse came "all these blacke Moores which are in Africa." Andrew Willett, a leading biblical commentator in in early 17th century England, also examined the Curse of Ham in his 1603 Hexepla in Genesin, but unlike Best he did not connect the curse to Africans. Willett stressed that the type of slavery created by the Hamitic curse was different from English forms of servitude. Servitude was a natural state and "a profitable service" that, even without the curse, "should otherwise have been in the world: as when men for order sake, and their better preservation obey their merciful and prudent rulers, that govern them as fathers."

Patriarchal hierarchy, according to Willet, was natural, a product of God's love for his people. "[T]he slavish life," however, "had its beginning in cursed Canaan" – slavery was born of sin, not the love of God. Slaves, then, were "more vile than the lowest servant," analogous to captives taken in war who, "being saved alive...became servants, being so called, because they were saved." While Willett was willing to accept that

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23 Genesis 9:25.
24 George Best, A True Discourse of the Late Voyages of Discoverie for the Finding of a Passage to Cathaya (London: 1578), 31.
Noah's curse had created slavery, he was unwilling to take the step that some other exegetes did in applying this curse exclusively to Africans. Indeed it appears he was more interested in a confessional limit to slavery than a racial one. The Hamitic curse, according to Willett, was "so much the more grievous" because Canaan was "subjected to his bretheren" – enslavement by "strangers" might be "more willingly borne" and could be condoned. But by this logic once a stranger was converted and assimilated, he or she might continue to be a servant, but could no longer be enslaved.

Nor were English ideas of Africa and Africans limited to travel literature or biblical exegeses – there were also blacks resident in England itself. Though few in number, Africans and Afro-Britons were a conspicuous presence in the early Tudor court as musicians and servants, and a contingent of Moors arrived as part of Catherine of Aragon's entourage in 1501. Five of Shakespeare's plays feature African characters in prominent roles, portrayed with characteristically Shakespearean attention to the complexity of the human experience. As historian James Walvin has argued, Afro-Britons were "securely lodged at various social levels" by the end of the 16th century, including a small number of black freeholders. Most black Britons, however, were no more able to avoid the uncertainties of the Elizabethan economy than were any other


28 Walvin, Black and White, 8.
English subjects. The few Africans who appear in Tudor records lived at the very bottom of English society, and at least some were certainly enslaved.

In early 1547 James Fraunces (or Jacques Francis) became one of the first African slaves to appear in an English court. The 20-year-old Fraunces worked as a diver and was the slave of one Peter Paulo Corso, who had been hired by Domenico Erizo of Florence to salvage tin from a wrecked ship lying off Southampton. When Corso refused to deliver the salvaged tin, claiming it was taken from another wreck, Fraunces was called before the High Court of Admiralty to give testimony in the case. Through his deposition, given "as he says of his own free will" and translated for the court, we learn that Corso had purchased Fraunces only two years earlier, and that before his enslavement he lived "in the Island of Guinea where he was born." Despite Fraunces' testimony is otherwise unremarkable, other parties to the case protested that the court should throw it out because he was "a morisco born where they are not christenyd." Furthermore, Fraunces was "a slave to the sayd peter paulo," and "therefore...no Credite nor faithe ought to be geven to his Sayenges as in other Strange Christian cuntryes hit ys to no suche slave geven." As a slave and a stranger, Fraunces’ testimony should be thrown out.

While it certainly illustrates many of the biases against Africans common in early modern Europe, the response to Fraunces' deposition cannot be reduced solely to race. The central objection to Fraunces' testimony was that it came from a heathen, though his

29 "Lying Off the Needles," BNA, HCA 13/93, ff. 203-4.  
30 "A morisco born where they are not christened," BNA, HCA 13/93, ff. 275-6.  
Christian name hints that Fraunces may have been baptized at some point.\textsuperscript{31} The Elizabethan crackdown on the laboring poor may also have played a role. Testimony from other witnesses describes Fraunces and the multi-ethnic salvage crew he worked with, including at least one English laborer, as "poore laboryng men...sekyng ther levyng abowte in sondrye places," much like the wandering poor targeted by the 1547 Vagabond Act.\textsuperscript{32} Without local precedent to rely on, objections to Fraunces' testimony cited the custom of excluding slave testimony in "Strange Christian" nations, likely because there was no analogous English precedent. Despite all these objections to Fraunces' deposition, the High Court of Admiralty included it in their considerations – neither his status as a slave nor his African birth were sufficient cause to reject Fraunces' testimony. This ambivalence toward slavery in an English courtroom illustrates that African slaves in Tudor England were still, at least to some extent, considered persons before the law. Fraunces, after all, gave testimony in the case from his own "free will."

Africans in England were a conspicuous enough presence by the 1590s to draw Queen Elizabeth's direct attention. Starting in 1596, she made a number of unsuccessful attempts to expel Africans from England. In a public letter to the Lord Mayor of London, Elizabeth complained that "divers Blackmoores...of which kinde of people there are all

\textsuperscript{31} Mass baptisms of African slaves were becoming more common in Portuguese slaving forts in the mid-16th century and it is possible that Fraunces was baptized even before his sale. See James Sweet, \textit{Recreating Africa: Culture, Kinship, and Religion in the African-Portuguese World, 1441-1770} (Chapel Hill, NC: University of North Carolina Press, 2003); John Thornton, \textit{Africa and Africans in the Making of the Atlantic World, 1400-1800} (New York: Cambridge University Press, 1992), 98-128, 235-271. It is also possible that Corso, most likely a Catholic, had Fraunces baptized at some point after his purchase. Whether he was Christian or not, Fraunces' alleged heathenism was not considered sufficient cause to reject his testimony.

\textsuperscript{32} "A morisco born where they are not christened," BNA, HCA 13/93, ff. 275-6.
ready here to manie," were exacerbating England's already glutted labor market. In July 1596, merchant Casper van Senden arrived in London with a group of Englishmen who he had redeemed from "great misery and thraldom" in Spain and Portugal at his own expense. Van Senden asked that the crown repay this act of charity by allowing him "to take up so many Blackamoores" from England, presumably to sell as slaves on his return trip to Spain. Elizabeth deemed the offer "a very good exchange," and ordered London's mayor to assist van Senden. Recognizing the property rights of English masters, van Senden was required to obtain consent from the Africans' owners before transporting them. To help convince reluctant masters, Elizabeth asked them to "doe charitable and like Christians rather to be served by their owne contrymen" than by African slaves or servants. "Those kinde of people," Elizabeth argued, "may well be spared in this Realme."34

Despite these requests from their queen, masters were apparently reluctant to give up their African laborers. Another royal proclamation in 1601 required masters who "willfully and obstinately refuse[d]" to comply to appear before the Privy Council and explain themselves or face the consequences.35 While it certainly singled out Africans, this attempt at expulsion was not entirely out of step with other late Tudor efforts to deal with vagabondage and unemployment. In the end, the deportation policy failed – masters "willfully and obstinately" clung to their property rights, the state authorized only a single

merchant to carry out the policy, and there were simply too many Africans at too many levels of English society.

Most English encounters with Africans, of course, took place far beyond the British Isles, and as English subjects began setting out for the New World at the end of the 16th century they were immediately forced to deal with the place of slavery and subjecthood in their proposed empire. Indeed the very act of building an empire raised central questions about the meaning of the English nation. By whom and for whose benefit would colonization be undertaken? What would be the status of Britons who settled overseas, and what legal regimes would they live under? Was the empire merely an extension of England, or could overseas possessions, and the people who resided in them, be treated differently than native English subjects? The answers to these questions would provide the foundation upon which imperial slavery would be constructed, and, from the very beginning, they were hotly contested.

To King James I, chartered corporations were ideal agents of colonization. Politically, royal charters bolstered his claims to absolute sovereignty by giving him a venue in which to exercise extraordinary prerogative powers. In his 1598 pamphlet, *The Trew Lawe of Free Monarchies*, he laid out a clear claim to the kind of power he would wield in creating the legal basis for colonization. Quoting the book of Samuel, James argued that Saul, the first Judeo-Christian king, had been anointed directly by God as the first King of Israel and that the Israelites had consented to his overlordship. Once made, however, this holy version of the social contract could not be undone. James’ vision of absolutism implied limitations on the rights of subjects. Displeased subjects could only “arme [them]selves with patience and humility, since he that hath the only power to make
[a King], hath the only power to unmake him.” This biblical exegesis led James to the conclusion that, as king of Scotland, he was “God’s Lieutenant in earth” and his subjects were bound to “[obey] his commands in all things...acknowledging him a Judge set by God over them, having power to judge them, but to be judged only by God, whom to only he must give count of his judgment.” Having given their consent to the creation of monarchy, the ancient Israelites, James claimed, need no longer give consent to the sovereign's decisions. According to James and other theorists of royal absolutism, this original grant of monarchial power made disobedience to the king not only treason, but sin as well. If, in the most extreme case, the king violated natural law in his decrees, subjects could resist them to point out his error, but must also accept whatever punishments the monarch meted out. This doctrine of passive obedience was the only form of resistance James' royalist absolutism would countenance.\(^{36}\)

James’ argument went beyond scriptural citation, however, to make broader claims about the basis of “free Monarchy” in a civil law nation like Scotland. To James, his authority as king of Scotland could not be limited. The crown descended to him from “a wise King” who “established the estate and forme of government” among the Celtic “barbares” and “thereafter made laws by himself.” All this, James claimed, preceded the first Parliaments, laws, or land distributions – “the Kings were the authors and makers of the lawes, and not the lawes of Kings.”\(^{37}\) The sovereign power of the first Scottish kings descended with the crown in an unbroken chain of succession under the ancient Roman civil law. But what of the other jurisdictions that came within James’ imperium when he

\(^{36}\) James VI, The True Lawe of Free Monarchies: or the Reciprock and Mutuall Dutie Betwixt a free King, and his naturall Subjects (Edinburgh: Robert Waldegrave, 1598), [unpaginated].

\(^{37}\) Ibid.
ascended the English throne in 1603? Would his absolute sovereignty extend to England? James claimed that when William the Conqueror, “the Bastard of Normandie,” conquered England in 1066, “he gave the Law, and tooke none, changed the laws, inverted the order of government, [and] set down the strangers his followers in many of the old possessours rooms.” William had, in James’ view, made himself absolute monarch of all England, and “his successors have with great happinesse enjoyed the Crowne to this day” on those same terms.38 Conveniently glossing the limits on monarchial power imposed by Magna Carta, James laid claim to nearly unlimited royal prerogative power that, to many English subjects, seemed a violation of their treasured rights under common law and the ancient constitution.

The absolutist-patriarchalist social and political vision elucidated by James I, and echoed by political theorists like Robert Filmer, provided much of the ideological material that would lay the foundation for Anglo-American slave societies.39 Theorists of absolutism commonly used two analogical models to naturalize absolute patriarchalist power: the human body and the household. “The proper office of a King towards his Subjects,” James I argued, “agrees very well with the office of the head towards the body.” As head of the body politic, the monarch was “the seate of Judgement” from which “the discourse and direction flowes,” empowered even to “cut off some rotten member...to keepe the rest of the body in integritie.”40 The most sophisticated and full-throated exponent of English absolutism, Robert Filmer, relied more commonly on the household as his model for the absolutist state in Patriarcha, printed in 1680 but written

38 Ibid.
39 Robert Filmer, Patriarcha: or the Natural Power of Kings (London: Walter Davis, 1680).
40 James VI, True Lawe of Free Monarchies, [np].
in the 1630s and '40s as a defense of Stuart absolutism. God had conferred power on Adam, the first father, which had descended through an unbroken line of patriarchs. To Filmer, the king was self-evidently the lord of his dominions just as a father was unquestionably the head of his household. Wives, children, and other household dependents could no more question the will of the father as head-of-household than a subject could actively resist their king – the consent of household members or royal subjects to the decisions of fathers and kings was philosophically unnecessary and potentially subversive of social and political order.\textsuperscript{41}

This household analogy, however, could run in the opposite direction as well – family patriarchs were divinely sanctioned kings within their own household dominions – and informed the ways in which male heads-of-household in early modern England thought about the rights and duties of those they oversaw, including their slaves. Just as subjects need not consent to the decisions of the king, wives, children, and servants were bound to follow the direction of fathers without giving their consent. The only form of resistance to which household members had recourse was passive obedience, and even then they were to meekly accept the punishments that were sure to follow. In this intensely gendered power structure, fathers as heads-of-household could legitimately limit the physical mobility of those who lived under them, control property through coverture and the laws of descent, represent wives and children legally in the courts, and use physical force to compel obedience from dependent household members.

Theoretically, this authority extended even to the power of life and death.\textsuperscript{42} As the Stuart

\textsuperscript{41} Filmer, \textit{Patriarcha}, passim.
monarchs worked to expand their power under this royal absolutist-patriarchalist philosophy, so many heads of household worked to augment their own authority over wives, children, and servants.\textsuperscript{43}

There was, however, one critical limit to the power of male heads of household. Wives, children, and servants, despite their subaltern status, remained subjects of the king, entitled to the basic protections of subjecthood. Though a father was unquestionably empowered to use physical force to compel obedience from members of his household, his wife, children, and servants still had recourse to the king’s justice for protection from excessive correction. Though rare, wives \textit{could} divorce their husbands for excessive cruelty, and were guaranteed use rights to properties they brought to the marriage. The legal rights of children were protected by the king as well through the Court of Wards, where the estates of minors could be held in trust to prevent their misuse by grasping male relatives.\textsuperscript{44} Servants could bring suit in the king’s courts against masters who failed to honor employment agreements, and could own separate property, protected by common law, during their service.\textsuperscript{45} Despite their theoretically unlimited authority, the powers of male heads-of-household were bounded by the sovereign power of the monarch. The legal and philosophical absurdity of \textit{imperium in imperio} dictated that ultimate sovereignty, even over individual households, remain in the hands of the king. Thus, while on one hand absolutist theory bolstered the gendered claims to power


made by heads-of-household, on the other hand it undercut those same claims by placing all subjects under the protection of the king.

Furthermore, not all Britons agreed with James I’s or Robert Filmer’s conceptualization of the king as divinely appointed head or father. Opposition to the Stuart absolutist vision of empire, however, was far from unified. Most English dissenters, including the first Puritan settlers of Massachusetts Bay, sought a "magisterial reformation" in church and state. Men like John Winthrop worried not only that James' insistence on a hierarchical system of church governance, with bishops appointed directly by king, corrupted the true churches of English puritans, but also that the political methods used to suppress the puritan reformation were illegitimate. The persecution of English dissenters in Star Chamber not only drove many to sin in feigning conformity with the Church of England against their conscience – it was an abuse of royal power in the service of Antichrist, a danger that went far beyond theology to threaten the rights of all English subjects. This is not to say that mainstream puritan opposition to early Stuart absolutism sought the radical overthrow of monarchy and patriarchy. Indeed, once ensconced in the Bay Colony, many of the same puritans who opposed James' religious and political policies would resort to similar tactics in organizing their New World colony. Rather, most English anti-absolutists wanted merely to restore the element of consent to government in both church and state. Just as a minister should not be called without the consent of his congregation, the king should not tax his subjects or abridge their basic common law rights without the consent of their representatives in Parliament. This was to be a reorganization of church and state that would keep ministers, elders, and
magistrates, hopefully in concert with the throne, firmly in control of the communities they oversaw not a radical experiment in democracy.\textsuperscript{46}

Radical anti-patriarchalist sentiment was not absent from England, however, and it was closely linked both with radical "separatist" Puritanism and the urban and rural unrest sparked by England's early 17th-century economic and demographic crises.\textsuperscript{47}

Radical puritans, like those who would form the nucleus of the Leiden separatist congregation and the earliest migrants to Plymouth, organized their churches on radically democratic principles, allowed women and unlicensed preachers to debate the word of God in underground conventicles, and openly disregarded statutes requiring conformity with the liturgy as proscribed by the Church of England. Debates over church governance, however, were implicitly debates over political sovereignty – as James I succinctly put it, "No Bishops, No King" – and hotbeds of religious radicalism also served as platforms for political organization. Radical puritans believed that their modes of church organization were closely attuned to those of the first Christian churches, and that extension of these modes to state governance would hasten the coming of the Kingdom of Christ. Eventually, as the unlicensed Coleman Street Ward preacher Samuel How pointed out, when the "wise, rich, noble, and learned" came to know the true gospel,


they would "make themselves equal with them of the lower sort, the foolish, the vile and unlearned; for those be the true heirs" of Christ.\textsuperscript{48}

The implications of these anti-absolutist positions were manifold. Although they differed in specifics, both mainstream puritans and radical separatists agreed that consent was crucial to the legitimacy of authority in church, state, and household. Their difference was one of degree, not of kind. Mainstream puritans sought a magisterial reformation led by the propertied few who had access to political subjecthood where radicals and separatists hoped for a transformation of the very definition of subjecthood itself, allowing those without property a political voice in shaping their churches and communities. While these differences were not insignificant, and would prove crucial in shaping the contours of society in New England, they did not prevent mainstream and radical puritans from recognizing their shared enemy – Stuart absolutism.

Implicit in this anti-absolutist critique was the belief that the most basic rights of civil subjecthood could never be abridged. The rule of law was an essential component of the opposition to Stuart absolutism. When Englishmen lost their access to the courts, legal protection from arbitrary imprisonment or physical violence, or the sanctity of their properties and families, they would no longer be subjects. To increasing numbers of commentators in the early 1600s, this loss of the most basic rights of subjecthood was tantamount to slavery. The solution was clear – guarantee that all subjects have access to basic civic rights, and ensure that those with a stake in society retain the ability to participate in the political life of the nation. While the logic of this position did not necessarily call for a broadening of the political nation, in practice it represented a serious

\textsuperscript{48} Quoted in Donoghue, \textit{Fire Under the Ashes}, 12.
challenge to James’ absolutist program by asserting the inviolability of civil subjecthood and envisioning a more active role in governance for political subjects. Early Stuart anti-absolutism, then, was not inherently democratic or anti-patriarchalist, but its fundamental insistence on a subject's access to basic civil rights would play a crucial role in shaping colonial ideals of subjecthood and slavery.

In the context of New World colonization, James’ Scottish civil law background and absolutist leanings proved particularly important. When framing charters and planning overseas settlement, English monarchs looked to the ancient civil law for guidance, not the relatively provincial English common law. Civil law had the benefit of international recognition and a stable corpus of texts upon which to base claims to sovereignty.\(^{49}\) Within England, James used his ordinary prerogative powers much as his Tudor predecessors had. The appointment of crown offices, calling and dissolving Parliament, and trying cases in the prerogative court of Star Chamber were, by the early 17th century, regularly used if not wholly accepted crown powers. These powers were, however, limited in a number of important ways. They could be exercised only within England and resistance to their unfettered use was growing.\(^{50}\) Parliament or the common law courts could challenge James’ domestic ambitions, but the colonization of terra

\(^{49}\) In the pre-Westphalian state system, before international law was codified by 17th century jurists, Europeans looked predominantly to Justinian’s Code and other Roman law texts for legitimation in their colonial enterprises. On the prevalence of civil law in structuring European overseas expansion in the 16th and 17th centuries, see Kenneth MacMillan, *Sovereignty and Possession in the English New World: The Legal Foundations of Empire* (New York: Cambridge University Press, 2006); Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (New York: Cambridge University Press, 2002).

\(^{50}\) In 1607, for example, Sir Edward Coke, the eminent jurist and Chief Justice of King’s Bench, argued that James I had no power to interpret common law. Four years later, Coke argued in the *Case of Prohibitions* that the monarch could not create new prerogative powers. Coke was removed from the bench for his attempts at judicial independence – all Stuart justices held their seats *in bene placio*, at the king’s pleasure.
nullis proceeded through his extraordinary prerogative power and was largely beyond the reach of local English institutions.\textsuperscript{51} For James, colonization provided a venue for independent royal action and bolstered royal supremacy.

Relatively late arrival to New World colonization did not mean that the English faced a wholly novel situation in structuring their expanding empire. In fact, English colonial planners had ample and recent precedent to draw on. As numerous scholars have recently argued, English campaigns for subjugating the native Celtic Irish and “planting” Ulster with “new English” provided one model for New World colonization. Under this model, new colonies could be treated as conquered territories and their people governed directly by the crown.\textsuperscript{52} Union between England and Wales during the reign of Henry VIII provided another possible organizational model whereby the colonies would be wholly absorbed into a nascent ‘Britain’ and governed directly by English laws and institutions, including Parliament and the common law courts at Westminster Hall.\textsuperscript{53} The succession of James VI of Scotland to the English throne as James I in 1603 provided yet another model – the composite monarchy of England and Scotland.\textsuperscript{54} The two British realms were both unquestionably within James the VI and I’s imperium, but retained their own distinct courts, parliaments, and ecclesiastical organization.\textsuperscript{55}

\textsuperscript{51} For the differences between ordinary and extraordinary prerogative powers, see MacMillan, \textit{Sovereignty and Possession}, chapter 1.


\textsuperscript{53} On the evolving nature of ‘Britain’, both as a territorially bounded polity and an object of subjects’ identity, see Linda Colley, \textit{Britons: Forging the Nation, 1707-1837} (New Haven, CT: Yale University Press, 1992).

\textsuperscript{54} James VI and I’s ascension to the throne in 1603 raised the question of subjecthood in a new way. Would Scots now be considered full English subjects? This question was largely settled by \textit{Calvin’s Case} (1608), discussed in more detail below.

\textsuperscript{55} On the concept of empire in early modern England and its application both within Britain and in the colonial context, see David Armitage, \textit{The Ideological Origins of the British Empire} (New York: Cambridge University Press, 2001).
Each of these models was attractive for a variety of reasons, but the limitations of the early Stuart state apparatus, the economic imperatives of settling a new colony in the American wilderness, and the political leanings of the Stuart monarchy dictated that colonization proceed, at least initially, through royally chartered corporations. Examining the debate over the structure of the early English empire illuminates the articulation of legal and political authority both within individual colonies and between the metropole and its new empire. The resulting structure of the early English empire played a key role in laying the legal foundations for American slavery.

Economic factors, linked closely to absolutist political ideology, also influenced English plans for structuring the growing English empire. James I and his councilors hoped that private individuals would finance risky colonial ventures out of their own pockets while the state offered support through short-term customs exemptions, trade incentives, and generous patents that often licensed privateering by English ships.\(^{56}\) Ideally, the investors’ initial outlay would be recouped quickly when American mines, agriculture, and fisheries began to generate the profits expected by optimistic imperial planners. James, of course, would supplement his royal treasury by taking a twenty-percent cut of all mining profits while colonial trade would augment customs and tonnage duties controlled directly by the crown.

\(^{56}\) Among these incentives was the power to “take and Surprise, by all Ways and Means whatsoever” the “Ships, Vessels, Goods, and other Furniture” of anyone trading without the crown’s license in the colony. English subjects (possibly denizens?) had to pay a 2% duty on all imported goods to the colony’s treasurer, and “Strangers” paid a 5% duty. These funds were granted to the “Use, Benefit, and Behoof” of the Virginia Council for 21 years, after which date customs would revert to the crown [Francis Newton Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies now or heretofore forming the United States of America* (Washington, DC: Government Printing Office, 1909), VII: 3787. [Hereafter cited as Thorpe, *Charters.*] These customs payments formed a crucial “sinew” of empire, helping to defray the initial costs to investors of planting a new settlement and later filling the royal treasury.
Widespread ownership of private property was anathema to James I’s imperial vision. Under the terms of Virginia’s first royal charter, all property rights in the colony were held by the Virginia Company’s appointed Council back in London. All land was granted directly by James, to be held “as of our Manor of East-Greenwhich, in the County of Kent, in free and common Soccage only, and not in Capite.” The wording of this royal land grant was crucial, and would recur again and again in later colonial charters. Holding land in “free and common Soccage” gave the Virginia Company a freehold tenure in all colonial real estate. Under this increasingly popular form of tenure, property owners were released from many of the feudal obligations that encumbered estates held in capite or knight’s service. Unlike older feudal tenures that required payment of annual fees or performance of service to the crown, freehold estates carried only the obligations of fealty and relief. Freehold estates could also be devised and were alienable. Granting tenure in free and common socage gave Virginia Company investors an additional economic incentive for colonization by ensuring that they would not be subject to feudal fees and guaranteeing that all revenue gained from colonial property would flow to the Company.

In turn, James I was freed from the burden of creating a new and cumbersome state apparatus for collecting feudal dues in a far-flung empire. Under these generous terms, the select group of thirteen royal favorites and investors who sat on the Virginia

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57 For the language of the first Virginia Charter, see Thorpe, Charters, VII: 3783-3789. From the mid-16th century on, many of the feudal services incident to capitas tenure were converted to financial burdens in the form of fees and quitrents. These feudal encumbrances were an important source of revenue for the crown. By the late 1630s, nearly £90,000 per annum flowed into the royal exchequer from feudal incidents, a threefold increase from the late 16th century. Opposition to these feudal encumbrances increased apace with royal revenues – negotiations between Parliament and James I over reform of land tenures broke down in 1611 and would not be resumed before the outbreak of civil war. See B. H. McPherson, “Revisiting the Manor of East Greenwich,” The American Journal of Legal History, vol. 42, no. 1 (Jan.1998): 35-56.
Council had the power to “GIVE and GRANT” all “Lands, Tenements, and Hereditaments” to “such Persons, their Heirs and Assigns” as they saw fit. Successive charter revisions in 1609 and 1611 confirmed this structure of property ownership and cemented the authority of the Virginia Council. Although empowered to grant land to colonists, in the first years of English colonization it made little sense for the Council to distribute their property to individual settlers. The expected profits of Virginia’s extractive economy were to accrue to select royal favorites and the crown itself, not individual settlers.

Other Britons, however, saw colonization as a critical phase in the unfolding of sacred history. Particularly to Puritans and reform-minded Anglicans, English settlement would counter the malign influence of antichristian papists in the New World, ushering in an age of conversion to true religion and speeding the second coming of Christ. Perhaps the most conspicuous booster for the religious mission of colonization was Samuel Purchas, a reformed Anglican cleric and compiler of travel narratives. While Purchas, like King James, recognized the potential economic benefit of American settlement, he criticized the “self-love” and “Covetousnesse” of many Britons, which led them to forget that “they are planting a Colony, not reaping a harvest, for a public and not (but in subordinate order) private wealth.” Rather, it was “Religion...[that] inviteth us there to seeke the Kingdome of God first” – all other concerns were subordinate to spreading Christianity. This religious mission, along with “Humanity and our common Nature forbids to turne our eyes from our owne flesh...[and] commands us to love our neighbours as our selves.” Speaking specifically of Virginia, Purchas insisted that the

58 Thorpe, Charters, VII: 3790-3810.
true purpose of colonization must be “to recover [Native Americans] if possible, as by Religion, from the power of Sathan to God; so by humanity and civility from Barbarisme and Savagenesse to good manners and humaine polity.” Economic benefit would surely follow, but could not be the sole aim of colonization – Britons had a sacred responsibility to spread true religion and civil order to all humanity.

Civil order, however, was as hotly contested as true religion and, in this politically charged context, the exact definition of the English subject and the balance of rights and duties a subject could claim took on a special salience, especially in the colonies. If the English were to successfully “plant” their new colonies, settlers would have to make the dangerous trans-Atlantic voyage and lay down roots in the New World. But would these distant settlers be considered full English subjects? Would they have access to the rights of Englishmen and, if so, how far would those rights extend? Would separatist and puritan settlers be accorded the rights of subjects, despite their ambivalence, if not open hostility, to the established order in church and state? And what of strangers or heathens like the "20 and odd Negroes" who arrived in Virginia in 1619? In 1608, a special tribunal made up of the leading English jurists of the day handed down a landmark decision in *Calvin's Case*, also known as the Case of the *Post-Nati*, that began to answer these thorny questions. *Calvin's Case* arose when Robert Calvin, a Scot born after James' ascension to the English throne, brought suit against Richard and Nicholas Smith for disseising Calvin's freehold estate in the parish of St. Leonard, Shoreditch, England. The Smiths claimed that, as a Scot, Calvin was an alien and could hold no real estate under

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English law. The essential question was whether the rights guaranteed to English subjects under common law would extend to all persons born within James I's dominions.\(^{60}\)

The eminent Sir Edward Coke's report of the case laid down the definitive statement of the doctrine of natural allegiance that came out of the court's decision. Coke, who participated in the case as Chief Justice of Common Pleas, recorded the court's decision that Calvin was entitled to his real property because he was born after James' ascension to the English throne, but Scots born before the ascension, the *ante-nati*, remained aliens under English common law. Only naturalization by the king's grace or Parliamentary grant could extend the protections of English common law to *ante-nati* Scots. *Post-nati* Scots, on the other hand, were born into a community of allegiance delimited by the sovereignty of the king's person. Because "power and protection draweth ligeance," all persons born within the king's dominions entered into "*duplex et reciprocum ligamen,*" a double and reciprocal bond, with their sovereign.\(^{61}\) The king was bound to extend his protection to all subjects, and all subjects owed the king fealty and allegiance in return. The ruling in *Calvin's Case* thus viewed subjecthood as a natural relationship between subject and sovereign and reflected an organic, patriarchalist view of society. Subjecthood was an immutable status determined by birth into the community of allegiance and defined by a reciprocal relationship with the sovereign.

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\(^{61}\) *7 Co Rep*, 9b, 5a.
English ideals of subjecthood and citizenship would continue be shaped by *Calvin's Case* well into the 19th century, but the 17th century political debate between royalist absolutists and puritan Parliamentarians played a critical role in defining who could claim the rights of subjecthood in practice. The imperatives of Stuart absolutism dictated that access to political subjecthood be tightly limited, and that the political power of elites tied to the royal court always exceed that of the commons. In their drive to bolster royal power, James and his court also worked to limit the access of many English subjects to even basic civil subjecthood, trying dissenters in prerogative courts like Star Chamber and imprisoning political opponents without due process. Even to most of James' opponents, however, direct resistance to these policies was unthinkable. The majority of opponents to early Stuart absolutism sought only to guarantee that the power of the king remain subject to the limitations of the English common law and the forms of the ancient constitution. These were not radical Levellers or proto-republicans – magisterial reformers simply believed that male property owners, as heads of their own households, should be allowed to give their consent to certain government actions. Their intent in opposing James' absolutist moves was not to bring all English subjects into the political nation, but to restore the rights of political subjecthood that James sought to revoke.

When transposed into a colonial context, this ongoing debate brought new and pressing questions about the limits of subjecthood to the fore. Would “strangers” who emigrated to the colonies be granted English subjecthood and if so on what terms? What about the Native Americans who planners knew settlers would encounter, or the Africans, enslaved and free, who were so ubiquitous in the Atlantic World? English law provided
procedures for naturalization and endenization that provided a legal template for conferring subjecthood. An alien could become an English subject through a special royal grant or a Parliamentary bill, but this procedure could be expensive and cumbersome. Naturalization had two baseline requirements – an alien must swear an oath of allegiance to the king and be a member of the established church. Though later adaptations would liberalize this naturalization procedure somewhat by loosening the sacramental requirement, allegiance to the king and membership in a Protestant church remained the twin pillars of English subjecthood well into the 18th century.

In the colonies, however, the pressing need for labor dictated a looser, more informal procedure for naturalization. The Virginia Company's charters reflected the concept of natural allegiance as elucidated in Calvin's Case and guaranteed that subjecthood would follow English migrants across the Atlantic. English colonists would "HAVE and ENJOY all Liberties, Franchizes, and Immunities of Free Denizens and natural Subjects within any of our other Dominions to all Intents and Purposes, as if they had been abiding and born within this our Realm of England, or in any other of our Dominions." The charters also welcomed "any other Strangers, that will become our loving Subjects, and live under our Obedience" to settle in Virginia. Left unsaid was when and where these strangers would become subjects. Imperial planners apparently assumed that non-English migrants to the English colonies would be naturalized or endenized in England before making their Atlantic crossing, but aliens were often endenized and possibly naturalized by colonial officials in the New World.

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62 Thorpe, Charters, VII: 3800.
63 Kettner, Development of American Citizenship, 65-105.
Officials in the colonies also pushed planners back in England to liberalize naturalization requirements. In 1624, the Governor and Council in Virginia petitioned the Privy Council to expand the endenization of one Monsieur Beaumont. Beaumont, a Huguenot merchant, had received a royal patent of endenization, but “onely [as] a free denizen of Virginia, and not of England.” This stipulation would have hampered the Frenchman’s planned voyages between Virginia and the metropole by limiting protections for his property within England. The Governor and Council asked that the patent be expanded to make Beaumont an English denizen as well, “as other undertakers have formerly been.” They also asked that Beaumont be exempted from customs duties usually required of foreigners, making him, in economic terms at least, “a naturall borne subject.” The Privy Council was pleased to grant all of these requests.64 Beaumont may have received special treatment as a vital contributor to the survival and profitability of the Virginia colony, but the relative liberality of colonial naturalization procedures and the economic necessities of maintaining early colonial settlement allowed for relatively open access to naturalization and endenization for “strangers.”65

Whether in Virginia or Massachusetts, settlers were welcomed into the king’s protection as long as they met the dual requirements of allegiance and Protestantism. Property ownership also conferred the rights of political subjecthood, a status all the more easily attained in the American colonies where land was readily available. Any colonists born in the colonies would, of course, be considered natural subjects, since they were

64 Governor and Council of Virginia to Privy Council, BNA, CO 1/3/28.
65 The extant evidence suggests that procedures for endenization and naturalization were even more liberal in early Massachusetts. Setters in Massachusetts Bay seem to have been naturalized through admission as freemen. While this formula still assumed the three basic tenets of English subjecthood – allegiance, Protestantism, and property ownership -- the social and political implications of Massachusetts puritanism dictated that the rights of subjects be broadly accessible.
born in the king's dominions. The determination of whether or not these principles would be applied to enslaved people, however, would be made not in the halls of imperial power in London, but on the frontiers of English settlement in the distant American colonies.

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In August 1619, Virginia colonist and pioneering tobacco planter John Rolfe noted the arrival of a significant group of settlers to his fledgling colony. In a letter to the treasurer of the Virginia Company back in London, Rolfe described how the White Lion, its supplies nearly exhausted, docked at Point Comfort, the Jamestown colony’s main port. According to Rolfe, they had “not brought any thing but 20 and odd Negroes,” a cargo that the colony’s governor and leading planters “bought...at the best and easyest rate they could.” In dire need of fresh labor, early Virginia colonists eagerly grabbed up able bodied laborers, of whatever race, to tend the tobacco crops that were rapidly becoming the colony’s main cash crop. The “twenty and odd Negroes” were made slaves by virtue of their capture in West Central African wars. They were laded as property into the cargo hold of the Portuguese merchant ship Sao Joao Bautista in Luanda, the capital of Portuguese Angola. They were claimed as property under Dutch letters of marque issued to English privateer John Colyn Jope, captain of the White Lion. They were sold as property when they arrived at Point Comfort and protected as property under English common law. English colonists in Virginia did not have to construct a system of slavery – they made no decision, unthinking or otherwise, to create a novel institution. The

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66 For a fascinating analysis that traces the White Lion's 1619 voyage through the Atlantic world, see John Thornton and Linda Heywood, Central Africans, Atlantic Creoles, and the Foundation of the Americas, 1585-1660 (New York: Cambridge University Press, 2007), esp. chapter 1.

centuries-old concept of property-in-man, the very essence of slavery, was imported along with the first "twenty and odd Negroes." 68

The exact status of these “20 and odd Negroes,” however, has been a point of considerable debate among historians for generations. Many slaves of this “charter generation” would go on to gain their freedom through various means, some even becoming freeholders and slaveowners in their own right. 69 Relatively high rates of manumission were a common feature of most early modern slave societies, and the first decades of English colonial slavery were no exception. 70 Africans in Virginia continued to gain their freedom, own property, write wills, sue and be sued in court, and contest the authority of their white neighbors well into the mid-17th century – in short, they retained many of the properties of subjecthood. This was certainly not the kind of behavior one would expect from a slave. Once they emerged from slavery into freedom, early Afro-Virginians acted like, and were sometimes recognized as, subjects of the early English empire.

Early Afro-Virginians’ access to the basic rights of subjects has led many historians to claim that the first Africans brought to English America were likely indentured servants, not slaves. These analyses, despite their importance in stressing the treatment or lived experience of enslaved people, have distracted scholars from the one element that makes slavery unique among other forms of bound labor – the fact that

68 For the chattel principle, see Moses I. Finley, Ancient Slavery and Modern Ideology (New York: Viking Press, 1980).
slaves were defined as the property of their owners. Much of this confusion stems from a tendency among scholars to project later English slave law onto early 17th century Virginia, searching for the black-letter positive law that created slavery in the Old Dominion.71 This search, however, has ultimately proved fruitless because early Virginians understood a basic truth that historians have long ignored – unlike Mansfield and most modern scholars, Chesapeake colonists started from a presumption of slavery, not freedom, when it came to the first "twenty and odd Negroes." By taking early Virginians on their own terms, we can better understand both what slavery meant in the early 17th century English colonies, and the processes by which English colonists defined exactly who could be enslaved in their new, peculiar institution. Slavery meant to early colonial Britons what it had meant throughout much of human history – property-in-man.

As important as it is, however, the debate over the status of the first Afro-Virginians has obscured another crucial development in colonial Virginia, one that

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directly facilitated the definition of the first African slaves as a species of property. In April, 1619, Sir George Yeardley, the colony’s newly appointed governor, issued a proclamation stating that the “cruel laws” of military rule imposed by Sir Thomas Dale seven years earlier were abrogated. Henceforth, Virginians would be ruled by “those free laws which his Majesty’s subjects live under in England.” This same proclamation freed all servants who had been in the colony for at least three years, encouraged them “to possess and plant” parcels of land, and called Virginia’s first elective assembly.72 As their economy turned toward tobacco exports, Virginians found the constancy of the English common law, with its settled procedures for adjudicating claims and protecting private property, essential to their rapidly commercializing society.73 With so few settlers in the colony, this new economic logic also likely informed the emancipatory impulse in Yeardly’s proclamation. English common law privileged the property rights of freeholders over those of servile status – turning servants into freeholders would promote the production of export commodities and ground their property rights in the ancient rules of common law. Thus, 1619 marks not only the beginning of Virginia slavery but also the ascendancy of English common law in defining property rights and the liberty of the subject in the Old Dominion – the temporal coincidence of these events illustrates the deep interconnectedness of Anglo-American slavery and colonial variants on English law, and the importance of specific imperial structures in defining the limits of property ownership and subjecthood. When faced with the problem of slavery, English colonists

adjusted the law in crucial ways to address fundamental questions about the boundaries of subjecthood in their settler societies.

From the outset, Virginia society was a strange reflection of the traditional English systems of property ownership, subjecthood, and personal status. The Virginia Company's original charter guaranteed that political and economic power would be concentrated in the hands of the appointed Council back in London and their delegates in the Chesapeake by granting them rights to all Virginia property. The charter also gave Virginians a great degree of leeway in framing their local law, requiring only that colonial statutes not be "contrary" to English law. The Virginia Company’s 1609 charter confirmed not only their authority to “make, ordain, and establish all Manner of Orders, Laws, Directions, Instructions, Forms and Ceremonies of Government and Magistracy, fit and necessary for…the Government of [Virginia],” but also to “abrogate, revoke, or change [local law]…as they in their good Discretion, shall think to be fittest for the Good of the Adventurers and inhabitants there.” The Adventurers, Virginia’s elite investors, would have “Power and Authority to correct, punish, pardon, govern, and rule all…subjects” according to the orders of the Company Council back in London. If these orders were insufficient to local circumstances in the Chesapeake, the charter also allowed for local alterations “according to the good Discretions of the…Governor and Officers,” as long as the law remained “as near as conveniently may be” to the laws of England. This allowance for divergence from English law would be confirmed in successive charter revisions throughout the colonial period, giving colonists a substantial degree of leeway in framing local statutes to meet the needs of colonization.

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74 Thorpe, Charters, VII: 3790-3802. (Hereafter cited as Thorpe, Charters.)
It was this jurisprudential eclecticism that allowed for the brutal martial law imposed by Governor Thomas Dale in 1611. The *Lawes Divine, Moral and Martial*, commonly known as Dale's Code, imposed capital punishment for a variety of crimes and required strict work discipline from all settlers. Enlarging on traditional remedies available to masters, colonists who "continued...unfaithful and negligent" of their labors could be "condemned to the galley for three years" for repeated offences. Colonists complained that Dale’s regime resulted in “continuall whipping, extraordinary punishments, [and] working as slaves in chains for terms of years.” Even after Governor Yeardley's proclamation in 1619, this strict work discipline remained in effect. The instructions Yeardley carried with him across the Atlantic empowered him to bind out idle Virginians to local masters and to deal with drunkenness and vagabondage with "such severe punishments as the Governor or Council...shall think fit," including bond servitude. Virginia planters later complained that Dale's Code had resulted in nothing less than "the slaughter of his Majesty's free subjects by starving, hanging, burning, breaking upon the wheel and shooting to death." One colonist was chained to a tree and left to starve for stealing food. To Englishmen accustomed to a degree of protection, even for unfree workers, Dale's “Tirranous Government” was "noe way better than Slavery.”

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76 *A Breife Declaration the Plantation of Virginia*, BNA, CO 1/3/21.I
78 *A Breife Declaration the Plantation of Virginia*, BNA, CO 1/3/21. Moses I. Finley’s research on ancient Athenian slavery affords an interesting parallel to Yeardley’s Proclamation. The Solonic reforms of the early 6th century BCE outlawed debt peonage in Athens, freed many Athenians held in bondage, and laid the foundation for Athenian democracy. These reforms also, however, created a pressing need for labor, fueling the growth of slavery in Athenian society. Thus for Finley, as for many scholars of American
Governor George Yeardley's proclamation of April 1619, however, substantially altered this equation. First, Yeardley freed all colonists present from “publique services and labors, which formerly they suffered” and declared that Dale’s “cruell Lawes” were abrogated. Colonists, many of whom had been forced into company servitude by Dale’s Code, were freed with a stroke of Yeardley’s pen, and encouraged to “make choice of their Dividents of Lande” and to “possesse and plant uppon them.” Furthermore, these new estates would not be subject to the capricious whim of a faraway corporate Council in London – colonial property would now be protected by “those free Lawes, which his Majesties subjects live under in Englande.” To give colonists “a hande in the Governinge of themselves,” Yeardley’s proclamation also decreed the creation of a new “generall Assemblie,” Virginia’s House of Burgesses. The Governor, his Council, and two Burgesses from each plantation, “freely to bee elected by the inhabitants thereof,” were to meet regularly to “make and ordaine whatsoever Lawes and orders should by them be thought good and profitable for [the colony’s] subsistence.”

The Burgesses quickly set about cementing the substance of Yeardley’s proclamation in statute law. Laws passed in 1623 confirmed that the Governor could not divert Virginians “from their private labors to any service of his owne” without the consent of the Council and Assembly, ordered that all existing estates be surveyed to avoid “petty differences,” and decreed that “there be an uniformity in our Church as near as may be to the Canons in England, both in substance and circumstance.” According to one colonist, the changes wrought by Yeardley’s proclamation brought “such

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incouragement to every person here [to follow] their perticuler Labors with singular alacrity and industry” that within three years the colony “flowrished with many new erected Plantations…comfortable for the releife and succor of all.”

By granting their "long desired freedom" to colonists who had served more than three years as colony servants and guaranteeing that Virginians would be "governed by those free Laws, which his Majesty's subjects live under in England," Yeardley guaranteed that all English subjects in Virginia would have access to the protection of the common law. Virginia colonists recognized the significance of this shift. In 1624, as the Old Dominion began its transition from a corporate to a royal colony, Virginia's elite requested that the king give them "assurance of ye continuance...of their several estates & possessions." The "ould Planters" begged that "they may have no such contracts...forced upon them" to labor for the colony, "but that they may have Liberty to make the best of their own labors, and may live under the same laws that the king's Majesty's subjects do here in England, and other his Dominions." The requests of the Virginia planters did not fall on deaf ears – the reorganization of Virginia as a royal colony in 1624 confirmed all titles to property and guaranteed the access of subjects to the common law.

Stabilized by the protections of English common law, Virginia’s economy and social structure underwent a dramatic transformation in the generation between 1619 and the outset of the English Civil War. Tobacco production in the Chesapeake grew nearly twenty percent annually – by 1640, Virginia planters exported over one million pounds of

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81 A Breife Declaration the Plantation of Virginia, BNA, CO 1/3/21.I.
82 Ibid.
84 Divers heads wherein the Lords are to be moved (July 1624?), BNA, CO 1/3/47.
tobacco to England each year. Fuelling this tobacco boom was the exponential growth in Virginia’s population. High mortality and conflict with the Powhatan Confederacy had culled the English colony to fewer than 400 settlers by 1623 but, despite the risks, thousands of colonists arrived over the next generation. By the outbreak of Civil War in England, Virginia’s population had exploded to well over 10,000 settlers. Of course relatively few of these settlers enjoyed the benefits of the rapidly developing Chesapeake economy – by 1640 close to fifty percent of Virginia’s population were bound laborers, either indentured servants, apprentices, or slaves.

The early dominance of Virginia’s “ould Planters” was due in no small part to patterns established early in the colony’s history. What Moses Finley once said of ancient Greece holds true for colonial Virginia – “as always, the starting-point is the land.” Under the terms of the Virginia Company’s charter, all property was held directly by the company. The few patentees who obtained grants from the Company and seated themselves on large estates were the only true freeholders at first. After Governor Yeardley’s proclamation extended the protection of common law and the reorganization of Virginia as a royal colony confirmed existing estates, the size of tobacco plantations grew prodigiously, but the number of Englishmen who owned them did not. Probably no more than twenty-five percent of Virginians were freeholders by 1640, and large estates

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86 James Horn, *Adapting to a New World: English Society in the Seventeenth-Century Chesapeake* (Chapel Hill, NC: University of North Carolina Press for the Institute of Early American History and Culture, 1994), 151-152. Horn’s analysis suggests that many servants became tenants upon gaining their freedom, reducing the percentage of freeholders in early Virginia even further.

87 Finley, *Ancient Slavery and Modern Ideology*, 132.
were far less common. Beginning in 1618, these few great planters got an additional boon for importing bound laborers – the headright system guaranteed 50 acres of land to colonists for each servant they transported to the colony.

Bolstered by the protections of common law, Virginia’s elite worked to consolidate its economic and political dominance by guaranteeing that large estates remained intact. The most important weapons in their arsenal were primogeniture and the entail. Both legal constructs worked to ensure that estates were passed down intact from generation to generation. While scholars have illustrated that the entail was rare in the first generations of Virginia settlement, historian Holly Brewer has argued that the accumulation of estates in tail throughout the colonial period kept a majority of available land in the hands of a small number of elite families, connected through intermarriage. Furthermore, early Virginia legislation also dictated that the estates of Virginians who died intestate would descend to the eldest male heir through primogeniture. Even among planters who did leave wills the general practice was to grant lifetime use rights or cash subsidies to younger heirs rather than devising estates. This early emphasis on consolidating large estates would continue as Virginia’s plantation economy grew and flourished in the second half of the 17th century.

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88 Morgan, *American Slavery, American Freedom*, 395-432; Horn, *Adapting to a New World*, 151-154. Horn's data shows that fewer than one-third of freehold estates in early colonial Maryland were valued at more than £250, and he suggests that the proportion may have been even lower in Virginia.

89 On the debates over headright grants, see Anthony Parnet, *Foul Means* [FINISH], 24-28.

90 Holly Brewer notes that probably only 1% of all wills in the first generation of Virginia settlement contained entail provisions. Even so, the logic of her argument that the use of entails by successive generations cemented the Virginia aristocracy illustrates that even this early use would have serious implications for Virginia’s future social development. Holly Brewer, “Entailing Aristocracy in Colonial Virginia: ‘Ancient Feudal Restraints’ and Revolutionary Reform,” *William and Mary Quarterly*, vol. 54, no. 2 (April, 1997): 307-346.

91 Horn, *Adapting to a New World*, 222-234. Horn's statistics suggest that real property descended to wives in only about twenty percent of wills, while the vast majority granted widows lifetime use rights to landed property or bequeathed chattel properties to wives and younger children.
Keeping tobacco revenue flowing into the royal treasury and the pockets of Virginia investors, however, required a massive investment in human capital. Most early Chesapeake colonists made their Atlantic crossing as indentured servants, contractually bound to work for their masters, usually for five to seven years, in return for passage to the New World, basic food, shelter, and clothing while employed, and the payment of “freedom dues” at the end of their indenture. During the time of their indenture, the labor of indentured servants was understood to be the property of the master. Masters could use moderate physical coercion to extract labor from servants and could turn to the common law courts to enforce labor contracts. Even oral contracts were enforceable under common law. In England, settled procedures existed for the creation of indentures and the policing of both master and servant.  

Virginia's distance from England and the difficulty in verifying oral contracts on the ground, however, created problems from the start. In preparation for a Quarter Court session in November 1622, a committee of Virginia Company investors met to hash out a process for registering indentures. The committee worried that "divers ungodly people that have onely respect of their owne profitt" were lured into oral contracts in England. They also acknowledged that Virginia masters were wont to "make his service of the longest and harshest nature...either by faire or fowle meanes." For their part, servants showed a marked tendency to "pretend their time of service to be shorter than indeed it is, or else challenge greater reward and wages then was promised and generally Demaund all such beifitte as the most advantageable condicons of service that they can heare of enjoyeth." To protect the interests of both masters and servants, the Virginia Company

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proposed that an officer be selected to register all written indentures so that "upon complaint of wronge either by Mr or Servant right and Justice might be done." Despite the exigencies of frontier settlement, then, Virginia planners certainly intended for servants to retain access to the courts for redress of grievances.

Their degraded status notwithstanding, indentured servants appear with striking regularity in Virginia courts as witnesses, plaintiffs, and defendants, and the range of grievances they brought before the courts illustrate the protections English servants expected from their sovereign and his colonial representatives. In October 1624, for example, the General Court looked into the violent deaths of two of Mr. John Proctor's servants, Elizabeth Abbott and Elyas Hintone. According to testimony, Abbott was severely beaten at Proctor's command after attempting to run away, one witness claiming she had received at least 500 lashes from William Nayle, another servant of Proctor's. In his testimony, Nayle claimed that Proctor had ordered him to "whip [Abbott] from the waist to the hand wrists & fleay her or ells his Mr wold flay him." Another witness, after seeing Abbott's "most grievous" wounds, entreated with Proctor to "send for A Surgeon to looke to her otherwyse she must needs p[er]ishe." When another neighbor, Alice Bennett, asked Proctor "to pardon [Abbott] for that fault and not to Corect her," Proctor refused and handed down another severe beating, likely leading to the servant's death. Continuing his violent streak, Proctor also severely beat his servant Elyas Hintone about the head with a rake. After the beating, Hintone told a fellow servant that "he was very ill and yt his M[aste]r had so beaten him yt he shuld dye, and he wold laye his death to

his M[aste]r." A few days later, Hintone's body was found in the woods near Proctor's farm.\textsuperscript{94} The brutality of Virginia masters was clearly not reserved for slaves.

Proctor's violent outbursts, however, brought him to the attention of Virginia magistrates, and he was brought before the General Court in October 1624 to answer for his crimes. A number of witnesses, including indentured servants, testified that Proctor "never ymmoderately" chastised his servants, limiting whippings to "20 or 30 lashes at atyme." Besides, Abbott had "often tymes rann away" and Hintone "was a very stubborne and desperat fellowe" – he "oftimes" threatened to "shoote himselfe wth a pistoll" rather than continue in bondage to Proctor.\textsuperscript{95} To Proctor and masters like him, servants Abbott and Hinton required strong management and English common law allowed for a degree of physical force to compel labor. Despite their servile status and the powers granted to masters, however, servants remained persons under the law, and such vicious assaults on the king's subjects required the intervention of local officials. Sadly, justice was not forthcoming for Elizabeth Abbot or Elyas Hintone – Proctor was cleared of all charges. Still, this case and many others like it illustrate that Virginia courts would have to monitor interactions between masters and servants in order to protect the rights of both, at least as long as the servants were English subjects.\textsuperscript{96}

English settlers were a distinct minority in Virginia, however, and debates over the nature of subjection were deeply influenced by the conspicuous presence of Native Americans. In hindsight it seems inevitable that Chesapeake Indians would become

\textsuperscript{94} General Court Minutes for 10 October 1624 in H. R. McIlwaine, ed., \textit{Minutes of the Council and General Court of Colonial Virginia, 1622-1632, 1670-1676, with Notes and Excerpts from Original Council and General Court Records, into 1683, now lost} (Richmond, VA: Virginia State Library, 1924), 23-25. (Hereafter cited as VA Gen Ct Recs.)

\textsuperscript{95} Ibid., 24.

\textsuperscript{96} Cf. Parent, \textit{Foul Means}, 36.
permanent outsiders in their own land, defined out of civilization by rapacious English colonists intent on driving them from valuable tidewater real estate. The reality on the ground in the first decades of settlement was far less straightforward. Jamestown was settled precariously in the heart of the powerful Powhatan confederacy, and its survival was far from guaranteed. Furthermore, the evidence suggests that in the first years of colonization, English policy dictated, and some colonists earnestly desired, the acculturation and assimilation of Virginia natives as English subjects. Christianization of natives was an important element of the English colonial vision, and it appears that at least some early Virginia colonists took their mission seriously.

Perhaps no Virginia colonist better exemplified the desire to convert Chesapeake natives than George Thorpe, a gentleman of the Privy Chamber and former Member of Parliament for Portsmouth, who sat on the governor’s council in Virginia. Upon his arrival at Jamestown in 1621, Thorpe threw his energies into the Henrico College, an institution meant to instruct young Native Americans in English Christianity and civilization. Powhatan leaders were encouraged to send their children to Henrico to be educated. These students were certainly captives in some sense, but their experience fit with both Native and English precedents. Europeans and North African Muslims had long used captivity as a means to convert their foes, and for many Native Americans captivity was a route to assimilation into a new group, as the famous experience of John Smith illustrates.97 English colonists and Chesapeake natives both had experience with the assimilatory potential of captivity. The end result, Virginians like George Thorpe

hoped, would be the creation of new loyal Native American subjects of the English empire.\textsuperscript{98}

Within a year of Thorpe’s arrival, however, events would prove just how difficult building an empire of multiracial subjects could be. Colonists who hoped to Christianize and assimilate natives faced an uphill battle—most Virginia colonists, Thorpe noted, had “nothinge but maledictions and bitter execrations” for Indians. Many Chesapeake natives shared this view of their new neighbors—in the famous “massacre” of 1622, Powhatan warriors descended on the English settlements and killed hundreds of colonists, including Thorpe, and nearly destroying the fledgling colony. Virginia colonists responded in kind, using their “uttermost and Christian endeavors in prosecuting revenge against the bloody Salvages” and claiming title to Powhatan lands “by right of Warre, and law of Nations.”\textsuperscript{99}

In the wake of this bloody conflict, Englishmen began forcing Indians captured in war into “servitude and drudgery,” a common fate for military captives throughout the early modern world. Indians who resisted acculturation violently were no longer the targets of an English Christianizing mission—by the time of the Anglo-Powhatan War of 1644, captives taken in wars with local natives were routinely sold to West Indian planters.\textsuperscript{100}

Despite this escalating violence, however, the goal of Christianizing and assimilating local natives persisted among some Virginians. Following in the footsteps of George Thorpe and the failed Henrico College, a number of private individuals took up the mission of Christianizing and acculturating Indians. London merchant Nicholas Farrar,


\textsuperscript{99} BNA, CO 1/3/21.I.

\textsuperscript{100} Guasco, \textit{Slaves and Englishmen}, 172-192.
for example, left a £300 legacy in his will for the Christianization and education of native children. Virginia planter George Menefie took in a young native who was literate and had been "well instructed in the principles of religion."\textsuperscript{101} Interactions like these, however, were the exception in early colonial Virginia.

Whatever the intentions of would-be civilizers like Thorpe and Menefie, relations between Virginia settlers and local Native Americans took on a warlike footing from an early date. Not surprisingly, the vast majority of references to Natives Americans in records before 1641 involve preparations for war – not a single Indian appears as a party to a case or a witness in any Virginia courtroom in this early period of colonization. To most early Virginians, the heathen natives who surrounded them could not be fellow subjects. Indeed, at a General Court in April 1628, Governor Francis West and his advisors decided to make a temporary peace with the Pamunky to provide the colony with a "better opportunity to be revenged on them...not to make any peace or dishonorable treaty." As part of this policy, the Court ordered that "none of them should come to our Plantations."\textsuperscript{102} Virginia planters, facing a serious military threat, hoped to keep contact with natives to a minimum.

Those few encounters that did take place were likely to be violent, and at least a few ended in captivity and, possibly, slavery. Captain William Epps appeared before the General Court in October 1626 with a "Weanoke Indian" who was "taken last spring at Shirley-Hundred," likely captured in a raid on the plantation. Epps, a resident of Virginia's Eastern Shore, was required to post a bond for the Native's good behavior if he

\textsuperscript{101} VA Gen Ct Recs, 477-478. Menefie's motives were not entirely altruistic -- he applied for, and was granted, an allowance of £8 a year from Farrar's bequest.

\textsuperscript{102} General Court minutes, 24 April 1628, VA Gen Ct Recs, 172.
brought him to his estate in what was then the frontier of Virginia settlement.

Furthermore, if Epps returned to Jamestown he was to deliver the Native to the governor "to be employed upon any service." The record contains no other details about Epps' native captive's status, but it is likely that he was understood to be a slave. The West Indian natives brought to the colony in October 1627 by one Captain Sampson were almost certainly slaves, but the General Court did not see them as Sampson's absolute property. These Caribbean slaves, the Court believed, were a danger to the colony and Sampson was "no way or means to dispose" of them in Virginia. They had already "stolen away divers goods, & attempted to kill" some English colonists. Perhaps fearing a Spanish incursion, the Court even worried that these few Caribbean slaves "may hereafter be a means to overthrow the whole Colony." These unfortunate native captives were hanged without trial – they were clearly not subjects.104

Many of the same questions that had been raised regarding the possibility of Native American slavery and subjecthood were raised by the arrival of the first Africans in Virginia. The “twenty and odd” were purchased as slaves, the product of the growing trans-Atlantic trade in Africans, but early English colonial slavery was remarkably porous, based at least partially on the Christian mission to catechize and acculturate strangers. Englishmen in Virginia, then, did not question whether the Africans they bought were slaves – they assumed slavery to be a species of property, protected by common law. The problem for English colonists was not slavery, but access to freedom

103 General Court minutes, 10 October 1626, Ibid., 116.
104 General Court minutes, 11 October 1627, Ibid., 155. Unlike in later cases where owners would be compensated for slaves who were seized and executed by the state, Sampson does not appear to have received any compensation. Sampson's property right in his Carib slaves, then, was not absolute and could be overridden in the interest of local security in Virginia.
and the rights of subjects. Once a slave was Christianized and freed, the logic of natural subjecthood and early English colonialism seemed to dictate that Afro-Virginians should be treated as fellow subjects of the empire, entitled to the basic protections of common law. The famous cases of Anthony Johnson\textsuperscript{105} and Antonio Longo, free African landowners in the 1640s, illustrate this potential for manumission and subjecthood in early Virginia. Longo was so confident of his status that he actively contested the authority of white colonists, even after he was summoned to testify in a suit between his neighbors. “A Shitt of your warrant,” Longo declared, whereupon he physically assaulted the men bearing the warrant for his appearance.\textsuperscript{106} Longo was behaving much like any other English subject would – contesting judicial authority was a time-honored English tradition – and was punished for contempt of court, just as any other subject would be. Once slaves became freemen, the possibility of black subjecthood in the New World collided with the social and economic imperatives of settler colonialism.

The court records of early Virginia are replete with African subjects like Johnson and Longo. These early cases, before the outset of the English Civil War, illustrate the importance of Christianization in attaining subjecthood and the extent of the legal rights Afro-Virginians could claim. In the 1624 case of “John Phillip, a Negro,” Virginia’s General Court ruled that Phillip was able to testify in court because he had “been baptized in England twelve years since.” Despite his race, John Phillip was “qualified as a free man and a Christian to give testimony” on the same basis as any other subject in

\textsuperscript{105} Breen and Innes, \textit{Myne Owne Ground}, passim.
\textsuperscript{106} Morgan, \textit{American Slavery, American Freedom}, 156-157.
Black Virginians were also involved in one of the most common issues facing early Virginia – fornication. Hugh Davis, a white colonist, was convicted of “abusing himself to the dishonor of God and shame of Christianity by defiling his body in lying with a negro.” To atone for his crime, Davis was “soundly whipt before an assembly of negroes & others,” a typical punishment for fornication in early modern England. The extant record does not specify Davis’ status, nor that of his African lover – indeed one scholar hints that Davis’ real violation may have been engaging in homosexual intercourse. Whatever the exact circumstances of their encounter, Davis and his African lover were dealt with under the traditional English law of fornication. Furthermore, the whipping of a white man before a crowd of “negroes and others” illustrates the extent to which Africans could be integrated into the colonial community. The public disciplining of a white colonist would have reinforced English behavioral norms and promoted the further acculturation of black onlookers. Before long, such a sight would be unimaginable in Virginia.

This is not, however, to say that all manumitted black Virginians were treated with equality under law. In 1639, the Burgesses declared that “all persons except Negroes” would be provided with arms and ammunition at the colony’s expense. Despite the continued threat of conflict with local natives, Virginia’s colonial legislators apparently felt they could not rely on African strangers to assist in the community’s

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108 VA Gen Court Recs, 479.
109 Higginbotham, In the Matter of Color, 23.
defense. The link between the right to bear arms and subjecthood was made even more explicit in 1640, when the Assembly declared that only black freeholders could own guns. Of course, most Afro-Virginians were slaves, and as such they received different treatment than both white servants and free blacks. *Re Emmanuel*, heard by the General Court in July 1640, decided the fates of seven runaways, six white and one, Emmanuel, black. The physical punishments meted out to the runaways were common in English law – Emmanuel and Christopher Miller, the Dutch servant who led the escape, were required to wear shackles for one year; Peter Wilcocke, Richard Cockson, and Emmanuel were publicly whipped and branded with an “R” on the cheek. In addition, the white servants were sentenced to “serve the colony” for terms ranging from two to seven years. Emmanuel’s sentence, however, did not include an extension of service, suggesting that he was already a slave for life and could not make satisfaction for lost labor by addition of time.\footnote{VA Gen Ct Recs, 467.} Though he was likely a slave, Emmanuel was punished under the traditional remedies provided by the English common law of master and servant – the fact of his appearance in court suggests that even enslaved people were not subject solely to the discretionary power of masters.

Another case heard by the General Court in the same month, *re John Punch*, further illustrates both the cross-racial alliances typical of early Virginia runaways and the tendency among Virginia elites to identify Africans with lifetime slavery. Punch had absconded with Victor, a Dutch servant, and James Gregory, a Scot. Victor and Gregory had a year’s service added to their original indentures and were required to serve the colony three years. Punch, on the other hand, was sentenced to “serve his said master or
his assigns for the time of his natural Life here or elsewhere” – he was a slave for life.113

Two intriguing elements emerge from this case. First, the extension of his service to his natural life implies that Punch was not a slave before he ran away. Perhaps he had entered into a contractual agreement with his master for a specific term of service. Or maybe Punch had entered Virginia as a slave, been manumitted by his owner, and been forced back into servitude by the limited economic opportunities available to early Afro-Virginians. Either way, it appears that before his escape attempt he had enjoyed at least some protection under common law – why else would his case have appeared before the General Court and not been dealt with directly by his owner as later slave law would allow? Second, re John Punch suggests the early tendency among Virginia elites to identify African-ness with slavery. The court’s decision revoked Punch’s tenuous freedom and transformed him from a rights-bearing subject into a heritable form of property that would descend to his owner’s heirs. No Africans had been punished in this way before in Virginia. To elites eager to make a fortune in the emerging plantation economy, confirming African slaves as heritable properties was a crucial step in stabilizing the labor force necessary for producing marketable Atlantic commodities.

Into the early 1640s, however, manumission was more common than it would later become, and early Afro-Virginians clung tenaciously to their subjectionhood. Even after re Emmanuel and re John Punch, Afro-Virginians continued to appear as subjects before the courts. In an October 1640 case, Robert Sweat was brought before the court for fathering a child with the “negro woman servant” of one Lieutenant Robert Sheppard. The details of Sweat’s dalliance are obscured by time – there is no way to know whether

113 Ibid., 466.
Sheppard’s black servant was a willing participant in their sexual encounter, nor the exact details of her personal status – but the outcome of the case clearly illustrates that some Afro-Virginians were still subject to English common law. Sweat’s black lover was publicly whipped and required to “do public penance” before the congregation of James City church, “according to the laws of England in that the case provided,” and Sweat received similar punishment. In this case, the General Court explicitly invoked English law in dealing with a breach of morality, and applied it to a white man and black woman alike. Whether the female African servant in this case was a slave or not, she was clearly being tried, convicted, and punished much as an English subject would be.

Perhaps the clearest illustration of the continued importance of black subjecthood in early Virginia is a March 1641 case, re Graweere. In this case, John Graweere, a “negro servant unto William Evans,” begged the court’s permission to purchase his child from Lieutenant Sheppard, arguing that the child would “be made a Christian and be brought up in the fear of God and the knowledge of religion taught and exercised by the church of England.” Graweere likely knew that at least some of Virginia’s judges would be sympathetic to his plea – it fit the lingering imperial mission of Christianization and acculturation perfectly. He, at least, felt confident enough of his rights under common law to approach the bench with his request. The General Court granted his petition, ruling that “the said child shall be free from the said Evans or his assigns and to be and remain at the disposing and education of the said Graweere.”

As a free member of the Church of England living within the English sovereign’s dominions, Graweere’s child

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114 VA Gen Ct Recs., 477. See also Brown, Good Wives, Nasty Wenches, 130-131; Parent, Foul Means, 109.
115 VA Gen Ct Recs, 477.
would have been accounted a full subject, with all the rights and duties that subjecthood implied. The sanctity of Graweere’s family, another right accorded to subjects, was also confirmed by the decision. Perhaps Graweere’s relative prosperity – Sheppard confirmed his ownership of several hogs to “make the best benefit thereof to himself” – convinced the court that he was a contributing member of colonial society, deserving of protection under law. Whatever their logic, the outcome of the case was clear. On the eve of the English Civil War, at least some black Virginians could leave slavery and gain the rights of an English subject.

For early Virginia colonists, then, the liberated slave became a subject, with access to the rights, duties, and protections that adhered to all persons born within the English sovereign's dominions. Despite the assumption that Africans imported to Virginia were slaves, and thus a species of property, the logic of natural allegiance as elucidated in Calvin’s Case dictated that all subjects, even manumitted slaves, lived under the protection of the king’s justice. Regardless of personal status, subjects had the right to appeal to the English courts for protection of their property and person. While the rights that attached to a freehold or a royal liberty were certainly more extensive than those claimed by servants and most former slaves, all Englishmen, at home and overseas, were subjects. In the interstices of the early English empire, legal space existed where the first generations of enslaved Virginians could gain freedom and make claims to subjecthood. As England fell into a generation of Civil War and Revolution the question of slavery would take on new urgency – freedom, subjecthood, and the claims that accompanied them, would be increasingly contested by black and white Virginians. Five
hundred miles to the north, English colonists in Massachusetts faced similar questions of slavery, subjecthood, and social order.

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Just under a year after the first African slaves arrived in Virginia, another storied group of migrants first set foot on the stony shores of Massachusetts. The Pilgrims, like their fellow Puritans who would later settle the Massachusetts Bay colony, had their own ideas about property ownership and the rights of English subjects, different from those of the Virginia elite. The errand into the New England wilderness was a holy endeavor, a utopian religious experiment in puritan social order. In the community of saints, all of the elect would live in relative equality so long as they observed the strict code of Calvinist morality. The Puritan founders of the New England colonies, hoping to enforce the cultural uniformity that was essential to their utopian social vision, turned to the rule of law to keep settlers in line – they were Englishmen after all.

To the Puritan elect, the true source of all just law was scripture, and they quickly set about creating local courts, often citing Mosaic Law alongside common law in policing their Calvinist utopia. Biblical injunctions informed the punishment of fornicators, the regulation of wages and prices, and interactions with local Native Americans. While Christian morality was certainly a crucial element of New England settlement, Puritans also grappled with many of the same issues of property distribution, personal status, and political subjecthood that Virginians faced. In contrast to Virginia's absolutist, patriarchalist society, however, the "godly republicanism" of the Massachusetts colonists dictated that all members of the community of saints share in the governance of their holy community. Early puritan Massachusetts was, in many ways, a
remarkably democratic society, a hothouse of anti-patriarchal thought, often to the chagrin of more moderate magistrates like John Winthrop. The collision of puritan and radical separatist ideologies of church governance, civil society, and the rights of subjects in Massachusetts had profound implications for the future of slavery in New England.

Pilgrims and Puritans, however, were not the first to arrive in New England -- the contours of early settlement were shaped by similar economic imperatives to those driving the colonization of Virginia. West Country fishermen had been exploiting the rich fisheries of the New England coast since the mid-16th century, often coming ashore to dry their catch and truck with local natives. In 1606, merchants from Bristol and Plymouth organized alongside their London counterparts and obtained a charter as the

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Virginia Company of Plymouth. They quickly set about constructing a settlement near the Kennebec River that, they hoped, would capture a share of the booming fur trade from the Dutch at New Amsterdam, the French in Canada, and their competitors in the Virginia Company of London. Thanks in no small part to the efforts of Sir John Popham, Lord Chief Justice of King's Bench, in acquiring royal patronage, the Plymouth Company erected a trading fort at Sagadahoc, but a lack of investment from West Country merchants and slow initial returns dogged the colony from the start. In 1608, the few settlers who remained at Sagadahoc returned to England. By 1614, New England settlement was isolated to a few short-term visits by fishing fleets at Monhegan Island and the old Sagadahoc trading fort. According to Sir Ferdinando Gorges, one of the primary planners of New England colonization, this first attempt at English settlement was entirely "fruitless" – the Plymouth Company investors had no choice but to "sit down with the losse [they] had already undergone."  

Gorges and other colonial planners, however, still hoped to reap a profit from the North Atlantic fisheries and the growing fur trade, and moved to reorganize the Plymouth Company as the Council for New England in 1619. As a number of scholars have noted, Sir Ferdinando Gorges and the other Councilors hoped to construct a "feudal principality" in the New World and to channel mercantile energies into "medieval institutional forms." These feudal pretensions may have done much to shape the vision of men like Gorges, but the structures of political and economic governance that were actually established in early New England bore a striking resemblance to the absolutist-patriarchalist society of Virginia. Much like the earlier Virginia Company, whose charter

118 Ibid., 6.
placed authority in the hands of an appointed board of joint-stock investors, the Council for New England was to be composed of 40 appointed nobles and gentlemen, who would parcel out trading rights to local joint-stock companies in major West Country ports.\textsuperscript{119} The Council was granted power to install and remove "all and singular, Governors, Officers, and Ministers" at will, and to "make, ordaine, and establish all Manner of Orders, Laws, Directions, Instructions, Forms, and Ceremonies of Government and Magistracy fitt and necessary for and concerning the Government of the said Collony and Plantation," including the imposition of martial law.\textsuperscript{120}

As in Virginia, the only stated limitation on the legislative power granted to the Council by King James was a requirement that New England law "be not contrary to the Laws and Statutes of this our Realme of England." Officials in New England were empowered to "correct, punish, pardon, governe, and rule all...Subjects" in the king's name and according the Council's instructions. In cases where instruction was lacking, local magistrates were to proceed at "the good Discretions of the said Governors and Officers...in Cases capitall and criminnall, as civill, both maritime and others." The charter asked only that these "Proceedings" remain "as near as conveniently may be" to the "Laws, Statutes, Government and Policie of this our Realme of England," but did not explicitly require the importation of English common law.\textsuperscript{121}

\textsuperscript{119} The composition of the first Council for New England reads like a who's who of royal favorites. Among the members of the Council were George Villiers, Duke of Buckingham and Lord High Admiral of England; William Earl of Pembroke, the Lord Chamberlain; Henry, Earl of Southampton, and Edward, Lord Zouch, members of James I's privy council; Edward, Lord Gorges and his son Ferdinando Gorges; and Sir Giles Mompesson, who would later be tried for extortion by the House of Commons for abusing the licensing of inns and taverns to raise revenue for James' treasury. For a full list of the first members of the Council of New England, see Thorpe, \textit{Charters}, 1830. See also, Bailyn, \textit{New England Merchants}, chapter 1.

\textsuperscript{120} Thorpe, \textit{Charters}, III: 1831-1833.

\textsuperscript{121} Ibid. See also Nelson, \textit{Common Law in Colonial America}, esp. chapter 2.
Significantly, and unlike even Virginia's 1619 charter revision, the Council's charter did not call for a local assembly or representative body. The closest the Council for New England came to authorizing such a body was a statement that colonial householders might gather to "frame & make such lawes, and constitutions as by the major part of ye assembled shall be thought fitt for the more peaceable Government of those under them." These laws, however, were "all to be subordinate to ye Genl Governmt & state there to be established" and would be in effect only "till other order may be taken." Gorges and the other councilors clearly hoped that limiting access to political subjectionhood would keep ultimate political power back in the metropole, while giving settlers enough legal leeway to generate their expected economic returns.

As had been the case in Virginia, the economic hopes of King James and the notables on the Council for New England shaped property relations in early New England. The 1620 charter gave the Council a monopoly in all fisheries and trade to New England. Though the Council actively farmed out its mercantile monopoly to smaller joint-stock companies, the terms of the charter guaranteed that much of the profit generated by colonial trade would flow to the coffers of king and council. All colonial property rights were vested directly in the Council "as of our Manor of East Greenwich, in our County of Kent, in free and common Soccage and not in Capite, nor by Knight's Service" as they had been in the earlier Virginia charter.

Despite this initial denial of feudal encumbrances on property, however, the predominance of nobles and gentry on the Council gave a decidedly aristocratic tinge to social relations in early New England. The Council for New England hoped to farm out

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123 Thorpe, Charters, III:1834.
much of the real work of colonization to smaller mercantile companies in the major West Country ports and to retain tight control over colonial property. Settlers already on the ground were often given generous lease terms to compensate for the costs of settlement. In 1631 for example, John Stratton was granted two thousand acres at Cape Porpus "in respect that he had been in New England these 3 yeares last past and had espended £1000 in transporting of cattle and maintaining of servants." This grant, however, was not a freehold as it was understood in English law, but a lease – Stratton would pay "11d. for every hundred acres of Land in use by the yeare, when it shall be demanded by the Rent-Gatherer," and could not "alyen ye same without consent full had and obtained." Gorges and his fellow councilors were absentee landlords, holding on to their rights to valuable colonial properties granted by the crown while delegating the work of colonization to merchants and settlers on the ground.

To promote the settlement of their lands, the Council was also empowered to transport "all such and so many of our loveing Subjects, or any other Strangers that will become our loving Subjects, and live under our Allegiance" to New England. The notable exceptions to this liberal transportation policy were those who adhered to the "Superstition of the Chh of Rome." No Catholics were to migrate to New England. Indeed, the charter required that all persons migrating to New England take the Oath of Supremacy acknowledging the Church of England, and empowered the Council to administer the oath to colonists. The charter also empowered the Council to "distribute, convey, assigne, and sett over" lands to "our loveing Subjects, naturally borne

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125 Thorpe, Charters, III:1839-40.
or Denisons, or others, as well Adventurers as Planters." While the Council rarely conveyed land directly to settlers as freeholds, the terms of the charter itself were relatively liberal in extending property rights, and the possibility of subjecthood, to settlers other than natural born subjects. In England, denizens could not own freehold property outright – the estates of endenized Englishmen reverted to the crown at death. Unlike in Virginia after its 1619 rechartering, however, few "strangers" were naturalized in New England and the estates of endenized foreigners reverted to the Council upon their deaths.

This was all perfectly in keeping with the vision Gorges and his fellow councilors had laid out for New England colonization. By maintaining tight control over colonial property rights and limiting the access of on-the-ground settlers to political authority, they hoped to build not the feudal society posited by some scholars -- that was already an anachronism back in England – but a hierarchical, absolutist, patriarchalist colony that would both enrich and empower the king and his favorites. Had Gorges and the Council succeeded in settling a viable colony in New England, their political and economic vision may have created a colony much like Virginia, with relatively few property owners and widespread use of bound labor. Few settlers made their way to New England under the Council's auspices, however, and many of the new settlers who did begin to arrive in the 1620s and '30s did not share the imperial political vision of King James, Ferdinando Gorges, and the Council for New England. These Pilgrims and Puritans would prove to be a persistent challenge to the Council's plans, and repeated conflicts between their

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126 Ibid., III:1834-1835.
imperial visions would play a crucial role in determining the boundaries of slavery and subjecthood in Massachusetts.

The Leiden separatists who would go down in history as the Mayflower Pilgrims did not initially set out to colonize Massachusetts, and only a series of unlikely events brought them to Cape Cod in 1620. Seeking a safe place to practice their peculiarly anti-authoritarian brand of Calvinist Christianity, they first relocated to Leiden in the Netherlands. By 1617 a variety of factors left some of the English separatists dissatisfied with the Low Countries, and they began to investigate options for relocating to Virginia. James I's reservations about the separatists' loyalty, ongoing debates within the Virginia Company over corporate restructuring, and the reluctance or penury of many potential settlers nearly scuttled the venture, but in 1620 the Leiden separatists finally received a patent from the Virginia Company of London to settle the northern region of the colony, in what is today New Jersey. The would-be Pilgrims would be employees of the Virginia Company, laying the initial groundwork of a new settlement that, investors hoped, would soon siphon off some of the fur trade flowing to Dutch New Amsterdam. At the close of seven years, the Company would take a half share in all developed properties as compensation for the initial funding of the colony. In return, the few sympathetic puritans on the Virginia Council would work to divert suspicion or hostility from the king and his supporters among the shareholders, allowing the Pilgrims a degree of toleration in church governance and practice.127

As circumstance would have it, all of this trouble was for naught – the Pilgrims landed not in Virginia but New England. There they settled on the shores of Cape Cod,

127 Winship, Godly Republicanism, 110-119.
dubbing their colony New Plymouth. Without a patent from the Council for New England, the Pilgrims' legal claims to settlement were as shaky as their prospects for survival in the earliest years at Plymouth. The Council, however, seems to have welcomed the presence of settlers who planned to stay in New England permanently. Perhaps they hoped, as the Virginia Company had, that the Pilgrims would serve as a conduit to the fur trade. Either way, Gorges and the council did not challenge their presence, nor scrutinize their religious practice closely enough to raise any objections. When William Bradford finally obtained a patent from the Council for New England in 1629, the Council for New England praised the efforts of the Pilgrims in "soe pious a worke which may especially tend to the propagation of religion and the great increase of trade." The Plymouth settlers were empowered to "frame, and make orders ordinances and constitucons...for the better governmente of their affairs," and to take whatever steps they deemed necessary for the "preservacon of the peace [and] suppressinge of tumults," but the Council reserved the power to hear "matters of justice by appeal uppon spetiall occasion." The patent required only that laws made in Plymouth "be not repugnante to the lawes of England."¹²⁸

This perfectly typical patent masked the radical religious and social program the Pilgrims were already implementing in Plymouth. The famous Mayflower Compact, signed as the Pilgrims sat anchored off Cape Cod, stated that the settlers agreed to "covenant and combine...together into a civil Body Politick" vested with authority to "enact, constitute, and frame such just and equal Laws, Ordinances, Acts, Constitutions, and Officers" as would most promote the "general Good" of the settlement, all of which

¹²⁸ Thorpe, Charters, III:1842-6.
was confirmed and legitimated by the 1629 patent. Despite their claims to be "Loyal Subjects of our dread Sovereign Lord King James," however, the structures of governance in church and state erected by the Pilgrims ran directly counter to early Stuart policies. As early as 1625, poor economic returns and allegations that the settlers "condemned all other churches, and persons but [themselves]" had convinced a number of investors to withdraw from the Plymouth Company. These charges against the Pilgrims were well founded – Plymouth church members refused their consent to a minister sent to them by the Company because he believed the Church of England was a true church, that it was "lawfull, and hee would not renounce it." Charges of non-conformity and sedition would continue to dog the Pilgrims and even the more moderate Puritans who followed them throughout the early 17th century.

The differences between the Massachusetts Bay colonists and the Pilgrims mirrored those between moderate, magisterial reformers and radical Puritans back in England. While these were mainly differences of degree rather than of kind, they would have myriad implications for structures of governance in church and state, the orientation of settler communities toward local Natives, and ideals of subjecthood and social inclusion. Much like the Virginia and Plymouth colonies, Massachusetts Bay began as a corporate colony. The Massachusetts Bay Company received a patent from the Council for New England to settle a colony between the Merrimack and Charles Rivers on Massachusetts Bay in late 1628 and immediately sent a handful of settlers to secure their claim. Leading planners were worried about conflicting grants, however, and applied to

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129 Ibid., III:1841.
130 Thomas Morton, New English Canaan, or New Canaan, Containing an Abstract of New England... (London, 1637 [2nd ed.]), 262-263. For controversies over church governance in the Plymouth colony, see Winship, Godly Republicanism, 120-133.
Charles I for a new charter, which they received in April 1629. The charter issued to the
Massachusetts Bay colonists was identical in nearly every way to those granted to the
Virginia and Plymouth colonists: land was granted to the company "as of our Mannor of
Eastgreenwich, in the County of Kent, in free and comon [sic] Socage, and not in Capite,
nor by Knightes Service"; the governor, deputy, and assistants were to be "elected and
chosen out of the Freemen of the saide Company"; four General Court meetings were to
be held annually for the "handling, ordering, and dispatching" of all Company business;
and the Company was empowered to "make Lawes and Ordinnces...for the Government
and ordering of the saide Landes...and the People inhabiting" them, so long, of course, as
these laws "be not contrarie or repugnant" to the law of England. 131

Very quickly, however, it became apparent that the Massachusetts Bay charter
was unique, not in its language but in its location. Shortly after obtaining their patent, the
directors of the Massachusetts Bay Company voted to transfer the seat of company
governance to New England and, crucially, to bring their patent with them to
Massachusetts. The planners of the Massachusetts Bay colony, after all, intended to
frame their ecclesiastical government in ways that were explicitly "contrarie" to English
law. 132 They were also well aware of the increasingly anti-Puritan inclinations of their

131 Thorpe, Charters, III:1846-1860.
132 An impressive roster prominent Puritans and opponents of Stuart absolutism came to New England
during this first wave of the Great Migration, including the weighty Puritan merchants Sir Richard
Saltonstall, John Endecott, and Theophilus Eaton; future Monarchist leader William Aspinwall;
and Sir Henry Vane, the future regicide and leader of the Independents during the Long Parliament. As
this list of prominent Massachusetts settlers suggests, it was clear from the outset that the Massachusetts
Bay colony would not conform strictly to Anglican practice. John Winthrop wrote of the colony's first
minister, George Phillips, that he was "acquainted with the way of church discipline, since owned by
 Congregational churches." The colonists' choice of Phillips as their minister illustrates that they intended
to erect non-conformist churches from the very outset of colonization. See John Winthrop, History of
 New England, James Kendall Hosmer, ed. (New York: Charles Scribner’s Sons, 1908), I:37 [hereinafter
cited as Winthrop, Journal]. See also Winship, Godly Republicanism, for the influence of radical
separatist ideology on early Massachusetts church governance.
new monarch, Charles I. Since taking the throne in 1625, Charles had outstripped even his father's absolutist pretensions, dismissing judges who displeased him without cause, quashing Parliament's Petition of Right in 1628, implementing his own personal rule by dismissing Parliament in 1629, and imposing the reviled Ship Money tax on inland towns to fill his royal treasury. Worse yet, Charles' new Archbishop of Canterbury, William Laud, inaugurated a new era of religious persecution, dragging non-conformists before the High Commission and Court of Star Chamber. Puritans, as John Winthrop put it, saw "some evil days to come upon England," and fled in the Great Migration of the 1630s, in which thousands of Puritans followed the Massachusetts Bay charter across the Atlantic to the New World.  

The society these migrants hoped to create was based on a radical vision of Christian fellowship. To the Puritans, the ultimate goal of their city on a hill was to construct a viable society based on the primitive Christian church, where all visible saints would have a share in church governance. This was not, however, solely a religious vision, and Massachusetts colonists structured property relations in the colony to mirror the general equality of their churches. Unlike their Virginia cousins and most Englishmen, Massachusetts Puritans generally practiced partible inheritance rather than primogeniture. Under this system, all male heirs received an equal portion of the estate, "according to the law of God," with a double share reserved for the eldest son.  

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135 The proposed statute cites chapter and verse from Numbers and Deuteronomy in support of the measure. A statute passed nearly simultaneously in Plymouth reinforced Biblical citation with a reference to the "comendable custome of...Est Greenwch." On Massachusetts inheritance law, see Richard B. Morris,
had the dual benefit of providing more men with the qualifications for political
subjecthood, enabling them to participate fully in church governance, and establishing a
strong material basis for the moral life Puritans hoped to live.\textsuperscript{136} The Plymouth
separatists codified their use of partible inheritance in 1635, and Massachusetts Bay
followed suit with their own statute in 1636.\textsuperscript{137} Within individual households, of course,
fathers retained authority over their wives, children, and servants, but relatively
widespread access to property meant that many individuals would go on to build
independent households of their own and participate fully in church and state
governance.\textsuperscript{138} Especially in comparison with the social basis for Stuart absolutism in
England, and the patriarchalist colonial state under construction in Virginia,
Massachusetts fostered a degree of political and social equality rarely seen in the early
modern world.

The Puritans' rough social equality found expression in early modes of political
governance. Under the terms of their patent, the General Court of the Massachusetts Bay
Company was empowered to legislate for the colony and hold courts to police colonists'
behavior and settle disputes. The Council for New England, however, likely assumed
that the Massachusetts Bay Company would oversee the colony from England, where the
king and Council could supervise its activities. With the charter removed to New

\textsuperscript{136} T. H. Breen and Stephen Foster, "The Puritans' Greatest Achievement: A Study of Social Cohesion in
\textsuperscript{137} Morris, "Primogeniture and Entailed Estates," 28-34. The Plymouth statute also guaranteed widows
use-rights to one-third of their husband's estate, and outright ownership of one-third of his personal
property.
\textsuperscript{138} See Morgan, \textit{The Puritan Family}; Cornelia Hughes Dayton, "Was There a Calvinist Type of
Patriarchy?: New Haven Colony Reconsidered in the Early Modern Context," in Christopher L. Tomlins
and Bruce H. Mann, eds. \textit{The Many Legalities of Early America}, (Chapel Hill, NC: University of North
England, however, Massachusetts colonists began to interpret their royal grant in innovative ways. The patent's clause empowering the General Court to "choose, nominate, and appointe, such and so many others as they shall thinke fitt" to be freemen of the Company – standard language included in most charters to allow new investors to join the company – bolstered the colonists' broad view of subjecthood. Rules for company elections were laid out in boilerplate language, but with the charter in Massachusetts and so many freemen admitted to full political subjecthood, they became the basis for an unprecedented experiment in participatory, consent-based governance.\textsuperscript{139}

In 1631 and 1632, repeated disputes arose between Governor John Winthrop and the locally elected Assistants over the proper limits to the power of the governor and General Court. Deputy Governor Thomas Dudley, who wished to see the Assistants vested with more power, alleged "in [a] passion" that Winthrop "had no more authority than every assistant," and had attempted to "make himself popular, that he might gain absolute power, and bring the assistants under his subjection." Winthrop countered that the company patent "gave him whatsoever power belonged to a governour by common law or the statutes," and pointed out that he had already proposed a measure in the General Court that would limit the powers of the governor.\textsuperscript{140} While Winthrop and some of his allies were wary of extending the sphere of political subjecthood too far, the influence of radical separatist church organization and the rough social equality of the settlers made them confident that the visible saints among them were capable of participating in making, or at least giving their consent to, political decisions.

\textsuperscript{139} Thorpe, Chartered, III: 1847-1860.
\textsuperscript{140} Winthrop, Journal, I: 84.
At the local level, governance took the form of the famous New England town meeting, where all freemen (adult male property-owning church members) assembled in the town's church or meetinghouse to participate in the selection of assistants, election of ministers, and resolution of disputes.\textsuperscript{141} The town meetings were notoriously democratic affairs. Each town's militia elected its own officers. Labor was tightly regulated, and towns retained the power to “warn out” uninvited settlers to prevent a drain on town resources and prevent competition with town born workers on the local labor market. The local freemen also had control over their town's land, and were responsible for its distribution to settlers. This function of local town governance was of the utmost importance, especially given Massachusetts settlers' preference for partible inheritance. Each new round of generational estate descents would subdivide existing landholdings, so control over access to new lands was hotly contested.\textsuperscript{142}

Even here, however, the democratic culture of early Massachusetts is evident. On 11 December 1634, when the first Boston selectmen were chosen, for example, many worried that "the richer men would give the poor no great proportions of land." Though Winthrop and newly appointed minister John Cotton persuaded the "inferior sort" to accept the election of local notables, including Winthrop, they did so from a particularly Puritan logic. Winthrop argued that "it would be very prejudicial to the commonwealth" if some land were not held aside for future immigrants while others held property they


\textsuperscript{142} Levy, \textit{Town Born}; Winship, \textit{Godly Republicanism}. 

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could not fruitfully use, "more than to please the eye with it." While Winthrop's magisterial vision convinced him that it was best not to allow Massachusetts society to become too democratic, the ultimate aim of this accretion of power was to lay a solid foundation for future participation by the broad mass of settlers.

Almost immediately, this innovative social and political system came under attack both from within and without. Internal problems arose when the magisterial vision of moderate puritans like John Winthrop collided with more radically democratic forms of church governance coming from the Pilgrims at Plymouth and radicals in the parishes at Watertown and Salem. The first clash came in February of 1632, when the Watertown congregation refused to contribute to a general levy for colonial fortifications. "The ground of their error," said Governor Winthrop, "was, for that they took this government to be no other but as of a mayor and aldermen, who have not power to make laws or raise taxations without the people." For their part, the Watertown congregants feared that, if they passively obeyed the General Court, they would bring "themselves and posterity into bondage." To make matters worse, "some indiscreet persons" among the colonists were writing letters back to England describing the prevailing sentiment "against the church government in England" and describing in detail the methods of church and state governance employed in New England. Though allies back in England were able to keep this incident from raising too much negative attention, it was but a glimpse of the turmoil to come.

143 Winthrop, Journal, I: 143.
145 Ibid., I: 99.
Historians have long noted how the arrival of radical Puritans, commonly referred to as antinomians, raised prickly theological questions and challenged the authority of local magistrates over church governance. What has less commonly been emphasized, however, is the political nature of the antinomian controversy. From his arrival in 1631, Roger Williams was a persistent political threat to the magisterial vision of Winthrop and his supporters. True, the crux of the issue was theological – Williams opposed the power of civil magistrates to dictate forms of church governance and charged that moderate Puritans communed with a false church by not sufficiently denouncing the Church of England – but the implications of the antinomian critique for civil governance were manifestly political. Williams' criticism of Massachusetts’ colonial state ran the gamut: he argued that elected magistrates had no power to enforce the Sabbath or tender oaths to the "unregenerate"; he questioned the legitimacy of the settlers' patent, arguing that "they could have no title, nor otherwise, except they compounded with the natives"; he openly condemned Massachusetts congregations that did not "make a publick declaration of their repentance" for communion with the Anglican Church.

All of these positions directly threatened the existence of the Bay Colony, especially given Charles I's increasingly anti-Puritan policies. Winthrop and his

supporters were in a tricky position – in spirit, they were at least mildly receptive to much of the antinomian critique, but they knew that unsympathetic eyes back in England were fixed upon their city on a hill. Williams' allegation that the settlers’ patent was illegitimate directly called into question the power of the king to dispose of his dominions as he saw fit. His denunciations of the Church of England stoked fears back in England about Massachusetts' theological heterodoxy. His critique of the magistracy suggested a radically democratic view of political society that, royalists suggested, was ascendant throughout New England. It is in this light that Winthrop's response to settlers like Roger Williams must be understood. He was forced to navigate between the Scylla of local antinomian opposition and the Charybdis of royalist threats to Massachusetts' continued existence.\(^\text{150}\)

Before long, the rising chorus of complaints about heterodox Massachusetts governance caught the ear of Ferdinando Gorges and the Council for New England. Thomas Morton, who had settled in the Massachusetts Bay under the aegis of the Council for New England, despised the growing power of the Puritans, and had been banished from the colony by the General Court, leveled a string of serious accusations against the Puritan colonists. Morton alleged that the colonists "inten[ded] rebellion." They had willfully "cast off [their] allegiance" and were "wholly separate from the church and laws of England." The ministers in New England, according to Morton, "continually rail against the state, church and bishops" in England, the very crimes for which many English Puritans found themselves dragged before Laud's High Commission.\(^\text{151}\)


Massachusetts colonists, according to their detractors, were not behaving like English subjects, and had therefore abrogated the protections subjecthood afforded them. Luckily, the Massachusetts colonists had able allies as well. Edward Howes was sensible that Puritan colonists could use "some hearty and able friends at court," and told John Winthrop, Jr. that he would undertake the study of law at the Inns of Court to support "the good and welfare of your plantation and state." Other friends back in England advised the Puritans "that the prayers for our king not be neglected in any of your publick meetings" and "that [they] differ no more from [the Church of England] in church government" than absolutely necessary.

Emboldened by internal divisions in Massachusetts and the string of charges being leveled against the Puritan colonists, Ferdinando Gorges and the Council for New England, who Winthrop believed "aimed at the general government of New England," sought to vacate the Massachusetts patent in April 1634. Gorges claimed that the Puritan colonists, though "presenting the name of honest & religious men," had "surriptitiously gotten...other lands" than those confirmed in their patent. Worse yet, they "wholy excluded themselves from the publique Governmt of ye Countrie...and made themselves a free People." The Puritans were seditious innovators who "framed unto themselves both new laws & new concepts of matters of Religion & forms of ecclesiasticall & temporall Orders & Governmt." All this, Gorges argued, they had done "partly through other pretences though indeed for no other cause save only to make

153 Francis Kirby to John Winthrop, Jr. (26 March 1633) in Ibid., III: 116-117.  
themselves absolute Masters of the Country."\textsuperscript{155} The solution was clear – King Charles must void the settlers' charter and take direct control of the colony. Charles and his Council were more than happy to cast their support with Gorges against the dangerous Puritan settlement and sent orders for the return of the charter to England, but events would illustrate just how far Massachusetts' settlers were willing to go to protect their utopian society.

When the news of the council's order calling in their charter arrived in July 1634, Winthrop and his allies, demonstrating their commitment to local consent, decided that "it should not be done but by a General court," which would not meet until September. Just before the Court met, rumors swirled that a new governor was to be sent by King Charles to govern the colony in his name. John Cotton responded to this threat with a rousing sermon, declaring that it was "the people's duty and right to maintain their true liberties against any unjust violence."\textsuperscript{156} On September 18th, the General Court announced the dreaded news – a new Commission for Regulating Plantations had been created by the king, chaired by the reviled Archbishop Laud, "to call in all patents, to make laws, to raise tythes and portions for [Anglican] ministers, to remove and punish governours, and to hear and determine all causes, and inflict all punishments, even death itself." Letters accompanying the orders assured the settlers that this innovative extension of absolute royal authority was "intended specially" to punish recalcitrant Massachusetts Puritans. A force was being assembled to "compel [Massachusetts], by force, to receive a new governour, and the discipline of the church of England, and the

\textsuperscript{155} An Act for the Resignation of the great Pattent of New England, CO 1/6/27 [??].
\textsuperscript{156} Winthrop, Journal, I: 134.
laws of the commissioners." To Massachusetts settlers, with their firm belief in consent-based governance, this order stripped them of their rights as subjects. In response, the Bay Colony geared up for war. New fortifications were built to protect settlements and St. George's cross, the king's ensign, was removed from the colors that flew over the forts.

While they prepared for a fight on the one hand, Winthrop and his allies also hoped to appease the new commission by a show of their loyalty. It was precisely during this imperial constitutional crisis that the moderate crackdown on Williams and the antinomians ramped up. While tacitly approving of the defacement of the king's colors, Winthrop wrote back to England expressing his "dislike of the thing," promising to seek out and punish the offenders, but hedged by arguing that the use of a cross in an ensign was "very unlawfull." When Roger Williams was finally banished from Massachusetts in October 1635, after numerous failed attempts by Winthrop and other moderate leaders to bring him to heel, it was as a last resort. Williams, who in Winthrop's eyes had become "very dangerous," was not banished because his beliefs were wildly out of step with those of most other Massachusetts settlers – indeed, Winthrop himself came to approve of removing St. George's Cross from the imperial standard and hewed far closer to Williams' position in church and civil governance than he could safely admit. Instead, Roger Williams was banished because his unwillingness to compromise on principle endangered the future of Puritan settlement in Massachusetts.

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157 Ibid., I: 135.
158 See ibid. I: 134-135, 137-138, 141-142, 145, 147-149 for the controversy over flying the king’s colors and preparations for the defense of the colony against the new governor.
159 Ibid., I: 141-142.
160 John Donoghue makes a similar argument about the political motivations for Williams’ banishment in *Fire Under the Ashes*, 61-63.
In the event, the ship that was to carry the new governor to the colonies foundered, and Massachusetts was saved, at least for the moment. In theory, all of England's colonial possessions were to be consolidated into twelve provinces, each ruled over by a proprietor back in England. But, as Winthrop noted with relief, "the project took no effect. The Lord frustrated their design." Though the immediate threat had passed, Winthrop was aware that Massachusetts remained a target because of its heterodox religious and political positions. Though Roger Williams himself was gone, his opinions lived on in the Bay Colony. Winthrop and other magistrates continued to grapple with antinomian opposition to their power but, as long as their opinions were not "scandalous" and did not attract unwanted attention from imperial planners, the moderates and radicals ought "to bear each with other." Leading Puritans knew that they walked a fine line between being true to their consciences and open rebellion to the king, and did everything in their power to protect their holy society both from internal dissension and absolute imperial control.

It is in this political and social context that the position of both radical and moderate Puritans toward slavery becomes intelligible. Despite recent claims that Puritanism was somehow "preset for racism," there was a strong egalitarian strand in Calvinist thought that militated against permanent racial slavery. To Puritans, the litmus test for social inclusion was not race but religiosity. Though they differed in modes of organization for their individual churches, the Pilgrims and Massachusetts Bay

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162 Ibid., I: 179.
colonists agreed that all of the saved should have the ability to participate in true churches, and saving souls was the prime animating force behind their colonial project. New England Puritans, despite their eventual failures, seem to have genuinely hoped to convert local Natives and, to some extent, to assimilate them into their religious and social experiment. Though there were very few Africans in New England before 1640, there is no evidence to suggest that Puritans would have excluded anyone who converted and conformed to strict New England morality on purely racial grounds. This is not, of course, to say that Massachusetts colonists disregarded all distinctions of rank, or that race played no role in the development of New England society. Individual households continued to be patriarchally organized, and only property-owning male church members could participate fully in colonial politics.\textsuperscript{165} But patriarchy on the household level or the racism of individual settlers did not necessitate patriarchalism in social organization – partible inheritance, consent-based forms of political organization, and widespread access to legal subjecthood combined to make Massachusetts one of the most democratic societies on earth in the 1630s.\textsuperscript{166} And while individual settlers certainly exhibited a great deal of hostility toward Native Americans, and later Africans, these individual biases would not become institutionalized, as they were in Virginia.

Still, under Massachusetts' peculiar brand of Puritan patriarchy, heads-of-household and magistrates were to play a crucial role in policing behavior and morality. This close invigilation of individual behavior began even before the settlers disembarked in the New World. A servant who tricked a young migrant out of his rations and sold

\textsuperscript{165} Dayton, "Was There a Calvinist Type of Patriarchy?" in Tomlins and Mann, Many Legalities, 337-356.
\textsuperscript{166} Thompson, “Enough of Thorough,” includes a useful discussion of the debate over the extent of Massachusetts’ democratic political culture.
them to other servants on board had his "hands...tied up to a bar," had "a basket with stones [hung] about his neck," and was forced to do public penance on the Arbella's deck for two hours. One Phillip Ratcliff, a servant sent over by former company governor Matthew Craddock, was convicted of "scandalous invectives" against Massachusetts' government and churches and was punished with whipping, ear cropping, and banishment. One servant was so terrified of the possibility of punishment for stealing from his master that he "went and hanged himself" with a fishing line – sadly, a letter from his father bearing money to purchase his freedom arrived that very day.

For particularly recalcitrant Puritans, Massachusetts had an especially harsh punishment – penal bondage. Those who continued in a life of sin, despite the best efforts of ministers, magistrates, and masters, were to be bound out to local church members. Ideally, the example of god-fearing Puritan families would awaken the sinner to his or her faults and, once they proved that they could walk in the path of righteousness, their bondage would end and they would rejoin the community of saints. In 1638, for example, William Androws was sentenced be whipped and bound out "to whom the Court shall appoint" for an unknown offense. Only a year later, however, he was released from penal bondage for "good carriage" and voluntarily entered into an indenture with a new master. In the 1639 case re Dickerson, the General Court sentenced a settler to penal bondage for theft until double restitution was made. A year later one Thomas Savory was whipped and sentenced to bond servitude for theft.

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167 Winthrop, *Journal*, I: 42.
168 Ibid., I: 64.
169 Ibid., I: 175.
171 *MBC Recs.*, I: 284, 300.
172 Ibid., I: 248, 297.
each case, the goal of penal bondage was to rehabilitate the sinner, holding him in
bondage only until he or she proved their fitness for inclusion in Puritan society.

Episodes like these, however, seem to have been the exception rather than the
norm. Massachusetts' early economy had little need for widespread use of servitude.
Most settlers migrated in family groups and, because landholdings were typically small,
could profitably run their farms without employing servants. Of the approximately
twenty one thousand migrants who came to Massachusetts during the Great Migration,
only about one-quarter came as servants, compared to a clear majority in the
Chesapeake. The few servants who did arrive in the colony were often familiar with
the families they served – many were sons and daughters of fellow Puritans back in
England who could not afford their own passage. The evidence suggests that most
Massachusetts servants, unlike their cousins in Virginia, survived their indentures and
were absorbed into Massachusetts society. Indeed, Puritan masters saw many
"testimonies of the Lord's gracious presence" in the good behavior of their servants. One
fourteen year old boy who for years had gone about "mourning and languishing" for fear
of his sins, came to have a conversion experience and was received into his local
congregation. John Winthrop noted that, since his conversion, the lad "went cheerfully in
a Christian course, falling daily to [his] labour." This was, ideally, the path that even
the most recalcitrant Massachusetts servants would take – come to know the saving
power of God through the example of the families they served, live an upright life and

serve faithfully in their calling, and eventually become church members and participate in the community.  

The impulse to conversion and inclusion seems to have guided New England settlers' early interactions with Native Americans as well. Both the Plymouth and Massachusetts Bay colonies' charters included clauses indicating that the "principall Effect" expected of colonization was "the Conversion and Reduction of the People in those Parts unto the true Worship of God and Christian Religion." Given the holy aim of their colony, there is little reason to doubt that settlers earnestly desired the conversion of local natives. The actions of many of the leading figures in Plymouth and Massachusetts Bay toward the Indians certainly indicate that they initially desired peaceful relations that would, in time, lead to conversions. Edward Winslow for example, one of the Mayflower Pilgrims and future governor of Plymouth, built a strong relationship with Massasoit, sachem of the Wampanoag, and steadfastly worked to improve relations between settlers and local natives.  

Almost immediately upon his arrival in Massachusetts, John Winthrop also worked to put English/Native relations on a peaceful footing. In March 1631, for example, Winthrop met with a local sachem named Chickatabot. The governor gave Chickatabot a suit of English clothes, dined with the sachem and his entourage, and left the meeting impressed. Chickatabot, Winthrop

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176 From the 1620 Patent issued to William Bradford and the Pilgrims by the Virginia Company, Thorpe, *Charters*, III: 1839. Similar language was used in the 1629 Plymouth patent, the 1628 patent from the Council for New England to the Massachusetts Bay Company, and the royal charter issued to Massachusetts Bay in 1629. Virginia's colonial charters, of course, contained similar language but, as discussed above, few meaningful attempts were made to convert Chesapeake natives in the early 17th century.
thought, "behaved himself as soberly...as an Englishman." The Puritan governor had reason to be optimistic about future relations – at their third meeting, Chickatabot "would not eat till the governour had given thanks, and after meat he desired him to do the like." These early encounters likely reinforced the Puritans' belief that local natives would convert to Christianity and become willing partners in English colonization.

Even before the growth of John Eliot's famous "praying Indian" towns in the 1640s, there were indications that some local Natives were at least somewhat interested in learning about Christianity. When a terrible epidemic of smallpox decimated local native populations in the fall and winter of 1633, some Indians turned to the English for help. John Sagamore, an important go-between for Winthrop and local native leaders, was one of those who fell ill. Sagamore "desired to be brought among the English" and asked that Mr. Wilson, minister of the Boston church, care for his son in the event if his death. He promised that, if he survived his illness, he would "live with the English and serve their God," and when he finally succumbed on December 5th, Sagamore "died in persuasion that he should go to the Englishmen's God." Other of John Sagamore's people also "confessed that the Englishmen's God was a good God" and promised to convert if they recovered. Few survived the terrible epidemic, but those who did were, according to Winthrop, moved by the actions of the English who, "when their own people forsook them...came daily and ministered to them." Many of the survivors were children who were taken in by English families, including one, christened as "Know-God" who lived with Governor Winthrop and his family. At least some early Massachusetts colonists,

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179 Ibid., I: 62.
then, were genuinely committed to the Christianization of local natives and hoped to build positive relationships that would lead to conversion.

In return for their cooperation, natives were generally treated with relative equanimity in Massachusetts courts, and local Indians often turned to English law to press claims on the settler state. Indeed, the case of Thomas Morton that drew the attention of Ferdinando Gorges and caused so much trouble for Winthrop began when the Massachusetts governor protected the rights of local natives. Morton, who stole a canoe and many valuable trade goods from local natives, was severely punished by the General Court. He was banished from the colony, his goods seized to repay the Natives and defray the cost of his transportation back to England, and his house was "burnt down to the ground in sight of the Indians, for their satisfaction for many wrongs he has done to them." Winthrop, ever ready to display the righteousness of his colony to local natives, assured them that "the habitation of the wicked should no more appear in Israel." Morton, of course, was a political enemy of the Puritan colony, and his banishment was likely a foregone conclusion. Still, the lengths to which Winthrop was willing to go to satisfy local natives is noteworthy, especially when compared to relations between Natives and English settlers in Virginia.

Morton's punishment, while perhaps extreme in its severity, suggests that local Native Americans were often treated as relative equals under law by Massachusetts colonists, at least in the earliest days of settlement. For their part, Natives came to understand that they could sometimes protect themselves from grasping colonists by making claims in Massachusetts' courts. Perhaps they heard about the reverence of

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181 Morton, New English Canaan, or New Canaan, containing an Abstract of New England... (London, 1637 [2nd ed.]).
Englishmen for the law from Jack Straw, a local Indian who had travelled with Sir Walter Raleigh and spent time in England.\textsuperscript{182} Whatever their introduction to English courts, natives quickly learned to use them to redress grievances with Massachusetts colonists. In September 1631, for example, a young man was publically whipped for "soliciting an Indian squaw to incontinency." The woman and her husband had "complained of the wrong" to Massachusetts magistrates and were present for the trial and punishment, with which they were "very well satisfied."\textsuperscript{183} Later that same month a settler named Josias Plaistowe was censured by the General Court along with two of his servants. The men were found guilty of stealing corn from Chickatabot, Governor Winthrop's ally. Plaistowe was required to pay dual restitution to Chickatabot, fined £5 by the court, and "degraded from the title of a gentleman." The servants were whipped while Chickatabot and his men looked on.\textsuperscript{184}

Puritan justice was exacting, however, and Natives were also charged with crimes by Massachusetts authorities. Despite their heathenism, it seems early colonial courts dealt with Indians in much the same way as they did Puritan settlers. In June 1631, for example, John Sagamore and Chickatabot "made satisfaction" for "injuries" done to a settler's cattle – another native was ordered to pay one beaver skin in restitution for shooting a colonist's pig.\textsuperscript{185} Winthrop and other leading Puritan colonists hoped that treating local natives with equanimity would build peaceful relations and lead at least some natives to conversion, and the just treatment of natives in early Massachusetts courts was a crucial element of this strategy. True, they did not go as far as Roger

\textsuperscript{182} Winthrop, \textit{Journal}, I: 61.
\textsuperscript{183} Ibid., I: 67.
\textsuperscript{184} Ibid., I: 68.
\textsuperscript{185} Ibid., I: 64.
Williams, who claimed that natives retained all rights to land in New England unless they agreed to sell it to English settlers, but they could not yet imagine treating natives as unredeemable others incapable of coexisting with Puritan colonists.\textsuperscript{186}

Unfortunately for local Native Americans, this initial peace was not to last. Part of the problem was internal to Puritan colonization. To ensure that as many church members as possible would have access to land, in 1633 the General Court ruled that any land not cultivated by local natives was open to any who would settle and improve it.\textsuperscript{187} As estates were subdivided through partible inheritance the land crunch grew even more severe, and pressure on settler/native relations increased. Inter-tribal native politics exacerbated the problem. As scholars have recently pointed out, English colonists stepped into a tense and fractious native political scene when they arrived in Massachusetts.\textsuperscript{188} Local tribes looked to the English as key allies in longstanding conflicts with powerful native enemies, like the Pequots and Narragansetts to the south, and the powerful Mohegans to the north. When these conflicts erupted into open violence, the Puritans were placed in a difficult position. In April 1632, there was "a broil" between English settlers and a party of Narragansett Indians, who attacked the

\begin{itemize}
\item \textsuperscript{186} Guasco, \textit{Slaves and Englishmen}, chapter 6. Anthony Padgen, \textit{The Fall of Natural Man: The American Indian and the Origins of Comparative Ethnology} (New York: Cambridge University Press, 1987) examines Iberian attitudes toward the possible inclusion of Native Americans in colonial polities and provides an instructive point of comparison to the English experience.
\end{itemize}
settlement at Sowamset where they believed the English were sheltering Massasoit, their enemy.\textsuperscript{189}

As tensions built throughout the summer and rumors of a Narragansett attack on Massachusetts swirled, colonists began to turn on local Natives. Massachusetts settlers were prohibited to sell or trade arms and ammunition with natives – one colonist who violated this order was publicly whipped and branded.\textsuperscript{190} The terrible smallpox epidemic in 1633-4 and a treaty with the Pequot Indians in November 1634 seemed to settle things for the moment. The Pequots, who were "now in war with the Naragansetts...and likewise the Dutch" seemed natural allies to the Puritans, who feared the nearby Narragansetts and hoped to quash Dutch claims in the region. The treaty stated that Massachusetts and the Pequot nation would "be at peace...and as friends to trade" but did not require the English settlers to join the war against the Narragansetts.\textsuperscript{191} Under the terms of this treaty, Massachusetts colonists were able to broker a peace between the Pequot and Narragansett that, while it ended one round of intra-native conflict, ultimately led to the Pequot War.

This peace brokered by the English settlers between the Pequot and Narragansett set in motion a series of events that culminated in the Pequot War of 1637. Throughout 1635, the Pequot, despite their treaty with the Massachusetts colonists, proposed that the Narragansett join them in a pan-Indian alliance against the English. Instead the Narragansett, seeing an opportunity to destroy their long-time enemy, joined in an alliance with the English settlers to wage war against the Pequot nation. When it finally

\textsuperscript{189} Winthrop, \textit{Journal}, I: 76.
\textsuperscript{190} Ibid., I: 90. For rumors of a Narragansett invasion, see Ibid., 91-92.
\textsuperscript{191} Ibid., I: 138-140.
arrived in March of 1637, the Pequot War was a bloody affair on all sides. Raids on the Connecticut frontier killed at least five percent of the English population there, and the combined English-Narragansett-Mohegan force that attacked the Pequot settlement at Fort Mystic killed between 300 and 700 men, women, and children.\textsuperscript{192}

Many of the Pequot who were not killed outright in the war were claimed as slaves. European law had long recognized the theoretical right of victors to enslave war captives and, since the Pequot captives were heathens, proscriptions against enslaving fellow Christians would not apply.\textsuperscript{193} Over 300 Pequot natives, mostly women and children, were taken captive during the 1637 campaigns. Many were quickly transported to Providence Island, a Puritan-financed plantation in the West Indies, where they may have been exchanged for African slaves.\textsuperscript{194} Others were sold to Puritan families.\textsuperscript{195} While their labor certainly supplemented household income, Indian captivity also provided more pious Puritans with a captive audience for their proselytizing efforts, and at least some of these efforts were successful. A tract published in London, \textit{New England's First Fruits}, claimed that many Pequot servants were "very inquisitive after God and his ways," while others were so devoted to their new faith that they would "weep and cry when detained by occasion from the Sermon."\textsuperscript{196} Though likely an


\textsuperscript{193} On the development of international law precepts regarding heathenism and the possibility of enslavement, see Antony Anghie, \textit{Imperialism, Sovereignty and the Making of International Law} (New York: Cambridge University Press, 2007); Anthony Padgen, \textit{The Fall of Natural Man}.


\textsuperscript{195} For the experience of Pequot captives in Puritan households, see Michael L. Fickes, "They Could Not Endure That Yoke": The Captivity of Pequot Women and Children after the War of 1637" \textit{The New England Quarterly}, vol. 73, no. 1 (March, 2000): 58-81.

\textsuperscript{196} [Anon.], \textit{New England's First Fruits}, 423, quoted in Fickes, 73.
exaggeration meant to paint the embattled Massachusetts colonists in the best possible light, *New England's First Fruits* nicely encapsulates the ideal end result of bond servitude in Massachusetts. Though the presence of native servants and slaves would continue to pose difficult questions about the rights of "strangers" in Puritan society, subsequent efforts to Christianize and assimilate New England natives would continue to reflect this ideal throughout much of the 17th century.

It is likely that the first African slaves arrived in Massachusetts as a direct result of the Pequot War. The first reference to African slaves in Massachusetts is a brief entry in John Winthrop's journal for 12 December 1638. Winthrop noted the arrival of the Salem ship *Desire*, which brought “some cotton, and tobacco, and negroes” from Providence Island and Tortuga – like the first “twenty and odd” brought to Virginia, these enslaved people would have been considered property under international law.\(^{197}\) The way that these first Africans were treated once in Massachusetts, however, must remain a topic of speculation. If the same logic that informed the governance of English servants and native captives applied to Africans, and the evidence suggests that it did, then it is likely that attempts were made to Christianize the first African slaves and that they had access to at least some basic rights. There is no official record of Africans in Bay Colony courts until 1642 when Mincarry "the blackmore was admonished, and dismissed."\(^{198}\) This painfully terse entry can tell us nothing about Mincarry except that he was an African; that he had, like so many other settlers, committed some offense that brought him to the attention of the Massachusetts Court of Assistants; and that he was apparently

\(^{198}\) John Noble, ed., *Records of the Court of Assistants of the Colony of the Massachusetts Bay, 1630-1692* (Boston: Rockwell and Churchill, 1904), 118. [Hereinafter cited as *MA Ct Assts.*]
treated by that court much as other English and native colonists were – "admonished, and dismissed."

By 1640, Massachusetts' settlers must have marveled at the progress their embattled colony had made. They had attracted thousands of new settlers, faced down Charles II and Archbishop Laud during the charter revocation crisis, and emerged victorious from their first large-scale war with the Pequot nation. But troubling signs remained – the Puritans had not seen the natives converted en masse as they had hoped, their own communities seemed permeated with unrepentant sinners, and the presence of African and Indian slaves raised difficult questions about how far their radical experiment in godly republicanism would go. Still threatened from without and unsure of their authority within, Massachusetts colonists realized that they needed a uniform code of laws to police the internal morality of their settlement and shore up their claims to sovereignty. Even more radical members of the community supported this move, worried that without "positive laws" to guide them magistrates might "proceed according to their discretions." In March 1635, the General Court appointed a committee "to frame a body of grounds of laws, in resemblance to a Magna Charta."199 The resulting document entitled Moses His Judicialls, a clear reference to the "grounds" upon which Massachusetts law would be built, was debated and amended for nearly five years but was eventually approved in 1641. These fundamental laws, the Body of Liberties, included the first explicit sanction for slavery in any English colony.200

200 On the process of compiling and ratifying the Body of Liberties, see Nelson, The Common Law in Colonial America, chapter 2.
Though the *Body of Liberties* was the first colonial statute to give full legal sanction to slavery, it did so in a decidedly roundabout way. Section XII of the document, "On the Rights of Strangers," stated that “neither bond slaverie, villeinage, or captivitie” would exist in Massachusetts society. Despite this apparent denunciation of slavery, the Puritan authors of the *Body of Liberties* went on to justify the enslavement of “lawful captives taken in juste warres.” This clause, in keeping with the emerging European international law tradition, legitimated the taking of captives in the Pequot War and guaranteed that the same practice could be repeated in the future. The *Body of Liberties* also allowed for the ownership of "such strangers as willfully sell themselves or are sold to us.” Slavery could also legitimately be used as a punishment for those “who shall be judged thereto by Authoritie.” All three of these forms of slavery – of Native captives, of Africans presumably "sold" to the settlers, and of settler convicts – were already practiced in Massachusetts when the *Body of Liberties* was penned. How, then, could its authors possibly believe that they were prohibiting "captivitie" or "bond slaverie"?

The answer may lie in another qualification. Immediately following its list of legitimate forms of slavery, the *Body of Liberties* guaranteed that slaves would “have all the liberties and Christian usages which the law of God established in Israel concerning such persons doth morally require.” Mosaic law, then, would govern the usage of slaves,

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202 Cf. Parent, *Foul Means*, 111, claiming that rooting enslavement in international law gave the institution legitimacy “above state prohibitions” and guaranteed that “those justly enslaved could not seek freedom.” As we shall see, this fundamental law neither precluded local regulation of slavery nor prevented enslaved persons from making legal claims to their freedom in Massachusetts courts.

who would retain “all the liberties” of subjectionhood. Slavery as practiced by the ancient Israelites was a tool of cultural assimilation; its goal was the conversion of slaves and their eventual absorption into Hebrew society. Nor was Mosaic slavery always heritable – the children of converted slaves were no longer “strangers” and thus could not be enslaved.\textsuperscript{204} In addition, by 1641 Africans in Massachusetts were already being baptized. John Winthrop recorded the baptism of a "negro maid" in April 1641, and there is every reason to believe that Puritan masters eagerly sought the conversion of resident Africans.\textsuperscript{205} As practiced by Puritan settlers in the earliest days of Massachusetts colonization, then, slavery was a temporary condition meant to facilitate the conversion of heathens and the redemption of sinners. This conceptualization of slavery meshed nicely with the structure of Massachusetts society, the imperatives of radical Puritan theology, and the broad access to subjectionhood implied both by Calvin's case and Massachusetts' godly republicanism.

Still, despite their protestations that “neither bond-slaverie, nor villeinage, nor captivitie” would exist in their city upon a hill, by 1641 Massachusetts Bay Puritans had created the first statutory justification for slavery in the English New World.\textsuperscript{206} The peculiar logic of human property was clearly not limited to the Chesapeake. The early charters that established New England settlements were framed in much the same way as the Virginia charters, and could have created a similar society based on limited access to landed property and widespread use of unfree labor. The utopian vision of the Plymouth


\textsuperscript{205} Winthrop, Journal, II: 26.

\textsuperscript{206} Massachusetts Body of Liberties quoted in Moore, Notes on the History of Slavery in Massachusetts, 12-13.
separatists and Massachusetts Bay puritans, however, when actualized in the loose legal context of the early English empire, militated against such a society. Rather, the religious radicals planting settlements in New England sought a more egalitarian society that, despite its confessional exclusivity, allowed for the assertion of full civil subjecthood by strangers, including free, and possibly even enslaved, Africans.

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By late 1641, the fears of these radical Puritan migrants that "some evill times" were approaching in England proved prescient. Opposition to Charles I's personal rule, which had been growing steadily for over a decade, had reached a fever pitch, and radical Puritans were at the forefront of this anti-absolutist resistance. Charles became, if anything, even more intransigent as this opposition grew, claiming absolute authority to rule within his dominions and ruthlessly suppressing all dissent. The simmering conflict between royal absolutism and Puritan-tinged consensual government was soon to explode into civil war, revolution, and regicide.\(^\text{207}\) The effects of this explosion were not limited to the British Isles – they would be felt deeply in the maturing English colonies along the Chesapeake and Massachusetts Bays as well. The English empire that emerged from this half-century of turmoil would be transformed in many critical ways, but the social, political, and economic foundations laid in Virginia and Massachusetts by 1640 continued to exert a powerful influence on the development of slavery and subjecthood.

\[^{207}\text{The scholarly literature on the coming of the English Civil War, and the debate over whether an actual revolution took place in England during this period, is staggering and cannot be examined in depth here. For a more complete discussion of the historiography of the English Civil War and Revolution, see chapter 2 below. For the broad outlines of the continuing debate over the revolutionary nature of the English Civil War, see R. C. Richardson, The Debate on the English Revolution (New York: Manchester University Press, 1977); J. C. D. Clark, Revolution and Rebellion: State and Society in England in the Seventeenth and Eighteenth Centuries (New York: Cambridge University Press, 1987); and contributions to the forum "Rethinking the English Revolution" History Workshop Journal, no. 61 (Spring 2006): 153-204.}\]
On the afternoon of April 13th, 1641, Thomas Wentworth, recently made the first Earl of Strafford by Charles I, stood beneath the vaulted wooden ceiling of Westminster Hall. This was to be the final day of his trial under a bill of attainder issued by the Commons for “high misdemeanors” committed as Lord Deputy of Ireland, where he had “govern[ed] like a king” since 1633. Strafford's trial was in many ways a test case for the Parliamentary argument against absolutist prerogative power.¹ The charges against Wentworth included “endeavouring to subvert the ancient and fundamental laws and government of His Majesty's realms of England and Ireland, and to introduce an arbitrary and tyrannical government against law in the said kingdoms.” Rehearsing charges that would later be leveled at Charles himself, Parliament accused Strafford of "exercising a tyrannous and exorbitant power above and against the laws of the said kingdoms, over the liberties, estates and lives of His Majesty's subjects."²

Strafford's closing speech in his defense dwelt on first principles, on the nature of the ancient English constitution and its implications for the deepening conflict between king and Parliament. “I thank God for it,” said Strafford, his voice straining to be heard through the cavernous hall, “by my master’s favor and the prudence of my ancestors I

¹ Strafford rose to become one of Charles I's principal advisors after the assassination of George Villiers, Duke of Buckingham, in 1638. Much as the impeachment charges leveled against Buckingham served as indirect methods of attacking royal prerogative without directly subverting the English constitution itself, Strafford's trial illustrates the lingering hope that conflict between Charles and Parliament could be resolved by removing corrupt advisors. On Strafford’s life and career, see J. F. Merrit, ed., The Political World of Thomas Wentworth, Earl of Strafford, 1621-1641 (New York: Cambridge University Press, 1996).

² For the text of the bill of attainder, see Oliver St. John, An Argument of Law Concerning the Bill of Attainder of High-Treason of Thomas Earle of Strafford... (London: John Stafford and Francis Eaglesfield, 1641), 4-6. For a defense of the Commons’ use of attainder against Strafford, see John Pym, “The Speech or Declaration of John Pym, Esq.” in John Rushworth, ed., Historical Collections of Private Passages of State: Volume 8, 1640-1641 (London, 1721), 661-671.
have an Estate which so interests me in the Commonwealth that I have no great mind to be a slave, but a subject.”³ The favor shown him by the monarch, and the property he had accumulated as a result, made Thomas Wentworth not only an English subject – all persons born in the king's dominion were naturally subjects – but a peer, the Earl of Strafford. Yet to strip him of the privileges granted by the king's majesty, to deny him even the basic rights of an English subject, was to reduce him to slavery.⁴ Taken together, the charges leveled by the Commons and Strafford’s response illuminate many of the fundamental issues at stake in the conflict between king and Parliament in revolutionary England – arbitrary government against the ancient law of the realm; royal prerogative above and against the liberties, estates, and lives of Englishmen; slavery against subjecthood.

But Strafford surely knew he would never be physically enslaved. As numerous scholars have suggested, the deployment of ‘slavery’ as a rhetorical trope during the English revolution was often just that – rhetoric. ‘Slavery’ worked well as a polemically charged term in early modern anti-tyranny discourse – the Earl of Strafford was using the term in this way to protest what he saw as the tyrannical abuse of power by upstart MPs in the House of Commons, bent on subverting the ordained social order.⁵ As we have seen, however, the construction of the early empire was bound up with real, human

³ Speech of Thomas Wentworth, Earl of Strafford at Westminster Hall (13 April 1641), British National Archives, Kew, [Hereinafter cited as BNA], SP 16/479, f. 57, p. 540.
⁴ Under English law, only their fellow peers in the House of Lords could judge the nobility. This was one of the "properties" of the English aristocracy, and to deprive Strafford of it was to wrongly deprive him of his rights as a peer of the realm. Charles I later recognized that allowing Parliament to attack the specific rights he had conveyed to Strafford was a direct attack on the royal prerogative, and pointed to Strafford's death as a direct precursor to his own execution.
slavery from the outset. The experience of revolution and civil war both at home and throughout the empire made many Englishmen acutely aware of the presence of slavery in their American colonies. When Virginia’s royalist governor William Berkeley protested Parliament’s 1650 Plantation Act, saying it would force Virginia planters into a “slavish life,” or former Massachusetts Bay governor Henry Vane, Jr. criticized Protector Cromwell’s policy of transporting the idle poor and political prisoners to the colonies as “slaves,” they knew of what they spoke. Multitudes of Englishmen had firsthand experience with coerced labor during this tumultuous period, men like royalist officer Major Ogilvy, who complained to Charles II in 1674 about being “twice sold as a slave” to Virginia and Barbados by the Interregnum state. Of course, Englishmen like Major Ogilvy were never truly enslaved, as thousands of Africans were during the same period, but their experience has much to tell us about the intersection of revolutionary transformations in social order, the ideal of English subjecthood, and the expansion of African slavery throughout the empire. The questions raised by the "slavery" of political prisoners during the English revolution forced a reevaluation of the role of bound labor in the empire, with revolutionary potential for the future of slavery in the colonies.

6 Though, as we will see, Berkeley and Vane had starkly different ideas of slavery and its place in society.
7 Major Ogilvy to Charles II, BNA, SP 29/363, f.258, p. 501. For examples of other royalists seeking compensation for time spent “enslaved” by the Protectorate in the colonies, see Capt. John Coughlan to Lord Arlington, 1665, BNA, SP 24/142A, f.66; Charles II to Trustees of Sutton’s Hospital, 4 August, 1680, BNA, SP 44/53 f.540, p. 588.
8 Here I differ significantly from recent scholarship by John Donoghue, who argues that the “bond slavery” of English and Irish convicts, vagabonds, and political prisoners was analogous to the enslavement of Africans. While I agree with Donoghue that the working lives of “bond slaves” may have been similar to those of enslaved Africans, there were significant legal differences between the two groups of unfree workers, both as objects of property ownership and as subjects of the English empire. I am also sympathetic to Donoghue’s claim that the English revolutions produced a genuinely anti-slavery ideology, but believe that the focus on Leveller radicalism in his analysis misses the extent to which more mainstream Parliamentarian ideologies shared this anti-slavery stance. See John Donoghue, “‘Out of the Land of Bondage’: The English Revolution and the Atlantic Origins of Abolition,” American Historical Review, vol. 115, no. 4 (October 2010): 943-974; Fire Under the Ashes: An Atlantic History of the English Revolution (Chicago: University of Chicago Press, 2013).
The English revolution was a critical moment in the development of the American colonies. Cavalier Virginians and Massachusetts Roundheads are more than mere caricatures – they were, to an extent, representative archetypes of the competing ideologies that underpinned the English Civil Wars and Revolution, and their colonies were key battlegrounds where royalists and parliamentarians sought to prove the right of their cause. In this colonial context, the political rhetoric of slavery so prevalent in Westminster Hall and the radical publications of the Levellers came face to face with the reality of human slavery, with dramatic results. When Fifth Monarchist revolutionaries rose up against Charles II in 1661, led by former Massachusetts Bay colonist Thomas Venner, they hoped to vindicate the “rights of men” by ushering in “the Visible Kingdom of our Lord Jesus Christ.” Influenced by his experiences in New England, Venner argued for a true godly “democracy” in the state and the destruction of the “yokes of the inward and outward man” through the “anointing holy spirit, the myrrh of liberty.” There was no place for bondage in this radical Christian utopia – “man-stealers” were to be executed. This aversion to human bondage was not isolated to fringe radicals, however. More moderate Parliamentarians also took up the struggle against slavery – men like Massachusetts Bay colonist Richard Saltonstall, who drew on a number of strands of revolutionary thought to engineer the first legal challenge to the African slave trade in English history.


11 Donoghue, Fire Under the Ashes, 262-264. The case, Smith v. Keyser, heard by the Massachusetts General Court in 1646, and my differences with Donoghue’s interpretation, will be discussed in greater detail below.
The debate over whether or not an Englishman might hold another human as property raised fundamental questions at the very heart of the revolutionary contest between king and Parliament. Could an Englishman own another person, and if so on what terms? What authority should a monarch have over his subjects, or a master over his servants or slaves, and what was the ultimate basis of this authority? What were the rights and duties of subjecthood (or subjugation), and what attributes must one possess (or lack) to be accounted a subject (or a slave)? Far more than rhetoric was at stake, for just as English subjects forcefully asserted the inviolability of their traditional liberties, they also fashioned the legal and political institutions that would bind millions of Africans to racial slavery over the next two centuries. The absolutist imperial vision of the early Stuart monarchy and the increasing commodification of English economic life certainly provided viable material for the construction of slave property regimes in the colonies. Puritan revolutionaries also realized the economic potential of unfree labor and seized the opportunity to expand the scope of their empire in the Western Design, an endeavor the restored Stuarts continued to promote after 1660. Simultaneously, however, the English Civil War and Revolution also produced a legal argument that was at best genuinely abolitionist, at worst racially exclusive and jingoistic, but always opposed to the most basic characteristic of slavery – the definition of persons as property.

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The English Civil Wars and Revolution were brought on by many issues and fought on many fronts, but at the heart of this transformative era was a fundamental conflict between competing, and to some extent mutually exclusive, visions of an ideal social order. Stuart absolutist patriarchalism and the "godly republicanism" typical of
English revolutionaries and New England saints could not coexist peacefully. The events in which this conflict played out between 1641 and 1660 are so well known as to bear only a brief summary here.\textsuperscript{12} Charles I, ruling without Parliament and claiming absolute authority over church and state, attempted to impose Anglican worship on his Scottish kingdom.\textsuperscript{13} The Scots resisted this imposition and rose in rebellion against Charles in 1638 in what has become known as the Bishop’s War.\textsuperscript{14} To fund this military expedition, Charles called the Short Parliament in early 1640, then quickly dissolved it when the Commons, led by reformers like John Pym who were sympathetic to the Puritan cause, refused to vote funds without redress of a series of grievances with Charles' rule.


\textsuperscript{14} Charles Mark Fissel, \textit{The Bishops' Wars: Charles I’s Campaigns against Scotland, 1638-1640} (New York: Cambridge University Press, 1994).
stretching back to the controversy over the Petition of Right in 1628.\textsuperscript{15} After a disastrous attempt by the Earl of Strafford to subdue the Scottish rebels in the summer of 1640, Charles was forced to call Parliament again. This time, however, the king's need for money overcame his natural distrust of Parliament, and he was forced to assent to a series of reforms aimed at bolstering Parliament's role in the government of the realm.

Parliament quickly dissolved the hated prerogative courts of Star Chamber and High Commission, passed the Triennial Act guaranteeing that Parliament would be called at least every three years, guaranteed the right of prisoners to \textit{habeas corpus}, required that Parliament be allowed to give consent to its own dissolution, and hauled the Earl of Strafford before the assembled houses to answer for his "tyrannical rule" in Ireland with his life.\textsuperscript{16}

Both king and Parliament hoped that these reforms and Strafford's execution would resolve their disagreements and restore stability to the realm, but it was not to be. Irish rebels rose up against the forced imposition of Anglican worship and military rule in 1641, and Parliamentary leaders worried that Charles had similar designs for his English dominions.\textsuperscript{17} When the king himself stormed uninvited into the Commons in January


\textsuperscript{16} Charles I later remarked that his own execution was divine retribution for allowing Strafford to be tried and executed by Parliament. For an extensive treatment of the Long Parliament and the leadup to armed conflict between king and Parliament, see Anthony Fletcher, \textit{The Outbreak of the English Civil War} (London: Edward Arnold, 1981).

\textsuperscript{17} Increased attention to the “three kingdoms” or “greater Britain” perspective has been a hallmark of “post-revisionist” historiography, largely in response to J. G. A. Pocock’s call for increased attention to the “British” dimension of 17th century politics in “The New British History: A Plea for a New Subject,” \textit{Journal of Modern History}, vol. 47, no. 4 (December 1975): 601-621. For works responding to and expanding on the broader British perspective, see contributions to the forum “The New British History in Atlantic Perspective,” \textit{American Historical Review}, vol. 104, no. 2 (April, 1999): 426-500; David Scott, \textit{Politics and War in the Three Stuart Kingdoms, 1637-1649} (New York: Palgrave Macmillan, 2004); Trevor Royle, \textit{The British Civil War: The Wars of the Three Kingdoms, 1638-1660} (New York: Palgrave
1642, hoping to arrest five Parliamentary leaders for treason, he was rebuffed by William Lenthall, Speaker of the House, who claimed that he had "neither eyes to see nor tongue to speak in this place but as the House is pleased to direct me, whose servant I am here."\(^{18}\) This ringing statement of Parliamentary independence from royal prerogative, and the increasingly violent popular protests outside Westminster Hall, shook Charles' resolve – fearing for his safety, the king and his household fled London for the north country.\(^{19}\)

Though even radical Parliamentarians still proclaimed their loyalty to the king, laying the blame for the growing conflict on a coterie of corrupt advisors, open warfare was all but inevitable and English subjects began choosing sides. As in all civil wars, the majority of Britons hoped to avoid direct participation in the conflict, but cadres of committed leaders on both sides pushed events inexorably onward toward military confrontation. A series of indecisive battles in 1642 and early '43 was broken by the military leadership of the Earl of Essex at the Battle of Newbury (20 September 1643) and Oliver Cromwell's resolute stand at Marston Moor (2 July 1644). The reorganization of the Parliamentary forces into the ideologically committed and battle-hardened New Model Army under the command of Sir Thomas Fairfax and Oliver Cromwell led to the decisive victory at Naseby in the summer of 1646. By late in the year, Charles was a

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prisoner of Parliamentary forces, bringing the first phase of the English Civil War to a close.20

Parliament's success and the growing power of the New Model, however, exposed the fissures within the parliamentarian movement. While most leading figures within Parliament hoped for basic reform in the English state, along the lines of the magisterial reformation envisioned by John Winthrop and other Puritan reformers21, the presence of many Levellers in the New Model Army, and the appeal of their revolutionary ideology to many English subjects, pushed more radical critiques of absolutist patriarchalism into the center of political discourse.22 Magisterial reformers, men like John Winthrop and Oliver Cromwell, sought merely to guarantee the traditional right of English male property owners to give consent to decisions made by the state, so that magistrates chosen by the godly might better usher in the reforms necessary to a commonwealth of saints. Levellers like John Lilburne and former Massachusetts Bay preacher Hugh Peter, on the other hand, envisioned a far more radically democratic revolution, one that would abolish monarchy and hereditary privilege and delegate specific sovereign powers to a


21 For a complete discussion of this magisterial reform vision, see Chapter 1, supra; Michael Winship, Godly Republicanism: Puritans, Pilgrims and a City on a Hill (Cambridge, MA: Harvard University Press, 2012).

more representative Parliament "inferior only to theirs who choose them," and reserve to all people a number of specific rights including freedom of conscience, freedom from military impressment, political freedom of speech, and equality before the law. ²³

Despite their many differences, however, Leveller radicals and magisterial reformers held many basic assumptions in common: that the English were a "free-born people" who were, simply by birth, subjects of the English state and its ancient constitution; that English subjects could not be bound by state authority without the consent of at least some subjects, and that this principle of consent was central to the governance of both church and state; that all legitimate authority should be limited by the rule of law as expressed by the representatives of the English people and reformed common law courts; and that the state should use its power to transform English society into a true godly republic. Crucially, Parliamentarians and Levellers both started from the assumption that all English subjects came under the protection of the law, and this central ideological premise of reformed Protestant anti-absolutism was, as we shall see, directly opposed to the concept of property in man.

In December 1648, with this Leveller/Puritan anti-absolutism at its peak influence, the radicals and committed magisterial reformers who controlled the "Rump" of the Long Parliament took the dread step of charging their sovereign, Charles I, King of England, Scotland, Ireland, and a growing overseas dominion, with high treason. ²⁴

²³ Philip Baker and Elliot Vernon, eds., The Agreements of the People, the Levellers, and the Constitutional Crisis of the English Revolution (New York: Palgrave Macmillan, 2012). Hugh Peter, who had lived in Massachusetts Bay in the 1630s, served as a New Model Army chaplain and was an important figure in shaping the army's religious millenarianism and political radicalism. See Raymond Phineas Stearns, The Strenuous Puritan: Hugh Peter, 1598-1660 (Urbana, IL: University of Illinois Press, 1954). Peter is well overdue for a scholarly reassessment.

Charles denied the authority of the specially created High Court of Justice to sit in judgment over even "the meanest man in England," never mind the monarch himself. In his argument against Parliamentary authority, Charles used much the same language his judges had leveled against him throughout his troubled reign. "How can any free-born Subject of England call life or any thing he posseseth his owne, if power without right daily make new, and abrogate the old fundamentall Law of the Land," the king asked without a hint of irony. The "true Liberty" of English subjects, Charles reminded the court, "consists not in sharing the power of Government, but in living under such Lawes, such a Government as may give...assurance of their lives and propriety of their goods."

Charles presented his case just as any other subject protesting unjust imprisonment would. His brief captivity narrative emphasized that he had been willing to compromise with Parliament, and had even made many concessions in a recent treaty at Newport, before he was "surprized, and hurried from thence as a prisoner...against my will." Just as countless Puritan preachers and political radicals had protested the legitimacy of Charles' prerogative courts a decade earlier, the king, when faced with this "lawlesse unjust proceeding," hoped that "the ancient Lawes and Liberties of this Kingdome" would vindicate his cause.25

As even Charles recognized, however, the verdict in this case was a foregone conclusion. On January 26, 1649, the fifty-nine commissioners of the High Court of Justice found King Charles I guilty of treason. The sentence was death by decapitation. A committed divine right absolutist to the bitter end, the deposed king faced his death

25 All quotations from Charles I in the following paragraph are drawn from His Majesties Reasons Against the pretended Jurisdiction of the high Court of Justice, which he intended to deliver in Writiting [sic] on Monday January 22. 1848[/9], broadside.
resolutely, wearing two shirts to keep from shivering in the bitter cold and declaring that as a "Martyr" he would exchange "this corruptible Crowne of Misery, [for] an incorruptible Crown of Glory." As soon as Charles Stuart was executed on January 31, 1649, questions of subjecthood and allegiance moved to the very center of English political debate. Under the monarchy, the doctrine of natural allegiance laid down in *Calvin's Case* had provided a clear definition of the nature and origins of English subjecthood. With the king dead, however, this traditional formulation was destabilized.

Parliament now claimed the mantle of sovereignty. Most regicides, and indeed most Parliamentarians, argued from the old medieval doctrine of the king's "two bodies" – the first, a physical and mortal body, died with the king's person; but the king's other body, the body politic, was made up of the whole people of England, font of all legitimate sovereign power. As a 1648 pamphlet argued, "The Parliament is in the King...and the King is in the Parliament...so that what the King does according to Law, we virtually do it, because our consent is in it." Parliamentarians could thus argue that they had always shared the sovereign power of the state as "king in Parliament." When Charles Stuart was convicted as a traitor, the sovereign power of the monarchy reverted to its original source, the English people. This formulation allowed for a degree of stability in the definition of subjecthood by substituting the Commonwealth for the

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29 Anon., *Salus Populi Solus Rex, The Peoples Safety is the sole Sovereignty, or The Royalist out-reasoned* (London, 1648)
monarch and retaining the concept of natural allegiance to the body politic, the English people.  

But who were the English people? As numerous scholars have noted, issues of identity and allegiance were increasingly framed in terms of "Englishness" during the Interregnum, but the term itself was fraught with contradiction and ambiguity. There were simply too many competing definitions of Englishness circulating during the revolution. Leading figures in the Commonwealth hoped to work a fundamental transformation in the English state, and many hoped that a strong dose of godly reform, similar to the program enacted in New England, would purge the body politic of its vestigial absolutism and pave the way for a republic of saints, a vision of Englishness that would exclude large numbers of Britons. Putting Puritan godly reform into action conflicted with England's increasing religious diversity and raised new questions about the limits of subjecthood. For royalists the problem was easily solved. The moment Charles I lost his head, his son, Charles II, immediately became king, and all true Englishmen owed him their allegiance. Those who denied the truth of the younger Charles' divine right were traitors who ceded the rights and protections of subjecthood in their open disobedience to Stuart rule – they ceased to be truly English.  

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31 Pestana, English Atlantic, passim; Linda Colley, Britons: Forging the Nation, 1707-1837 (New Haven, CT: Yale University Press, 1992). See also Anon., A Declaration of the Commoners of England to his Excellency the Lord General Cromwell... (London, 1651), which begins with the assertion that, "The Government of a common-wealth is the uniting of the people of a Nation into one heart and mind," betraying the conflicting universalist ("the people") and particularist ("one heart and mind") presumptions of many Parliamentary supporters.  
Parliamentarians, the exact opposite was true. The Leveller-influenced *Agreement of the People* recommended that any who had shown "forcible opposition" to the Parliamentary cause be disfranchised, and even the more conservative *Instrument of Government* that created the Cromwellian Protectorate in 1653 barred royalists from voting or holding office.\(^{33}\)

Despite their belief that the body politic had survived the regicide and their agreement that royalists could legitimately be barred from the political nation, factions within the Parliamentary cause disagreed over the exact definition of Englishness and continued to debate access to subjecthood. With the abolition of episcopacy in 1646, religious conformity as a workable basis for subjecthood became untenable. The Levellers and some Independents called for total freedom of conscience and religious worship, Puritan leaders hoped to establish a godly ecclesiastical order similar to New England Congregationalism, large numbers of influential Presbyterians in the military leadership hoped for an English equivalent to the Scottish kirk, while the majority of English subjects quietly practiced private "prayer book" Anglicanism or openly argued for the return of the bishops. Faced with such diversity and resistance, the Interregnum state had no choice but to extend a qualified religious toleration to English subjects,

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replacing episcopacy with a watered-down Presbyterianism it was unable to enforce, and removing many limits on the rights of nonconformists.34

With religious qualifications for subjecthood destabilized, allegiance to the Commonwealth increasingly became the basis for defining Englishness, but again the diversity within the British Isles made the issue problematic. All agreed that only those who swore an oath to support the Commonwealth should partake in the governance of the realm, but beyond that there was little common ground. Some of the more thoroughgoing Puritan revolutionaries in Parliament hoped to see political authority vested in a few godly magistrates as in New England, but religious toleration for most Protestants made this impossible in practice. In place of testamentary qualifications, many gentry Parliamentarians hoped to substitute higher property requirements. Like the magisterial reformers in New England, mainstream Parliamentarians had no desire to see the world turned upside-down. Where all anti-absolutists agreed was their belief in the fundamentally "free-born" nature of the English people, the wellspring from which all forms of consent flowed. While only a qualified few subjects would exercise direct consent through participation in the governance of the commonwealth, all English subjects, and increasingly in the thought of the period all persons everywhere, were naturally free, despite the mediation of their consent through various levels of household and state governance.

Henry Parker, a barrister at Lincoln's Inn and "privado" or advisor to many leading figures in Parliament, made these assumptions about natural liberty and the limited nature of authority explicit in his discussion of the popular basis for sovereignty in a remarkable 1644 pamphlet, *Jus Populi.* These ideological assumptions, shared by many Parliamentarians, became a clear anti-slavery argument in Parker's work. In refuting royalist arguments about the divine origins of absolute monarchy, Parker drew a clear separation between "order" ordained by God, coeval with natural law, and "jurisdiction" or "government" instituted by sinful man. "Servile subjection," in Parker's analysis, was a function of "humane policy...not itself from Nature." In response to absolutist arguments that "if the major part [of the people] bee not condemned to slavery, and poverty...the weale of the whole is exposed to great hazard," Parker asserted that authority was a mere function of "jurisdiction" – the divine "order" mandated that "every man be left free, and not abridged of his own consent, or forced by any Law of God to depart from his freedome." Upon this foundation of self-ownership and consent, Parker constructed a compelling argument for popular sovereignty and an inclusive republican vision that bore a striking resemblance to Massachusetts-style godly republicanism.

35 On Parker's influence in Parliamentary circles during the 1640s, see Michael Mendle, *Henry Parker and the English Civil War: The Political Thought of the Public's 'Privado'* (New York: Cambridge University Press, 2011).

36 See Nyquist, *Arbitrary Rule*, 184-192, for a close reading of Parker's philosophy and its implications for slavery. Nyquist argues that Parker's tract was unique in revolutionary English thought in its explicit anti-slavery stance, and that most other revolutionary thinkers separated figurative political slavery from actual "economic" slavery. While I agree with, and draw on, her sensitive and thoughtful analysis of Parker's thought, I disagree with her assertion of his exceptionality – English Parliamentarians shared many of the assumptions about the nature of subjecthood and the illegitimacy of property-in-man that informed Parker's antislavery stance.

37 Henry Parker, *Jus Populi, or, A Discourse Wherein clear satisfaction is given, as well concerning the Rights of Subjects as the Right of Princes...* (London, 1644), 3-5.

38 Parker, for example, argued against the practice of primogeniture, and drew on scriptural and historical examples of "the people" giving their consent to magistrates chosen to rule over them. Ibid., 6-9.
There was nothing remarkable about these assertions – many Parliamentarians shared Parker's vision.

Like most moderate Parliamentarians, Parker also agreed that some forms of "milde subjection" comported well with divine "order."\(^{39}\) Husbands, parents, brothers, and magistrates might all legitimately exercise limited power over individuals within their household without violating divine mandate, as long as this power was used for the good of the family or body politic. Where he differed was in his explicit extension of this rubric to slaves. Drawing on classical formulations of slavery, he defined a slave as a person with "no propertie remaining in himselfe: he only lives, or hath a being to his Lord; but is dead, nay nothing to himself" – "the very definition of it leaves the slave utterly disinherited of himself." The "Despoticall" power of slave owners originated in an "absolute, arbitrarie interest in the slave" but, in Parker's formulation, this interest could be supported neither by "jurisdiction," because "it proposeth no ends of Justice in itselFe," nor by "Nature," which would admit of no such "violent, noxious, unvoluntarie inequalitie, or restraint."\(^{40}\)

Slavery not only violated the basic revolutionary tenet of natural freedom, but also deprived "the Common-wealth, the Society of Mankinde, nay God himeslf" of their "publicke and sublime propriety" in the persons of subjects. All individual proprietary rights were mediated by an overarching state interest in the common weal. Servitude might be allowable under the right circumstances, but even the most degraded servant retained his or her legal personhood – "If thou may'st tyrannize over him as he is thy servant, yet thou may'st not as he is man: If the misery of one capacity have exposed him

\(^{39}\) Ibid., 8.
\(^{40}\) Ibid., 36-37.
to thy cruelty, the privilege of the other capacity ought to recommend him to thy favour: 
If the more base relation of servant entitle thee to domineer, yet the more noble relation of man checks the insolence of that title." Even those sentenced to "slaverie" as punishment for a crime were still subjects – to grant a property right in their persons would be "unjust and excessive," and English law made this impossible by guaranteeing that only the labor of a servant could be owned, "wherein neither the right of the Delinquent [to his own person], nor the right of the State is wholly lost and relinquished."[41] Self-ownership and the public interest of the commonwealth in the bodies of subjects were perfectly compatible to Parker.

This distinction mattered greatly because lack of self-ownership and the protection of the law exposed slaves to the violent caprice of individual masters.

Recounting a vignette from imperial Rome where the excesses of a brutal slave owner were checked by the imperial state, Parker recognized the "grace" of the state's action but went even further, arguing that the Romans would have been better served had they "dismist all the slaves...for the same reason, or so curbed the power of the lords, that they might not have been any longer incited thereby to such prodigious degrees of inhumanity." Where Rome had failed, Parker hoped the English commonwealth would succeed. While he recognized that slavery was tolerated "where it is established by publike authority" and thus could not be "repealed by private persons," Parker also asserted that "where slaves are under the protection of other Laws than their lords wills, and where they are truly parts and members of the State, and so regarded; they cease to be slaves." The question then became whether the Commonwealth regarded slaves as

[41] Ibid., 36-42.
property under the dominion of an individual owner, or as persons protected by English law. The stakes were high, Parker argued, for if England had no "interest in slaves," she would lose nothing, but if she insisted on legitimizing property-in-man, "how [could] such mis-improvement...be answered to God, or justified in Policie?" Slavery, to Parker, was "a thing fit to be antiquated for many equitable reasons" and history illustrated its gradual decline. He pointed to laws passed "to free all Christians from slaverie," a result of the "piety [and] equity" of God's chosen people. Parker hoped that a revolutionary transformation of the English state would usher in a new era of fraternal love and equality, one free of the inhuman stain of slavery.42 This explicit antislavery stance, while perhaps unique to Parker in English revolutionary thought, was a function of his fundamental belief in the limited nature of all legitimate authority and the access of all persons to the protection of a just and equitable law, beliefs shared by practically all Parliamentary anti-absolutists.

Whether these English revolutionaries would succeed in building a reformed state after the regicide, and the form that state might take, remained an open question. Unlike Massachusetts magistrates who could reinforce godly rule through their Congregational establishment, Cromwell and Parliament faced an increasingly fractured religious and political landscape. Emerging in tandem with the radical ecclesiastical positions of nascent Baptists and Quakers were potentially revolutionary new concepts of consent that loomed large in debates over political participation. Many Levellers and leading figures in the New Model called for a broad franchise and the reform of the "rotten borough" system in Parliamentary representation. The New Model Army's Agreement of the

42 Ibid.
People (1649) had called for a dramatic increase in the number of MPs, the "indifferent" apportionment of seats, and the admission of all native-born or endenized male "housekeepers" to the suffrage, except known royalists, servants, and those "receiving wages" from another. More radical political movements, like the "Diggers" at St. George's Hill, went even further in their communal ownership of property and assertion of the complete equality of all persons. Tellingly, all of these radical re-imaginings of subjecthood assumed the self-ownership of the "free-born" English people.

Despite their many philosophical commonalities, the political radicalism of the Leveller and New Model Army programs drove a wedge between them and most leading Parliamentarians and paved the way for Oliver Cromwell's rise as Lord Protector in 1653. The Instrument of Government that created the Protectorate turned against the radical Leveller position and imposed a £200 freehold requirement for suffrage. The ability to consent would be limited to (hopefully god-fearing) English property owners – those without a stake in society were excluded. To the horror of many, the Commonwealth and Protectorate also turned to coercion to enforce their godly republican vision. Puritans in Parliament hoped to use the power of the state to work a moral transformation, famously banning the theater, gambling, and even Christmas as tools of Antichrist. Moral infractions were severely punished, and those who refused to submit to godly authority were subject to public chastisement, imprisonment, banishment, and even death. All

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43 An Agreement of the People of England, And the places therewith INCORPORATED... (London, 1649).
Englishmen owned their own persons, but the state retained much of its coercive power over their bodies.

Some Leveller critics and religious radicals urged further reform and charged that, as far as they were concerned, Parliamentary rule was "the same it was in the Kings dayes, onely the name is alter'd." The Commonwealth was drifting dangerously close to tyranny. Only by ushering in "true and free Common-wealths Government" would English subjects "gain your Crown, and keep it, and leave peace to your Posterity." Royalists agreed that Parliament's coercive tactics were lapsing into tyranny. The English people had lived "miserably and slavishly" under their "false and abominable masters the Members of Parliament" since Charles I's execution. Opposition to the levels of coercion necessary to implement godly republican rule made for strange bedfellows, and widespread opposition made the full implementation of Massachusetts-style social reform practically impossible in Interregnum England.

Coercion was also crucial in bringing the colonies to heel, a central goal of Commonwealth and Protectorate policy. The New England colonies lent various levels of support to the Parliamentary cause, while most of the other Anglo-Atlantic settlers hoped, like many Englishmen back home, to avoid the disruptions of civil war as much as possible. When Cromwell launched his Western Design in 1656, he was confident enough of New England's support to request that a number of Massachusetts divines emigrate to Jamaica to speed its projected godly reformation. A few colonies however,

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46 Anon., A Declaration of the Commoners of England, to His Excellency the Lord General Cromwell... (London, 1651), 3, 8.
47 Anon., The Mystery of the Good old Cause Briefly unfolded... (London, 1650),
49 Pestana, English Atlantic, 179.
Virginia conspicuous among them, refused to recognize the Commonwealth and had to be subjugated by force of arms. These colonies were "reduced" by the Commonwealth navy in 1651-2, their governors dismissed and replaced with more reliable men, their charters and patents revoked. Royalist or Parliamentarian, all colonies were bound by the Navigation Acts of 1651. This new policy promoted free trade by dismantling chartered monopolies and opening imperial markets to all English merchants, while also laying the foundation of mercantilist policy by barring unauthorized commerce with foreigners and subjecting all trade to central taxation and oversight.\(^{50}\) Fighting costly wars had drained the Commonwealth's treasuries, and a tighter grip on the empire would ensure that the state would get its share of the profits from Atlantic trade. The Navigation Acts also set an important precedent that any legislation passed by Parliament specifically naming the colonies would be binding on them, providing further support for imperial centralization.\(^{51}\)

This centralized imperial vision also led to calls for increased trade with Africa. The acquisition of Jamaica during the Western Design and the difficulty of recruiting demobilized soldiers as plantation labor certainly led to an increase in demand for bound labor,\(^{52}\) but the evidence suggests that Interregnum imperial planners hoped to force captured royalists, Irish rebels, and unruly political dissidents into plantation labor, not African slaves. Despite assertions to the contrary, little evidence suggests that Cromwell and other Parliamentary leaders made any more concerted effort to tap the African slave


\(^{51}\) See Pestana, *English Atlantic in an Age of Revolution*, chapters 3 and 5.

trade than had their early Stuart predecessors. During the Civil Wars themselves, English merchants made 46 documented slave-trading voyages to Africa. The peak of wartime English participation in the slave trade came in 1645 and '46, when direct confrontation between king and Parliament drew attention away from Atlantic trade and allowed independent merchants to disregard the Guinea Company's royal monopoly. The Commonwealth period, on the other hand, was the nadir of English slave trading, with only nine slaving voyages recorded between 1649 and 1653. The resurgence of the English slave trade from 1656 to 1658 was likely due more to the success of Cromwellian free trade policies than any deep commitment to the nefarious traffic by the Protectorate. While English merchants carried nearly 20,000 African slaves into the Middle Passage on their seventy-seven slaving voyages between 1640 and 1660, these already shocking numbers would soon be dwarfed by the deep investment of the Restoration Stuarts in the slave trade.

Thus in 1649, a group of London merchants could appeal to the Council of State for an increased focus on the Africa trade without once mentioning slaves. Noting the "private benefit" accruing to the Guinea Company, a monopoly chartered by James I, the authors of A Remonstrance...for...the Trade of Affrica argued that the profits from trade in "Wood, Elephants teeth, and Hides," as well as "such small quantityes of Gold, as the

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53 This and the following data on English participation in the slave trade is drawn from the Transatlantic Slave Trade Database, [http://www.slavevoyages.org/tast/database/search.faces](http://www.slavevoyages.org/tast/database/search.faces), (accessed 26 March 2014).


Blackmoores bring in," should accrue to "the sole benefit of the State." These imperial boosters requested that the Africa trade be entrusted to a committee of five merchants, whose "chiefest care" would be "to discover the certaine places from whence the Gold is brought" and gain more direct access this most precious of African commodities. English involvement in this lucrative West African trade, however, would have to rely on the willing participation of Africans themselves. Recognizing that "our English bodyes are not fitted" for the West African climate, these mercantile planners knew that, at least initially, their access to valuable exotic woods, ivory, and gold would depend on the assistance of local leaders. Betraying extensive knowledge of West African geography and politics, they counseled that if merchants brought "fitt presents" for the "petty Kings" of specific villages in Senegambia, they would be "given liberty to plant where we will" and could gradually move up the Gambia toward "Tombatu," the supposed source of Africa's gold. This projected alliance with African chieftains would also help protect English merchants from "the straggling Portugals" who continued to dominate trade in the region. Within a few years, this trade with Africa could be expected to enrich the Commonwealth's treasury to the tune of £300,000 to £600,000 annually, and make the English, in time, "the Masters and Comanders of the Countrey."\(^{56}\)

The petitioners' omission of slaves in their list of potential commodities to be obtained in West Africa is telling. Perhaps they worried that engagement in the slave trade might endanger alliances with the local chieftains English merchants relied on for access to gold, ivory, and other exotic commodities. Perhaps some still held to Richard Jobson's belief that the English did not buy and sell "those who have our own shapes," or

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\(^{56}\) A Remonstrance...for the Generall good of the Land, by the Trade of Africa..., BNA, CO 1/11/13.
saw permanent enslavement of Africans as anathema to their godly vision of a reformed polity. Perhaps they hoped the demand for bound labor in the colonies could be met by the transportation of undesirable elements within English society. Or perhaps they simply assumed that the slave trade, heretofore dominated by the “straggling Portugals,” would continue under English auspices and felt no need to justify the traffic in African bodies. Whatever the reason, the Council of State agreed that an increase in trade with Africa would be a boon to the English empire, and implemented many of the petitioners' recommendations. The old Guinea Company continued to operate but its monopoly was ended – trade with Africa was opened to all English merchants under the free trade provisions of the Navigation Act.\footnote{Order from Commons to Council of State (14 April 1648), BNA, CO 1/11/23.}

What being "Masters and Comanders" of the Gambia would mean for the slave trade, however, remained unclear. English imperial planners certainly knew that African slaves were valuable commodities in the Atlantic littoral -- the "straggling Portugals" who dominated trade in the region were deeply engaged in slaving, and earlier English merchants like John Hawkins had made small-scale forays as well.\footnote{On the Portuguese slave trade in West Africa, see Miller, Way of Death. On early English participation in the slave trade see Michael Guasco, Slaves and Englishmen: Human Bondage in the Early Modern Atlantic World (Philadelphia: University of Pennsylvania Press, 2014), 65-77.} The well-financed Guinea Company continued to dominate African trade, and instructions to company captains and trading factors often emphasized their desire to obtain "lusty negroes" alongside other valuable commodities.\footnote{See, for example, the instructions given to John Blake, captain of the Friendship, and Bartholomew Hayward, captain of the Supply, by the Guinea Company in 1651. Printed in Historical Manuscripts Commission, Thirteenth Report, Appendix, Part II - The Manuscripts of His Grace the Duke of Portland, preserved at Welbeck Abbey, (London: Eyre and Spottiswoode, 1893), II:29-31. Neither the Friendship nor the Supply delivered a cargo of slaves to the colonies in 1651, however – both were taken by Charles I’s nephew, Prince Rupert, with the assistance of the local Portuguese governor. The Transatlantic Slave Trade Database includes both ships in its list of English slaving voyages in 1651/2, but a petition by the}
certainly allowed some interloping slavers to cut in on the Guinea Company's monopoly, and doubtless some merchants took advantage of Cromwellian free trade policies to independently engage in slaving. As the Africa merchants' petition suggests however, not all Englishmen approved of or promoted the slave trade. At least some merchants and imperial planners believed that England could enrich itself through trade with Africa without deep engagement in slaving. This belief would ultimately prove short lived – within a generation the Restoration Stuarts' support for the newly chartered Royal African Company would lead to sustained English participation in the Atlantic slave trade – but in the heady days of the Commonwealth it was possible to envision an alternative relationship with Africa that would enrich the state while largely eschewing the trade in African slaves.

The godly reformers shaping England's empire during the Interregnum had another bound labor source in mind for their colonial plantations anyway – the many royalists and other malcontents who resisted their authority. First under the Commonwealth and increasingly under Cromwell's Western Design, political prisoners, rebellious soldiers, and poor criminals were transported to the colonies as bound laborers. Crucially these groups had, at least in the minds of imperial planners, ceded some of the protections of subjecthood and given tacit consent to their servitude when they committed their treasons or crimes. In the colonies, it was hoped these wayward Englishmen would, in keeping with Puritan hopes for moral reform, be regenerated by their labor and repent

Guinea Company to the Council of State in 1652 seeking compensation for merchandize taken from the Friendship and Supply does not list any slaves, perhaps a tacit admission that the Commonwealth was unlikely to compensate merchants for slave property. See BNA, CO 1/11/56 and CO 1/11/67.
of their sins under the oversight of godly masters. While it is also true that increasing numbers of poor young men and women were being "spirited" or "kidnapped" into indentured servitude during this period, their bondage was not legal and commissioners were appointed to search outbound ships and approve indentures. Prisoners and criminals deported to the colonies, despite the hard life that awaited them, always labored under an indenture. Indeed, this was a central problem with colonial transportation as a solution to England's political problems – indentured bondservants would be freed after a period of years, and their years of labor would do little to lessen their hostility to the Commonwealth when they regained their full subjecthood.

In the rhetorically charged environment of the Interregnum, the forced servitude of English subjects, despite the formal legality of their indentures, blurred the line between "free-born" Englishness and slavery and by the late 1650s a chorus of voices rose to denounce the policy. In March 1659, Marcellus Rivers and Oxenbridge Foyle, two royalist rebels, presented Parliament with a petition asking for the redemption of royalist prisoners held as "slaves" in Barbados. Rivers and the other prisoners were captured during the royalist Salisbury Rising of late 1654 and, despite acquittal by a

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60 See, for example, Declaration of the Earl of Warwick to the Colony and Plantation of the Summer Islands, 23 October 1644, BNA, CO 1/11/???. Warwick and Lord Say and Seale, prominent Puritan critics of Charles I, both signed the declaration calling for the "Catechizing" of all servants and strict oversight by masters. While this document was directed only at Bermuda, both peers were important forces in the formulation of late 1640s colonial policy and their description of bond servitude as an element of godly reform is in keeping with the larger Puritan position on the issue. Thus, although both peers would turn away from the revolution after the regicide, their understanding of servitude continued to be important to later Cromwellian prisoner transportation.

61 Op. cit. Donogue, Fire Under the Ashes, 242-247. Donoghue argues that these spirited servants were protected as the chattel property of colonial masters, but does not provide any direct evidence to support this claim. While it cannot be denied that thousands of English subjects were spirited into colonial servitude during the Interregnum, the state always treated spiriting as a crime, and the claim that leading members of Parliament knew that spiriting was the "dominant" source of colonial labor, and yet did nothing to stop it, is unsubstantiated.

62 Pestana, English Atlantic, 184-204.
grand jury, were held as prisoners at the Lord Protector's order to await transportation to
the colonies as bond servants. A printed broadside of the petition, entitled *England's
Slavery, or, Barbados Merchandize*, described how the prisoners were sold "as the goods
and chattels" of Martin Noell, a leading London merchant and prominent Member of
Parliament. To be defined as property in this way was a "most deplorable (and as to
*English*-men unparallel'd,) condition." Rivers claimed that because he and his fellow
captives were "not under any pretended conviction of Law," their transportation by
"Merchants that deal in slaves and souls of men" violated the rights of "the free People of
England." To remind Parliament of its professed commitment to godly reform, and the
consequences for those who transgressed God's commands, *England's Slavery*
prominently displayed a passage from Exodus on its title page that, as we shall see, was
also invoked in debates over slavery in New England – "He that stealeth a man and
selleth him...He shall surely be put to death."63

Such a scathing indictment of leading Parliamentary figures could not go
unanswered, but justifying the bond servitude of English dissidents was a difficult matter
– Sir John Coplestone acknowledged the political "disadvantage [to] any man" who
spoke out against the petition. Captain Hatsell, present when Rivers and his fellow
prisoners were shipped from Plymouth, testified that far from being coerced, he "never
saw any go with more cheerfulness." A number of MPs flatly stated that the petition
should never have been accepted in the first place because "they come before you by the
name of Cavaliers," and hearing the petition would only encourage further intransigence,

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63 Marcellus Rivers, *England's Slavery, or, Barbados Merchandize, Represented In a Petition to the High
and Honourable Court of Parliament, by Marcellus Rivers and Oxenbridge Foyle Gentlemen, on the
behalf of themselves and three-score and ten more Free-born English-men sold (uncondemned) into
slavery...* (London, 1659), np.
kindling “such a fire as you will hardly quench." Those who rose up in rebellion against the duly constituted authority of the Commonwealth abrogated the right of English subjects to petition Parliament. Defending the legitimacy of forced labor, Captain Adam Baynes, MP for Appleby, argued that rebellion was tacit consent and "so a man may be sent to the galleys, or any place of banishment." "That those that have fought against you, should be taken into equal freedom with you, I understand not," said Samuel Desbrow, MP for the Scottish Sheriffdom of Midlothian. This readiness to disregard the traditional rights of English subjects was precisely why critics of the Protectorate worried so intently about their own potential enslavement.

Arguing for the inviolability of the petitioners' rights, however, was Henry Vane, former Massachusetts governor, who claimed that the petition was not "a Cavalierish business; but...a matter that concerns the liberty of the free-born people of England." The "barbarous treatment" of the petitioners in being "sold...for 100l" set a dangerous precedent. Vane warned the Parliament not to be "cozened by popularity" into abandoning servitude as a punishment, but to "take occasion from these ill precedents to make good laws" that would guarantee that all subjects, even those in a degraded status, retained their free-born English rights. Other MPs rose to support Vane's position. Invoking Magna Charta, Arthur Annesley, MP for Dublin, asked, "If he be an Englishman, why should he not have the benefit of it[?]" "I would not have your doors shut to any complaints," urged Major Robert Beake of Coventry. Without recourse to the

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rights of subjects, Hugh Boscawen of Cornwall complained, the lives of Englishmen would be "as cheap as those negroes." Boscawen's solution was not only to reexamine the Rivers petition's merit, but also to request that Parliament "consider the trade of buying and selling men" in a future session. Whatever their past crimes, many in Parliament agreed that bond servants still retained the basic rights of English subjects. The lives of English subjects should never be held as “cheap” as those of African slaves.

Martin Noell, specifically named as one of the merchants involved in spiriting Rivers and his fellow bond servants, rose to defend himself against the charge of enslaving his countrymen. Noell called the claims made in England's Slavery "false and scandalous." While he admitted to a role in the transportation of political prisoners, Noell explained that he "abhor[red] the thought of setting 100L upon any man's person." All servants sent to the colonies were indentured – as Noell explained, "none are sent without their consent." Here Noell made two important legal distinctions. First, while defending his right to own and sell the labor of bondservants like Rivers, Noell denied that he had ever purchased "any man's person" – he had never enslaved anyone. Second, bondservants, even those forced into bondage as political prisoners, legally gave their consent to labor arrangements through indentures. Whether Rivers himself ever voluntarily signed an indenture was irrelevant in this case. He gave tacit consent to be sold as a prisoner when he took up arms against Parliament, the sovereign representative of the English people, knowing full well what consequences would follow.

65 Rutt, Diary of Burton, IV: 257-273, passim.
66 Ibid., IV: 258-259.
67 See esp. speech of Andrew Broughton, MP for Maidstone, arguing that Rivers and other rebels had given "consentus tollit erratum" – consent in redress of error. Ibid., IV: 269-270
Furthermore, the claims of ill treatment made in the petition were unfounded. Servants were worked hard, but "not so hard as is represented." The deadliest plantation labor was "mostly carried on by the Negroes." Here Noell hit upon another key distinction between the bond servitude of English subjects and the enslavement of Africans, hundreds of whom Noell sold into bondage over the course of his career. Regardless of their treatment, Rivers and other political prisoners remained persons before the law, subjects of the English state. Without access to these rights, the English would become, as Hugh Boscawen put it, "miserable slaves." The very presence of the Rivers petition in Parliament is testimony to the resilience of English subjecthood – despite their treasonous acts against the state and their degraded servile status, a petition drafted by bond servants in far away Barbados was considered by the highest tribunal in the English empire. While one can safely assume that the twenty-five thousand African slaves then in Barbados, whose lives Hugh Boscawen accounted so "cheap," detested their forced labor just as much as Rivers and Foyle, the English state could safely turn a blind eye to their condition because, as slaves, they held no standing as persons before the law.

Slavery, then, was not simply a disembodied rhetorical trope in the English Revolution. It was a meaningful way for men and women of all political stripes to denounce the attempts of their opponents to deprive them of their rights as "free-born" English subjects. Neither was the rhetorical choice "free-born" accidental – it re-emphasized the fundamental traits all subjects shared, regardless of personal status: self-

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68 Ibid.
69 Noell’s extensive investments in slavery and the slave trade are evident in a dispute over his estate that was repeatedly heard in Chancery between 1680 and 1687. See the discussion of Noel v. Robinson in Chapter 3, infra.
ownership and protection under the rule of law. Despite these foundational principles, English revolutionaries constructed a robust imperial state that retained much of its coercive power. Even as the world turned upside down, many English subjects continued to believe that only the propertied few were fit to give their explicit consent to the social or political arrangements under which they lived. Some were made to rule, others to serve and obey. Still servants, wives, children, and others of degraded personal status, as "free-born" English subjects, could never be reduced to articles of property. Regicide and ecclesiastical disestablishment shook the foundation of English identity, however, and the reality of transported English laborers working alongside African slaves blurred the lines of subjecthood. The response of the Interregnum state to the shocking rise of bound labor in the colonies was not to immediately and fully embrace African slavery, but to double down on the natural freedom and access to legal protection of all English subjects. Whether or not African slaves might share in that proposition would largely be determined in the American colonies.

Across the Atlantic, settlers of the fledgling English colonies along the Chesapeake and Massachusetts Bays were no more able to avoid the currents of change than their Old World kin. Indeed the conflicts at the heart of the English Civil War and Revolution took on a special salience in the New World, where social order was tenuous at best and the political and legal institutions that provided stability at home were only just coming into existence. Virginia and Massachusetts colonists grappled with the same questions of social order and political inclusion that swept England into Civil War, but crucial local differences steered the two colonies in fundamentally different directions. Orientations toward political authority, property relations, slavery, and the rights of the
subject both shaped and were shaped by the particular legal cultures of Virginia and Massachusetts.

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Settlers in Massachusetts Bay were keenly aware of the revolution unfolding back in England. Throughout the Civil War years, Massachusetts' leaders continually promised to "yeild subjection to the state of England," which to Bay Colonists meant Parliament, and pledged their "allegiance and fidelity to that state." In 1646, the General Court declared Massachusetts to be "brethren by nation" with England. Throughout the 1640s magistrates mandated a number of official days of fasting and "publique humiliation" to ponder "ye weighty occasions in hand" back in England. The rise of Cromwell to the Protectorate was the occasion of an official day of thanksgiving for the "hopefull establishment of government in our native countrie...that the Lord's kingdome and people will be cherrished, the peoples liberties preserved, and the peace of the nation setled." Massachusetts saints hoped that sympathetic leaders in Parliament and the Protectorate would complete the reformation of England by establishing both Puritan religion and godly republican civil government. Recognizing their shared interests with neighboring Puritan settlements, Massachusetts colonists worked to create the United Colonies of New England, a mutual-defense confederation that brought

72 Nathaniel B. Shurtleff, Records of the Governor and Company of the Massachusetts Bay in New England (Boston: William White, 1853), II: 84. [Hereinafter cited as MBC Recs.]
73 MBC Recs, IV:i: 200.
Massachusetts Bay, Plymouth, Connecticut, and New Haven together as a united front in support of Parliament.  

Many Massachusetts colonists, seeing the hand of Providence at work in the transformation of their homeland, returned to England to contribute to the revolution. Hugh Peter, former preacher of Salem’s Puritan church, returned to England as an agent for the Bay Colony in 1641. Peter became a man of some influence during the war and under the Commonwealth – he is credited with contributing to the radicalization of the New Model Army as a chaplain in Warwick, Fairfax, and Cromwell's units, and was appointed to the Hale Commission for legal reform in 1652. Peter was also an important booster for the New England way in revolutionary England, publishing a glowing description of the colony's attempts at Indian conversion in *New England’s First Fruits* (1643) and recommending English adoption of many New England practices.

Former Massachusetts Bay governor Henry Vane was one of the leading figures in the Long and Rump Parliaments, and maintained a regular correspondence with John Winthrop and a number of other New England colonists. Despite his squeamishness with regicide, Vane continued to exert a powerful influence in Parliament where, as his

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76 [Hugh Peter] *New Englands First Fruits...* (London, 1643). Peter was also an important figure in the debate over Robert Child’s petition to the Massachusetts General Court (discussed below). Peter wrote to contacts in New England in early 1646, warning that “Jesuit” spies had been sent to infiltrate Massachusetts society, adding another layer to the magisterial suspicion of Child’s petition.
participation in the Rivers petition debate illustrates, he often made arguments that would have sounded familiar to Massachusetts colonists. Peter and Vane were merely two of the most prominent New England settlers to return and join their Old World compatriots – thousands of other colonists were part of this reverse migration as well, and each of them carried their experience of godly republicanism back to England with them. If ever there was a moment when Massachusetts seemed poised to fulfill its promise as a 'City on a Hill', this was it.

At just this moment, however, internal dissent began to shake Massachusetts and, in tandem with metropolitan pressure, led to an intense debate about the nature of subjechthood in the colony that ultimately made it an unsuitable model for a reformed English state. In May 1646, the Bay Colony's religious qualifications for political subjechthood came under attack from non-Puritan settlers, led by Presbyterian minister Dr. Robert Child and Samuel Maverick, an Anglican royalist aligned with Ferdinando Gorges. Turning the radicalized language of English subjcethood against the Massachusetts saints, the petitioners asked that "civil liberty and freedom be forthwith granted to all truely English [settlers], equall to the rest of their countrymen," regardless of religious affiliation. Without this broadened body politic, non-Puritan settlers would be doomed to "a non certainty of all things we enjoy, whether lives, liberties or estates." The petitioners particularly hoped to establish that "the bodyes of us and ours...may not

be impressed" or subjected to "greater punishments" than allowed under English law. Without these protections, nonconformist colonists would be "in a worse case here [than in England] and lesse free than the natives amongst whom we live, or any aliens."\(^{79}\)

Though the petitioners claimed benevolent, disinterested motives – "those who are under decks," after all, could best "perceive those leaks" which might scuttle Massachusetts' ship of state – they also warned that their "brethren of England [were] not ignorant" of their situation and they would appeal their case to Parliament if necessary.\(^{80}\) The General Court roundly dismissed the petition, compiling meticulous lists of English common law principles and the "fundamentall law" of Massachusetts to illustrate their congruence. The magistrates cited their charter as the basis of their authority, but were quick to point out the checks against arbitrary government built into their godly republic and dared Child and Maverick to "produce any colony or commonwealth in the world...where hath been more care and strife to prevent all arbitrariness." Besides, the magistrates argued, the true test of a "freeborne English subject is his interest in the lawes," not the "right of election of publick officers" – despite their lack of direct political participation, even "non-freemen," those who were not members of a Congregational church, still had "justice...equally adminstred to them with the freemen," an "equall share" of town lands, and "freedom of trade and commerce."\(^{81}\) Though they limited political participation to the godly, Massachusetts magistrates recognized that all English settlers retained their subjecthood and were protected by common law.

\(^{80}\) Ibid. On the use of appeals to metropolitan authorities as a way to challenge local authority in New England, see Mary Sarah Bilder, The Transatlantic Constitution: Colonial Legal Culture and the Empire (Cambridge, MA: Harvard University Press, 2008), esp. chapter 4.
\(^{81}\) "A Declaration of the General Court...concerning a Remonstrance and Pettion...by Doctor Child....," in Hutchinson, Papers, I:223-247.
This debate provoked unwanted scrutiny back in England. John Child, brother of the embattled Massachusetts physician, published much of the 1646 remonstrance debate in a pamphlet entitled *New Englands Jonas Cast Up at London*, exposing the fissures within New England society. Child argued that the treatment of dissenters by New England's godly republic betrayed "a deep and subtle Plot against the Lawes of *England*, and Liberties of English Subjects." Like English Independents in Parliament, New Englanders merely sought to replace monarchy with an "Arbitrary government of their own" – indeed, Child argued that the Puritans were "*growing into a Nation*...which makes them usually term themselves as *States*, all the people there *Subjects*." If they succeeded in their plot, New England saints would "stop the Currant of the greatest Liberty of English subjects" by imposing their republican vision on other colonies, on Ireland or Wales, even on England itself, limiting political participation to the godly few.  

Edward Winslow, Mayflower Pilgrim and former Plymouth governor, was in England as Parliamentary agent for the United Colonies at the time, and defended New England against Child's accusations. Winslow began by reassuring English readers that he, like all true puritan New Englanders, could never “oppose the Law of *England*: nor ever stand against the liberties of the subject.” Indeed, Winslow argued, “next to the word of God [Massachusetts colonists] take the Law of *England* for their pre[ce]dent before all other whatsoever.” Distance, circumstance, and godliness, however, made strict adherence to English law impossible. Just as “the Garments of a growne man would rather oppresse and stifle a childe if put upon him,” Winslow believed that the full

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body of English law would be “too unweldy” for early colonial Massachusetts. Besides, the whole point of the Puritan errand into the wilderness was precisely to escape Charles I’s patriarchalist organization of church and state, and the terms of the colony’s charter allowed for variation in local law, so long as it “goe as neare the Lawes of England as may bee,” an injunction the Puritan colonists “punctually follow so neare as wee can.” Winslow did admit that, when it came to political participation, “there are many that are not free amongst us,” but this was also true of the “many thousands in this kingdome [England] who have not libertie to choose.” In addition, Child was a known malcontent who had “no proprietie or knowne proper estate” in Massachusetts. To admit him to the franchise would imply that “any English man may volens nolens, take his habitation in any Government, bee as free as the best...thus breaking all Order, Charters, and peace of Societies.” Child’s petition had no merit. Massachusetts’ linked civil and ecclesiastical governance was a model of godly republicanism, and Winslow claimed that, if Parliamentarians could only see how well ordered the colony was, “they would close with our practice.”

Ultimately, partly because of this exacting Puritan definition of the body politic, Massachusetts would prove a poor model for revolutionary England, and Bay Colony magistrates moved to protect their commonwealth from metropolitan corruption. As Winslow warned in his *New England’s Salamander*, “if the Parliaments of England

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84 Pestana, *English Atlantic*, 83-84.
should impose Lawes upon us having no Burgesses in their house of Commons,...then wee should lose the libertie and freedome I conceived of as English indeed.”

Though they steadfastly supported the revolutionary English state, Bay colonists jealously guarded their relative local independence. By the late 1650s, relations between New and Old England had soured, and days of thanksgiving were replaced once again by fast days. As early as 1646 the General Court worried that the colony was "so subordinate to the parliament, as they might countermand our orders and judgments," perhaps fearing the imposition of a new ecclesiastical order by the Westminster Assembly then sitting back in London. Others worried about pressing their claims for independence too far – Massachusetts colonists relied on their English subjecthood for the security of their land tenure, physical protection, and "the continuation of naturalization and free liegance" – but still believed they might be "independent in respect of government," at least for local issues. Like colonists throughout the English empire, Massachusetts settlers worried about the implications of the Navigation Acts for their local economy, skirting prohibitions on trade with the nearby Dutch colonies, and even censuring a captain who brought a Dutch ship to Boston as prize under the acts because it might lead to "a confronting of this government, and...the infringing of our liberties [and] discouraging of trade.”

Being a city on a hill, it turned out, could be a liability.

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85 Winslow, New England’s Salamander, 24.
87 Quoted in Pestana, English Atlantic, 175.
These few squabbles aside, Massachusetts generally received preferential treatment from the Commonwealth and Protectorate governments. The authority of the Massachusetts Bay governor and legislature was extended to New Hampshire and control over Maine was confirmed, much to the chagrin of Ferdinando Gorges and his allies. Bay Colony merchants were exempted from many of the customs duties levied on less cooperative colonies after the Navigation Acts were passed, and imperial officials generally looked the other way as Massachusetts colonists violated restrictions against trading with other European colonies. Cromwell considered appointing a governor-general for New England in the mid-1650s to better enforce the Navigation Acts, but the presence of influential former Bay Colonists in the Protector's councils squashed the idea.

The result was a boom in the New England economy, as Massachusetts-built and manned ships took a larger share of the carrying trade between England and its staple producing colonies. This new economic vitality was due largely to the Cromwellian reorganization of the empire. With former New England residents scattered throughout the English Atlantic, like former Plymouth governor Edward Winslow, sent first to London as agent for the United Colonies then installed as governor of Barbados, and allies like Henry Vane and Hugh Peter advocating for them back in London, Boston merchants could draw on ties within this Puritan diaspora to build new mercantile

88 See, for example, the complaints of Maine to the Council of State (6 November 1652), BNA, CO 1/11/70; the petition of Joseph Mason protesting Massachusetts’ jurisdiction over Strawberry Bank in Portsmouth, New Hampshire, BNA, CO 1/12/3; the “Report of the Commissioners of the Massachusetts Bay General Court” claiming jurisdiction over Wells, Cape Porpoise, and Saco, BNA, CO 1/12/7
89 See, for example, the petition of William Franklin of Boston, CO 1/12/46.
connections. Massachusetts leaders recognized that Cromwell was "the fountaine whence all these streames of bountie have been derived," and lavished praise on the Lord Protector to ensure his continued support. Cromwellian free trade, despite worries about imperial centralization, was an unqualified victory for New England merchants.

In this period of economic growth, a few Massachusetts merchants were drawn into the trade for one of the most profitable of all Atlantic commodities – slaves. Yet Bay colonists were not free to ply this nefarious trade as they saw fit. Massachusetts law followed them onto the high seas and governed their acquisition of slaves. A 1646 case heard by the General Court, Smith v. Keyser, is illustrative. On a Sunday in early 1645, James Smith of Boston, captain of the Rainbow, and his first mate, Thomas Keyser, broke with the customary practice of the slave trade and directly incited a war between two villages on the Guinea coast. Smith and Keyser were participants in the ensuing battle, killing roughly 100 people and taking others as slaves. Most of these slaves were exchanged for casks of wine at Madeira, and others likely sold in Barbados, where Smith and his first mate fell out over the division of their cargo. Keyser sailed the Rainbow back to Boston without her captain, and upon his arrival sold the two remaining Guinea slaves, one to Francis Williams of Pascataqua, an Anglican and supporter of Ferdinando Gorges. When Smith returned to Boston and learned of the sale, he sued for damages to regain the value of his lost slave property.

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92 “Copy of an Address to his Highness Oliver Cromwell,” in Hutchinson, Papers, I: 307-308.
93 MBC Recs, II: 115.
Smith's suit, however, exposed the questionable means by which the slaves were obtained and drew the attention of Richard Saltonstall, a stalwart defender of popular government and individual liberties who had been selected as assistant for Ipswich in 1637. Saltonstall, arguing that the end of Massachusetts' government was "dispensing justice equally and impartially according to the laws of God and this land," brought a petition in the General Court to free the slaves and return them to "Ginny" at public charge. "Stealing negers," Saltonstall argued, was contrary to "the law of God and the law of this country," a reference to the Body of Liberties' requirement that slaves be captives taken in "just warres." It is likely that Saltonstall would have discussed the case and its relation to Massachusetts law with Nathaniel Ward, author of the Body of Liberties, who was minister to the Ipswich congregation. The case was a tricky one, involving overlapping questions of jurisdiction, property rights, and godly reform, and Saltonstall's petition was carefully framed to address each of these issues. For Saltonstall and Ward, the godly dictates of Massachusetts law followed residents beyond the boundaries of the Bay Colony, governed their conduct in trade, and denied that Puritan colonists could make property out of innocent men and women. Participating in a legitimate slave trade might be condoned, but kidnapping and murdering faultless Africans, especially on the Sabbath, and selling them as property, to a non-Puritan household nonetheless, violated the central tenets of Massachusetts law. Rather than using servitude as a way to spread Puritan morality, Smith and Keyser stole and sold Africans to enrich themselves.

94 Winthrop, Journal, II: 461-462, Appendix M.
When *Smith v. Keyser* came before the General Court in October 1645, the magistrates recognized Smith’s right to the *Rainbow*’s legitimate cargo, and awarded him £90 compensation for the Madeira wine and a further £50 damages for defamatory statements made by Keyser in Boston and Barbados. The *Rainbow*’s human cargo, however, was a different story. The General Court “[thought] meet to alowe nothing” in compensation for the ”negars” because they were ”none of his, but stolen.”

They further ordered that Mr. Williams of Piscataqua return his slave to the court – the unfortunate slave had been ”fraudulently & injuriously taken” from Africa, and they were resolved to return him home at public expense ”without delay.” The court did not stop there, however. Stirred by Saltonstall’s petition, the magistrates went on to register their “indignation against ye haynos and crying sinn of manstealing.” Purchasing a slave was one thing – the *Body of Liberties* allowed for the slavery of those “sold unto us” – but this was something else entirely. Smith and Keyser must have shuddered to recall that Mosaic law, the basis of Massachusetts’ colonial legal code, severely punished those who illegally enslaved another: “he that stealeth a man, and selleth him…he shall surely be put to death.”

Following this maxim, the court indicted Smith and Keyser for man-stealing, stating that “the act of stealing negers, or taking them by force (whether it be considered as theft or robbery) is...expressly contrary both to the law of God, and the law of this country.” Furthermore, “the act of chaceing the negers...upon the sabbath day (being a servile worke...) is expressly capitall by the law of God.”

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95 *MBC Recs*, II:129.
96 Ibid., II:136.
97 Exodus 21:16
98 *MBC Recs*, II:136.
only broken Massachusetts restrictions on the acquisition of slaves by violently attacking African villages, they had done so on the Sabbath. In the end, the General Court did not punish Smith or Keyser, but ordered that the Africans be returned to Guinea at public expense “by the first opportunity.”

The court also prepared a letter for the freed Africans to carry back home with them to express "ye indignacon of ye Courte thereabouts, & [the] justice thereof." Bay Colonists were entering into the slave trade, but this did not free them from the obligations of Puritan morality. While recognizing the legality of slave property for the purposes of trade, Massachusetts magistrates put local regulations on participation in the slave trade that tried to balance property claims with the moral and social mandates of their godly republic.

The Massachusetts General Court's decision came at an important juncture in imperial development. At a moment when New England's saints were streaming back across the Atlantic, and before English revolutionaries abandoned Massachusetts' commonwealth as a model, Smith v. Keyser may have influenced the ways English subjects thought about slavery, not only as a rhetorical trope to denounce monarchy, but as an economic system and a lived experience. John Winthrop noted in his journal that "the Londoners pretended a just revenge" for the General Court's decision, so it is likely that word of the case crossed the Atlantic.

In England, former colonists Henry Vane and Hugh Peter kept up a regular correspondence with their former neighbors in the

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99 There are a number of reasons to explain why Smith and Keyser escaped punishment -- perhaps they repented of their sin before the court, which was often considered sufficient in Massachusetts courts. Despite their reputation for harsh justice, especially in the 1640s and '50s, Massachusetts magistrates rarely actually imposed the death penalty on those who admitted guilt and repented. See David D. Hall, A Reforming People: Puritanism and the Transformation of Public Life in New England (New York: Alfred A. Knopf, 2013), 85.

100 MBC Recs, III:84.

101 Winthrop, Journal, II:300.
colonies, and both men occupied prominent positions during the Commonwealth. Parallels between the Massachusetts court’s decision regarding African slaves and Commonwealth policies certainly suggest that, even if there was no direct influence, the magistrates in control of both polities worked from many of the same basic premises. Most basic was their presumption that liberty was natural to England and its dominions – human bondage could exist only in closely regulated circumstances.

As the continued presence of penal slaves in Massachusetts and political bondservants transported from England illustrates, Puritan reformers had no qualms about forced labor, but they balked at the concept of property in man. Englishmen might own the labor of their bondservants, even without their consent if the servants were royalist prisoners or convicts, but servants remained persons before the law with access to the basic rights of subjecthood. English merchants could legitimately purchase slaves from others, but only if the slaves were heathens and had been acquired through legal channels. If Puritan slavery in Massachusetts is any indicator, even these legally acquired slaves could still find various ways to freedom and membership in the community of subjects. As Smith v. Keyser made clear, merchants who flaunted the conventions of the slave trade by "man-stealing" would be hauled before the courts, if not executed as Exodus required, and any slaves acquired illegally would be freed. All of these propositions proceeded from the fundamental assumption of the natural freedom of English subjects, and were expressed by godly reformers on both sides of the Atlantic.¹⁰²

This is not to say, of course, that New England Puritans abandoned bound labor entirely. As the Body of Liberties had declared, bond servitude was a perfectly legitimate

punishment and Massachusetts magistrates continued to use penal slavery to enforce
Puritan morality. Just as they had in the late 1630s, Bay Colonists continued to "enslave"
criminals and religious dissidents. Marmaduke Barton, an English colonist, was
sentenced to bond servitude in 1642 until further court order.\textsuperscript{103} Quakers, who bore the
brunt of Puritan hostility during the Interregnum, were viciously persecuted in
Massachusetts, many of them "enslaved" or banished from the colony.\textsuperscript{104} Despite this
brutal treatment, even bondservants remained persons under the law. In 1651, John
Cotton assured Lord Protector Cromwell that Scottish captives sent to New England were
not "sold for slaves to perpetuall servitude, but for [a term of] years, as we do our
ownte."\textsuperscript{105} By the mid-1650s, however, the Bay Colony Puritans' insistence on church
establishment and their use of such harsh punishments for offenders came into conflict
with the Commonwealth's official policy of religious tolerance and provoked a negative
response from some in Parliament. On the ground in New England, where
nonconformists continued in their defiance to Congregational establishment, magistrates
were increasingly hesitant to impose harsh penalties like bond servitude that were likely
to draw unwanted attention from the metropole.\textsuperscript{106}

In May 1659, the Massachusetts General Court sentenced its last European
colonists to bond servitude. Members of the Southwicke family, recent converts to the
Society of Friends, had taken to proselytizing in the area around Salem and Ipswich in

\begin{footnotes}
\footnotetext{103}{\textit{Mass Ct Assts,} II:118.}
\footnotetext{105}{John Cotton to Oliver Cromwell, 28 May 1651, in Hutchinson, \textit{Papers,} I:265. Cotton also noted that the Scottish bondservants were only required to work three days a week and were given "some acres of
ground" by their masters to work "as their owne."}
\footnotetext{106}{Pestana, \textit{English Atlantic,} 82-84.}
\end{footnotes}
violation of a 1658 statute banning Quaker preachers. Daniel and Provided Southwicke, fined in Salem and Ipswich for their Quakerism, refused to satisfy their fines, and the court, "on perusall of the lawe," resolved to "sell the said persons to any of the English nation at Virginia or Barbadoes." The rest of the Southwicke family were banished from the colony on pain of death.\(^{107}\) Provided Southwicke was not cowed by the court's verdict – in November she appeared in court again and was sentenced to ten lashes for her continued proselytizing. In the end, none of the Southwickes were actually sold out of the colony because "none were willing to take or carry them," perhaps an indicator of the lack of enthusiasm for bond servitude in the waning days of the English revolutionary Commonwealth, or the equally strong aversion to Quakerism in much of the English Atlantic.\(^{108}\) Perhaps the Southwicke family took advantage of the General Court's grant of "liberty to goe for England" in October 1660, or emigrated to another colony with less rigid expectations of religious conformity – whatever their fate, they disappear from Massachusetts records by 1661.\(^{109}\) Even if they had been sold to Barbados or Virginia, however, the Southwickes would have retained their basic subjectionhood, just as royalist prisoners transported from England did. But the forced bond servitude of English subjects, even the reviled Quakers, had become increasingly difficult to justify in Massachusetts – as the Rivers-Foyle petition debate illustrated back in England, assertions of the fundamental self-ownership of English subjects made bond servitude seem dangerously close to slavery – and the Bay Colony subsequently abandoned servitude as a punishment for English colonists.

\(^{107}\) *MBC Recs*, IV.i:366-367.

\(^{108}\) Ibid., IV.i: 366

\(^{109}\) For the qualified amnesty for Quakers willing to return to England, see *Mass Gen Court Recs*, IV.i:433.
While the bond servitude of English subjects was fast disappearing from Massachusetts, Native Americans continued to be held as 'servants' in Puritan society. This servitude, however, was geared primarily toward conversion and conditional assimilation, and the increasing presence of christianized Natives in Puritan households also contributed to debates about slavery and subjecthood. It was in the 1640s that Puritan efforts at Indian conversion really got underway, and servitude was considered a useful tool in the conversion process. The leading figure in the Puritan mission to the Natives was John Eliot, minister to the gathered church of Roxbury. Despite early failures in preaching to local Natives, Eliot persisted, and by 1647 his efforts began to bear some fruit. Governor Winthrop noted that a sermon preached by Eliot was well-attended by “very attentive” Natives, many of whom were “seriously affected” and “ready to reform whatsoever they were told to be against the word of God.”110 By 1652, construction of a new meetinghouse and a special school for “teachable Indians” at Harvard was underway, and Eliot’s effort to convert local natives was making real headway.111

As Massachusetts ships plied the Atlantic in greater numbers, Africans began to appear in Massachusetts as well, and the evidence suggests that their bondage followed the same Puritan norms that influenced treatment of other bond servants. There were certainly a number of prominent colonists who thought African slavery could benefit Massachusetts. Emanuel Downing, John Winthrop's brother-in-law, called for a "just warre" against the Pequot in 1646 that would provide Indian captives to be exchanged for African slaves in Barbados. Downing asserted that slaves could be kept for one-twentieth

111 Hutchinson, Papers, I: 290-292.
the cost of an English servant, and argued that the Bay Colony's economy could not compete in the Atlantic economy "untill we gett...a stock of slaves sufficient to doe all our business."¹¹² Despite Downing's recommendation, very few African slaves were brought to Massachusetts during the Interregnum, likely less than a hundred. These few slaves are difficult to find in colony records, partly because their numbers were so small, and partly because Massachusetts masters nearly always used the term 'servant' to describe their bound laborers. In April 1646, for example, Winthrop noted that “A negro maid, servant to Mr. Stoughton of Dorchester, being well approved by divers years’ experience for sound knowledge and true godliness, was received into the church and baptized.”¹¹³ Once she proved her godliness, this unnamed African woman was admitted to the central institution of Bay Colony life.

The use of the term ‘servant’ does not appear to have been a mere sop to squeamish Puritan sensibilities – the surviving evidence illustrates that Africans were considered persons, not property, under Massachusetts law. One of the Africans stolen by Smith and Keyser had apparently learned some English and served as a translator during the proceedings, implying that the General Court took testimony from the *Rainbow* Africans themselves during their investigation.¹¹⁴ When Massachusetts Bay enacted a new ratings system for taxation in 1646, "every male within this jurisdiction, servant or other," over age 16 was counted for assessing each household. The poor and infirm were exempted from paying, though they were still counted as polls, as were "such s'vants & children as take no wages," whose masters or parents would pay for them.¹¹⁵

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¹¹⁴ *MBC Recs*, II: 168.
Servants were defined as persons, not property, under this taxation system, and there is no evidence to suggest that African 'servants' were an exception to this rule. In 1653, New Plymouth governor William Bradford and two Assistants resolved a dispute between John Smyth of Plymouth and his neighbor's "neagar maide servant." After "whatsoever could bee said on either side was heard," both parties were admonished and dismissed.¹¹⁶ Like the God they served, New England magistrates were no respecters of persons – all were equal before the law, regardless of their race or status.

Like so much about Massachusetts during this period, its uniquely Puritan system of bondage may have served as a model for English imperial planners. Godly reformers on both sides of the Atlantic shared a set of assumptions about self-ownership and the rights of subjects that made the outright ownership of another person unthinkable. The unprecedented centralization of the empire under the Protectorate meant that this unique form of servitude might be implemented in the rest of the empire as well. Perhaps this was what Henry Parker had in mind in Jus Populi or what Hugh Boscawen wanted when he asked Parliament to consider enacting a law prohibiting "the buying and selling of men."¹¹⁷ Cromwell knew what he was doing when he sent Edward Winslow, Mayflower Pilgrim and former governor of New Plymouth, to serve as the new governor of Barbados in 1655, carrying New England assumptions about slavery with him.¹¹⁸ While perhaps not enraptured with every element of the imperial settlement, most Massachusetts Bay colonists must have felt a sense of vindication, even pride, at the transformations wrought by the English revolution and their role in bringing them about.

¹¹⁷ See supra.
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Virginia was another matter entirely. When civil war engulfed England in 1642, Virginia, like most colonies, hoped to stay above the fray. Despite their general unwillingness (or inability) to participate directly in the royalist cause back in England, it was clear where Virginia's allegiance lay. Charles himself simply assumed that Virginia, a royal colony under the direct control of the throne, would support his cause. When, in 1642, an attempt was made to re-impose corporate governance in the colony under a board of directors with Puritan sympathies, the Virginia burgesses took the opportunity to assure Charles of their devotion. They would not tolerate the "unnatural...distance" that company rule would place between colonial subjects and their sovereign. To replace Charles' "clemency and benignity" with a "popular and tumultuary government depending on the greatest number of votes" would shake the basis of their subjecthood -- Virginians worried that the end of royal rule would cause them to "degenerate from the condition of [their] birth, being naturalized under a monarchial government." Despite their distance from the king's person, Virginians saw themselves as "a branch of his own royal stem" – they held their rights directly from the monarch himself. To override the royal claim to sovereignty in Virginia would "prove the illegality of the king's proceedings," calling all royal grants into question.\(^{119}\) As resistance to Charles erupted into war back in England, when push came to shove, most Virginians stood firm for monarchy.\(^{120}\)

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\(^{120}\) Pestana, *English Atlantic*, 50-51.
A small Puritan minority, concentrated in Isle of Wight, Nansemond, and Lower Norfolk counties, where they wielded considerable influence, complicated this royalist commitment. Wealthy London merchant Edward Bennett and a number of other English Puritans received land grants from the Virginia Company in 1621, settling hundreds of dissenting families on Virginia's southern frontier. By the outbreak of civil war, the Bennett family alone owned over ten thousand acres in Nansemond County, and Richard Bennett, Edward's nephew, had risen to political prominence, even serving on the Virginia Council in the early 1640s. Other prominent Puritans settled in the region as well. Daniel Gookin, who would soon remove to New England and work closely with John Eliot in converting New England's Indians, and John Hill, who had mercantile ties to John Wilson, minister of Boston's First Church, increased the political visibility and economic viability of this small Puritan community.

The religious lives of these tidewater Puritans, however, were less secure, especially as hostility to Puritanism in Virginia grew apace with the violence back in England. Already in 1642, William Durand, a Nansemond puritan, wrote to John Davenport in New Haven, describing Virginia as "swoln...great with the poison of sin, as it is become a monster, and ready to burst." Durand recognized that the colony, tainted by "blind Idol shepards" and "false worship," might not take naturally to Puritanism, but

121 Despite his Puritan leanings, Richard Bennett did not take the extreme separatist position that many New England Puritans embraced in the 1630s. Bennett retained at least outward conformity with the Anglican establishment, likely to ensure the safety of his estates and political reputation. By 1648 however, as we shall see, even Bennett's outward conformity could not protect him from Governor William Berkeley's anti-Puritan policies. See Kevin Butterfield, “Puritans and Religious Strife in the Early Chesapeake,” The Virginia Magazine of History and Biography, vol. 109, no. 1 (2001): 5-36.

hoped that the "prosperous proceedings of the present parliament in England" would make straight the path to godly reform in the Chesapeake. Accordingly, Richard Bennett and other Virginia Puritans asked their New England brethren to supply them with three ministers "selected, nominated and Commended" by Massachusetts divines. These ministers were to be "faithful in purenes of doctrine, and integrity of Life," their "preaching and Government" to comport with "the institution of Christ." If these nominees were found suitable, Bennett and the Virginia Puritans would "subject [themselves] to their Teaching and discipline." John Winthrop described the three ministers sent from Massachusetts to Virginia as "seed sown, which would bring us in a plentiful harvest" by bringing Tidewater puritans into conformity with the New England way, further increasing the godly influence of Massachusetts throughout the empire.

Whether religious orientation shaped Virginia Puritans' political and economic life is less certain. The accumulation of large estates by the Bennetts and other prominent Puritan settlers was certainly out of sync with New England partible inheritance practices. While these Eastern Shore Puritans certainly held bound Africans, the terms of their bondage remain unclear, and may have tilted closer to the practice of Massachusetts than Virginia’s planter elites. Whatever their individual household arrangements, this fledgling Puritan community, with its connections to religious and political radicals in Old and New England, posed a threat to Virginia's old planter elite. Insisting on conformity with the Anglican establishment, the House of Burgesses disallowed the

124 Ibid., "To the Pastors and Elders of Christs Church in New-England and the Rest of the Faithful," 105-106.
payment of tithes to any minister who refused to use the Book of Common Prayer in 1642. In 1648, with Charles I a prisoner of Parliamentary forces, persecution of Virginia saints increased, forcing Bennett and many other Puritan settlers into exile in Maryland where they founded a new settlement, aptly named Providence, on the Severn River. Lord Baltimore's Catholicism ironically necessitated a tolerant ecclesiastical climate, allowing the exiled Puritans a degree of religious freedom in Maryland. With this troublesome Puritan minority purged, Berkeley moved to cement Virginia's royalist commitment, describing the regicide as "high and horrid, monstrous, impious and hereticall" treason, and immediately declared Charles II the rightful sovereign. Virginians would sooner submit to "the Turks, or our neighbor Savages" than to the "perjured Traytors" in Parliament, and Berkeley began raising a force to resist the anticipated Parliamentary invasion.126

In its first session after Charles' execution, the House of Burgesses lost no time voicing its agreement with Berkeley's assessment. Declaring regicide an "unparalal'dd treason" against their "most excellent and now undoubtedly sainted king," the Burgesses worried, despite their earlier purge of Puritans, that some disaffected settlers might work toward the "accomplishment of their lawless and tyrannous intentions." If English revolutionaries could divest Charles of the rights "inherent to his royall line" in violation of "the law of nature and nations and the knowne lawes of...England," what was to prevent a like transformation from sweeping across Virginia? To forestall this potential disaster, the Burgesses declared that any "stranger or inhabitant" who defended the regicide, questioned the "undoubted & inherent right" of Charles II to ascend the throne,

or spread "false reports and malicious rumors...abroad...tending to change of government" would be "adjudged an accessory post factum" to the regicide itself and "suffer such censure and punishment as shall be thought fitt by the Governour." The purged tidewater Puritans, relatively safe in Commonwealth-aligned Maryland, must have counted themselves lucky to escape royalist Virginia with their lives.

Virginia maintained its royalist stance, in defiance of Commonwealth claims to sovereignty. In August 1650, Parliament enacted the Rebel Plantations Act, which put an embargo on Virginia and the other defiant royalist colonies, called in their charters, and declared Parliament's ability to legislate for the empire as a whole. In March 1651, when word of Parliament's act reached the colony, Berkeley used it to drum up further royalist support. Despite threats to invade and subdue the colonies, Berkeley assured Virginians that "not a ship goes...but to beg trade" – if Virginians quailed and submitted to Parliament's "paper bullets" they would be no better than "slaves by nature." The only options were to "resist their Imperious Ordinance" and the "heavy chains" it sought to impose, or become "their worships slaves, bought with their money." The Burgesses agreed that "excluding us the society of Nations, which bring us necessaries for what our Country produces" would "rob us of all we sweat and labour for" and declared that Virginians were not such "slaves by nature as to be awed with the iron rods held over us." The Old Dominion prepared for war.

Virginia retained this defiant stance through January 1652, when a Parliamentary fleet under the command of William Claiborne arrived to "reduce" the colony to

127 Hening, VA Statutes, I:359-361.
129 Ibid., 80-81.
obedience. Berkeley and the Burgesses already knew that Claiborne had successfully brought Barbados to heel after a brief military engagement, dampening their prospects for success, and in early March the thousand-odd men mustered to defend the colony were dispersed before a shot was fired. The articles of capitulation negotiated by Claiborne, the recently returned Richard Bennett, and the deposed governor and council were, all things considered, relatively generous, and Virginia officially capitulated to the Commonwealth on 15 March 1652. Berkeley and his council were given one year to "sell and dispose of their estates" and "transport themselves wherever they please," exempted from the new loyalty oath, and their estates and access to "equall and free justice" were guaranteed. In keeping with Commonwealth principles, the House of Burgesses would continue to meet, at least once a year, as the Grand Assembly of Virginia. The articles of capitulation also allowed Virginians to "[speak] well of the king...in their howses and private Confines," granted a general indemnity to any residents "of what qualitie or Condicon soever that have servd the king here or in England," and allowed Virginians to travel into England for up to six months without "any trouble or hindrances of arrest or such like." Perhaps Parliament hoped to quiet Virginians' fears of a draconian settlement, or recognized the difficulty of imposing harsh terms from across the Atlantic. Whatever the reasoning, these generous terms at the surrender

130 Pestana, English Atlantic, 115-117.
131 For the lenient terms given to the Virginia Commissioners by Parliament, see "Instructions for captain Robert Denis, Mr. Richard Bennett, Mr. Thomas Stagge, and captain William Claibourne, appointed commissioners for the reducing of Virginia...." in Thomas Birch, ed., A Collection of the State Papers of John Thurloe (London: Fletcher Gyles, 1742), X:6-7.
masked a real desire by Parliament and Virginia's returned Puritan exiles to bring the Old Dominion into line with godly republican practice.

The movement to implement Commonwealth reforms began almost immediately. When the Burgesses met again in April 1652, Richard Bennett was elected governor and a number of other prominent merchants and Parliamentary supporters were appointed to the new Council of State. Virginia's old planters were conspicuously underrepresented in this provisional government. Under the Council's close supervision, the Burgesses passed a series of laws aiming at nothing less than a total transformation of Virginia society. Much as Parliamentarians had done when they gained control of the English state, the new government recommended a wholesale revision of existing law. They repealed statutes requiring Anglican conformity and left local churches "to their own ordering and disposall." They banned activities "tending to the profanation" of the Sabbath and mandated that "Servants, and others" attend religious services. A litany of moral infractions, including the "odious Sinns" of drunkenness, blasphemy, swearing, fornication, bigamy, and "Scandalous Liveinge," would be "severely punished." Most Virginians were unwilling to abide by this new Puritan order. By 1656, godly reform had made little progress – many parishes still had no qualified ministers to preach the gospel or enforce church discipline, and the Burgesses offered £20 to any colonists who would bring ministers to the colony.

The political reformation of Virginia fared little better. Though Bennett and others sympathetic to the Commonwealth were able to wrest control of the colony from

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134 Henting, SAL, I:399-400, 418.
Virginia royalists, they met resistance from the outset. When the Burgesses met in March 1653, their first act was to expel vocal royalists John Hammond and James Pyland, elected to represent Isle of Wight County, for their "scandalous...libell and other illegall practices." At this same session, the Burgesses empowered Bennett and the Council to "go over to Accomack...for the settlement of the peace of that countie, and punishinge delinquents." Conciliar oversight was extended to Northampton County as well, with the governor empowered to "appoint all officers for peace and warr [and] the division of [the] county." Faced with a reluctant populace, Bennett and the Virginia Council of State, much like the Commonwealth and Protectorate governments back in England, were more than willing to use coercion in the service of their godly republican vision.

Perhaps nowhere did Virginia's Interregnum government face more resistance than in the enforcement of the Navigation Acts. The assembly passed token legislation for enforcement of the acts in November of 1654, requiring all incoming ships to register with the governor before engaging in trade, but this policy was honored mainly in the breach. When one of their own was embroiled in a legal controversy over the Navigation Acts in early 1653, the Burgesses wasted no time registering their distaste for metropolitan trade restrictions. Prominent James City merchant Walter Chiles' ship, the

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135 Hening, SAL, I:374-375. Hammond, and perhaps Pyland as well, fled to Maryland hoping, as Bennett and the Puritans had, that Lord Baltimore's government would be more sympathetic to their royalism than Virginia's interim government proved to be. See Lyle Gardiner Tyler, ed., *Encyclopedia of Virginia Biography*, (New York: Lewis Historical Publishing, 1915), I: 251. [Hereinafter cited as EVB.]
136 Hening, SAL, I:379 notes that "several pages" of the original MS dealt with rebellious Virginians. See also *Burgesses Journals*, 86-89.
137 Hening, SAL, I:380-385.
138 Ibid., I: 392.
Fame of Virginia, was returning from Rotterdam laden with cargo and bound for Brazil, when it was taken by Captain Richard Husband on the "pretext" that Chiles did not have a Parliamentary license to trade outside the restrictions of the Navigation Act. The case was to be determined by the Assembly in its upcoming session, and when Chiles was subsequently elected speaker by the burgesses, Governor Bennett, attempting to enforce the acts, asked that his candidacy be set aside until the dispute was settled. The Burgesses, denying the right of Parliament to regulate their trade or the governor to set aside their speaker, seated Chiles anyway before giving him leave to tend to his "private affairs." 139 While the fate of the Fame of Virginia is not mentioned in the record, Chiles was later awarded another ship, the Leopold of Dunkirk, that had been confiscated "by the grand assembly of this country" in violation of the same Navigation Act, a boon of some £400. 140 If the Navigation Acts were going to be enforced in Virginia, the Burgesses wanted to be sure it was on their terms, and to their benefit.

What Virginians really wanted was free trade, but not the kind offered by the Protectorate. Especially after chafing under a Parliamentary embargo for nearly three years while they refused to submit to Commonwealth rule, Virginia's merchants wanted not just the dissolution of old trading monopolies and an open trade for all English subjects within the empire – they wanted total freedom of trade with all nations. In March 1655 the Burgesses passed a sweeping free trade law that established trading posts in every county, repealed a law forbidding profits in excess of fifty percent in mercantile transactions, and allowed Virginians "all freedom of trade" with "all merchants and

139 Ibid., I: 377-378. See also EVB, 114.
140 Hening, SAL, 383. See also Ibid., 385, where Samuel Mathewes, William Claiborne, and other prominent Virginians are remunerated for "their several services done to the country in the said business."
traders." Newly elected governor and well-connected merchant Edward Digges gladly approved of the measure, despite its questionable legality under the Navigation Acts.\textsuperscript{141} Perhaps some of this desire for free trade stemmed from Virginians' growing demand for African slaves. Calls for free trade in Virginia certainly increased after the First Anglo-Dutch War ended in 1654, when Dutch slave traders were barred from trading with English colonies. In March 1658, the Burgesses passed an act reopening trade with Dutch merchants, by that point the leading carriers of African slaves in the Atlantic, as long as they paid customs duties on any exported tobacco.\textsuperscript{142} Adherence to the Navigation Acts, or lack thereof, was certainly one of the main concerns of imperial planners, but distance and concerted resistance from Virginia residents made full enforcement difficult and allowed for continued slave importations to the Chesapeake.

Still, the Commonwealth reform program did leave a visible imprint on Virginia. In keeping with English republican principles, the suffrage was extended first to all "house keepers, whether freeholders, lease holders, or otherwise tenants," and later to all free men.\textsuperscript{143} The colony's law code was compiled, digested, and reformed along the lines recommended for England by the Hale Commission, and new parliamentary procedures were introduced into the House of Burgesses.\textsuperscript{144} Supporters and opponents of Commonwealth reform all came to cherish the robust role afforded their burgesses in colonial governance and the local autonomy representative government provided. Raised repeatedly during the metropolitan civil wars, the question of who had the power to

\textsuperscript{141} "An Act for regulating of Trade and establishing Ports and Places for Marketts," in \textit{SAL.}, I: 412-414. For Digges, see \textit{EVB}, [FINISH].
\textsuperscript{142} \textit{SAL.}, I: 469.
\textsuperscript{143} Ibid., I: 403, 412.
\textsuperscript{144} For the former, see Billings, "Some Statutes not in Hening," [???]; for the latter, see Hening, \textit{VA Statutes}, I:505-506.
adjourn the colonial assembly became a point of contention between Commonwealth governors and Virginia burgesses. A debate over this power broke out in the spring of 1658 when governor Samuel Mathewes attempted to "dissolve" the assembly. John Smith, the Speaker of the House, replied that the Burgesses were "not dissolvable by any power yet extant in Virginia but our own," and claimed sole authority to appoint officers for themselves. An order from the Council of State back in London in late August may have been a response to this independent streak in the Virginia assembly. Lamenting the colony's "loose, & distracted condicon." Cromwell and the Council resolved to "[settle] the government there," but the Lord Protector died before definitive action could be taken. Though Virginians may have balked at many elements of Commonwealth reform, popular sovereignty and legislative independence were not among them.

Despite the uneven reception of metropolitan reforms, the debates over subjecthood and self-ownership that raged during the Revolution wrought meaningful changes in Virginia's unfree labor system. Virginians abandoned servitude to the colony as a punishment in 1658, perhaps a function of lingering memories of draconian company rule under Dale's Code, but certainly in keeping with contemporaneous developments in Massachusetts as well. As a destination for many transported English bondservants, Virginia practice was also influenced by Commonwealth ideals of servitude. As we have seen, English royalists and criminals transported to the colonies, despite their fears of enslavement, remained persons under law with access to the courts for redress of their grievances. To protect the rights of servants, the Burgesses passed statutes requiring the

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145 Hening, SAL, I: 499-505.
146 Billings, "Some Statutes not in Hening," 130. For the Burgesses' response to Cromwell's death, which again asserted their continued sovereignty in local affairs, see Hening, SAL, 507.
147 Hening, SAL, 459.
registration of all indentures and banned the distribution of headright grants to any masters who could not "prove their title or just right."\textsuperscript{148} Even statutes setting longer terms for Irish servants brought without an indenture set limits on the length of service, and were in keeping with the Commonwealth policy of transportation.\textsuperscript{149} While Virginia planters certainly made extensive use of bound English labor during the Interregnum, all servitude in the colony was to be of limited duration and could only be imposed through consent – all Virginia servants, even the Irish, retained their legal personhood.

Acquisition and use of Native American servants was also altered by Commonwealth reforms, though recognition of separate Indian sovereignty and continued conflict between settlers and local tribes complicated the attempted conversion and assimilation of Virginia's Natives. The settlement treating Chesapeake Natives as strangers under English law continued to hold in Virginia into the 1640s, and relations between settlers and Indians were primarily arranged through treaties. Though the Second Anglo-Powhatan War (1644-1646) proved the instability of these treaties, the settlement of the conflict reinforced the tendency to see Natives as foreign nationals living within English dominions. The articles of peace that ended the war in 1646 stated that Necotowance, the Powhatan chieftain, held his kingdom from "the King's Ma'tie of England," required payment of regular tribute to the English, and defined the boundaries between Powhatan land and the colonial settlements. Both Indians and English were enjoined to respect these new boundaries, and Necotowance agreed to assist in the return of any English servants or African slaves who attempted to escape to Powhatan

\textsuperscript{148} Hening, \textit{VA Statutes}, 444-445.
\textsuperscript{149} Ibid., 411. The statute required six years of labor from transported Irish servants over sixteen years old, and until age 24 for those under sixteen. A later statute of 1658 expanded this time frame to "all aliens," though, as we will see, it may not have applied to newly imported African slaves. See Ibid., 471.
Colonists were prohibited from trade with local natives, especially for weapons or ammunition. Despite numerous peace treaties with local Native Americans, Virginians remained on a decidedly warlike footing.

A treaty relationship could also have its benefits for Natives, however. Virginians were also bound by the terms of these agreements, and the new colonial government established after Virginia's surrender took steps to ensure that Indian treaties were enforced. In 1653, the Burgesses ordered the removal of any English settlers living on Pamunkey or Chickahominy lands, and a year later Northampton County settlers were required to "proceed justly and to have the consent" of local Indians before purchasing more tribal lands. A 1658 statute required that no further English settlers be given land grants along the Rappahannock until "the Indians be first served with...fiftie acres of land for each bowman." The Burgesses worried that continued attempts by colonists to settle on Indian lands were "contrary to justice, and the true intent of the English plantation in this country, whereby the indians might by all just and faire waies be reduced to civility and the true worship of God." To prevent future conflict and, hopefully but rather unrealistically, promote conversion, the assembly confirmed the Indians' right to lands they currently held, prohibited English settlement on Indian lands without tribal consent, and voided all patents "contrary to the sense" of the act. These Natives who retained their separate sovereignty were protected in their rights through treaties, but, as the Burgesses' 1658 acts hinted, some Interregnum Virginians hoped that

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150 SAL, I: 323-326.  
151 Ibid., I: 255.  
152 Ibid., I: 380, 391.  
153 Ibid., I: 457.  
154 Ibid., 467-468.
godly reform would lead to Indian conversion and conditional assimilation as well, as it seemed to be doing in Massachusetts.

This complicated dual policy toward Virginia Natives made the outright enslavement of Indians difficult to justify. Native captives taken in war were certainly liable to be enslaved under traditional European law, but enslaving people who the Commonwealth hoped to convert was bad policy and might well lead to further armed conflict. Indian enslavement would also have run contrary to Commonwealth practice, at least as it was being implemented in John Eliot's 'praying Indian' towns in New England. In Virginia, despite the failure of George Thorpe's Henrico College a generation earlier, the goals of conversion and assimilation still held some potency. Though the legal reform implemented by Bennett and the purged Burgesses left the treaty basis for Native relations relatively unaltered, there were a number significant alterations made to the status of Indians as servants in settler households. The Burgesses had learned of the "perfidious dealing" of many Virginia residents who attempted to "steale, and Conveigh away some...Indians Children" as slaves, to the "great Scandall of christianitye, and of the English nation." Worried that this practice would make "the name of Englishmen odious to [the Natives]," the Burgesses passed an act prohibiting the purchase or sale of Indians. Earlier statutes allowing English settlers to kill any Native they believed to be committing a crime were repealed, requiring legal proof that a Native had committed a felony for the killer to be exonerated.

155 See chapter 1, supra.
157 Hening, SAL, I:415.
A 1656 act further refined Virginia's Indian policy. Acknowledging their complicity in recent conflicts, owing to "our extreame pressures on [the Natives]," the Burgesses declared their new policy for "civilizing them and...making them Christians." Virginia would introduce the Indians to concepts of private property by offering them bounties of livestock in exchange for wolf pelts, which it was hoped the Indians would use in developing settled agriculture, and confirming their legal ownership of tribal lands. To promote the Christianization of Native youth, the Burgesses declared that Virginians would "not use [Native children] as slaves, but do their best to bring them up in Christianity, civility and the knowledge of necessary trades." Financial incentives were offered to those who "really intend the bettering of the children." Another statute passed in 1658 barred the sale or transferal of any Indian children held as servants by English settlers, and stipulated that they be "free and at [their] owne disposall at the age of twenty five yeares." While reformation of Indian policy in Virginia was not as complete or successful as it was in Massachusetts, the changes wrought by Commonwealth reforms still made a visible impact, and always stressed the legal personhood of Indians.

Whether these revolutionary reforms had much impact on African slavery is harder to determine. As had been the case since 1619, African slaves were considered property not persons under law, and rarely appear in Virginia records. Certainly they continued to be bought and sold, rented to smaller planters, and bequeathed in wills, but their absence as persons in courts of law is conspicuous. The overwhelming majority of Virginia's small black population remained enslaved, outside the bounds of subjecthood.

158 Ibid., I:395-396.
159 Ibid., I:455-456.
Some, however, challenged their bondage in ways that clearly resonated with Interregnum Virginians. As in Massachusetts, conversion to Christianity problematized the definition of enslaved people as outsiders subject to the cold logic of the chattel principle. Mihill Gowen, an enslaved African who had converted to Christianity, exploited this opening by having his son William baptized in 1655 – three years later father and son were both emancipated on the grounds that slavery was incompatible with Christianity.\(^{160}\) Elizabth Key, the mixed-race daughter of white planter Thomas Key and one of his enslaved women, gained her freedom in 1655-56. Elizabeth had been bound out by her father in 1636 on a nine year indenture, but was then sold to John Mottrom, a prominent settler in Northumberland County. When Mottrom died in 1655, Elizabeth and her attorney, William Greensted, initiated a suit for her freedom in the county court, arguing that her decent from a free English subject, her Christianity, and the terms of her indenture all made her continued servitude illegal. Though there was some jurisdictional wrangling over the case, in the end Key won her freedom and ended up marrying Greensted.\(^{161}\) Both Ferdinando and Elizabeth Key successfully challenged their bondage and joined the ranks of Virginia’s growing free black population.

This growing population of free Africans illustrates that race, as separate from slavery, had not yet hardened enough to exclude a free Virginia resident from the rights of English subjecthood. Indeed, the 1640s and ’50s are, in many ways, the high water mark of colonial Virginia's free black community. While their numbers remained small,


these Afro-Virginians, most of them former slaves, clung tenaciously to the rights they could claim as English subjects. The presence of this free black community would ultimately prove a serious threat to the continued existence of slavery, and the rights so cherished by Johnson and Longo would soon be revoked. As long as they retained their legal personhood, however, there was nothing in the logic of English law to place free Africans outside the community of subjects, especially not under the relatively broad conceptualization of subjecthood promoted by the Commonwealth.

While the lack of surviving evidence from the period makes a definitive analysis of impact of Commonwealth reforms on Virginia slavery difficult, there are hints in the historical record that the ideological dominance of self-ownership in the revolutionary English empire began to chip away at the legitimacy of property-in-man. A 1658 statute passed in the House of Burgesses classed "all negroes imported whether male or female...however procured" among the tithables to be counted for household taxation. In Virginia legal usage, only persons were counted as tithables -- property was assessed and taxed differently -- and all Africans "however procured" were included under the act, collapsing the distinction between newly imported slaves and the small colonial free black population. The same statute also categorized "negroes imported" under the same terms as "Indian servants," implying that limitations on sale and treatment might have applied to both groups. The interposition of state power into the domestic relations of individual masters – the limits on sale of servants and registration of indentures, or the allowance of servants' legal claims by colonial courts – certainly fit Henry Parker's definition of legal personhood in *Jus Populi*. Even the increased usage of 'servant' as a

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descriptor for bound laborers in Virginia may be significant. Reformers in England and Massachusetts certainly knew the difference between slavery and servitude, and it is not inconceivable that reforming Virginians like Richard Bennett consciously avoided the term 'slave' as well. Language mattered. This fundamental difference between property and person, between slavery and self-ownership, had a real impact on the treatment afforded free Africans, Native Americans, and European servants under law throughout the Anglo-American world.

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Historical change is glacial, in a very tangible sense. Envision a plateau, flat and featureless, being shaped by a glacier. When this massive sheet of ice spreads and retreats, it transforms the natural landscape, carving deep gorges and raising up new moraines. Not every new gorge cuts fully through the plateau, however -- some leave behind a series of incomplete valleys, dead ends, evidence of a transformative force that could not fully shape the earth below it. In much the same way, the terrain of the past is etched deep with the fits and starts of change, the tantalizing remains of what might have been that continue to shape historical change long after their original moment has passed.¹⁶³ The imperial English revolution was one of these moments of unfulfilled historical possibility. What might the English empire have looked like if revolutionary reform were successfully imposed by the Commonwealth state? How would slavery have coexisted with a regime based on a fundamental assumption of self-ownership?

Henry Parker's *Jus Populi* illustrated the anti-slavery potential of English revolutionary ideology, and Massachusetts practice suggests that many colonists hoped to construct a polity based firmly on Commonwealth principles and rooted in the assumption of self-ownership. The fact that these anti-slavery principles were not fully enacted throughout the empire, that they are a historical glacial dead end, should not prevent us from recognizing their significance.

Perhaps if the Commonwealth had endured, the halting reforms underway in Virginia would have taken root. Land usage patterns might have developed that favored New England partible inheritance rather than the development of massive plantations through primogeniture and entail, and agricultural reform efforts might have moved Virginia away from cash crop monoculture. The legal premise of natural freedom and limited servitude that informed the definition of Virginia servants – European, Indian, and perhaps even African – as tithable persons rather than chattel properties might have become dominant in the colony, destabilizing the very foundation of human slavery. The access of Afro-Virginians to subjecthood and the common law courts might have continued, bolstering the position of the colony's free black population. Perhaps a reformed Virginia would have taken steps to regulate participation in the African slave trade, as Massachusetts did in *Smith v. Keyser*, or debate the legitimacy of holding another human as property, as Parliament did in 1659. And perhaps if England itself had been more like New England -- relatively uniform in religious and political views, with the coercive power to enforce magisterial reformation and godly republican rule -- such reform could have been implemented throughout the empire.
Of course this alternate possible history was not to be – the restoration of Charles II to the English imperial throne in 1660 overturned much of the Commonwealth's revolutionary reform program, led to heavy royal and state investment in the Atlantic slave trade, and saw the rise of a new slaveholding West India interest in English politics. By 1688, free Afro-Virginians had lost nearly all the common law rights they traditionally had access to, and African slaves were explicitly defined as property, not persons, under law. It is difficult to imagine the revolutionary Commonwealth, or even the Protectorate state, enacting such measures. Without the Stuart restoration and the creation of the Royal African Company, would the English state have invested so heavily in the slave trade? Would Jamaica or the Carolinas have developed so rapidly into plantation-based slave societies? The construction of a plantation empire based on African slave labor, then, was largely contingent on the uncertain outcomes of political contests back in England, and the reception of a new political settlement in the colonies. In spite of the Stuart counter-revolution, assumptions of self-ownership and the inviolability of basic rights, forged in civil war and regicide, persisted in the minds of many English subjects, and made the debate over the growth of chattel slavery in Restoration England far more contentious than has commonly been recognized.
Chapter III – "A Terrible Master": Slavery and the Human Tragedy of the Stuart Counterrevolution, 1660-1687

The apparently placid surface of the Restoration era belies deep currents of dissatisfaction with the monarchial absolutism of the latter Stuarts and the extreme modes of coercion they mobilized to enforce their vision of English society. As one historian has recently noted, at its heart "Restoration history is the story of human tragedy." This assertion is certainly true of the British Isles, where Charles II ruthlessly tracked down and executed the regicides that had beheaded his father, brutally repressed nonconformists after a brief experiment with religious toleration, and crushed any hint of direct resistance to the throne. Throughout Charles II's three kingdoms, many of the traditional rights of subjects seemed under attack again as the de facto religious tolerance of the Interregnum gave way to new Conformity and Test Acts, as requirements to call regular parliaments were ignored, and as thousands of religious dissenters and political dissidents perished in prison cells or colonial plantation fields. When a new Whig opposition consolidated during the Exclusion Crisis of 1679-1681, they stood not only against the abstract concepts of “tyranny and popery,” but also against the real, concrete human tragedies perpetrated by an increasingly absolute and Catholic-leaning monarchy.1

Nowhere was the human tragedy of the Stuart Restoration more evident, however, than in England's growing empire. The English Atlantic colonies weathered waves of political unrest, repeated rounds of bloody warfare with neighboring Native Americans, and unsettling instances of resistance from bound laborers.\(^2\) The dramatic growth of African slavery, however, was certainly the most shocking development of the age. One of Charles II's first acts after taking the throne was to grant the Company of Royal Adventurers Trading to Africa a new charter, giving them monopoly rights to the Africa trade. Company ships made nearly twice as many slaving voyages in their first decade of operation alone than had been made during the entire Civil War and Interregnum – after being rechartered as the Royal African Company in 1672, the number of voyages undertaken would more than double again in the following decade. All told, English merchants made nearly 650 successful slaving voyages in the Restoration era, delivering well over 160,000 enslaved Africans to the American colonies, primarily in the Caribbean but increasingly on the mainland as well.\(^3\) Considering the relatively tepid engagement of the English state in the slave trade during the Interregnum, this massive

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\(^3\) The TASTD2 lists 86 slaving voyages by English ships in the period 1640-1659. Between 1660, when the Company of Adventurers was chartered, and 1672, when the company was reorganized and rechartered as the Royal African Company, 149 English ships traded for slaves in Africa -- that number would more than triple to 442 voyages over the next sixteen years. Of the 591 English slaving voyages documented in the TASTD2 for the period 1660-1688, only 24 disembarked in the mainland colonies, the vast majority between 1676 and 1688. All but three of these mainland slaving voyages disembarked in Virginia. The 21 ships that landed in Virginia carried at least 4,000 captives into slavery, only 2.5% of the total number of captives carried in the trade. The TASTD2 also likely undercounts slaves acquired through the coastwise trade between the mainland and Caribbean colonies, many of which were unrecorded.
commitment to slavery and the slave trade represents a stunning volte face in imperial policy.\textsuperscript{4} The ownership of persons as property, heretofore of limited importance to the English empire, was “Transmuted into a Vertue” by the restored Stuarts.\textsuperscript{5}

This combination of repressive absolutist policies and increasing reliance on colonial bound labor provoked sustained political and legal debate about the place of slavery and the rights of subjects in English imperial society. As one scholar has recently noted, the “legal-constitutionalist discourse” of Restoration England “opened up [new space] for debate” over the proper place of royal authority in the English empire, and the limits that should be placed on the monarch’s absolute power.\textsuperscript{6} While largely contained by the coercive apparatus of the Restoration state, these debates often threatened to degenerate into outright rebellion – the Fifth Monarchist risings of the early 1660s, a rebellion of Scottish Covenanters in 1679, revelation of an alleged “Popish Plot” to murder the Protestant king in 1676, the organization (and covert militarization) of the Whig opposition during the Exclusion Crisis of 1679-81, the Rye House plot of 1683, Argyle’s and Monmouth’s Rebellions in 1685, and finally, the greatest ‘rebellion’ of them all, the Glorious Revolution of 1688.\textsuperscript{7} At each step along the way English subjects worried that some malign force, whether popish Catholics, fanatical Protestant dissenters, or their own dread sovereign, plotted their reduction to a state of abject slavery. As one commentator worried in 1683, the openly Catholic James, Duke of York, Charles II’s younger brother and heir, with his admiration for French-style absolutism and deep investment in colonial slavery, would be “a terrible master, once he gets all into his

\textsuperscript{4} See Chapter 2, supra for Commonwealth and Protectorate policies regarding slavery and the slave trade.
\textsuperscript{5} Morgan Godwyn, The Negro’s and Indians Advocate... (London, 1680).
\textsuperscript{6} Southcombe and Tapsell, Restoration Politics, 17.
\textsuperscript{7} Harris, Restoration, passim.
hands.” 8 Faced with such obvious danger, English subjects faced a stark choice: resist Stuart absolutism, or become the rightless slaves of an absolute tyrant.

The restored Stuarts’ American empire was no more quiescent. Indeed, one might safely describe the Restoration in the colonies as an age of rebellions. Increasing English encroachments on Native lands sparked King Philip’s War in New England, and conflict with local tribes famously played a major role in Bacon’s Rebellion in Virginia. The masses of indentured laborers and enslaved Africans who marched under Nathaniel Bacon’s standard, burning Jamestown to the ground, were a stark reminder of the tenuous hold colonial masters had over their bound labor force. Perhaps most startling, however, were the well-organized rebellions staged by African slaves. At least 200 Coromantees rose up against their masters in St. Anne’s Parish, Jamaica, in 1673, escaping from bondage to join the growing Maroon community of the island’s leeward highlands. Augmented by further runaways and small-scale rebellions, the Leeward Maroons continued to raid colonial sugar plantations until the English were eventually forced into signing a treaty recognizing the Maroons’ autonomy, though requiring them to return runaway slaves, in 1739. In 1675, plans for a rebellion by recently arrived male slaves on “most of the plantations” in Barbados, apparently in the works for some three years, were uncovered just in time to prevent the uprising. 9 Much as the increasingly absolute power of the Restoration Stuarts provoked dissent and rebellion in England, claims by slave owners to absolute property ownership and absolute mastery, and the apparatus

8 Quoted in Harris, Restoration, 359.
9 For details of the Jamaica and Barbados rebellions, as well as rumors of other slave insurrections in the West Indies, see W. Noel Sainsbury, ed., Calendar of State Papers, Colonial Series: America and West Indies, Preserved in the Public Record Office (London: H. M. Stationary Office, 1893-), IX: 661, 682, 690, 712, 741, 793, 820, 822, 862, 985. [Hereinafter cited as CSPC. All citations are to document numbers.]
constructed to enforce those claims, came under attack from those forced to bear the heavy yoke of bondage.

As one scholar has recently noted, this spate of violent resistance by Native Americans, slaves, and indentured servants provoked a “paranoid” reaction from elite colonists, leading to the adoption of increasingly repressive police laws to prevent further “conspiracies” by hostile Indians and bound laborers.\(^\text{10}\) While the reaction to growing subaltern resistance was certainly severe, emphasizing white settlers’ paranoia occludes the very real threats they faced. Nor were the sources of these threats limited to servants, slaves, and Natives – the increasingly close oversight of the imperial state also threatened to intrude on the liberties of colonial settlers. Freedom of trade, local self-government, and the distinctive patterns of property ownership and ecclesiastical organization that had developed in the first generations of settlement were all now subject to the whim of a monarch who claimed absolute sovereignty over the empire. Of course some colonists, the newly consolidated Virginia gentry or a small but growing number of well-connected Massachusetts merchants for example, benefited tremendously from this imperial arrangement, and looked to the reinvigorated monarchy to protect their interests. Others, like the Massachusetts colonists who chafed at the imposition of royal governance under James II’s Dominion of New England, were not simply being paranoid when they worried about becoming the slaves of a monarch who was personally responsible for the physical enslavement of tens of thousands of Africans – James’ absolutism and consistent support for chattel slavery both flowed from the same ideological wellspring.

\(^{10}\) Stanwood, \textit{Empire Reformed}, passim.
This confluence of factors forced the question of slavery into political debate, calling forth new pro- and antislavery arguments and leading to the first explicit sanction for slave property in English law. *Butts v. Penny*, heard by the Court of King's Bench in 1677, recognized that slaves were a form of "Merchandise" sanctioned by "the custom of merchants," and were therefore protected as property under English law. Antislavery tendencies forged in the Interregnum were still present, however, and informed the legal argument against the total commodification of enslaved persons. Slave property might be protected as "merchandize," as a commodity exchanged in an international market, but baptism would "Infranchise" a slave in England, bringing him or her under the protection of the law and into the community of subjects.11 Many of the underlying premises of this antislavery argument drew on aspects of Whig anti-absolutism.12 Although few figures in the Whig opposition openly expressed uneasiness with the growing slave trade or colonial slavery, their emphasis on the fundamental equality of subjects and open access to the protection of the law could also be used to revive rightless slaves from social

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death. Despite the growth of colonial slavery, some believed that English air remained too pure for slaves to breathe.

The colonies, of course, were a different matter. Virginia planters must have applauded the court’s decision in *Butts v. Penny* that slaves were a protected form of property. They desperately needed more laborers, and hoped that an increased English slave trade would solve this problem. Besides, they had only recently passed a statute guaranteeing that baptism would not free a slave, precluding the enfranchisement the few Africans who had somehow managed to be baptized. Virginia statute, however, also classified slaves as a special mixed form of property, more closely akin to real estate than chattels. Would English law reach into Virginia and override this local statute? And what of Massachusetts, with its peculiar local form of slavery – did *Butts v. Penny* force Bay Colonists to recognize their slaves as "merchandize," or would local regulations defining slaves as persons before the law continue to hold? If *quo warranto* proceedings to recall the Massachusetts charter, attempts at restructuring of land ownership patterns, and the imposition of royal governance through the Dominion of New England are any indicator, Bay Colonists certainly had cause to fear for the future of their peculiar settlement. The future of slavery in the American colonies hinged on the outcome of

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13 Orlando Patterson, *Slavery and Social Death: A Comparative Study* (Cambridge, MA: Harvard University Press, 1982).

continuing legal and jurisdictional wrangling and the array of political forces in both the center and periphery of the Restoration empire.

Restoration-era policies touching slavery and subjecthood in England and its growing empire were received and implemented very differently in Virginia and Massachusetts. Debates over subjecthood and the rights of English subjects under late Stuart absolutism had real implications for the political construction of slavery in the colonies, and positions honed in the continuing battle over absolutism also shaped arguments for and against chattel slavery. In Virginia, a spate of legislation passed immediately following the Restoration defined slaves as a special form of property and systematically closed off the possibility of legal personhood for Afro-Virginians, firmly riveting the chains of slavery on black laborers. In Massachusetts however, despite increasing participation in the slave trade and a growing black population, Bay Colonists were hesitant to embrace chattel slavery, and the evidence suggests that slaves continued to be treated as persons before the law. Though driven underground by the Stuarts' repressive tactics and the overwhelming political momentum of the Tory Reaction, concepts of natural liberty and consent forged in civil war and revolution, and now linked to the Whig critique of royal absolutism, continued to inform debates about the growth of slavery, even in the midst of the human tragedy of the Restoration.

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On his 30th birthday, 29 March 1660, Charles II ascended the throne his father had so ingloriously lost eleven years earlier, and English subjects turned out in droves to

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celebrate this symbolic rebirth of monarchy. Buoyed by this reception, Charles quickly moved to reassert the centrality of monarchy to the English state. The political radicalism so prevalent during the Civil Wars and Interregnum was driven underground by a combination of harsh repression, deft political maneuvering, and a new campaign to mobilize popular support by Charles and his Tory supporters.\textsuperscript{16} Though Charles was briefly able to effectively reassert royal absolutism throughout his dominions, particularly in the first decade of his rule, opposition to absolute monarchy remained a potent political force, especially in Scotland, Ireland, and the American colonies.\textsuperscript{17} When James, Duke of York, Charles' brother and heir, publicly converted to Catholicism in 1673, an emerging 'Country' faction argued for his exclusion from the royal succession, and the Whig opposition that emerged from the Exclusion Crisis of 1679-1681 continued to argue for limitations on monarchial power and guarantees for the basic rights of English subjects throughout the Restoration era.\textsuperscript{18}

Despite continued opposition to royal absolutism and the fear during times of crisis that "'41 was come again," Charles II never faced the same level of opposition that his father had. Much of this apparent quiescence may be attributed to the political terms upon which the Stuart Restoration was predicated. Many Britons were placated by


\textsuperscript{17} Again, the recent work of Tim Harris is crucial in restoring the “three kingdoms” dimension to the historiography of the Restoration. See Harris, \textit{Restoration}, 20-32 and passim. See also Ronald Hutton, \textit{Charles II: King of England, Scotland, and Ireland} (New York: Oxford University Press, 1989).

Charles’ Declaration of Breda, made before his official return to the throne, which, while theoretically maintaining the absolute nature of English monarchy, promised that the restored king would rule according to English law. To more radical English subjects, Charles promised indemnities for Interregnum treasons and a new ecclesiastical settlement that would comprehend loyal dissenters. Constitutionally, the Stuart Restoration made a handful of minor concessions to revolutionary Parliamentarians, including an act requiring triennial meetings of Parliament and another placing restrictions on the use of prerogative courts. These concessions aside, England’s constitutional clock was wound back to 1641 – officially, the interregnum had never happened. This arrangement had the virtue of allowing English subjects of various political stripes to work toward reconciliation without recrimination, but left unaddressed many of the basic structural issues that had torn the kingdoms asunder a generation earlier.

Despite the initial quiescence of the restoration, many of Charles’ promises soon proved hollow. Despite hopes of a more general amnesty and the relatively generous terms of the Indemnity Act, the brutal crackdown on Interregnum radicals quickly proved that while England may have officially returned to the status quo ante bellum, the memories of nearly two decades of violent civil war could not easily be erased. Oliver Cromwell’s corpse was disinterred and mutilated – the former Lord Protector’s rotting head gazed over Westminster hall from atop a spike for the next 25 years.19 Former Massachusetts divine Hugh Peter, despite his refusal to sign Charles I’s death warrant and open uneasiness with the king’s beheading, was executed for treason and regicide in

19 Harris, Restoration, 48; Sharpe, Rebranding Rule, chapter 3.
October 1660. Even moderates who had initially welcomed the Restoration quickly found much to dislike about the Stuart monarchy. Hopes of a broad church settlement that would comprehend most Protestant sects were dashed by the so-called Clarendon Code which reinstated Anglican uniformity, banned dissenting conventicles, and required all magistrates and freemen to take an oath of allegiance and supremacy. Though the Triennial Parliaments Act was honored in the breach, Charles proved more than willing to prorogue and dissolve his great council when he could not guarantee its compliance to the royal will. Furthermore, alliance with the Catholic French against the Reformed Dutch, and the open conversion of James, Duke of York to the church of Rome, exacerbated persistent English fears about a drift to popery, tyranny, and slavery.

When a nascent Whig coalition came together to protest James’ claims to the throne, much of the political impetus behind this Exclusion Crisis hinged on a redefinition of Englishness. Adding to the discourse of “free-born” Englishness that had emerged during the Civil Wars, proponents of James’ exclusion argued that England’s innate love of liberty precluded Catholics, particularly French-style absolutist Catholics like the Duke of York, from ascending the English throne. Linked to traditions of English freedom, anti-Catholicism became a potent political weapon that could be used to narrow the scope of the English imperial subjecthood. This tendency, however, also opened up new understandings of subjecthood itself. Given the prominence of dissenters among the early Whigs and their supporters, a narrow definition of the English nation as

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21 Harris, *Restoration*, 52-56.
adherents to the Anglican Church was deeply problematic, as illustrated by repeated calls for increased religious tolerance for all Protestants. Furthermore, allied to a growing Protestant International, Britons came to see themselves as part of a broader anti-Catholic bloc, committed to blunting France’s march toward universal monarchy. In such a context, with Protestant refugees from the Continent pouring into the British Isles, the narrow definition of subjecthood as applicable only to those of English birth became increasingly difficult to support. In place of these older, narrow definitions, a more capacious understanding of Englishness defined by access to basic legal rights began to emerge. When linked to the political opposition against restored Stuart absolutism, this changing ideal of subjecthood had the potential to redraw the boundaries of the English nation. At its most comprehensive, this new definition of English subjecthood might even include enslaved people.

This, of course, was exactly what the restored Stuarts feared. Without a narrow definition of subjecthood and limits on access to basic rights, absolutism simply could not function effectively. To meet the emergent Whig challenge, political theorists worked to bolster the legitimacy of absolute monarchy. As absolutist theorists like Robert Filmer and Thomas Hobbes argued, an absolute monarchy was the only political system that could contain the violent, capricious passions of the state of nature within the bounds of civil society. In addition, at least to many supporters of the Stuart regime, the divine origin of European monarchy conferred absolute, theoretically indivisible sovereignty on the king. In practice, of course, the monarch was incapable of directly overseeing his dominions, and so the practical application of absolute rule fell to the jurists, magistrates, and heads-of-household who ruled in loco parentis over the mass of the population. As
literary scholar Michael McKeon has argued, this “devolution of absolutism” from the monarch to more and more subjects over the course of the 17th and 18th centuries shaped modern conceptions of property, interiority, and family structure.\(^{24}\) In the context of Stuart absolutism, this devolutionary process also enabled increasingly absolute claims of authority and dominion by representatives of the absolute state. Ormonde and Tyrconnell in Ireland, like Berkeley and Andros in the American colonies, claimed grants of authority from the king’s sovereign prerogative in their often bloody attempts to bring the dominions into line with the Stuarts’ absolute vision.\(^{25}\) For slave owners, this devolution of absolute sovereignty enabled and legitimated their claims of absolute dominion over the enslaved. Slaves, as uncivilized heathens outside the bounds of civil society, were defined as property, not persons, and as such were subject to the absolute control of petty plantation monarchs. *Imperium in imperio* was not particularly problematic in this instance – slave owners merely enacted the divine and indivisible absolute sovereignty of their monarch in its basest form.

Theoretical questions aside, slavery and the slave trade became spectacularly profitable investments in the late-17th century as the West Indian plantation complex matured. This economic potential quickly drew the attention of the Restored Stuarts. When domestic revenue extraction proved politically difficult, Charles moved to tap the massive economic potential of his American empire through prerogative taxation on colonial trade. The passage of the first Navigation Acts during the Interregnum had illustrated the economic potential of an increasingly centralized imperial structure, and


\(^{25}\) Harris, *Restoration*, 420-425.
Charles quickly came to realize that robust imperial policies could be made to bolster royal absolutism and economic clout at home. Through centralized control of imperial trade, the Restoration state could extract revenue from trade without having to rely on domestic taxation and vexatious Parliaments. Unlike Charles I and the series of regimes that succeeded him, the reorganized empire gave Charles II a substantial source of revenue and, thus, substantial room for political maneuver.

A productive English empire, then, was a crucial fiscal asset to the monarchy during the Restoration. Charles’ attempts at imperial centralization aimed at extracting revenue from his American colonies, but in order to maximize the empire’s profitability continued shortages of labor in the colonies had to be addressed. As we have seen, Charles continued the Interregnum policy of transportation and bond servitude for English dissidents and political prisoners but found, much as the Commonwealth and Protectorate regimes had, that transportation could neither stem the tide of political opposition nor sate the demand for plantation labor.26 Another source of bound labor was needed and, increasingly over the course of the Restoration, African slaves were used to fill this void. The relatively meager English slave trade of the 1640s and ‘50s, however, had proved insufficient to meet colonial demand – state action would be necessary to guarantee a sufficient bound labor supply and, thus, a steady flow of customs and excise duties into the royal exchequer.

Charles immediately moved to provide just such support. One of his first acts as

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king was to charter the joint stock Company of Royal Adventurers Trading to Africa, granting them exclusive trading privileges along the African coast. The royal family was the largest single investor in the Company – among those listed as shareholders in 1663 were “Royal Consort Queen Katherine, Mary the Queen, our mother, our dearest brother James, Duke of York, our dearest sister Henrietta Maria, Duchess of Orleans, [and] Prince Rupert, Duke of Buckingham.”

The Company was an immediate economic success. Its initial capital stock of £120,000 more than doubled to an estimated £273,807 by 1665. The company’s president, James, Duke of York, took a special interest in the day-to-day management of the slave trade. Under his guidance, slaving voyages rose to well over 40 per annum, carrying at least £160,000 in exports and “furnish[ing] all the plantations with negro servants.”

The late Stuart monarchy provided legal and political support for colonial slavery in other ways as well. In 1664, the newly created Council for Foreign Plantations recognized that slaves, who they described as “perpetual servants,” were “the most useful appurtenances of a Plantation” and pledged their support for the growing English slave trade. The Privy Council regularly accepted and acted on petitions from the Company of Adventurers and its successor, the Royal African Company, reaffirming the Company’s monopoly privileges and issuing orders against independent merchants. In 1677, the Privy Council declared that slaves would be classified as commodities under

27 CSPC, V: 408.
28 Ibid, V: 618. See also TASTD2 for the marked increase in English slaving after 1660.
30 CSPC, V: 414, 545, 583, 756, 902, 1111, 1164, 1294, 1346, 1364, 1685, 1750. See also Pettigrew, Freedom’s Debt, 22-30.
the terms of the Navigation Acts, throwing the full weight of the royal prerogative behind
the growing slave trade.\textsuperscript{31} Still, it appears that the Privy Council remained somewhat
reticent in extending this commodification of slaves to English soil. A 1679 order in
Council declared that, while slaves were certainly considered property for purposes of
trade, Africans were not to be counted or taxed like other commodities brought into
England.\textsuperscript{32} While recognizing the existence of slave property in the empire, orders
issuing from the Privy Council and Council for Foreign Plantations did not explicitly
extend this property right to England itself, a decision that would have dramatic
consequences for the future development of imperial slave law.

Given the explosive growth of the slave trade, however, it was only a matter of
time before questions of slave property ownership made their way into the English courts,
where royally appointed justices handed down a series of proslavery decisions. The first
English common law decision regarding slavery was handed down in June 1677 when
\textit{Butts v. Penny} came before the Court of King’s Bench at Westminster Hall.\textsuperscript{33} At issue
were “10 Negroes and a half” purchased by a Mr. Butts in the West Indies.\textsuperscript{34} Somehow,

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\textsuperscript{32} Seymour Drescher, \textit{Capitalism and Antislavery: British Mobilization in Comparative Perspective}, (New
York: Oxford University Press, 1987), 27, n15. Jonathan Bush has argued that this conciliar decision
worked only because it was “relatively infrequent that Africans, unlike tobacco, sugar, and other articles
of tropical trade, were brought into England,” a point that his own argument, and much recent
scholarship on the presence of Africans in England, seems to contradict. In the end, Bush argues that
conciliar statements about slave property were “revenue ruling[s] with almost no social implications.”
\textsuperscript{33} An early version of my argument about \textit{Butts v. Penny} was presented at the CUNY Graduate Student
Conference in May 2013 and the Council for New York State History annual conference in
Cooperstown, NY in June 2013. I am grateful to my fellow panelists and conference attendees for their
valuable feedback and critique.
\textsuperscript{34} 3 Keble 785 (June 1677). The other extant report of \textit{Butts} from Creswell Levinz lists the number of
slaves at issue as 100, but this is almost certainly a transcription error. See 2 Levinz 201 (Trin. 1677).
Young enslaved children were often listed as \(\frac{1}{2}\) in slave trading records, and it is relatively easy to
mistake \(\frac{1}{2}\) as rendered in late 17th century orthography for a zero, thus leading to Levinz’s ”100
Negroes.” See Brewer, “Twelve Judges,” on the likelihood of this misreading. See also the excerpted
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these Africans found their way into the hands of a Mr. Penny, who refused their return to Butts. Butts brought an action in trover, a common law writ seeking compensation for improperly seized chattel properties, in hope of recovering the value of his lost slaves. As proof that he had “a property in” his 10 ½ Africans, counsel for Butts argued that he had “bought [them], and was in possession of them until the Defendant took them.” They had been purchased as slaves, as property, and Butts’ uninterrupted possession was offered as sufficient proof of ownership. Besides, “the Negroes were Infidels, and the Subjects of an Infidel Prince, and are usually bought and sold in America as Merchandise.” As heathens, outside the protections of Christian baptism and the rights of the English subject, these Africans were classed as “Merchandise,” chattel property, and recognized as such by the “Custom of Merchants.” Purchased and held as chattels, trover must lie for African slaves.36

A Mr. Thompson, solicitor for Penny, countered with a simple and straightforward position: “there could be no Property in the Person of a Man sufficient to maintain Trover,” citing as precedent the eminent Sir Edward Coke’s assertion, in his Commentaries upon Littleton, “That no Property could be in Villains but by Compact or Conquest.”37 It might be possible to have some form of property in man, Thompson argued, but the property relation would be limited by the common law of villeinage, and villeins were not the absolute property of their master. They retained access to the king’s justice, they could marry, and they were not subject to the unlimited physical power of

36 2 Levinz 201 (Trin. 1677).
37 Ibid.
their master. In short, villeins were considered *people* under the law. Coke's assertion that villeinage was essentially a contractual relation – a lord's property in his villeins originated through "Compact" – implied that an English subject's self-ownership could only be limited by their own consent. Even then, villeins were tied legally to a landed estate and were not saleable as chattels. In other words, villeinage implied the ownership of a person's labor output, not their person, and villeins remained legal persons, subjects, under the law.38

Thompson’s argument, then, was simple but powerful – villeinage was the closest thing to property-in-man sanctioned by English law; the Africans at issue were clearly not villeins; therefore Butts could have no property in them. Besides villeinage as an institution had, for all intents and purposes, been dead for nearly a century. Thompson also addressed the international norm of enslaving non-Christians, arguing that the slaves in question should "go to [an] administrator until they become Christians; and thereby they are infranchized."39 Here Thompson acknowledged the traditional link in European international law between heathenism and liability to enslavement but also, in a crucial turn, reaffirmed the emancipatory power of Christianity and English air. The implication of these arguments was clear – property in man, the essence of slavery, could not exist under English common law.

Thompson’s argument, however, did not carry the day. The justices of King’s Bench, led by the eminent Sir Richard Raynsford, Chief Justice, found for the plaintiff, Butts, in a special verdict. Raynsford, a confirmed royalist and former MP in the

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39 3 Keble 785 (June 1677).
Convention and Cavalier Parliaments, handed down a decision that must have pleased
Charles II – no small matter as Raynsford held his seat as Chief Justice in bene placio, at
the king’s pleasure. Accounts of the court’s decision in Butts vary, but essentially
Raynsford and his fellow justices agreed: “there might be a Property in [the Africans]
sufficient to maintain Trover.” Since Africans were “bought and sold among Merchants,
so [they are] Merchandise, and also being Infidels,” the slaves were “by usage tanquam
bona [as goods].” This decision seems to confirm precisely what generations of
historians have taken as received wisdom: slaves were classified as property under
English law, legally equivalent to any other chattels, and ownership of this peculiar form
of property was protected by English common law courts.

Yet upon further inspection the decision in Butts v. Penny becomes far less
straightforward. Both extant reports of Butts register a degree of ambivalence on the part
of the king’s justices. Creswell Levinz’s account records the court’s decision that “there
might be a Property in [slaves] sufficient to maintain Trover.” This uncertainty is also
reflected in the qualification of the court’s verdict. The judgment was registered “for the
Plaintiff, nisi Causa, this Term.” Nisi Causa was a juridical qualification to allow for
new arguments to be presented by the defendant – the verdict would stand unless cause
was shown to change it within the court’s term. Apparently cause was not found to

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41 2 Levinz 201 (Trin. 1677). For interpretations stressing the imperial reach of Butts v. Penny and arguing
for its applicability in England itself, see A. Leon Higginbotham, In the Matter of Color: Race & the
Bush, “Free to Enslave,” 441-442; Van Cleve, “‘Somerset’s Case’ and its Antecedents,” 614-616; Imtiaz
Habib, Black Lives in the English Archives: Imprints of the Invisible (Burlington, VT: Ashgate, 2008),
183-187.
42 2 Levinz 201 (Trin. 1677). My emphasis.
change the verdict, and the fate of the slaves at issue, in the end, is unknown – Butts, Penny, and the disputed African slaves are not mentioned again in the record.

Regardless of the specific outcome for any particular party to the case, however, the court’s definition of the slaves as “Merchandize” hints at another interesting qualification. Slaves might be considered chattels for purposes of trade – it was, after all the “custom of merchants” that seems to have swayed the King’s Bench – but their status within any specific jurisdiction was left unclear by the court’s decision. It was, after all, the slave trade that most directly touched the royal interest. As long as marketable commodities continued to flow from the colonies, augmenting the royal revenue through customs and excise, the crown seems not to have cared much about the specific legal status of bound laborers in any particular colonial jurisdiction. As long as the court’s decision greased the wheels of imperial commerce, Charles would be pleased.

Furthermore, the (admittedly brief) statement of the facts of the case does not specify where the slaves in question were held at the time of trial. If they were in a colonial jurisdiction, which seems likely, then the lex loci of that particular colony would determine their ultimate status, not the “custom of merchants.”44 To be sure, all English colonies had legalized some form of slavery by 1677 but, as we have seen, broad variation existed in the precise definition of slaves as property or persons under law in individual colonies.

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44 Most analyses of Butts assume that the slaves in question were held in Barbados, which is entirely likely given the massive influx of enslaved Africans to Barbadian sugar plantations in this period. The extant case reports, however, do not specify the location of the slaves in question, merely noting that Butts “bought” them in the “West Indies.” None of the extant historiography on Butts v. Penny sufficiently grapples with the implications of this jurisdictional question. In fact one scholar has recently claimed that Butts made slaves a legally protected form of property not only in the colonies, but in England itself as well. See Habib, Black Lives, 186-87.
In England itself, the significance of *Butts* is even less clear – defining slaves as “merchandize” for purposes of trade did *not* necessitate a continuation of that property status in English air, as the Privy Council orders discussed above illustrate. The logic behind this jurisdictional division was clear – unlike in the colonies, in England a master might own the *labor* of a slave or servant, but not his or her *person*. Under the relatively inclusive vision of subjecthood still dominant in England at the time, all persons were understood to have at least basic access to the king’s protection so long as they met the dual qualifications of Christianity and allegiance, qualifications which defined them as persons under the law. This is precisely the logic Thompson relied on in his antislavery argument about baptism and enfranchisement. To be sure, this understanding of slavery was fundamentally challenged by English participation in the slave trade and the reliance of the colonial plantation economy on bound labor, but the presence of Thompson’s argument illustrates that, in spite of the Restoration monarchy’s commitment to African slavery, anti-slavery tendencies had not completely disappeared.

In addition, the usage of *trover* in disputes over slaves rather than writs of *replevin*, in which an owner sought the actual return of specific chattels, provides further insight into both the legal rights afforded to masters and the lived reality of enslavement. Butts’ decision to initiate his suit with a writ of trover may have been an acknowledgement that, as commodities in a lucrative Atlantic market, the slaves in question had likely already been sold off or worked to death in a West Indian cane field, and could not be returned without great personal cost and disruption to the imperial economy. Trover perfectly suited the legal assumption that slaves were interchangeable commodities, not persons, under law – witness the designation of the enslaved child at
issue in *Butts* as “½” for example. One can also imagine this usage of *trover* redounding to the benefit of enslaved persons, however. Were a slave to be improperly taken, or were he or she to abscond from service, and somehow become free, perhaps by reaching English soil, actions in *trover* would guarantee compensation for the former owner but not the return of the specific slave in question to bondage, as a *replevin* would require. Though recognizing their status as chattel properties, the use of *trover* also implicitly acknowledged that slaves retained human agency.\(^{45}\)

In a legal world where the substance of justice was embodied in the procedures of its administration, the specific writs or forms of action used to initiate suits mattered greatly.\(^{46}\) The use of *trover* to initiate suits over slaves was certainly the norm in late Stuart courts but, as *Sir Thomas Grantham’s Case* (1687) illustrates, the English common law writ system could also, even if inadvertently, recognize the humanity of colonial bound laborers. Sir Thomas Grantham, a naval officer and tobacco trader who helped put down Bacon’s Rebellion in Virginia before establishing an English colonial toehold at

\(^{45}\) Use of trover to gain compensation for slave property also appears in *Noel v. Robinson* (1680-1687), which was heard repeatedly in Chancery by Lords Chancellor Nottingham and Jeffreys. The case was essentially over whether or not colonial real estate, in this case a moiety in a Barbados sugar plantation, could be attached for debts contracted in England, with the court, in the end, deciding in the affirmative. Typically under English common law, real property was not liable to seizure for debt, guaranteeing the integrity of landed estates. *Noel v. Robinson* has typically attracted attention from legal scholars interested in questions of land ownership, but has been generally neglected by historians of slavery. At some point during the proceedings in Chancery, the defendant, Robinson, was advised to bring a separate action in *trover* to gain compensation for slaves attached to the estate in question – slaves were defined as a form of real property in Barbados at this time – and he obtained judgment for “the fourth part of a Negro.” See 1 Vern. 90; 23 E.R. 334. Because *Noel v. Robinson* was heard in equity rather than under common law I have omitted a full discussion of the case, but it does illustrate the increasing use of *trover* writs in cases concerning slave property, and the tendency of English equity courts to favor the economic interests of plantation owners over the rigorous application of common law principles. The question of whether colonial estates would be subject to attachment for English debts will be considered more fully below. See Chapter 5, *infra*.

\(^{46}\) The distinction between “procedural” and “substantive” due process is a relatively recent innovation. 17th century English subjects would have understood the specific procedural writs used to initiate suits as embodying the substance of justice. See Matthew J. Franck, “What Happened to the Due Process Clause in the *Dred Scott* Case?: The Continuing Confusion over ‘Substance’ versus ‘Process’,” *American Political Thought* vol. 4, no. 1 (Winter, 2015): 120-148.
Mumbai, “bought a monster in the Indies” – a young man named Shackshoon with “the perfect shape of a child growing out of his breast.” Grantham brought his Indian captive to England and “exposed [him] to the sight of people for profit.” At some point, the young man was baptized and “detained from his master.” Grantham’s Indian “monster,” it seems, had sympathetic English allies who hoped to end his public exploitation. Sir Thomas, however, was unwilling to let such a prized possession go without a fight and brought a writ de homine replegiando in the Court of Common Pleas. A local sheriff executed the writ and “replevied the body,” returning the unfortunate young man to his master, but did not include an acknowledgement of Grantham’s proprietary interest in his official return. It was this technical question of usage that brought Grantham’s Case before the Court of Common Pleas, where Lord Chief Justice Edward Herbert, a staunch royalist who would soon flee the country with James II after the Glorious Revolution, handed down the court’s decision. The sheriff was ordered to redraft his return to explicitly affirm that “Sir Thomas claimed a property” in the body of his Indian “monster.”

At first glance, Grantham’s Case once again illustrates the commitment of the English legal system to the property rights of masters. The use of homine replegiando to initiate suit, however, does not sit easily with this analysis. Homine replegiando, literally ‘man in distress,’ was a legal writ similar to habeas corpus, most commonly used to bring a person held in prison or by another private subject before the court. In this

47 3 Mod. 120, (January 1687). It is most likely that Grantham purchased the physically deformed man while in India, not the West Indies. All subsequent quotations from Grantham’s Case draw from this same source.

48 Campbell, Lives of the Chief Justices, 80-94.

49 Baker, Introduction, 471-472. Homine replegiando was largely supplanted by use of habeas corpus writs in the 18th century, likely because of the increasing political relevance of habeas writs during and after the Glorious Revolution, but both writs clearly assume the legal humanity of the detained person in
sense, and especially in comparison to the rising use of *trover* in cases touching slave property, the use of *hominem replegiando* in *Grantham’s Case* implied recognition of the humanity of Grantham’s Indian “monster.” It is likely that this was the how the English allies who baptized and protected the young man viewed the situation – Solicitor Thompson had argued in *Butts v. Penny* that Christianity would “Infranchise” slaves, and later anti-slavery activists would certainly turn to forms of action like *hominem replegiando* and *habeas corpus* to challenge property-in-man. Though in this specific case the person in question was returned to his master, the court did not rule that Grantham’s “monster” was a slave. The property right Sir Thomas claimed was in the *labor* value of a legal *person*, in this case the public display of a physical deformity for profit, not in the person himself.\(^5\) Clearly this was an exploitative employment relation, but Grantham’s Indian “monster” remained a person under law who, at least in theory, could expect state intervention to protect his basic rights as a Christian and an English subject.

Perhaps the most stinging criticism of Restoration-era colonial slavery, and obliquely of late Stuart absolutism, came from Morgan Godwyn, an Anglican minister who spent time in Barbados in the late 1670s. Godwyn’s 1680 treatise *The Negro’s and Indian’s Advocate* offered a clear and cogent defense of the humanity of African slaves, called for their conversion to Christianity, and asked that the English state limit the power of masters over their slaves and facilitate conversion to Christianity. The *Negro’s and Indian’s Advocate* also sheds light on new pro-slavery arguments denying even the basic

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\(^5\) Cf. Brewer, “Twelve Judges”.
humanity of slaves, arguments that appear to have emerged for the first time during the Restoration.⁵¹ Colonial slave owners, Godwyn tells us, subscribed to the “disingenuous and unmanly Position” that “the Negro’s though in their Figure they carry some resemblances of Manhood, yet are indeed no Men.”⁵² These “wild Fancies and absurd Positions” allowed masters to argue for “their Negro’s Brutality; justifie their reduction of them under Bondage; disable them from all Right and Claims, even to Religion it self; pronounce them Reprobates, and upon a sudden (with greater speed and cunning than either the nimblest Jugler, or Witch) transmute them into whatsoever substance the exigence of their wild reasonings shall drive them to.”⁵³

The motivation for the planters’ actions was clear – they knew “no other God but Money, nor Religion but Profit.” Nor was this spirit isolated to Barbados. Godwyn claimed that individual economic gain had become the “most operative and universally owned Principle...of the whole Plantations.”⁵⁴ The main objection Godwyn encountered when trying to convert slaves to Christianity was that it would be “destructive to [the planters’] Interest, tending to no less Mischief than the overthrow of their Estates, and the ruine of their Lives, threatening even the utter Subversion of the Island.” Clearly, despite the King’s Bench ruling in Butts v. Penny and colonial laws decoupling Christianity and emancipation, planters still worried that baptism would imply legal personhood, limiting

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⁵¹ The early use of slave labor in the colonies, as discussed above, provoked little in the way of explicit defense for the institution, likely because most English masters simply assumed that their slaves were a legitimate and legal form of property. The pro-slavery arguments discussed below were formulated clearly for the first time during the Restoration, in response to the continued articulation of Interregnum-era anti-slavery arguments stressing importance of natural liberty and broad access to basic rights.

⁵² Godwyn, Negro’s and Indian’s Advocate, 12, 3.

⁵³ Ibid., 14-15.

⁵⁴ Ibid., 80-81. On early modern critique of acquisitive capitalism more broadly, and the ways in which individual wealth was transformed into a virtue, see Albert O. Hirschman, The Passions and the Interests: Political Arguments for Capitalism before Its Triumph (Princeton, NJ: Princeton University Press, 1977).
their ability to extract labor from their African slaves. Worse yet, Godwyn complained, the English state was actively supporting the dehumanization and continued heathenism of Africans. Making the linkage between slavery and absolutism explicit, Godwyn leveled a scathing critique aimed in equal parts at colonial planters and the domestic policies of the Stuarts. The connection of the Stuart court to colonial slavery led the monarchy to extend its absolute power “even...to the Lives and Fortunes of Freemen, whom (no less than slaves) they can without scruple divest of all Right...And no wonder that they who hold and practice such Principles concerning Freemen, should prove no less fierce sticklers against the Right of Slaves.”55 Were this tendency toward absolute, arbitrary power to continue, “all Subjects and subordinate Governors would be Men but in part; but yet by so much the more, by how much they approached nearer to Absoluteness. And in all the Grand Seignior’s spacious Domains, where there are none but Slaves, there would not be so much as one Man besides himself; not excepting the very Christians. The evil consequences of which Belief, the Authors thereof may sooner feel, than they are willing to understand or see.”56 Prophetic words indeed.

The result of this coordinated imperial choice to define Africans out of legal humanity, Godwyn argued, was increasingly inhumane treatment from masters. The definition of slaves as property rather than persons allowed masters a “two-fold Use, first to Brutifie them; and...to deprive them of all both Temporal and Spiritual Rights, which their Manhood, notwithstanding their being Slaves, would otherwise infer.”57 As we will see, these two intellectual moves – the definition of slaves as brutes, the legal equivalent

55 Godwyn, Negro’s and Indian’s Advocate, 68-69.
56 Ibid., 31.
57 Ibid., 20.
of domesticated animals, and the removal of all access to rights – map perfectly onto the construction of Virginia slave law during the Restoration. Without access to these rights, enslaved people had no way to legally resist the arbitrary brutality of their absolute masters. It was this “two-fold Use” that allowed a master to starve or beat their slaves to death – if the slave were defined as a legal person, such acts would make the master a “Murtherer, and amongst more vertuous Christians, [he] would certainly be Arraigned for one.”58 It was this definition that reduced the holy institution of marriage to “direct Fornication”; that accounted for so many of the mixed-race children conspicuous in planters’ households; that allowed for the use of brutal instruments of torture on enslaved bodies.59 All of this inhuman brutality, Godwyn argued, was “an effect...of their believing Negro’s to be Brutes.”60

The solution was clear – Englishmen must reaffirm “the Negro’s Humanity, and to shew that neither their Complexion nor Bondage, Descent nor country, can be any impediment thereto.”61 Much as Henry Parker had done during Interregnum debates over slavery, Godwyn made a clear distinction between legitimate servitude and the illegitimate concept of property-in-man.62 Taking aim at the first element of the slave owners’ “two-fold Use,” Godwyn flatly denied “that Servitude should be attended with such dismal effects, as of Men to transform them into Brutes.”63 In Godwyn’s analysis, the concept that humans could be defined as “beasts,” “brutes,” or “Cattells,” was ridiculous. It was obvious that Africans, equally with all other humans, were “endued

58 Ibid., 78-79.
59 Ibid., 37. Clearly, the English language did not need to wait for Equiano, Garrison, Douglass, or Stowe to produce a shockingly graphic portrayal of the brutality of slavery.
60 Godwyn, Negro’s and Indians Advocate, 82.
61 Ibid., preface [n.p.].
62 For Parker and the Interregnum debate over slavery, see Chapter 2, supra.
63 Godwyn, Negro’s and Indians Advocate, 50.
with a reasonable and immortal Soul, which alone constitutes him a Man.” Without this basic human trait, Africans “could neither be subject to Laws or Discipline, nor capable of Rewards or Punishments separated, a greges brutorum...Above whom he is only advanced by that Prerogative of Reason implanted in his Soul.”64 Why else would masters place slaves as “Governours and overseers” on their own plantations?65 How else could Africans have “arrived to an ability of Understanding, and discoursing in English equal with most of our own People[?]”66 “How should they otherwise be capable of Trades, and other no less Manly imployments...or shew so much Discretion in management of Business; eminent in divers of them...were they not truly Men?”67 Of course Africans, like English subjects, might be legally reduced to some form of servitude, but nothing could deprive them “of that Right which we naturally have to be ranked within the Degree and Species of Men.”68

Thus, enslaved Africans remained human and as such their “Servitude is no such forfeiture of Right, but that a Slave hath as good a plea and just claim to Necessaries, both for his Soul and Body, as his Master hath to his strength and industry in those Works, about which he is imploied.”69 Echoing Henry Parker’s 1641 tract Jus Populi, Godwyn called on the English state to intervene in and regulate the master/slave relation. He hoped “the Government at Home” might make “some wholesome and good Law” both to check the “Inhumanities of the wrankest kind” perpetrated by slave owners, and to guarantee enslaved Africans’ access to Christian baptism and education. The ancient

64 Ibid., 10-11. Note Godwyn’s emphasis on Africans as “reasonable,” anticipating the Enlightenment emphasis on rationality as the basis of humanity.
65 Ibid., 13.
66 Ibid., 2.
67 Ibid., 13.
68 Ibid., 27-28.
69 Ibid., 68.
Greeks and Romans had passed such laws. Even the hated Spaniards had “most graciously released” their slaves from the absolute control of masters by regulating treatment and allowing baptism. According to Godwyn, these laws were explicit acknowledgements of “a Right in the Party, on whose behalf they were made” – even the Spaniards of the Black Legend recognized their slaves as humans and protected their basic rights.\textsuperscript{70} The anti-slavery implications of this line of argument should be clear: using the power of their centralized imperial state, the English could, if they so chose, legally interpose state power between master and slave, recognize the humanity of enslaved persons, and guarantee their access to certain basic rights, especially Christian baptism. Were these steps to be taken, African slaves would be legally indistinguishable from English servants.

Obviously, the English imperial state did not enact such legislation during the Restoration. Indeed, the economic and political dictates of late Stuart absolutism made such an anti-slavery position all but unimaginable in the halls of government. Nor were the Virginia gentry planters or New England merchants who controlled their colonial governments any more sympathetic to Godwyn’s message. As we shall see, their economic success and political dominance relied on the same intellectual and legal foundations as the absolute monarchy itself – they came to see themselves as absolute masters of their own little monarchies. The overweening power of these petty absolutists, however, could never completely erase the essential humanity of enslaved persons, nor could it fully silence the many critics who saw clear parallels between their own plight and that of African slaves. The battle between the essential liberty of humanity and the

\textsuperscript{70} Ibid., 82.
absolute property rights of slaveholders that would determine the future of millions of Africans would not be fought in the free air of England, but in the plantation fields, merchant houses, and courtrooms of the colonies.

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Perhaps no single moment in the history of American slavery has been so closely and thoughtfully examined as the “transition” from white indentured servitude to the enslavement of Africans in colonial Virginia. Whether its cause was an increase in the supply of slaves due to the growth of the slave trade, a realization that European bound labor could not meet the demand of a developing plantation complex, or increased rebelliousness and demands for greater political rights from British servants, most scholars agree that the period between 1660 and 1688 saw the emergence of the English empire’s first true slave societies.71 The minute attention given this transitional moment has greatly enriched our understanding of the demographics and lived experience of African slaves – we know more today about the African origins of enslaved Virginians, their experience of the slave trade, the labor regimes under which they toiled, and the lives they built for themselves under slavery than Edmund Morgan knew in 197672 – yet we still lack a coherent narrative of how and why specific changes were made in the legal structure of slavery in Restoration Virginia. A closer inspection of the precise legal

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71 The historiography of the “transition” to slavery in colonial Virginia is far too broad to survey extensively here. For recent contributions to the debate that lay out the historiographical terrain and point to new areas for investigation, see the contributions from James Horn, John C. Coombs, Douglas Bradburn, Lorena S. Walsh, Paul G. E. Clemens, Peter A. Coclanis, April Lee Hatfield, William A. Pettigrew, and Alexander B. Haskell to “Forum: Transformations of Virginia: Tobacco, Slavery, and Empire,” *The William and Mary Quarterly*, vol. 68, no. 3 (July, 2011): 327-426.

72 The classic treatment of the “transition” – Edmund S. Morgan’s *American Slavery, American Freedom* – remains crucial and influential.
status of bound labor in Virginia, and its relation to broader imperial legal-constitutional discourse, may point us toward such an understanding.

Something had changed after 1660, but what? As we have seen, Virginia masters had no qualms about defining bound African laborers as property from the very outset of colonization. The Commonwealth and Protectorate regimes, however, had begun to implement a number of reforms in imperial structure and colonial law that, if continued, might fundamentally challenge many of the underpinnings of the slave regime. What the Virginia gentry accomplished in the “transition,” then, was not the construction of a new slave society or the reception of older bodies of slave law, but the legal reestablishment of extant local practice and its protection (indeed unprecedented promotion) by the imperial state. In other words, they put local Virginia law to Morgan Godwyn’s “two-fold Use” – statutes explicitly defined the precise form property-in-man would take and stripped both enslaved and free Afro-Virginians of all access to the rights of English subjects. In so doing, Virginia planters made themselves increasingly absolute masters, ruling over their plantations as petty monarchs and denying the African and Afro-Virginian laborers subject to their authority even the barest recognition of a common humanity.

Before they could execute their design, however, the Virginia gentry needed to consolidate their political power. The old guard of pre-civil war planters fell in line behind the restored Governor Berkeley and quickly turned back Virginia’s constitutional clock. In March 1660, even before receiving official word of Charles II’s return to the throne, the Burgesses repealed all Interregnum legislation, declared any residents who spoke out against the new regime “enemies of the peace,” and unleashed a brutal wave of
repression against Quakers and other dissenters. Their political clout was further augmented by the arrival of more royal favorites during the early Restoration. Indeed, the roster of great families that would dominate the Virginia gentry in the 18th century was largely in place well before the Glorious Revolution cemented the political stability of the Old Dominion. Marriage and inheritance patterns ensured that this central cohort of great planting families retained their grip on the choicest tobacco lands and most influential political positions. Continued royal favor and imperial protection of the tobacco trade tied the consolidated Virginia elite closely to the Stuart regime, which relied on the customs and excise duties on colonial exports to fund its increasingly robust imperial state apparatus.

The dominance of the Restoration’s great planting families was quite literally inscribed on Virginia’s landscape – it is to the decades just after 1660 that the Old Dominion’s first great tobacco plantations date. Leading Virginia families, including the Ludwells, Lees, Randophs, Tayloes, Masons, Carters, and Byrds, entered the colony during the Restoration and quickly parlayed political influence into massive estates. Of the hundred or so great planters comprising the Virginia gentry, not one owned fewer than two thousand aces, and most had much larger estates. William Fitzhugh, for

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73 Hening, VA Statutes, I:529-534. The Burgesses also created a new local Admiralty jurisdiction, a non-common law court devoted solely to policing trade, which likely heard many cases that treated slaves as chattel properties under mercantile law. The primary sources that might confirm this hunch, unfortunately, do not exist, but given the use of separate admiralty courts by the Royal African Company and the increasing caseload of the English admiralty jurisdiction, Virginia’s construction of new admiralty courts was certainly in keeping with broader imperial strategies for keeping slavery out of common law courts and protecting the economic interests of slave traders and planters.

74 For the arrival of many prominent settlers during the Restoration, including William Byrd I and Thomas Ludwell, see Anthony Parent, Foul Means, 29.


76 James Horn, Adapting to a New World: English Society in the Seventeenth-Century Chesapeake (Chapel Hill, NC: University of North Carolina Press, 1994), 204-222.

77 See especially the essays by Hatfield and Bradburn in the “Transitions” forum.
example, owned well over fifty thousand acres by the turn of the 18th century. Not surprisingly, these great planters were also the colony’s largest slave owners – Fitzhugh employed dozens of enslaved people on his home plantation on the Northern Neck alone. William Byrd I once filed headright patents for one hundred imported slaves in a single year. Freed from the meddlesome reform efforts of Puritans and commonwealthmen, Virginians got right back down to business.

To ensure the stability of the plantation regime, the Burgesses officially readopted English common law in 1662, guaranteeing that division and descent of real property would follow known guidelines and privilege the integrity of landed estates. Increasingly, the gentry turned to the entail to protect plantations from division and alienation in perpetuity. These tactics were so successful that by the 1670s Virginia’s great planters owned hundreds of thousands of acres of prime tidewater real estate. In this economic context, there was little opportunity for former servants to become independent freeholders. In 1673, Thomas Ludwell noted that at least a quarter of all freed servants owned no land at all, and with little demand for wage laborers, this landless class was both an economic and political liability. Without meaningful economic incentives to bring them to the Old Dominion, then, the influx of indentured servants from England was already slowing well before Bacon’s Rebellion.

This unequal distribution of productive tobacco land inevitably led to a severe land crunch, sparking the great turning point of Virginia’s colonial history, Bacon’s

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78 Parent, Foul Means, 41-47.
81 Parent, Foul Means, 37.
Rebellion. Nathaniel Bacon, a well-connected settler with gentry ambitions, felt he could not gain access to sufficient property to sate his economic and political desires, and led a small army of poor freeholders, indentured servants, and about 250 Afro-Virginians – ten percent of the colony’s enslaved population – into war against the Pamunkey natives in April 1676. Governor Berkeley, under royal orders to prevent an expensive conflict with the Natives if possible, condemned the raid and called out the militia to quash the rebellion. The militia was routed by Bacon’s rag-tag band, which then proceeded to march on Jamestown and put England’s first permanent American settlement to the torch, leveling the rudimentary statehouse and few ramshackle homes that made up the colonial capitol. Though eventually quelled by a contingent of troops sent from England, among them Sir Thomas Grantham, Bacon’s Rebellion was clearly a shock to the Virginia gentry. The continued restiveness of the colony’s bound laborers – the last of Bacon’s rebels to be suppressed were 80 Afro-Virginian slaves and 20 white servants – convinced the planters and Burgesses that further steps were needed to cement their absolute authority.

Scholars have traditionally pointed to this historical moment as the key turning point in the development of Virginia’s colonial history. In order to placate restive indentured servants and smallholders, the Burgesses constructed a fully racialized form of slavery, creating a permanent underclass upon which discontented white laborers could vent their frustrations while simultaneously extending more rights to the broad mass of white settlers. And indeed there is much to recommend this line of reasoning. New

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82 The discussion of Bacon’s Rebellion that follows draws on Morgan, *American Slavery, American Freedom* and Webb, *1676*.
statutes were passed during the Restoration era to protect the rights of white servants. One statute limited the terms of service of all “Christian” servants to no more than seven years, and guaranteed that any persons forced to labor beyond this period would be paid “competent wages” for their “overserved” time.84 The property rights of white servants were also confirmed by the Burgesses. Servants who brought moveable property with them would retain “the propriety in their owne goods” and could use them “for their future advantage.” Servitude as a punishment for white settlers convicted of serious crimes was abolished, and reined in the “barbarous usage” of “cruell masters” by explicitly granting the right of servants to petition the courts for mistreatment.85

Bacon’s Rebellion had a far less sanguine impact on the Pamunkey and other Virginia natives. Native American tribes, which had previously been understood as separate sovereign nations in a tributary relation to the English throne, were now defined as conquered peoples and restricted to reservations. Without protection under English law, even these reservation lands were subject to a slow attrition. The few limited attempts made to Christianize and assimilate local natives before 1660 ended almost completely after Bacon’s Rebellion. A handful of Native Americans who remained and continued to toil as servants after 1677 were among the last to live among white settlers for a generation, the last gasp of a never very potent assimilative English civilizing mission to the Virginia Natives.86 Defined out of English law and without access to

84 Parent, Foul Means, 118.
85 William Waller Hening, The Statutes at Large: Being a Collection of all the Laws of Virginia... (New York: Bartow, 1823), II:115, 117-118, 164. [Hereinafter cited as Hening, SAL] Tellingly, all of these statutes were passed well before Bacon’s Rebellion, illustrating that the legal separation of slavery and servitude predates the commonly used timeline that sees 1676 as a pivot.
86 This last cohort of Native servants were not defined as slaves in the way African slaves were. A 1670 statute had declared that servants who “come by land” – Native Americans – would “serve for a term of years,” as opposed to those who came “by sea” – Africans – who would serve as “slaves for life.” See Hening, SAL (1670), II: 139-155.
Christian baptism, Natives were treated as permanently hostile and omnipresent enemies, subject to the full coercive power of Virginia’s absolute colonial state.

The effect of Bacon’s Rebellion on Virginia’s enslaved African population, however, is less clear. Indeed, the Africanization of Virginia’s labor force began almost immediately with the Restoration in 1660. This unprecedented growth in the enslaved African population predates any significant decrease in the availability of white indentured labor. As we have seen, the restored Stuarts continued to use colonial transportation against political and religious dissidents, providing a small but steady influx of laborers, and voluntary migration of servants continued at a relatively robust pace. Indeed, the availability of English indentured labor remained relatively steady in Virginia until the opening decades of the 18th century.\textsuperscript{87} The apparent transition to enslaved labor, then, was due more to the increased supply of African slaves from the Royal African Company than to any substantive change in the attitudes of Virginia planters toward their bound labor force. The events of 1676 did not \textit{cause} the Old Dominion to become a slave society – if anything Bacon’s Rebellion was a \textit{consequence} of the increased use of slave labor on growing plantations by the Virginia gentry.\textsuperscript{88} Virginia planters had always wanted slaves, but before the Restoration and the rise of a state-supported slave trade they had been unable to get many into their hands.

Despite continued demand for slaves and a noticeable uptick in slave imports, the Royal African Company largely ignored Virginia as a potential market, preferring instead to send their cargoes to the more robust slave markets in the West Indies. Only twenty-

\begin{footnotesize} 
\item[87] McCusker and Menard, \textit{Economy of British America}, 219-225. 
\end{footnotesize}
two recorded slaving voyages disembarked their cargo in the Old Dominion, delivering 3,445 enslaved people to labor-hungry Virginia planters. While this certainly represents a vast increase over Virginia slave imports during the Interregnum, it was hardly the solution to persistent labor shortages gentry planters had hoped for. With direct access to the official slave trade limited, some Virginians turned to illegal smuggling to obtain slaves, and all ramped up importation through the coastwise slave trade. Even with their access to new slaves limited by the RAC’s preference for West Indian markets, the enslaved population of the Old Dominion grew rapidly during the Restoration era. By 1670, before Bacon’s Rebellion, there were already approximately two thousand enslaved Africans in Virginia, comprising nearly five percent of the total colonial population, and at least twenty-five percent of the bound labor pool. Bacon’s Rebellion, then, may have accelerated the trend toward slave labor in Restoration-era Virginia, but the pattern was already evident well before 1676.

As slavery became more and more central to the tobacco plantation economy, Virginia law was forced to deal with questions about the precise status of slaves as articles of property. As we have seen, Virginians assumed slaves to be a form of property from the arrival of the first “twenty and odd” Africans in 1619. Restoration-era legislation made this assumption explicit, first in a 1670 statute defining all non-Christian servants who “come in by sea” as “slaves for life,” and again in 1682 when all imported non-Christians were termed “slaves for life.” Imported Africans were clearly

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90 Parent, Foul Means, 68; Pettigrew, Freedom’s Debt, passim.
91 Coombs, “Phases of Conversion”.
92 See Chapter 1, supra.
93 Hening, SAL, II: 283, 491.
understood to be a species of property but this general assumption did not sit well with the specificity of common law, and so the Restoration also saw increased attention to the specific forms slave property would take. The issue was clearest in cases of descent. Planters who left a will, of course, could bequeath their slave property in whatever way they saw fit, and used a variety of strategies to best exploit their investments. Some treated their slaves as realty, attached to specific plantations, while others willed their slaves as moveable property, disbursing them among several heirs or selling them off to cover debts. A few even entailed their slaves, guaranteeing their decedents a sufficient bound labor force. Planters who died intestate, however, were another matter. How should the colonial state treat their slaves when dividing up estates?

A 1671 statute solved the problem by giving county courts maximum flexibility – slaves were classified alongside “sheep, horses, and cattle” and could be “apprized, sold at an outcry, or preserved in kind” at the court’s discretion in the interest of the “preservation, improvement or advancement of the estate.” Slaves had to be treated as a special, mixed form of property because “the difficulty of procureing negroes in kind” and “the value and hazard of their lives” made it nearly impossible to guarantee that heirs would receive the specific slaves in question when they came into their estates. In a sense, this statute conferred a kind of equity jurisdiction on local courts, allowing them to depart from the strict rules of common law descent. This novel definition of slave property, of course, provided no equity to the slaves themselves – justice to heirs and the

95 Brewer, “Entailing Aristocracy”.
dictates of a plantation economy required that enslaved Africans be recognized only as property under law. With a stroke of the pen, the Burgesses enshrined their longstanding assumptions about slaves in statute law and completed the first element of Godwyn’s “two-fold” definition of slavery. However they had been legally defined under the custom of merchants or in other jurisdictions, once in Virginia slaves were no more than “brutes” or “beasts” under law, more akin to livestock than legal persons.

All that remained, then, was to remove all access to the rights and protections of English subjecthood – the second step in Godwyn’s “two-fold Use” of slave law. As Thompson’s argument in Butts v. Penny and Godwyn’s Negro’s and Indian’s Advocate illustrate, conversion to Christianity was a potent reminder of enslaved Africans’ humanity and provided a firm basis for claims to legal personhood. This was not simply a theoretical question. In 1665 for example, an enslaved man named Manuel petitioned the General Assembly for his freedom, claiming that, as a Christian, he could not be held as a slave. Manuel’s purported owner, William Whittacre, argued that a clear chain of property ownership illustrated that Manuel was “a Slave for Ever.” The assembly ruled that such a property claim was inconsistent with Christianity, however, and decreed that Manuel should “serve as other Christian servants do.” Another enslaved man named Fernando petitioned the Lower Norfolk Court for his freedom two years later, arguing that, as a Christian and previous resident of England, he must be afforded the same legal rights as any other English Christian servant. The court disagreed, declaring Fernando to be “a slave for his life,” whereupon the embattled slave appealed the decision to the General Court. Though the final disposition of Fernando’s suit is not known, the fact that

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97 Morris, Southern Slavery, 61-66. As Morris notes, these legal distinctions made no meaningful difference in the lives of enslaved people and existed solely to protect the interests of slaveholders.
he was accorded basic legal rights – petition and appeal – by a Virginia court illustrates just how powerful claims to freedom based on Christianity could be.  

In this context, then, it is little wonder that most Virginia masters showed little interest in converting their slaves. Even small numbers of conversions raised “some doubts” about whether the “charity and piety” of devout owners would lead to legal freedom for enslaved Afro-Virginians. In 1667, the Burgesses settled the issue with a statute declaring that “baptisme doth not alter the condition” of those who were “slaves by birth.”  

Anticipating the King’s Bench decision in Butts by a decade, the Virginia gentry fully severed the traditional connection between Christianity and English subjecthood. Though the Burgesses claimed humanitarian motives in the statute, hoping that by dispelling doubts about the emancipatory power of baptism they might encourage masters to convert their slaves, there is little evidence that the 1667 law led to any meaningful change in planters’ behavior – mass conversions of slaves did not follow, and Godwyn could still lament Virginians’ disinterest in conversion well into the 1680s. The intent of the statute, then, was not to ease tender consciences and clear the way to Christianization, but to bar Africans from a crucial element of European legal personhood and further protect slave property.

Birth into the community of subjects, another traditional source of legal subjecthood, also became nearly impossible for Afro-Virginians during the Restoration. An infamous 1662 statute dispelled any doubts about whether “children got by any

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98 For Manuel and Fernando’s cases, see Parent, Foul Means, 112-113; Brown, Good Wives, Nasty Wenches, 114-115.
100 On the unwillingness of slavholders to baptize enslaved people, see Travis Glasson, Mastering Christianity: Missionary Anglicanism and Slavery in the Atlantic World (New York: Oxford University Press, 2012), passim.
Englishman upon a negro woman should be slave or free,” stating that “all children borne in this country shalbe held bond or free only according to the condition of the mother.”¹⁰¹ Historians have crafted many explanations for this statute, the first of its kind in the Anglophone Atlantic. One important line of reasoning focuses on the extreme patriarchy of colonial Virginia. Guaranteeing that slave status followed the mother rather than the father inverted the traditional patriarchal logic of English descent, thus allowing Virginia masters unlimited sexual access to enslaved women and bolstering the gendered claims to power so important to gentry identity.¹⁰² Others have emphasized the disruptive impact of the principle *partus sequitur ventrem* on enslaved families in erasing any legal claims enslaved men had to their own children.¹⁰³ Perhaps most important for our purposes, however, the 1662 statute ensured that the children of enslaved women could have no claim on the rights of English subjecthood. Whether the father was free or enslaved, the children of enslaved women would be defined solely as property and were entirely barred from legal personhood under Virginia law.

The introduction of *partus sequitur ventrem* also bore a striking congruence to Hobbesian theories of natural pre-civil slavery. As we have seen, Hobbes’ pre-social war of all against all produced an ideal foundation for concepts of enslavement – only through submission to powerful monarchs could humanity exit this natural condition and find safety in their subjection to the absolute state. Those who had not entered into this social contract, however, still inhabited the nasty and brutish state of nature, and were thus liable to enslavement. The power of life and death conferred on captors in this war

¹⁰² Brown, *Good Wives*, [PAGE #s].
slavery doctrine was a crucial intellectual underpinning of Atlantic slavery. As Mary Nyquist has recently pointed out, however, it was the *mother* who held the power of life and death over children in Hobbes’ state of nature. Indeed, Nyquist argues it was this very trait of pre-civil motherhood that necessitated the erasure of women from Hobbesian civil society and the construction of an all male body politic.\(^{104}\) In the context of Virginia’s slave society, in which Hobbes himself had been an early investor, *partus sequitur ventrem* served both to reaffirm the pre-civil brutishness, and thus enslavability, of Africans and to transfer the power of life and death upon which European war slavery doctrine was based from pre-civil enslaved mothers to absolute English masters. While it is unlikely that the Burgesses had Hobbes’ subtle theorizations in mind when constructing their 1662 statute, the congruence between *partus sequitur ventrem* and a gendered Hobbesian pre-civil state of nature is striking.

To further mark slaves as a separate population within Virginia society, the Burgesses enacted a series of laws meant to drive a wedge between enslaved Africans and white indentured servants. As Bacon’s Rebellion had shown, the potential for cross-racial alliances remained alive and well in Restoration Virginia. It did not take a rebellion for Virginia planters to recognize the danger of this situation, however, and preventative laws were put in place immediately after Berkeley and the planter gentry regained control of the House of Burgesses. A 1660 act mandated that any English servants running away with “negroes who are incapable of makeing satisfaction by addition of time” would owe additional labor to make up for the African slaves’ lost time.\(^{105}\) Two years later, this statute was expanded dramatically. English servants would

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\(^{105}\) Hening, *SAL*, II: 277.
now be responsible for “double their [own] times of service soe neglected” – in “extraordinary” circumstances, local magistrates could even extend this term of service “proportionable to the damage the master shall make appear he hath susteyned” – in addition to serving double the lost time of their African fellow runaways. If any slaves in interracial runaway attempts died or succeeded and escaped, the white servants would either be fined 4,500 pounds of tobacco or, in the likely event they were unable to pay such a hefty sum, forced to serve the escaped slaves’ masters for four years “for every negro so lost.”106 While such legislation clearly did not put an end to interracial runaway attempts, the price of failure was exceedingly steep. When combined with the increasing physical separation of white servants and black slaves in the plantation labor force, these statutes reinforced an increasingly racialized divide between white indentured servants as subjects and enslaved Africans as property.

Specifically defined as articles of property and placed beyond the pale of legal personhood, slaves were subjected to increasingly brutal local police law as well. Indeed, rather than interposing its authority between master and slave as Henry Parker and Morgan Godwyn advocated, Virginia’s colonial state systematically removed itself from the master/slave relation and granted unprecedented powers to slave owners. A series of new police measures passed in 1680 are illustrative of this trend. Physical mobility, a right typically guaranteed to free subjects which could only be limited by the state for specific causes, came under the direct purview of masters. A 1680 statute barred slaves from leaving their master’s plantation without a written pass, and two years later the Burgesses limited slaves’ sojourn on any plantation but their owner’s for more than four

106 Hening, SAL (Act CII, 1662), II:116-117.
hours. While similar laws limited the mobility of white indentured servants, they at least retained access to the courts to challenge excessively coercive masters and benefitted from local laws regulating treatment. African slaves, of course, could expect no such state intervention on their behalf.

Perhaps most shocking, though, was the 1669 “Act about the casuall killings of slaves,” which conferred unlimited coercive power on slave owners. Since the traditional punishment for refractory servants, addition of time, could not logically be imposed on slaves, and since a slave’s “obstinacy” could only be suppressed by “violent meanes,” the Burgesses declared that “if any slave resist his master...and by the extremity of the correction should chance to die...his death shall not be accompted a felony, but the master...be acquit from molestation.” The logic behind this statute was clear – “it cannot be presumed that prepensed malice (which alone makes murther ffelony) should induce any man to destroy his own estate.” Why would anyone willfully destroy his own property? This statute clearly took no notice of slaves as legal persons. In 1680, the Burgesses went even further and declared that any white colonist could legally kill a runaway slave who resisted recapture. Any slave who even lifted a hand against a white Virginian would be subject to torturous punishment. The absolute coercive power of life and death had devolved from the absolute monarch to the absolutist colonial state to increasingly absolute individual masters and now to all white male Virginians – without state intervention to protect the persons of slaves, the arbitrary and capricious whim of Virginia’s slave owning gentry unleashed brutally repressive violence on the enslaved

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108 Ibid., (Act I, 1669), II: 270.
109 Ibid., (Act X: An act for the preventing of Negroes Insurrections, 1680), II:481-482.
population. This was precisely the situation Henry Parker had feared in *Jus Populi* and Morgan Godwyn so fervently decried in the *Negro’s and Indian’s Advocate*.

The human tragedy of the Restoration meant the death knell of Afro-Virginian subjecthood. Indeed, Virginia legislators specifically targeted free black families with new punitive statutes. The 1668 tax assessments, for example, classed free black women as tithables – unlike white women, who were seen as dependent and subordinate members of patriarchal households, black women were taxed as productive laborers and “ought not in all respects...be admitted to a full fruition of the exemptions and impunities of the English.” This taxation scheme put undue economic strain on free Afro-Virginian households and contributed dramatically to their decline. Forceful assertions of traditional English liberties by black Virginians, so evident in the Interregnum examples of Anthony Johnson and Antonio Longo, disappear almost entirely from the record by 1688. At Johnson’s death in 1670, a probate court seized his estate on the grounds that the prosperous Afro-Virginian was an alien, not a subject. Stripped of their patriarch’s hard-won estate, Johnson’s family left their home on the Eastern Shore and moved to Maryland, where repressive legislation had not yet been passed to the same extent. While demographic data for colonial Virginia is notoriously incomplete, it appears that many other free Afro-Virginians followed the Johnsons’ lead and left the colony. In Northampton County between 1664 and 1677, somewhere around twenty percent of African residents were free heads-of-household. This relatively robust presence was largely a function of the porous nature of early Virginia slavery and represents the high water mark of colonial Virginia’s free black population – by 1700 free black households

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110 McKeon, *Secret History of Domesticity*.
had all but disappeared.\footnote{112} The access of black Virginians to the courts also appears to have waned substantially.

One of the few records of an African in the court records of Restoration Virginia appears in *Re Warwick* (1669), where Hanna Warwick, a white servant, had her case “extenuated because she was overseen by a negro overseer.”\footnote{113} This painfully terse entry is emblematic of the conspicuous absence of African voices in the record of Restoration Virginia. Hanna Warwick’s African overseer was worth mentioning only to mitigate her (we must imagine) criminal acts – even a lowly white female indentured servant should be spared the indignity of being disciplined by a less-than-human slave. The reclamation of power by Berkeley and the rising gentry, aligned closely with an increasingly absolute monarchy, firmly reestablished Godwyn’s “two fold Use” in local law – slaves were defined as a flexible form of property that would find explicit protection in Virginia courts, and access to even basic rights was systematically eliminated. In the earliest years of settlement, legal space existed for African men like Anthony Johnson to gain their freedom and press claims on the colonial state – in the human tragedy of the Restoration, the Virginia gentry made sure that this window was firmly and decisively closed.

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Unlike the Virginia gentry and many Englishmen back home who welcomed Charles II’s return, Massachusetts colonists were quick to recognize the tragic potential


\footnote{113} H. R. McIlwaine, ed., *Minutes of the Council and General Court of Colonial Virginia, 1622-1632, 1670-1676, with Notes and Excerpts from Original Council and General Court Records, into 1683, now lost* (Richmond, VA: Virginia State Library, 1924), 513. [Hereinafter cited as *VA GC Recs.*]
of the Stuart Restoration and moved to insulate their godly republic from absolutist influence. The first action of the General Court that met on 30 May 1660, the first to meet after Charles’ restoration to the throne, was to denounce the “horrid blasphemies & wickednesses” back in England that had caused the “utter frustrating of those hopeful beginings” of the Commonwealth. The assembled delegates declared their hope that the “unsetlements & overturnings in church & state” sure to follow the Restoration would not undo Interregnum reforms but would instead advance “the kingdome of the Lord Jesus, & setting up of his throane in that land.” Bay colonists were right to worry – the Restoration era saw continued royal attempts to radically restructure Massachusetts’ distinctive forms of church and state organization, culminating in James II’s creation of the Dominion of New England in 1685. Fears of losing access to their basic rights and being made “the slaves of rulers imposed upon them” were not simply paranoia or rhetorical hyperbole.

Shifts in imperial policy were keenly felt in Massachusetts. The establishment of direct royal governance raised the specter of new religious Test Acts in Puritan New England and exacerbated growing fears of a spiritual “declension” from the region’s initial godly mission. The unique landholding patterns that underpinned Massachusetts’ godly republic came under direct attack from the metopole through

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115 Samuel Nadnordt to Secretary [Wm?] Morrice (26 Oct 1666), BNA, CO 1/20/154.

repeated revisions of local law and the revocation of the Massachusetts charter, shaking the very foundation of Puritan society. Continued hopes for Native conversion dimmed after 1660, and were nearly dashed once and for all when an increasing land crunch sparked King Philip’s War in 1675. As it had earlier during the Pequot War, the eruption of conflict with local Native Americans raised crucial questions about enslavement, subjecthood, and the legal status of Indians in a Puritan society surrounded by increasingly hostile enemies.117

In addition, the growing volume of the English slave trade, and the involvement of more and more Massachusetts merchants and vessels in slaving voyages, brought substantial numbers of African slaves to the colony for the first time, another worrying trend associated closely with the Stuarts. By the 1680s, Bay Colonists had grown increasingly fearful of potential rebellions by enslaved Africans, and began instituting new police measures to oversee this potentially combustible population.118 Despite, or perhaps because of, their fears of slave rebellion, Indian war, and royal absolutism, however, Massachusetts colonists refused to recognize their bound Indian and African servants as non-human articles of rightless chattel property. For many in Massachusetts Bay, slavery could be “transmuted to a Vertue” not through unlimited and absolute ownership of enslaved persons, but by the recognition of Africans’ essential humanity, and the protection of their bodies and souls through access to colonial courts and churches. These competing imperial and local impulses resulted in a hodge-podge of


118 On the “paranoia” of Massachusetts colonists in the 1680s, see Stanwood, Empire Reformed, 16-20.
colonial legal decisions regarding slaves, some recognizing slaves as property, others as persons under law.

To many colonists, the hand of Providence was clearly at work in the Restoration. The destruction of England’s godly commonwealth was the punishment decreed by a just God for his wayward people, and many Puritans looked to redouble their already strict policing of morality in a violent wave of collective expiation. Bay Colony magistrates cracked down on religious nonconformists like Quakers and punished moral infractions severely in an attempt to prevent declension from their spiritual mission. Most, however, also recognized their marginal position in the English empire and meekly if unenthusiastically acknowledged that Charles was the rightful king of their “Brittish Israel.” Somewhat disingenuously, the General Court claimed to have played only “a passive part” in the late civil wars and hoped that Charles would allow them the continuance of their “civil privileges” and their “libertye to walke in the faith of the gospell.”\textsuperscript{119} Bay colonists asked only to “stand as a shrub among cedars, growing up on their own root, and not be forced to be the slaves of rulers imposed on them contrary to the rule of their charter.” Besides, Massachusetts was fast becoming a key hub in the colonial carrying trades, and a stable transition to royal rule would guarantee “the great advance of his Majesty’s customs.”\textsuperscript{120}

Charles’ initial response to Massachusetts’ entreaties appeared favorable and the overwhelming popularity of the Restoration back in England, combined with conspicuous displays of local authorities’ renewed loyalty, muted opposition from the more radical saints. When it finally proclaimed Charles II the

\textsuperscript{119} MA General Court to Charles II, 19 December 1660 in \textit{MBC Recs}, IV.i:450-453.
\textsuperscript{120} Samuel Nathorth to Secretary [William?] Morrice (26 October 1660), CO 1/20/154.
rightful monarch on 8 August 1661, well over a year after he had ascended the throne in England, the Massachusetts General Court was effusive to an almost farcical level in addressing “the best of kings,” one of the divinely anointed “gods amongst men,” a “savior.” Bay colonists clearly knew what Charles wanted to hear from his loyal subjects.

Had Charles been in Boston to observe his official proclamation as king, however, he might have had ample cause to doubt the General Court’s sincerity. Unlike the bacchanalia of bonfires and revelry that greeted the Merry Monarch in England, the Stuart Restoration in Massachusetts was a sober affair – drinking toasts to the king’s health was explicitly forbidden and settlers were advised to keep the day as one of prayer and quiet reflection, more akin to a fast day than a celebration. Even before Charles was proclaimed in the colony, a number of petitioners from Ipswich, Newbury, Sudbury, and Boston questioned the wisdom of submitting to royal authority. Following the restoration, a spate of sedition cases came before the General Court – that speech against the crown often went unpunished is a testament to continued uneasiness with royal rule. Not surprisingly, anti-monarchial sentiment circulated through trans-Atlantic print networks as well, leading to the suppression of John Eliot’s *Christian Commonwealth*, a radical tract that came dangerously close to advocating Fifth Monarchist revolution. Whatever their public proclamations, Massachusetts colonists

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121 *MBC Recs*, IV.ii: 32-33.
122 Ibid., IV.ii: 30-31.
123 Ibid., IV.ii: 26
124 See for example the case of Joseph Jenks who was charged with speaking “divers treasonable words agt the kings majty” but released by the Court. Ibid., IV.ii:7-8.
125 *MA Gen Ct Recs*, IV.ii:5; John Eliot, *The Christian Commonwealth: or, The Civil Policy Of The Rising Kingdom of Jesus Christ* (London: 1659), esp. the Preface. The main body of Eliot’s treatise is a relatively measured call for Massachusetts-style godly republicanism as the only fit civil government for
only grudgingly gave their allegiance to the restored Stuarts.

For his part, Charles II was no more trusting of Massachusetts’ Puritan colonists than they were of him, and with good reason – Englishmen with ties to the Bay Colony were a persistent thorn in the restored monarchy’s side. Hugh Peter, former Salem minister and leading Independent during the civil wars, was specifically exempted from the Indemnity Acts and publicly hanged, drawn, and quartered at Charing Cross in London on 16 October 1660 for inciting regicide. 126 Thomas Venner, a former Massachusetts colonist and Fifth Monarchist radical, led a band of discontented former New Model soldiers in rebellion against the king in early January 1661. 127 Though the General Court hoped to reassure Charles that “Diabolical Venner” was “not of us,” the rebellion only served to reinforce Massachusetts’ reputation as a hotbed of anti-monarchist radicalism. 128 Edward Whalley and William Goffe, two of the commissioners who had signed Charles I’s death warrant, fled to Boston where they received a warm welcome from Governor Endicott in July 1660. When official orders to apprehend the regicides and return them to England for trial arrived in June 1661, the General Court officially pledged to execute the king’s warrant “diligently & faithfully,” but Whalley and Goffe escaped to New Haven, where they lived under assumed names with John Dixwell, another regicide, under the protection of well-connected minister John Davenport. Though Charles continually sent instructions to all the Puritan colonies to apprehend and deliver the regicides, all three eluded capture and remained in New Haven

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126 Stearns, Strenuous Puritan, chapter 15.
128 MBC Recs, IV.ii:33.
until their deaths.129

Given this level of resistance to the restored monarchy, it should come as no surprise that Massachusetts came under increasingly close scrutiny by imperial planners back in London. Though Charles initially agreed to confirm the original Massachusetts charter, complaints from Anglicans and Quakers about religious persecution and continued suspicions of disloyalty led him to appoint an official commission to investigate civil and ecclesiastical order in Massachusetts in the summer of 1664. Regular negotiations between royal commissioners and the General Court continued throughout the 1660s and ‘70s, but bore little fruit. Bay colonists continually argued that their charter allowed the distinctive forms of civil and ecclesiastical governance that had developed over the first generations of settlement and jealously guarded their juridical autonomy. They consistently denied the ability of claimants to appeal cases to royal courts in London, defended limiting the freemanship to church members, continued issuing writs in the name of the Commonwealth rather than the king, and even claimed exemption from elements of the Navigation Acts on the grounds that colonists were not represented in Parliament. By the late 1670s, it was clear that as long as the Massachusetts charter remained in force, Charles would have little success in bringing his wayward Puritan colonists to heel.

Vacating the Massachusetts charter, however, is likely what Charles had in mind from the very outset. Though the colony had been under close metropolitan scrutiny

129 On Whalley, Goffe, and Dixwell, see Ezra Stiles, A History of Three of the Judges of King Charles I, Major-General Whalley, Major-General Goffe, and Colonel Dixwell: Who at the Restoration, 1660, Fled to America; and were Secreted and Concealed, in Massachusetts and Connecticut, for near thirty years (Hartford: 1794). For royal instructions on the apprehension and rendition of regicides, see MBC Recs, IV:ii:26-27, 193, 201 and V:200.
since 1660, the ascendance of the Tory reaction in the late 1670s bolstered the crown’s political power and sparked renewed efforts to reorganize the empire under tighter royal control. Indeed the move to finally revoke Massachusetts’ charter by *quo warranto* was only one element of a thoroughgoing effort to reorganize chartered boroughs and corporations throughout the Stuart dominions. In 1684, with the status of Massachusetts’ charter still uncertain, the crown issued a writ of *scire facias* in Chancery voiding the charter entirely, apparently without notifying the colonial government – the General Court was shocked to receive news of the revocation in January 1685. The Bay Colony was reorganized as part of the larger Dominion of New England, its local political autonomy limited and the power of the crown reinforced by the presence of royal governor Edmund Andros.

All this legal uncertainty shook the very foundation of Massachusetts society. Ongoing fears of charter revocation threw issues of land tenure into disarray. If the charter were revoked, would the Bay Colony’s distinctive patterns of land ownership change? Would Puritan magistrates be able to guarantee a competency to all god-fearing households? As we have seen, it was this broad, relatively egalitarian access to landed property that undergirded the Puritans’ godly republic, shaping demand for labor and the role of slavery in Massachusetts society. Combined with increasing land shortages brought on by a growing population and generations of partible descent within families, it is no wonder that questions of land ownership and distribution dominated the General Court’s time – only the ongoing conflict with the metropole received as much attention.

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130 The revocation of Massachusetts’ charter fits with Charles II’s attempts to call in borough charters in England. On charter revocations and the reorganization of municipal governance, see Harris, *Restoration*, 293-300.
Bay colonists were becoming more property conscious, while the political and economic policies of the Stuarts chipped away at the social structures underpinning their godly republic.

Given this context, the widespread fear that Massachusetts’ initial godly mission was slipping into declension was well founded. Fearing that their children were straying from the New England way, Puritans adopted the Half-Way Covenant in 1662, establishing that partial church membership could be inherited and dealing a blow to the active attempts at conversion that marked the earliest years of settlement. The cultural compromise of the Half-Way Covenant both recognized the changing context of Restoration-era Massachusetts and sought to maintain the authority of the Congregational Church by keeping membership numbers high, even if members were not particularly devout. Rather than opening up further access to Christianity and membership in society, however, fears of declension pushed Africans and Native Americans further outside the bounds of New England society. As one literary scholar has recently noted, making the covenant between God and the Puritans heritable called into question the status of converts and “circumscribed...the Christianity and humanity” of converted Africans and Native Americans. “Through the Half-Way measures,” according to Zubeda Jalalzai, “blood quite literally united the chosen people.”

Blood may have carried new power in the Bay Colony, but conversion to Christianity still played an important role in determining the status of residents, and the

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success of earlier conversion drives made the total exclusion of Christians of color difficult. John Eliot’s “praying Indian” towns, for example, were growing by the year, and residents of these towns had at least some access to Massachusetts law.\textsuperscript{132} In 1661 Eliot brokered a land deal between the Christian Natives of Patucket and the English settlers of Chelmsford, and the General Court followed their usual procedures in laying out the grants.\textsuperscript{133} Separate “Indian courts” headed by prominent English settlers heard cases involving Christainized Natives, but, as we shall see, Native Americans also had access to the regular courts of justice in Massachusetts if their claims involved a white settler.\textsuperscript{134} When the Native settlement at Quabacook was attacked by a group of hostile Mohegans, Wassamegin, the sachem of the Quabacook Indians, petitioned the Bay Colony government for assistance. The General Court laid down an ultimatum to Uncas – either return all captives and make restitution for “the goods...taken from our...subjects” or face a war. English troops were stationed at Quabacook to protect the Natives from further Mohegan incursions, but the General Court hoped to avoid war and assured Uncas that any crimes committed by “our said subjects” – meaning Wassamegin or his people – could be tried in Bay Colony courts.\textsuperscript{135} They may not have been on an equal footing with English settlers, but Native Americans under Massachusetts’ jurisdiction, particularly those who had converted to Christianity, were clearly considered subjects.

The terrible bloodletting of King Philip’s War shook the Puritan mission to local

\textsuperscript{132} For an argument that the “praying Indians” were largely excluded from Massachusetts society and used primarily as a public relations measure by unpopular Puritan colonists, see Kristina Bross, \textit{Dry Bones and Indian Sermons: Praying Indians in Colonial America} (Ithaca, NY: Cornell University Press, 2004).

\textsuperscript{133} \textit{MBC Recs}, IV.i: 430-431.

\textsuperscript{134} See, for example, the appointment of prominent merchant and magistrate Daniel Gookin to “keepe Courts amongst the Indians.” \textit{MBC Recs}, IV.ii: 34.

\textsuperscript{135} \textit{MBC Recs}, IV.ii: 22-23.
Natives to its very core. As had been the case in the earlier Pequot war, numerous captives were sold into slavery in 1675 and 1676. One Bay Colonist reported in July 1676 that his unit had “lately killed abundance of [Natives] & taken as many Captives” – he had himself taken 9 captives, six of whom he sold into slavery in Jamaica.\footnote{Samuel Shrimpton to Elizabeth Shrimpton, 8 July 1676, quoted in Lepore, \textit{Name of War}, 154.} John Eliot warned that such measures were sure to prolong the war, provoke further enmity from local Natives, and scuttle his fledgling missionary project. “The terror of selling away...Indians, unto the Ilands for perpetual slaves, who shall yeild up themselves to your mercy,” Eliot argued, would produce “evil consequences, upon all the land.”\footnote{Eliot quoted in Ibid., 158-159.} The missionary’s warnings had little effect however – Puritan magistrates throughout New England construed their conflict with Philip and his people as a just war, and enslavement was perfectly legal in such cases.\footnote{Ibid., 160-165.}

Still, there was ambiguity in Indian slavery in Massachusetts. There was already a long history of captivity as a tool of conversion in the Bay Colony, and it is possible that colonists who kept Native American servants captured in the war saw Indian slavery in this light. When this earlier tenency came into conflict with the view of Natives as enslavable outsiders, Bay Colony magistrates responded in contradictory ways, leaving the question of Indian slavery open. A 1674 case, \textit{Re Indian Hoken}, a Native American man who had been convicted as “an incorrigable thief” and subsequently escaped from prison was sentenced to be “sold or sent to Barbadoes...to free the colonie from so ill a member.”\footnote{Nathaniel B. Shurtleff, ed., \textit{Records of the Colony of New Plymouth in New England}, (Boston: William White, 1855), V: 151-152. [Hereinafter cited as \textit{Plym Col Recs.}]} That same year, another case, \textit{Re Indian Tom}, saw a Native man convicted
of rape and sentenced to death. When he begged the court for mercy, they declared that rather than suffer execution, Tom would be “sold for a slave for ten yeares” and transported to “the English living in some parts of the West Indies.” Clearly, Tom was no longer seen as a target for conversion and assimilation but his term of bondage was still limited by the court, though one wonders whether a West Indian plantation owner would abide by a distant Massachusetts court’s restrictions or if Tom would even survive ten years of hard labor in the sugar fields.\footnote{140}{Starting in 1677, however, lifetime bondage was imposed on a number of Natives. In \textit{Re Indian Popanooie}, for example, Popanooie and his entire family were sentenced to perpetual slavery for their “great crewlty” toward the Bay colonists. Another group of Natives were sentenced to slavery for life after they were convicted of stealing a mere 25 from English settlers. Unlike Tom and Hoken, however, these enslaved Indians remained in the colony, bound out to local residents.\footnote{141}{As the Puritan mission to the Natives waned, a new definition of Indians as enslavable began to take its place. Still, this new institutional form of penal slavery sat, often uncomfortably, alongside the definition of praying Indians as subjects and made Indian slavery a particularly ambiguous practice.}}

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There was one group of Bay Colonists who, at least under the terms laid down in \textit{Butts v. Penny}, could be considered chattel property – newly purchased and imported slaves direct from Africa. To be sure there were precious few African slaves in the colony as yet. In a 1676 report to the Lords of Trade, Edward Randolph claimed there were “not above 200 slaves in the colony, and those are brought from Guinea and Madagascar” and Governor Bradstreet estimated only “about one hundred or one hundred

\footnote{140}{\textit{MBC Recs}, V: 25.} \footnote{141}{\textit{Plym Col Recs}, V: 243-244. See also \textit{Plym Col Recs}, V: 270.}
and twenty” Africans in 1680.\textsuperscript{142} Though their numbers may have been small, African slaves were a conspicuous presence in many Boston households. A French refugee scouting for a potential Huguenot settlement remarked “there is not a House in Boston, however small may be its Means, that has not one or two [slaves]. There are those that have five or six, and all make a good Living.” The Frenchman also noted a number of local protections for the institution – residents could “own Negroes and Negresses,” local settlers and Natives gladly returned attempted fugitives, and anyone who attempted to “take them off” would be “rigorously punished” for their “open Larceny.”\textsuperscript{143} As Butts \textit{v. Penny} had established, slaves were property, at least under mercantile custom, and the tiny number of Africans trickling into the colony certainly seemed to fit this definition.

This small but growing African population was a direct result of Bay Colonists’ increasingly direct participation in the slave trade. A 1678 voyage financed by a consortium of Boston merchants delivered 45 Malagasy slaves, “most women and children,” to Massachusetts, where they found a ready market and sold for between £10 and £20 each.\textsuperscript{144} Governor Bradstreet claimed in 1680 that only “one small Vessell” had ever brought slaves directly to the colony “since the beginning of this plantation,” in addition to “two or three Negroes” occasionally “brought...from Barbadoes...and sold here.”\textsuperscript{145} Though Bradstreet was right that few slaves were imported directly to Massachusetts, the ships, merchants, and capital of the Bay Colony were drawn into the

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\textsuperscript{142} The Prince Society, \textit{The Hutchinson Papers}, (Albany, NY: Joel Munsell, 1865), I: 485. [Hereinafter cited as Hutchinson, \textit{Papers}.]

\textsuperscript{143} Quoted in Nathaniel Shurtleff, \textit{Topographical and Historical Description of Boston} (Boston, 1871), 48-49.


\textsuperscript{145} Bradstreet to Lords of Trade, quoted in Moore, \textit{Notes}, 49.
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profitable smuggling trade, despite the Royal African Company’s monopoly. John Saffin, a wealthy Boston merchant and Speaker of the colonial assembly who had lived in Virginia and cultivated extensive business ties in Jamaica; John Usher, who would serve as treasurer under the hated Dominion government; Edward Shippen, a Quaker merchant with ties to the influential Penn family; and Andrew Belcher, who would be appointed to the Massachusetts Council after the Glorious Revolution – all funded a number of slaving voyages. They were likely involved in the 1678 voyage discussed above, and may also have financed another 1679 voyage that delivered 126 enslaved persons to Jamaica – an additional twenty three souls perished in the middle passage of that voyage.\footnote{TASTD2, \url{http://www.slavevoyages.org/voyages/gHELfQbh}, (accessed 25 September 2014).}

All were investors in the 1681 voyage of the \textit{Elizabeth}, which brought 155 slaves to New England. In keeping with the centralizing initiatives of the Tory Reaction, local enforcement of the Royal African Company’s monopoly was increasingly stringent, making direct slave importation by a Massachusetts ship dangerous. Saffin sent Captain William Welstead to intercept the \textit{Elizabeth} before she reached Swansea, her original destination on the Massachusetts-Rhode Island border, where imperial officials intended to seize her and her cargo. Instead, Welstead was to take “such negroes...of o’rs” and deliver them “in the night...wth what privacy you can” to Saffin’s associates at Nantasket near Boston. Whether this secrecy was necessitated by local enforcement of the RAC’s imperial monopoly, increased attention to New England violations of trade law by metropolitan overseers, or fears about the local legitimacy of slave trading remains unclear, as does the final fate of the \textit{Elizabeth}’s human cargo.\footnote{The TASTD2 lists the \textit{Elizabeth}’s slaves as disembarked in Rhode Island, but Saffin’s correspondence does not note the final disposition of the slaves in this case. The most likely scenario, given the available evidence, is that the William Warren, captain of the \textit{Elizabeth}, never made contact with Welstead and}
increasing participation of Massachusetts settlers in the transatlantic slave trade and their assumption, especially after *Butts v. Penny* established the imperial chattel principle in 1677, that their slave property was legitimate and legally saleable in Massachusetts.

Despite this increased and largely licit participation in the slave trade, the precise legal status of African slaves within Massachusetts remained unclear. Under imperial law, at least, there was no question that the handful of Africans noted by Governor Bradstreet in 1680 were slaves – nearly all of them were imported directly from Africa or the West Indies, where local and imperial law defined them as property. In addition, there were “very few blacks borne here, I think not above [five] or six at the most in a year” so birth into English imperial subjecthood was a minor issue. Unlike in Virginia, however, the status of the few black Bay Colonists born in the colony followed that of their fathers under a 1670 statute, so birth into the community of free subjects was at least theoretically possible. Christianity as a basis for legal personhood also seemed unlikely for most Massachusetts slaves – Governor Bradstreet claimed that “none [were] baptized” as far as he knew. Imperial law defined Massachusetts slaves as property, and they possessed none of the properties of English subjecthood. Why, then, do Africans appear with such regularity in Massachusetts records, almost always as persons, not articles of property? Much of the extant evidence suggests that, for the most part, Massachusetts colonists continued to view slavery as a coercive labor status, not a

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148 *MBC Recs*, IV.ii: 467.
149 Bradstreet to Lords of Trade, quoted in Moore, *Notes*, 49.
property relation, and accorded Africans the same basic rights that any person living in the colony could expect.

John Endicott, Jr. may have been motivated by this ideal when he sold two Africans into a specifically delimited term of servitude in Virginia in May 1678. In keeping with the chattelizing logic of *Butts v. Penny*, Endicott noted that he had every right to sell Antonio, a “Spanish Mulatto...for his lifetime,” but at the urging of another Massachusetts settler, opted instead to sell Antonio to Richard Medlecott of Middlesex County, Virginia “But for Tenn yeares from ye day that he shall Disembarke.” After this period of servitude ended, Antonio would be “a free man to goe wherever he pleaseth.” Inscribed beneath this fairly typical transfer of a servant was another crucial detail – Antonio himself noted his “consent to ye above pr’misses.”

If Africans were entering Massachusetts as chattel slaves, as Antonio all but certainly did, not all of them retained that status – there would be no need for Endicott to obtain consent before selling an article of his property. This conceptual separation between ownership of the persons and labor of African servants was even more evident later that same year, when Endicott sold another “mulatto Serv’t named Anthonio” to Ralph Wormeley, scion of a rising Virginia gentry family. Anthonio was to “serve, dwell, and abide” with Wormely for a term of ten years, but would then be “free & wholly at his own dispose.” Anthonio would serve Wormeley, but would not be owned by him. Both of these transfers follow, almost to the letter, the procedures for transferring the labor of indentured servants, not the legal mechanisms for alienating chattel properties.

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150 *VA Magazine of History and Biography*, vol. 8, no. 2 (October, 1900): 187-188.
151 Ibid.
One wonders, however, how much credence Wormeley and other settlers in the plantation colonies gave to Massachusetts’ local practice. With increasing numbers of slaves entering the colony through Massachusetts’ participation in the coastwise trade, a number of cases arose questioning whether property rights established in the plantation colonies were binding in New England. In 1670, for example, Robert Granby of St. Christophers sued Nicholas Leech and William Hobby for carrying off eight tons of sugar and five slaves – they asked for £600 in damages. The final determination of the case is not recorded, nor is the exact form of action used to initiate suit clear, but, drawing on the principles laid down in *Butts*, Granby clearly believed his slaves remained articles of property, even in Massachusetts.\(^{152}\) In 1670, a “little negro boy” named Seaser living in the household of William Hollingworth was seized by Salem magistrates and returned as the “proper goods” of Michael Powell of Barbados.\(^{153}\) When Massachusetts residents held African servants claimed by planters, the law of property-in-man dictated rendition or compensation for rightful owners.

Other cases were less straightforward, however. In 1672 John Keene sued Thomas Blighe for depriving him of the service of his “Negroe boy” named James. Keene presented evidence that James had been left to him as a “gift or Legacy” in the will of William Oates. The jury found in Keene’s favor and ordered that either James be returned or Blighe pay £30 plus court costs. James’ ultimate fate is unknown, and it is entirely possible that the jury’s decision hinged on their belief that he was an article of

\(^{152}\) Donnan, *Documents Illustrative of the Slave Trade...,* III: 14, n2. The fact that Granby sued for the value of his lost property rather than restitution of the specific slaves in question suggests that he initiated suit with a writ of trover, just as had been the case in *Butts*.

\(^{153}\) George Francis Dow, ed., *Records and Files of the Quarterly Courts of Essex County, Massachusetts* (Salem, MA: The Essex Institute, 1914), IV:322. [Hereinafter cited as *ECCR*.]
property. It is also possible, however, that the case turned on questions of rights to James’ labor – the fragmentary record does not record the form of action that initiated Keene v. Blighe.\textsuperscript{154} A 1680 case further illustrates the confused nature of claims made to black Bay colonists. In 1675, Elizabeth Gibbs had “put her negro man and servant Zanckey” out to John Wing, a Boston shopkeeper, for four years in return for five pounds ten shillings per annum. Wing was in arrears to the tune of £22 by 1680 and Gibbs, now widowed and remarried to Jonathan Corwin, brought suit to recover the amount owed. Zanckey was apparently a sickly fellow, however, and Wing argued that he had laid out far more than the £22 he owed in medical costs over the years. The court found for Corwin and awarded damages, but the logic of the decision is unclear. Some witnesses had testified that Zanckey was a “slave” so perhaps the case is an early illustration of slave hiring in the Bay Colony. Most, however, referred to Zanckey as a servant, and Corwin clearly had no claim beyond the four years of labor he had contracted for. It is plausible that all parties saw the sickly African as a servant subject to the same legal rules as any bound English subject.\textsuperscript{155}

This bias in favor of the legal humanity and basic rights of black Massachusetts settlers also gave Africans themselves a number of rights in New England courtrooms. In stark contrast to Restoration Virginia, Massachusetts courts consistently afforded black colonists the same legal rights as English settlers. On 2 March 1669, the Court of Assistants in Boston heard the case of Franck Negro. Franck was indicted for conspiracy in helping John Pottell, a white sailor held on suspicion of murder, escape from prison in

\textsuperscript{154} Allyn Bailey Forbes, ed., \textit{Records of the Suffolk County Court, 1671-1680}, (Boston: The Colonial Society of Massachusetts, 1933), XXIX: 159. [Hereinafter cited as \textit{SCCR}.]

\textsuperscript{155} \textit{ECCR}, VII: 394-395.
Boston. Governor Richard Billingham himself questioned Franck, and a number of
witnesses were summoned to give testimony in the case. In the end, the grand jury
acquitted Franck of all charges. Crucially, the trial procedures in Re: Franck Negro were
identical to those in other grand jury hearings. Since it is unclear from the surviving
evidence whether Franck was free or enslaved, two possible conclusions can be drawn
from this case, both of which support the claim that Massachusetts courts saw Africans,
whether servants or slaves, as persons with access to certain basic rights. If Franck was a
free man or a servant, the court’s treatment of his case is compelling evidence that racial
difference had not brought forth a two-tiered justice system, as it had in Virginia.
Franck’s potential freedom also raised the intriguing question of how he became free –
perhaps he had served out an indenture locally, was manumitted by an individual owner
for faithful service, or converted to Christianity and was absorbed into the Puritan
community, none of which would be possible for enslaved Africans in Virginia. If
Franck was held as a slave, the court’s treatment of his case is even more compelling,
illustrating that Massachusetts magistrates refused to complete Godwyn’s “two-fold Use”
by fully dehumanizing bound African laborers and depriving them of basic rights. In
either case, the contrast with developments in Virginia is striking.

Nor was this tendency limited to the Bay Colony – black New Englanders’ access
to courts of law was also evident in the cases of Robert Trayes and Hannah Bonny, heard
by Plymouth magistrates in 1684 and 1685 respectively. Robert Trayes of Scituate

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156 John Noble, ed., Records of the Court of Assistants of the Colony of the Massachusetts Bay, 1630-1692, (Boston: Suffolk County, 1904), III: 194. [Hereinafter cited as MA Ct Assts Recs.]
157 Though obviously still a separate jurisdiction from Massachusetts Bay in 1685, Plymouth’s law code and legal culture were remarkably similar to those in the Bay Colony and shed further light on the legal definition of African servitude in New England.
was brought before a grand jury to answer for the murder of Daniel Standlake, an English settler also of Scituate. The grand jury, again using the same procedures as in any other proceeding, indicted Trayes for “felonulously, wilfully, and presmtruously” killing Standlake. The proceedings of Trayes’ trial are only briefly recorded in the record, but again all trial procedures seem to be precisely those accorded any settler accused of a crime. In the end, the jury acquitted Trayes of murder, finding him only to be “an instrument of the death of Daniell Standlake by misadventure.” John Trayes, also described as “negro” and likely a relative of Robert’s, was also cleared of any wrongdoing in connection with Standlake’s death. The pair were ordered to pay £5 in restitution to Standlake’s father, or to be publicly whipped if they could not pay, and encouraged to “lay [their actions] much to heart” and repent before God.\footnote{Plym Col Recs, VI:141-142.} Again, though the legal status of the Trayes family remains unclear, the Plymouth courts certainly treated them as though they were subjects under English law.

\textit{Re: Hannah Bonny}, heard by the Plymouth courts in 1685, is another telling example of the degree of legal acceptance African New Englanders could expect in Puritan society. Hannah Bonny, a white colonist, was convicted on two counts of fornication in October 1685 – one with John Michell, another English colonist, and one with Nimrod, with whom she had “a bastard boy.” Bonny was “well whipt” for her indiscretions, as was Nimrod, who was also required by the court to pay 18 pence a week for the child’s upkeep. In no way did the fact that Nimrod and Hannah Bonny’s dalliance crossed racial lines impact the court’s deliberations. The case was unique in one way however – unlike most other cases involving black settlers during this period, the court
recorded that Nimrod was held in some sort of servile status. If he was unable to make the ordered child support payments, his “master” was to make them on his behalf. In the case that neither Nimrod nor his master could make payments, Nimrod was “to be put out to service...soe long time, or from time to time” to guarantee that his illegitimate child would not become a burden on the community. Still, this does not necessarily prove that Nimrod was a slave, at least not by Morgan Godwyn’s definition. Indeed his presence in a Plymouth courtroom, the use of regular procedures of justice in his trial, and the punishment meted out by the court are all perfectly in line with the normal course of justice in Puritan New England. The fact that the court sentenced Nimrod to make payments on his own account hints that he had some property of his own. Clearly, this kind of equality before the law was anathema to widespread enslavement.

The testimony of enslaved Bay Colonists also appears to have been accepted by colonial courts. “Captain White’s ‘neger’” testified in *Taylor v. White*, a paternity suit heard by the Essex County Quarterly Court in 1663. A decade later, Mary Rowland’s “negro maid” gave a deposition in *Smith v. James*, a civil suit over a debt between two white settlers. Black Massachusetts settlers also appear to have had access to another traditional right of English settlers: judicial appeals. In 1676, Hannah Negro appealed her conviction by a Suffolk County court in the Court of Assistants. Her appeal was denied by the jury empaneled by the court to hear her case, and she was ordered to serve

159 *Plym Col Recs*, VI:177.
160 For another instance of a black Massachusetts colonist being charged and tried for sexual crimes under the same terms as white English settlers, see the case of Jack Negro, a Boston “servant” found not guilty of bestiality in *MA Ct Assts Recs*, I:74. For other examples of black colonists tried for sexual offences, see Lorenzo Johnston Greene, *The Negro in Colonial New England* (New York: Columbia University Press, 1942), 203.
her original sentence and pay court costs.\textsuperscript{163} Still the fact that Hannah, who had almost
certainly entered the colony as a slave in the previous decade, had not only the right to a
trial in the Suffolk County court but the right of appeal to a higher court as well is truly
remarkable. Perhaps she had been baptized – her Christian name in the court record
suggests as much – and negotiated an indenture with her master. Perhaps she was already
free. She may even have still been considered a slave. In Massachusetts courts it made
little difference. In Hannah’s case, as in every instance where a black colonist came
before a Massachusetts court, she was treated as a person with rights, not a socially dead
article of property. Whatever their initial status on arrival to the colony, Africans in
Restoration Massachusetts were almost universally referred to as servants, not slaves – a
descriptor that much more aptly describes their treatment by colonial authorities.

As we have seen, however, Africans were most certainly defined as slaves when
they arrived in New England during the Restoration, and Massachusetts courts were
forced to deal with the property claims of slave owners when meting out justice to black
settlers. In 1676, for example, Robert Cox petitioned the General Court to release
“Sebastian, negro, his servant,” into his custody. Sebastian had been convicted of raping
Cox’s three-year-old daughter Martha, and was awaiting execution in a Boston prison,
not a situation likely to provoke the sympathy of godly Puritan magistrates. Despite the
gravity of his offense, Sebastian had his day in court – even a slave could not be found
guilty of such a heinous crime without a trial. Only after his slave was sentenced to die
did Cox attempt to intervene. The General Court, rarely overeager to impose the death
penalty, obliged. Sebastian was “severely whipt” and ordered to “weare a roape about his

\textsuperscript{163} MA Ct Assts Recs, I:151-152.
“neck” as a visible reminder of his guilt, then released from prison and returned to his master’s custody.164

The case is puzzling. Why would Massachusetts Puritans, who so closely monitored the settler population and punished even minor sexual indiscretions, release a convicted rapist from custody? Why would the father of the victim of such a terrible crime petition for the release of his daughter’s assailant? One possible explanation is that Cox claimed Sebastian as his slave and protested that the scheduled execution would deprive him of a valuable property right. The Court of Assistants had explicitly described “Basto” as a “slave” in his initial trial, making a property claim on Cox’s part likely. Unfortunately Cox’s petition and the Court’s deliberations on it are lost to history, so a definitive explanation of Sebastian’s case remains elusive. Even if the General Court did accept a property argument, however, it still retained the ultimate power to mete out punishments to African slave/servants who, even when they stood accused of the most heinous of crimes, were not rightless before the courts. Though he had been released into his master’s custody, and was subsequently sold out of the colony, Sebastian was not under Cox’s absolute disciplinary power within Massachusetts itself – there the powers of life and death were at the discretion of duly appointed courts, not individual masters. Unlike in Virginia, that power had not fully devolved to Massachusetts slave owners.165

This did not preclude the colonial state from exercising this power of life and death, however, particularly in cases where open resistance by bound African laborers

164 MBC Recs, V: 117.
165 For Sebastian’s rape trial, see MA Ct Assts Recs, I:74. For the General Court’s consideration of Cox’s petition for leniency, see MA Gen Ct Recs, V:117-118.
endangered the safety of the godly republic. In the summer of 1681, a spate of arsons by African servants stoked fears of a widespread plot to destroy the Bay Colony. Three African “servants” – Chefaleer, Marja, and “James Pemberton’s negro” – set fire to the homes of Dr. Thomas Swann and Joshua Lambe in Roxbury on July 11th. Jack, “negro servant” to Samuel Woolcot of Weathersfield, burned down Lieutenant William Clark’s Northampton home three days later. All four arson cases came before the Court of Assistants in the fall, and the colonial state used the most coercive means at its disposal to punish the rebellious Africans and squelch any future plots. Chefaleer and “Pemberton’s negro,” who had already been tried and convicted by a lower court, had their sentences confirmed – both were confined to prison until their masters sold them out of the colony, likely to labor-starved West Indian sugar plantations. The court appears to have anticipated some resistance from Thomas Walker, Chefaleer’s master, perhaps a claim about the wrongful taking of property, and stipulated that if the convicted Chefaleer was not transported within one month, the county treasurer would handle the sale, returning only the “overplus” from the sale to Walker.166

However terrible, sale and transportation paled in comparison to the brutal punishments handed down to Marja and Jack. Marja admitted to being “Instigated by the divil” and “at the barr pleaded & acknowledged hirselfe to be Guilty.” Jack pled not guilty and asked to be tried “by God & the Country.” The trial was short – Jack’s confession was read aloud to the jury and a series of witnesses testified to his guilt. No one was surprised when the jury pronounced Jack guilty the next day. Both Marja and Jack were sentenced to death. Marja was to be burned alive. Jack was to be hanged at

166 MA Assts Recs, I:197-198.
the scene of his crime, and his corpse returned to the court to be “burnt to Ashes in the fier wth Maria.” Invoking the mercy of God on the souls of the rebellious Africans, Governor Bradstreet sent Marja and Jack to their deaths. Such draconian punishments were *de rigeur* in the annals of Anglo-American slavery and would only become more common as the peculiar institution deepened its roots throughout the empire.

More immediate contexts also likely influenced Massachusetts’ response to an increasingly restive African population. The Exclusion Crisis back in England was reaching its peak in the summer of 1681, and pervasive fears of a “popish plot” to subvert the Protestant succession may have heightened Bay Colonists’ anxieties about their own godly mission. Perhaps the accused Africans were associated with a Catholic threat – Marja (Maria) and Chefaleer (possibly an Anglicization of Chevalier) may have spent time in the Spanish or French colonies before being imported to Massachusetts. Bay Colonists certainly exhibited a good deal of paranoia about invasions from French Canada, and reports of James Stuart’s close ties to the French court did little to assuage these fears. Possible ties to a Catholic threat certainly informed Massachusetts’ response to another outbreak of slave resistance in 1690. With the future of their godly experiment hanging in the balance and signs of declension all around, some Puritan colonists may even have taken Marja’s admission that she was “Instigated by the divil” literally – perhaps a burnt offering would placate a wrathful God who seemed bent on destroying their city on a hill. These factors would certainly play a role in the witchcraft trials that rocked the Bay Colony a decade later. Faced with very real threats to their way

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167 *MA Ct Assts Recs*, I:197-199.
169 For a more detailed examination of the 1690 Newbury conspiracy, see Chapter 4, *infra*. 
of life, Puritan colonists gladly utilized every ounce of coercive force their colonial state could muster to protect their godly commonwealth.

This did not, however, include the reduction of human beings to socially dead, rightless chattels. Even Marja, Chefaleer, and Jack, almost certainly among the handful of African slaves trickling into Massachusetts during the Restoration, were tried in colonial courts using the same procedures a free, English colonist would have expected. All the 1681 conspirators were arraigned by grand jury, examined and tried before juries of twelve colonists, and sentenced according to “the Lawes of the Jurisdiction.”¹⁷⁰ In the few cases where Massachusetts magistrates did seem to recognize some sort of property right in bound Africans, this right was framed as ownership of labor not persons. One might assume that the hated Dominion government imposed in 1685 would have rolled back any recognition of enslaved peoples’ legal humanity – this would, after all, have been perfectly in line with the kind of policies favored by James II’s darling Royal African Company. Quite the opposite occurred, however. Instructions to Edmund Andros required that the Dominion government “pass a low for the restraining of inhuman severity” of slaveholders and make the “willfull killing of Indians and Negros” a crime punishable by death.¹⁷¹ In other words, even in the midst of the human tragedy of the Restoration, the Bay Colony refused to work Morgan Godwyn’s “two-fold Use” on African slaves – they were never fully chattelized and reduced to “brutes,” and they retained access to those “Temporal and Spiritual Rights, which their Manhood...[would]

¹⁷⁰ MA Ct Assts Recs, I:198.
Indeed, by Godwyn’s definition, and Henry Parker’s before it, bound African laborers in Massachusetts were hardly slaves at all.

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James II and VII met much the same welcome on his ascension to the throne in 1685 as his older brother had twenty-five years earlier. Despite his open Catholicism and close ties to the French court, James’ repeated assurances that he would rule according the established laws of the realm sufficiently calmed most anxious subjects. Besides, the purges and repression of the Tory Reaction had already condemned many Whig anti-absolutists to prison, exile, or the relative silence of tactical retreat. Rebellions by the Duke of Argyle and James’ nephew, the Duke of Monmouth, were quickly suppressed by the king’s new standing army. Bonfires filled the streets in celebration of every conceivable royal commemorative event, and loyal addresses poured in to the king from around the empire. The Virginia Council, for example, decreed that James II’s ascension be celebrated with “all the solemnity and Ceremony, our Condition is capable of performing.” With their colony becoming ever more profitable thanks to the enslaved laborers James had delivered, Virginians had good reason to pledge their loyalty to such a king.

Secure in his throne and rich from the profits of colonial trade, James must have counted his early engagement in the slave trade as a major element of his success. It had made him personally wealthy beyond measure and helped to guarantee the fiscal solvency of his realm. He had made many powerful political allies among the empire’s

most important merchants and colonial planters through continued support for imperial slavery and the slave trade. During James’ short reign alone, at least 150 English vessels delivered over 30,000 enslaved Africans to the colonies. What these thousands of forced migrants knew or thought of their new and distant monarch, we cannot know. Did they hear James’ name discussed in connection to their enslavement? Did they see his face circulating on the newly minted coins named for their distant home? Did they hear prayers for his health and long reign from their masters, or complaints about abuses of basic rights? None of this seemed to matter anyway – no one in England was much concerned about the plight of African slaves. Slavery and Stuart absolutism, it seemed, had emerged triumphant and unchallenged from the ashes of the Interregnum.

Morgan Godwyn, however, was unwilling to sit quietly by and let James’ ascension to the throne pass without reminding the new monarch of his (specifically Protestant) Christian duty to the heathens living in his dominions. The sermon Godwyn preached before King James II at Westminster Abbey in 1685 urged the monarch to promote the Christianization of African slaves and Native Americans in the colonies – hardly a controversial request it would seem. None of this would necessarily challenge royal authority or, since the decision in Butts v. Penny had defined slaves as non-human properties despite their conversion, threaten the growing system of slavery. Yet the Anglican cleric also linked his scathing attack on the slave trade to a series of thinly veiled Whiggish criticisms of the Stuart regime, reminding his fellow subjects that their new king, who promised them justice and protection, had actively enslaved thousands of innocent Africans and stripped them of all basic civil rights. Would Britons be next?
Godwyn’s sermon was based on Jeremiah 34:2 – “Also in they Skirts is found the Blood of the Souls of the poor Innocents; I have not found it by secret search, but upon all these.”¹⁷⁴ This blood, Godwyn argued, was on the hands of all present, especially his new absolute sovereign. By refusing, or at least not promoting, baptism for African slaves and Native Americans in the colonies, the Stuarts had made the English nation “Murherers of Souls.” The devotion of metropolitan merchants and colonial planters “unto their MAMMON” had driven them to the “unheard-of Villany...of exercising those their Hellish Cruelties, not only upon the Bodies, but extending them to the very Souls, and that of poor Innocent Men.” Indeed, “the necessity and benefit arising to them from their Trade and Commerce with Forreign Nations,” these Mammonists claimed, “would not barely excuse, but even consecrate the Villany.” Though there were many symptoms of this moral cancer in English society, many of them promoted by the Stuart court, the prime example, in Godwyn’s mind, was “the compelling of Persons imported out of Africa...residing in our Families, and Vassals to us, to remain in their native Gentilism; without any regard to the honor of our Religion and Nation, any more than to the good of their, or our own Souls.”¹⁷⁵ The greatest impediment to the baptism of Africans was the definition of slaves as property, not persons – slave owners and metropolitan planners were “not ashamed to debase Men, made in the Image of God (no less than themselves,) and whose Flesh is as their own” to base chattels. Rather than becoming “Instruments in

¹⁷⁴ All quotations in the following discussion of Godwyn’s sermon, unless otherwise cited, are drawn from Morgan Godwyn, *Trade Preferr’d Before Religion and Christ Made to Give Place to Mammon...* (London, 1685).
¹⁷⁵ Godwyn’s use of “vassal” here may be significant. As we will see, villeinage and serfdom, though often invoked to give cover of English law to chattel slavery in England, could also be used to construct an anti-slavery argument. Chief Justice John Holt would hand down a number of rulings at the turn of the 18th century that used precisely this logic to delegitimize property in man – a master might claim the labor of his “slave,” as a lord would claim that of a villein or a master of his servant or apprentice, but not their person.
God’s Hand to save Men’s Souls from Hell, and their Lives from the Destroyers,” the English had instead “conspired with Satan...entered into a confederacy with Hell it self...[and] exceeded the worst of Infidels, by our first enslaving, and then murthering of Mens Souls.” James hands, Godwyn implied, were “not so much spotted or stained only, as thorowly wrenched and dyed in [the] precious Blood of Souls.”

The great tragedy, to Godwyn, was that this unchristian turn to slavery was so recent. As recently as “fifty or sixty years since,” the kind of claims made by slave owners and traders would have “render[ed] the Authors obnoxious, not only to the publick Censure, but to the Peoples Fury.” Sadly, in England no one dared “to open his Mouth against it, or so much as to look the Impiety in the Face,” while in the colonies the sin of slavery was “legible in Capital Letters, made evident to the most incurious Observer, and entered into their very Laws and Records.” Slavery existed in the colonies, a fact that Morgan Godwyn decried, but this did not mean an African slave was inhuman or without “a living and immortal Soul, capable of Eternal things, and destined to the highest Happiness.” Though certainly no Puritan, Godwyn put forth the “great Industry of our People in New-England” in “their converting of Nations” as a possible model for England to emulate. The only Christian solution, Godwyn advised his audience, was to make “a speedy composure and reconciliation: At once striving to make (at least) some kind of reparation for what is past, and no less joining in all laudable Proposals and ways for effecting these poor Peoples Christianity, without any further delays.” The king, after all was bound to protect those living in his dominions, even the “Negro’s and Indians, Slaves and Tributaries, all of them Subjects of this Kingdom.” Should the English nation fail to act, dire consequences were sure to follow. Slave traders and colonial planters,
men very much after the king’s own heart, would face God’s “most calamitous and...most lasting” punishment for their sins, and should they continue in their present ways, would drive “divine Vengeance [to] stir up these very Soul-oppressed People...and make them the Rods of his Anger.”

James II could not have been pleased to hear such a sermon. Though the king was never directly indicted for the national sin of slavery, all who heard or read Godwyn’s sermon would have known precisely who had orchestrated, and profited from, the Anglo-Atlantic slave trade, and wondered whether their own liberty was safe under a French-leaning Catholic monarch who had proved so willing to enslave his darker-skinned subjects. Godwyn knew his sermon would draw potentially dangerous attention from powerful forces aligned with the king – the dedicatory to the published version of the his sermon worried that the author would “fall under no small danger of Censure, as well for my first preaching, as now publishing this Discourse.” Morgan Godwyn’s predictions proved more correct than he knew – the Anglican cleric and lone antislavery voice in the wilderness of the English empire was found dead under suspicious circumstances shortly after his sermon was printed.176

But his death was not Morgan Godwyn’s only accurate prediction. Disaffection with an absolute Catholic monarch only grew as James II used his dispensing power to favor fellow English adherents of the Church of Rome, accepted massive financial subsidies from the French crown, and infringed many of the cherished rights of his subjects. As Godwyn had predicted in 1681, royal absolutism and slavery went hand in

176 Holly Brewer, “Slavery and Sedition: Rethinking Historical Silences through the Mysterious Death of Morgan Godwyn,” unpublished paper presented at The Graduate Center, CUNY (29 April 2013). I thank Prof. Brewer for permission to cite her paper here.
hand—“all Subjects and subordinate *Governors* would be Men but in part; but yet by so much the more, by how much they approached nearer to *Absoluteness*. And in all the *Grand Seignior’s* spacious Domains, where there are none but Slaves, there would not be so much as one Man besides himself; not excepting the very *Christians*. The evil consequences of which Belief, the *Authors* thereof may sooner feel, than they are willing to understand or see.”¹⁷⁷ In 1688, Godwyn’s prediction came to fruition, with dramatic results for the place of slavery in the English empire.

Chapter IV – The Williamite Moment: Property Personhood, and the Transformation of Colonial Slavery, 1689-1714

John Locke’s desk is a remarkable piece of furniture. A scrutoire with a fold-down writing surface and dozens of drawers and “pigeon holes” to store folios, octavos, and manuscript notes, it is remarkable not in its appearance but in the body of work its owner produced on it. We can imagine the father of English Enlightenment thought reworking drafts of his philosophical treatises at this desk in the 1680s or scribbling memoranda as secretary to the Board of Trade in the 1690s. Perhaps it was here that Locke put the finishing touches on his *magnum opus*, the *Two Treatises of Government*, originally penned while in exile during the Restoration. It was here that he laid down the central maxims of modern liberal thought: “all men are naturally in…*a state of perfect freedom*”; “every man has a *property in his own person*”; “no body can…compel me by force to that which is against the right of my freedom, *i.e.* make me a slave.” It was here that classical liberal political economy emerged: through his labor, man made the common inheritance of the Earth into private property, “a part of him, that another can no longer have any right to”; inequalities in property distribution were natural and even beneficial, since “he who appropriates land to himself by his labour, does not lessen, but increase the common stock of mankind” through surplus production, leading the civilized world to consent “to a disproportionate and unequal *possession of the earth*”; the “great and chief end” of civil society was “*the preservation of…property*” by “an *established, settled, known law*, received and allowed by comment consent.” We know this John
Locke well—progenitor of modern liberal individualism, defender of private property and proponent of limited government.\(^{178}\)

We also know, however, that Locke’s desk also saw a startling number of documents tied to plantation slavery and the trans-Atlantic slave trade shuffle through its drawers and pigeon holes. The great theorist of natural freedom likely drafted key sections of the Fundamental Constitutions of Carolina establishing African slavery at this desk, and passages about the sanctity of vested property rights drafted and revised on its polished oak writing surface were used by slave owners to legitimate property-in-man. Locke even explicitly condoned the “lawful” slavery of captives taken in “just wars,” the traditional basis of European slavery, albeit with a number of crucial qualifications. Despite lofty pronouncements about human equality, Lockean liberalism left ample conceptual space for racist exclusion from full humanity as well—since the “freedom of man...is grounded on his having reason,” then “any one [who] comes not to such a degree of reason, wherein he might be supposed capable of knowing the law, and so living within the rules of it, he is never capable of being a free man.” To large numbers of Anglo-American colonists, it was self-evident that African and Afro-British slaves lacked the rationality necessary for civil society and the exercise of freedom. Even Locke himself hinted that uncivilized others who refused to enter into civil society were unfit for freedom and remained in the state of nature, where the uncertainty of natural

rights exposed them to warfare, captivity, and enslavement, “the state of war continued, between a lawful conqueror and a captive.”

While Locke denied the legitimacy of slavery in European civil societies, where the natural law of reason precluded dominion over another human being, he also admitted that the “legislative power...established, by consent, in the common-wealth” could limit individual freedom with the “restraint of law.” Furthermore, any person whose life was forfeit, through war captivity or legal proscription, came under the despotic and arbitrary power of another – became a slave – allowing a master to “make use of [the slave] to his own service, and he does [the slave] no injury by it: for, whenever he finds the hardship of his slavery outweigh the value of his life, it is in his power, by resisting the will of his master, to draw on himself the death he desires.” Unlike servants, whose labor power could be purchased and whose terms of service were regulated by law, suicide-by-slave owner was the only escape that enslaved people could hope for. Was this not the very system Anglo-American slave owners had legitimated through their local laws throughout the empire? Irrational, uncivilized captives taken during wars between peoples inhabiting a state of nature became the property of civilized Britons who, through their local legislatures, stripped the enslaved of their freedoms and took dominion over their very lives, turning the labor of slaves into future property claims for masters. The strong strand of possessive individualism underpinning Lockean thought, it


180 Locke, Two Treatises, §4-6.
seems, could be just as hospitable to human slavery as the patriarchalist absolutism of the Stuarts.

Indeed, there is much in the history of the Glorious Revolution and its aftermath to support this line of thought. A long and illustrious line of commentators from Edmund Burke to J. C. D. Clark have argued that the revolution of 1688 was no true revolution at all, but rather a conservative vindication of traditional English rights and liberties, the triumph of the ancient constitution over popish innovations. The Glorious Revolution was a quintessentially English affair, meant to benefit only a small sliver of the property-owning male population. The Stuarts may have been deposed, but English law and politics remained substantially unchanged by the ascension of William and Mary.\textsuperscript{181} Historians of slavery and empire have drawn attention to the Janus-faced nature of the revolutionary settlement – English, and later British, subjects reaped the benefits of nascent liberalism while African slaves, indigenous Americans, and other subaltern peoples were excluded from the liberal order, subjected to coercive labor regimes and defined out of the community of rights-bearing subjects. The liberal empire that Britons constructed in the wake of their Glorious Revolution depended in no small measure on

the exclusion and enslavement of African and Afro-British men and women in the American colonies.\textsuperscript{182}

But there was another side to John Locke and the revolution he wrote to defend, one deeply informed by the corporate humanism of the English Civil Wars and the dissenting Protestant tradition embodied in Massachusetts’ godly republicanism. In contrast to possessive individualism’s focus on natural freedom, the foundational principle of the corporatist liberal tradition was fundamental human equality. As Locke put it, mankind began in “A state...of equality, wherein all the power and jurisdiction is reciprocal...; there being nothing more evident, than that creatures of the same species and rank, promiscuously born to all the same advantages of nature, and the use of the same faculties, should also be equal one amongst another without subordination or subjection...” Where liberal self-ownership opened up avenues to property accumulation and inequality, Lockean corporatism recognized God’s higher proprietary interest in all persons – everyone shared an “omnipotent, infinitely wise maker” and therefore “they are his property, whose workmanship they are.” It was surely true that, even in the state of nature, it might happen that “one man comes by a power over another,” but this could never be an “absolute or arbitrary power” to use another “according to the passionate heats, or boundless extravagancy” of one’s own will – to do so would violate God’s interest in His own creation. This fundamental belief in the essential equality of all

humanity is just as central to the liberal tradition as its oft-cited possessive individualism.\textsuperscript{183}

The Glorious Revolution and the settlement it wrought enshrined many of these corporatist ideals in the unwritten English constitution, which bracketed all legitimate authority under the rule of law and ensured the basic rights of all subjects within English, and later British, dominions in the Bill of Rights (1689) and Act of Settlement (1701). Broad toleration for dissenting Protestants largely quieted earlier conflicts over religious exclusion from the body politic and linked England to the growing Protestant International squaring off against Catholic absolutism. Though mediated through multiple levels of virtual representation, all subjects were also understood to give some form of consent to the arrangements under which they lived, and an increasingly deliberative political culture meant that more and more Britons would participate directly or indirectly in the affairs of the realm. Perhaps most importantly, the revolutionary settlement recognized the fundamental legal equality of all subjects, and worked to bring the common law into line with this foundational principle. The Glorious Revolution, then, marked a moment of truly revolutionary possibility for England and its empire, bringing “the people” more fully into the political life of the nation and shaping a new, “modern” state committed to the protection of its subjects. After a nearly a century of

often violent political turmoil, Britons hoped that the revolutionary settlement would “free the nation from slavery forever.”

We are often told, however, that English revolutionaries like Locke were interested only in preventing the political enslavement of rightfully freeborn Englishmen. ‘Slavery’ was simply a potent rhetorical weapon in the arsenal of the opponents of absolute monarchy – Britons, by and large, had little interest in the very real, lived slavery of the hundreds of thousands of Africans transported to their New World colonies. Yet, as we have seen, the ways in which English men and women thought about and structured their own political lives could, in certain circumstances, have a dramatic impact on colonial bondage. For his part, Locke was explicit about the illegitimacy of human slavery of all stripes. Slavery, said Locke, was “the state of war continued” – an arena where the sacrosanct law of civil society held no sway. To be enslaved was to be beyond the protection of the laws. But Locke questioned the kind of power that conquest could convey, simultaneously undermining this very basis for enslavement. “Despotical power” could be imposed only on “captives, taken in a just and lawful war, and such only.” In Locke’s hands, however, the definition of a just war was exceedingly narrow – only “those who actually assisted, concurred, or consented to the unjust power” that provoked the war were liable to enslavement. By this metric, even if enslavement in Africa, beyond the pale of English civil society, was legitimate, could the children of slaves continue in bondage? Outside of this narrowing definition of

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legitimate enslavement, the law of natural liberty or the rule of civil law made slavery
difficult to justify. “Where there is an authority,” Locke argued, “a power on earth, from
which relief can be had by appeal, there the continuance of the state of war is excluded,
and the controversy is decided by that power” – the ability to appeal to the laws was
incompatible with slavery. 186

If slavery was illegitimate, as Locke so clearly argued it was, then what relation
might former slaves turned free subjects have to the state and to their former owners?
Here Locke is silent, though his disquisition on the nature of subjecthood hints that all
free people who gave their consent to be ruled also had a claim to basic rights and
protections. Locke argued that all persons born into a civil society are naturally “obliged
to obedience and the laws of that government” and must therefore be considered subjects,
as they were understood to have given their tacit consent to their government. Even this
tacit consent bound “person and possession...to the government and dominion of [the]
common-wealth, as long as it hath a being.” Once established, the commonwealth’s
interest in the persons of subjects was immutable. There were also lines of exclusion
built into this theory of subjecthood however. Merely living peaceably under the law
“makes not a man a member of that society,” and the access of non-members to the
protection of the law was “only a local protection...[for] all those who, not being in a state
of war,” come within a jurisdiction. 187 If property-in-man was rooted in the state of war
continued, then slaves could not be subjects. 188 But any persons who could make a
“positive engagement, and express promise and compact” with the state must be

186 Locke, Two Treatises, 16-17.
187 Locke, Two Treatises, 64.
188 Nyquist, Arbitrary Rule, 329-361.
considered “subjects or members of that common-wealth.” With the basis of slavery increasingly narrowed, and such a robust and relatively capacious understanding of subjecthood, it is little wonder that very real challenges to property-in-man emerged in Britain and its empire.

Despite its reification of the vested property rights of individual subjects, then, the Glorious Revolution also held out the potential of a fundamental reworking of imperial slavery – there was nothing inherent to the logic of English revolution principles that would exclude formerly enslaved people living within English dominions from their basic rights as rational humans. This tendency was made clear by a series of remarkable decisions handed down by John Holt, Chief Justice of King’s Bench, between 1697 and 1706. Turning Restoration-era slave law on its head, Holt, drawing on antislavery principles first worked out during the Civil Wars, declared that property-in-man, the very basis of imperial slavery, was inconsistent with common law and the rights of the subject. Reaffirming traditional ideals of free English air, Holt declared that “as soon as a negro comes into England, he becomes free” – though masters might still have a claim to the labor of what Holt called a “slavish servant,” ownership of a person was illegitimate. As legal persons living in English jurisdictions, then, Afro-Britons must have access to basic rights because, as Holt said, “the common law takes no notice of negroes being different from other men.” Whether they intended to or not, Whig revolutionaries had created legal space for a forceful statement of antislavery principles from the highest court in the Anglophone world.

189 Locke, Two Treatises, 64.
190 3 Ld. Ray. 129-133; 5 Mod. 92; 1 Ld. Ray. 146; 5 Mod. 186; 1 Carth 397.
Though these developments at the metropole were crucial, however, the real revolutionary contest over slavery took place on the uncertain terrain of empire, where the patchwork of local law erected over the 17th century largely shielded colonial slavery from imperial innovations. Scholars have long noted Locke’s fascination with empire and the indigenous people of the Americas, and the ambivalent relationship he had with both. Locke surely recognized the importance of the empire to England’s future, but his was a new economic vision, based not on the extension of English dominion and acquisition of ever more territory, but rather on the more intensive development of the extant empire. True wealth, Whigs like Locke argued, was to be found not in extent of possessions but in “greatness of people,” in the ability of free subjects to contribute to the common wealth through their labor. Secure in their persons and possessions, Anglo-American colonists would turn to intensive development of the resources they already controlled, with the benefit redounding to the public good of all subjects. Not everyone shared this vision, however, and the loose legal structure of empire precluded the kind of centralized, coordinated economic development Locke desired. Colonial charters and local positive laws could not simply be ignored. Even Chief Justice Holt, in his revolutionary antislavery legal decisions, recognized that local colonial law, once established, could not be easily altered and limited the scope of his emancipatory reading of common law to England itself.

This complicated position on slavery, we are often told, was limited to the realm of political theory, a rhetorical stance meant primarily to safeguard the rights of freeborn white Englishmen – Whig anti-absolutists were at best ambivalent about the very real bondage that tens of thousands of enslaved men, women, and children endured in the
colonies. But John Locke was not merely a philosopher, and as secretary to the Board of Trade from 1697 to 1703 he had considerable influence over the direction of colonial policy, helping to craft reform plans that would bring colonial law more closely in line with the revolution principles of 1688. Here Locke’s desk held one final secret, a document hidden away in one of its pigeonholes for centuries until its discovery by scholars in the 1960s – the Virginia reform plan of 1699, which sought to break up the Old Dominion’s huge landed estates and guarantee the access of all imperial subjects to life, liberty, and property. While Virginia’s local positive law made it difficult to tamper with the institution of slavery directly, when Locke had access to the levers of imperial power he attempted to use them in ways that would have fundamentally remade the basis of the colonial plantation economy, bringing it more closely in line with the political economy of Massachusetts and the antislavery legal culture of the Holt Court.\(^{191}\)

The Glorious Revolution and its philosophical justifications, then, had a complex and ambivalent impact on Anglo-American slavery. One the one hand, the sanctity of vested property rights at the heart of possessive individualist liberalism reinforced the claims of colonial slaveholders to their human property, couching their violent domination of Afro-Britons in the rhetoric of English liberty. This same line of reasoning also bolstered the claims of independent merchants to unrestricted participation in the trans-Atlantic slave trade, inaugurating a period of unprecedented growth in the empire’s enslaved population. On the other hand, however, many of the more corporate humanist elements of English revolution principles seemed inimical to property-in-man. The bracketing of all legitimate authority by consent and the rule of law, and the assertive

\(^{191}\) Holly Brewer, “John Locke and Slavery: A Reconsideration,” unpublished MS. I thank Prof. Brewer for sharing this chapter with me and allowing me to cite it here.
claims of enslaved persons to the rights of freeborn English subjects, opened up political and legal space where the enslaved and their allies could press for recognition of the legal personhood of Afro-Britons. The contest between these competing strands of revolutionary thought played out in courtrooms and legislative assemblies, New England seaport towns and Virginia plantation fields, marking a protracted Williamite moment throughout the British Empire and fundamentally transforming the institution of slavery.

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Much may have changed when William of Orange came ashore at Torbay with his Dutch army on 5 November 1688, but the desire of metropolitan planners to take greater control of their empire did not. Though William and his Whig supporters were initially occupied with hashing out their revolutionary settlement, by the mid-1690s the broad outlines of the new English polity were in place and direct resistance from James II and his allies had been scotched. With domestic affairs well in hand, attention turned to the empire. Unlike at the Restoration in 1660, there was no widespread voiding of charters or fundamental imperial reorganization. Instead, William and Mary, along with their Whig allies, built on the progress of earlier imperial planners and continued the centralization of their empire.

In 1694, for example, the Whig justices of King’s Bench declared that in Blankard v. Galdy that parliamentary supremacy, one of the key elements of the post-revolution settlement, extended to the colonies. Though in theory limited to Jamaica, Blankard set a crucial precedent tying colonial legal regimes to the centralized will of Parliament.192 Two years later, the drive for imperial centralization was furthered with

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192 2 Salk 411.
the creation of the Board of Trade, an advisory body tasked with informing Parliament of the present state of the empire and proposing measures to make it more profitable and easier to govern. Stacked with prominent Whigs and allies of the mercantile establishment, the Board had no direct enforcement mechanisms but played a crucial role in shaping imperial policy and regularizing colonial law by reviewing local legislation and making recommendations on approval or rejection to the Privy Council. Colonial assemblies certainly continued to assert their juridical independence from the metropole and craft law to meet particular local needs, but there is little question that Williamite reforms resulted in an empire far more centralized and subject to greater metropolitan oversight than even the Stuarts could have dreamed.

The empire also continued to bear that hallmark of Stuart imperial policy – plantation slavery – and metropolitan planners were forced to deal with numerous questions surrounding slavery and the slave trade. Most pressing was the Royal African Company’s monopoly over the slave trade, which many liberal Whigs now described as a violation of the liberty of the English subject. To the merchants known as the “separate traders,” the RAC monopoly was not only economically backward, it also violated the liberties of freeborn English subjects. In a 1689 court case centered on a challenge to the monopoly, Sir Bartholomew Shower, perhaps ironically a Jacobite sympathizer, argued that English law guaranteed freedom of trade to “freemen, whose property none can invade, charge, or take away, but by their own consent.”194 In 1698, after years of

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194 89 ER 498.
Parliamentary lobbying and legal wrangling, the separate traders won a great victory – though the RAC monopoly was upheld, the Africa trade was opened up to all English merchants so long as they paid a ten-percent tax to offset the cost of maintaining the Company’s slaving forts along the African coast. Continued lobbying resulted in the complete deregulation of English slaving in 1712. The right of freeborn Englishmen to trade in African slaves was clearly among the liberties protected by the Glorious Revolution.195

With the Royal African Company and the separate trading “ten-percent men” vying for dominance in slaving, the total volume of the English slave trade increased dramatically. Even before the separate traders entered the picture, there was already a robust trade in African bodies – between two thousand and eight thousand persons per year were carried to the New World in Company ships. With the separate traders diving into the trade with gusto after 1698, annual slaving totals ballooned to between ten thousand and twenty-two thousand souls. All told, over 150,000 Africans were sold by English slavers – over 40,000 died in the Middle Passage between 1688 and 1705.196 The continued growth and importance of imperial slavery guaranteed that questions about the property rights of colonial slave owners and the status of enslaved people as subjects would continue to come before English courts.

The Williamite Bench was staffed by some of the most notable Whigs of the day. Sir William Gregory, previous speaker of the Commons and a key force behind the

passage of the Habeas Corpus Act, was appointed to the court in 1689 and sat until his death in 1696. Sir Giles Eyre, also appointed to King’s Bench in 1689, had played an important role in shaping the 1689 Bill of Rights, as did Sir George Treby, made Chief Justice of Common Pleas in 1692. Samuel Eyre, on the King’s Bench from 1694 to 1698, had been a key ally of the Earl of Shaftesbury’s during the Exclusion Crisis. Sir Thomas Rokeby, son of one of Cromwell’s officers, was an early supporter of William’s ascension to the throne and was rewarded with a seat on the Court of Common Pleas in 1689 – he was later elevated to the King’s Bench in 1695. Littleton Powys too had thrown his lot in with the Prince of Orange in the crucial days of 1688, and found himself made Baron of the Exchequer by 1695 and a justice of King’s Bench by 1701. But the most important and perhaps most politically committed of these Whig justices was Sir John Holt, who sat as Chief Justice of King’s Bench from 1689 to his death in 1710. Holt had been a crucial figure in shaping the constitutional settlement through which William came to the throne and, the admiration of contemporaries and historians for his judicial independence, was a strong supporter of Whig policies.197

These Whig-leanining justices also benefitted from structural changes to the English legal system wrought by the revolutionary settlement. During the Restoration, all English judges had held their positions in bene placito, at the king’s pleasure, ensuring that the justice they meted out would be in line with royal policy. Judges who challenged royal policy from the bench, like Sir Edward Coke under James I or Matthew Hale under Charles I, soon found themselves turned out of their positions. Under the terms of the Act of Settlement in 1701, however, all judicial appointments were to be made for life,

giving the king’s justices an unprecedented level of independence.198 Ideologically, most of the Williamite judges were reliable Whigs – Chief Justice Holt might even plausibly be classed with the radicals – who hoped to use the bench as another way to insinuate revolution principles into the common law. Like many other Court Whigs in the 1690s, however, the Williamite bench was also closely linked to mercantile interests calling for an expanded English slave trade. When questions touching on slavery came before the court, then, Chief Justice Holt and the king’s judges had to balance a number of ideological, political, and economic concerns. Revolution principles reaffirmed that English air was uniquely free, at least for Protestant Britons, but could those same principles coexist with an empire increasingly based on racialized chattel slavery? Might the free air of England extend to the thousands of William and Mary’s unfree African subjects?

Initially it appeared that the Glorious Revolution had done little to alter the legitimacy of property-in-man. In 1694, the Court of Common Pleas followed in the footsteps of Restoration-era jurisprudence and ruled that African slaves could be claimed as chattel property under common law in *Gelly v. Cleve*. The only extant report of the case is brief and straightforward. Chief Justice John Powell and his fellow justices, Thomas Rokeby and Edward Neville, echoed the precedent set by *Butts v. Penny* (1677) and declared that “trover will lie for a Negro boy.” As in *Butts*, the court’s decision hinged on the definition of Africans as social outsiders. Powell declared that “a man may have a property” in slaves because “they are heathens,” again echoing *Butts*’ rationale

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that, as “subjects of an Infidel prince,” slaves could be defined as “Merchandize.”

Though it upheld earlier definitions of slaves as chattel properties, the court’s decision in *Gelly v. Cleve* did not definitively answer the question of whether slavery and Christianity were compatible. In this sense, the case provides an intriguing glimpse of the tensions between absolute individual property claims and revolutionary corporate humanism. Gelly’s individual property claim to his slave was confirmed, but the court left open the possibility of emancipation through conversion. Membership in a corporate body, particularly one as central as the Protestant church, might still establish a slave’s humanity and bracket a master’s property claims. As we shall see, the refusal of the Common Pleas to address this central tension would have dramatic repercussions for subsequent cases.

Three years later, with Parliamentary debates over the future of the Royal African Company driving the question of slavery into public debate, the Court of King’s Bench handed down a decision that privileged the free air of England over any economic considerations, contradicting the Court of Common Pleas’ decision in *Gelly v. Cleve* that enslaved Africans would be treated as property under English law. What could have led John Powell and Thomas Rokeby, now sitting with Chief Justice John Holt at King’s Bench, to repudiate their earlier decision? At stake in *Chamberlain v. Harvey* was the fate of an unnamed Barbadian slave, born to enslaved parents on the plantation of Edward Chamberlain. Though the details of this enslaved man’s life emerge only dimly in the record, what little we can discern is startling proof that the fears of English

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antislavery thinkers were not overblown. Again and again the logic of property-in-man intervened and changed his life in ways that must have felt arbitrary and unjust.\textsuperscript{200}

In Barbados, as in many late-17\textsuperscript{th} century plantation colonies, slaves were classed as real property, tied to landed estates as they descended from generation to generation to guarantee a steady labor supply. Though on first impression this definition might seem to have imparted some stability to plantation life by limiting the salability of slave property, being classed as real estate did little to protect enslaved families or communities.\textsuperscript{201} The actual workings of English inheritance law practically guaranteed that a decedent’s enslaved labor force would be sold to pay debts or moved to another estate. When Edward Chamberlain died in 1673, for example, one third of his estate descended to his widow, Mary, as part of her dower right, with a reversion upon her death to his grandson and heir, Willoughby Chamberlain.\textsuperscript{202} Mary was later remarried to Sir John Witham, the Lieutenant Governor of Barbados, who gained use rights to her dower property through the law of coverture, including the young enslaved man who would later spark such legal controversy, and resettled many of the slaves on his own plantation. Classification as real property did not tie Mary’s dower slaves to Chamberlain’s plantation, nor did it preclude their sale. Witham himself purchased deeds to a number of Barbadian slaves in the

\textsuperscript{200} Reports of \textit{Chamberlain v. Harvery} are 3 Ld. Ray. 129-133; 5 Mod. 92; 1 Ld. Ray. 146; 5 Mod. 186; 1 Carth 397. The Modyford report hints that the enslaved person in question may have been a woman, though this fact was not material in the case.


\textsuperscript{202} All of the reports of the case identify Willoughby Chamberlain as Edward’s son. This was a mistake, likely occasioned by the early death of Edward Chamberlain’s son (and Willoughby’s father) Butler Chamberlain and Willoughby’s status as heir. For the Chamberlain family’s genealogy, see James Henry Lawrence-Archer, \textit{Monumental Inscriptions of the British West Indies...} (London: Chatto and Windus, 1875), 362.
1680s, like the “negro girl” he purchased from Mary Gough in April 1684. While the common law of real property may have made the sale of enslaved persons more complicated, requiring registration by deed unlike than the simpler and more direct transfer of chattel property, a brisk market in enslaved bodies developed nonetheless.

Political scandal soon made life even more complicated for the Cartwright dower slaves. In the winter of 1684, John Witham, who had been serving as Barbados’ acting governor, was arrested and imprisoned by the governor, his political rival Sir Richard Dutton, for maladministration and corruption. Among the charges leveled at Witham was the doubly objectionable act of taking “a negro girl for a bribe.” After a sham trial – the besieged lieutenant governor was not allowed counsel, had no time to prepare a defense, and presented his case to a jury packed with personal and political enemies – Witham was sentenced to pay an astronomical £11,000 in fines. When Witham could not pay, he was hauled before the court again, and a fieri fascias was issued to attach his estate for sale to satisfy the sentence. Before the Witham estate, and potentially many of the Chamberlain dowry slaves along with it, could be sold, however, the disgraced lieutenant governor lodged a complaint with the Lords of Trade, who ordered his release, the return of his estate and offices, and restitution of over £400 in April 1685. By September, John and Mary Witham were in London, where the former lieutenant

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203 J. W. Fortescue, ed., Calendar of State Papers, Colonial Series: America and West Indies (London: H. M. Stationary Office, 1898), XI: #2091. [Hereinafter cited as CSPC. All citations are to document numbers.]

204 The immediate dispute appears to have been over money. A royal decree of 1682 stipulated that the lieutenant governor receive one-half the governor’s pay and perquisites when serving as acting governor. Dutton had left Barbados for some time in early 1684, leaving Witham as acting governor. Upon his return, however, Dutton demanded that Witham return his pay. When Witham refused, Dutton had him arrested on trumped up charges. For the charge of bribery, see CSPC, XI: #94.i. For a narrative overview of the controversy, see Sir Robert Hermann Schomburgk, The History of Barbados (London: Longman, Brown, Green, and Longmans, 1847), 298-301.

205 CSPC, XI:#2044, 2048, 2049.
governor presented his defense to the Lords of Trade and pressed legal claims against his political enemies.206

When the Withams returned to London, they took a number of their household slaves with them, including the young man who would later be at the center of Chamberlain v. Harvey. There was nothing unusual in this choice. Doubly protected under Barbados’ law of real property and the English common law as expressed in Butts v. Penny (1677), Witham, like most colonial planters, assumed that his property rights as an English subject would adhere throughout the empire. Witham was remarkable in one crucial respect, however – he baptized his slaves “according to the rites of the church of England.”207 We can only speculate at the motivations behind this decision. Perhaps Witham was inspired by contemporary calls, like those from Morgan Godwyn, to prove the justice of the Protestant cause by converting his slaves. Perhaps he had a genuine concern for the souls of the enslaved, whatever injustices he might have visited upon their bodies. Or perhaps the enslaved man had sought baptism on his own. Maybe he heard the persistent rumor that conversion to Christianity would free a slave. He could not have missed the contentious debates about the nature of English freedom and subjecthood surrounding the Glorious Revolution – perhaps he took this discourse to its logical conclusion and hoped that baptism in the national church would give him access to the rights of an English subject. Whatever the motivations on either side, the baptism of the Chamberlain dower slave turned out to have tremendous repercussions, forcing the question of baptism and emancipation directly into the highest court in England.

207 3 Raym. 132-133.
The status of the dower slaves became even more complex when Mary Witham, nee Chamberlain, died in 1687. Under the common law of real property, her lifetime use rights to the one-third interest in the Chamberlain estate and slaves reverted to her grandson, Willoughby Chamberlain. At least one of the slaves in question, however, was in London at the time, exposing the dubious nature of the legal fiction that Barbados slaves, as real estate, were “tied to the land” in any meaningful way. Rather than returning the dower slave to Chamberlain as the law required, however, John Witham “absolutely put the said negro slave out of his service.” 208 Again, the motivations behind Witham’s decision are unclear. Perhaps he no longer needed to employ as many hands in his household and found the expense of supporting an unneeded laborer excessive. Family conflict may have influenced his decision as well, for John Witham’s relationship with step-grandson was not a happy one. When Chamberlain was considered for a position on the Barbados Council in May 1688, Witham cautioned William Blathwayt, Secretary of the Lords of Trade, against giving his stepson any position of authority. Chamberlain, Witham warned, was “deeply in debt, and has boasted that he will defeat his creditors by getting into the Council.” Worse yet, the young Willoughby was “quarrelsome drunk almost every night” and had a vicious violent streak – he had been known to “beat the ordinary people within danger of their lives.” 209 Perhaps Witham balked at returning his baptized dower slaves to the arbitrary power of an unrepentant drunkard and sadist. Or maybe the dower slave, having tasted free English air and converted to Christianity, refused to return to slavery in Barbados and absconded.

208 3 Ld. Ray.133.
209 CSPC, XI: #1757.
Whatever the circumstance of the dower slave’s discharge, he apparently lived independently “for several years,” serving “several other masters” in England before entering the employ of Robert Harvey, Esq. in September 1695. What kind of work the dower slave did for Harvey we do not know, but he apparently lived in the parish of St. Mary of the Arches in Cheapside, London and was paid £6 a year in wages for his services. At some point in late 1696, Willoughby Chamberlain somehow tracked down his wayward property and entered a writ of trespass against Harvey for “[taking] and [leading] away...the negro...so that [he] totally was without, and lost the use and benefit of the said negro for the whole time.” Chamberlain valued his slave at £100 and claimed an additional £50 in damages for lost service.

The legal framing of Chamberlain’s suit was significant. Rather than initiating suit with a writ of trover, claiming direct compensation for improperly taken chattel property, Chamberlain’s lawyers filed a trespass writ with the King’s Bench. While trespass included a broad array of legal remedies that could address wrongs ranging from battery to theft to wrongful imprisonment, it appears that Chamberlain entered a trespass de bonis asportatis for the wrongful taking of chattel property. Unlike trover,

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210 3 Ld. Ray. 129.
211 1 Ld. Ray. 146; 5 Mod. 186. The language of the writ used the formula vi et armis, or “by force of arms” to describe Harvey’s taking of the disputed slave. This should not be understood as a forcible kidnapping of the slave. Vi et armis was a legal fiction used to bring trespass suits directly to the central courts at Westminster, who would only consider original crimes contra pacem regis, against the king’s peace. Given the context of the case, it appears highly unlikely that the slave in question was forced into Harvey’s service.
212 3 Ld. Ray. 129-130.
213 None of the extant reports supply the full writ filed by Chamberlain’s legal team, referring to the writ only as a trespass, but the form of pleadings fits the typical pleading of a de bonis asportatis (literally ‘carrying away the property’). For a useful point of comparison, see the report of the original pleading in 3 Ld. Ray. 129-133, and the sample pleadings in J. H. Baker, An Introduction to English Legal History, 4th ed. (New York: Oxford University Press, 2007), 554-557. It is also possible that Chamberlain initiated suit with a quaere clausum fregit, a trespass writ for improper possession of real property. As is discussed below, lawyers for Chamberlain presented arguments about both real and chattel property,
however, a trespass de bonis asportatis sought not compensation for the lost property itself, but for the rightful owners loss of the use of that property. Chamberlain already overstepped himself by claiming the original £100 purchase price of his alleged slave in addition to £50 for lost service, and both claims would now have to be considered up by the jury. The very terms on which Chamberlain v. Harvey would be argued, then, forced fundamental questions before the court – what exactly was the property right conferred by slavery? Did masters own the persons of slaves or only their labor?

When the case began during Michaelmas Term in 1696, Chamberlain certainly believed that the full weight of the law was behind him. In their pleading before the jury, counsel for Chamberlain relied almost entirely on the force of Barbadian property law to make their case. A 1668 statute there had defined slaves as “estates real, and not chattels, [which] shall descend unto the heir or widow of any person dying, according to the manner and custom of lands...held in fee-simple.” Since the slaves and estate in question were legally defined as realty in Barbados, they should descend according to the common law of real property, which clearly vested the estate and its slaves in Willoughby Chamberlain. The slave at issue had been baptized and turned out of John Witham’s service “without the consent or knowledge” of his legal owner, and Chamberlain had been illegally deprived of his rightful slave’s valuable service.

The simplicity and clarity of this argument, however, was not enough to convince the jury. In a clear illustration of continued English ambivalence toward property-in-man, the jurors claimed to be “wholly ignorant” of the proper verdict in the case. Instead, they entered a special verdict, seeking the “advice of the court” and throwing the final

perhaps in an attempt to cover all possible bases. In the end, it is difficult to say what the exact writ in question was, pending further examination of court rolls.
determination of the case back to the King’s Bench justices.\textsuperscript{214} The jury did, however, recommend a specific sentence if the justices found Robert Harvey guilty of trespass. Though Chamberlain had sued for the original purchase value of his slave \textit{plus} damages, the jury assessed his damages at only £50 and disregarded his claim of the original purchase price of £100 entirely.\textsuperscript{215} This recommendation suggests that, while the jurors were sympathetic to Chamberlain’s claims of lost service, they were not willing to countenance the kind of absolute property claim he advanced in seeking the value of the slave’s \textit{person} as damages. Where the king’s justices would come down on the question, however, remained to be seen.

When the court convened again during Easter Term 1697 to enroll the special verdict and hear further arguments from counsel, it did so in spectacular fashion – King William III himself joined his three justices at King’s Bench, illustrating the importance of the question at hand to his government.\textsuperscript{216} The court certainly took note of the unique circumstances of the case, stating in the record that “a case like this never happened before.”\textsuperscript{217} After entering the special verdict reached by the jury in the previous

\textsuperscript{214} All quotes in this and the preceding paragraph are drawn from the pleadings to \textit{Chamberlain v. Harvey} during Michaelmas Term, 1696 found in 3 Ld. Ray. 129-133. In early modern England, juries served an investigatory function and were charged with gathering evidence and precedent applicable to a case. Though the quotes used herein are drawn from the jury’s special verdict, the arguments presented by the jurors can be taken as a reasonable approximation of those advanced by Bartholomew Shower and other counsel for Chamberlain. Furthermore, the final decision in \textit{Chamberlain} handed down in Hilary Term 1697 was made on a special verdict, wherein “the terms of the verdict were settled by counsel and entered on the roll, to be argued in banc on motion.” Under this formula, the jury would enter the verdict as crafted by counsel before being dismissed – additional arguments were then presented before the justices, who would make a final determination on the case. On the role of juries in early modern England, see Baker, \textit{Introduction to English Legal History}, 71-75. On special verdicts, see Baker, \textit{Introduction to English Legal History}, 82-84.

\textsuperscript{215} 3 Ld. Ray. 133.

\textsuperscript{216} Brewer, “Twelve Judges in Scarlet.”

\textsuperscript{217} This and all subsequent quotes in the following discussion of the court’s consideration of \textit{Chamberlain v. Harvey} during their Easter Term 1697 session are drawn from 5 Mod. Case #92, 186-191 unless otherwise noted.
Michaelmas term, the court laid out the three essential questions to be argued by counsel: first, was there “any legal property vested in the plaintiff”; second, if Chamberlain did have a property interest in the slave, would “bringing this NEGRO into England be...a manumission, and the property thereby divested”; and finally, would “an action of trespass...lie for taking a man of the price of one hundred pounds?”

While admitting that “the word ‘slave’ has but a very harsh sound in a free and christian country,” Chamberlain’s barrister, the High Tory Sir Bartholomew Shower, set out to address the court’s first question by illustrating that “perfect bondage has been allowed in such places.”218 First of all, slavery was a perfectly natural institution. To Shower, the “power” of slaveholders “naturally arises” because masters provide slaves with “food and raiment...as a recompence for their labor.” Even if slavery were unnatural, however, Shower went on to argue that positive legislation guaranteed masters’ property rights in slaves. Since the slave in question had been born in the West Indies, Shower’s next resort was to local Barbadian slave law. Citing a 1668 Barbados statute, he argued that children born to enslaved parents were “slaves as well as they.” Here counsel’s argument relied on the definition of slaves as strangers, citing ancient Roman practice as precedent – “where both parents were aliens, the children were so too.” To Shower and Chamberlain, African slaves were not members of the English nation and were therefore liable to enslavement. Since local Barbadian law defined

218 Shower had been a vocal opponent of the Whigs during the Exclusion Crisis and came to prominence after printing a vicious pamphlet attacking William Lord Russell in the early 1680s. He was knighted by James II in 1687 and gained some fame (or notoriety) for his speech in support of the crown during the Trial of the Seven Bishops in 1688. Following the Glorious Revolution, Shower became a rather vocal Jacobite and critic of William and the Court Whigs.
slaves as “part of the real estate,” the slave in question must revert to Willoughby Chamberlain under the accepted common law of real property.

True enough for Barbados, but would colonial slave property law continue to adhere in England? Shower argued that it must because colonial law, “being subject to the crown of England, has the same force there as an act of parliament has here.” To deny the extraterritoriality of Barbadian slave property would impugn both the power of the royal prerogative as articulated through the colonial assemblies and the rights of English subjects guaranteed by Parliament, a deft political argument sure to garner points from both King William and the Whig justices of the King’s Bench. Besides, Shower argued, there was an indigenous English legal precedent for Chamberlain’s claim – villeinage. Tied to the land as real estate, Barbadian slaves were the equivalent of English villeins regardent “in which, by the law of this land [England], the lord had so absolute a property, that if [the villein] were taken away, the party detaining him gained no property in him” – precisely the situation alleged by Chamberlain’s trespass suit.

Should appeals to colonial real estate law and villeinage fail, Shower also cited the court’s 1677 decision in Butts v. Penny to prove that “it cannot be denied but that trover will lie for a negro.” Whatever the initial terms of Chamberlain’s writ, Shower had covered all his bases and put forth a broad array of justifications – the natural origins of slavery, Barbadian real property law, English villeinage, and the imperial chattel principle as elaborated by Butts v. Penny – to bolster his client’s property claim.

Moving on to the question of whether English air had freed the slave, Shower flatly stated that, “nothing here found [in the case] amounts to a manumission or enfranchisement.” Turning to the venerable Sir Edward Coke for authority, Shower
again took English villeinage as his point of departure, arguing that villeins could never be manumitted “but where the lord is an actor.” Whether through deed of manumission or legal judgment, only a direct act of the lord, who held an absolute property in the villein, would result in freedom. Clearly, Shower argued, there was “nothing of the lord’s consent found” in this case. Indeed, as the equivalent to a villein regardant to a lord’s manor, the slave should never have been removed from the Chamberlain estate in the first place, and any purported alterations to the slave’s status were voided by John Witham’s initial trespass in bringing him to England. Invoking the treasured right of subjects not to be deprived of their property without consent, Chamberlain and his lawyers couched the principle of property-in-man in the revolutionary discourse of English liberty, the ancient constitution, and consensual governance.

The trickiest question for Chamberlain and Shower to address dealt with the disputed slave’s conversion to Christianity. Unlike the other elements of the case, emancipation through baptism was not a settled point of law. Most of the extant legal precedent dealing with property-in-man had hinged on the heathenism of the alleged slave – Butts v. Penny’s definition of the Africans in question as “Infidels” and the cryptic declaration that “the court will take notice they are Heathens” in Gelly v. Cleve for example. By grounding their narrow decisions in religious language, earlier justices had left the door open to the enfranchisement of baptized slaves.219 This was a particularly thorny issue because Willoughby Chamberlain was a vocal advocate of slave baptism. In a sermon given shortly after Chamberlain’s death in late 1697, John King, rector of an Anglican church in Chelsea, described a very different Willoughby

219 3 Keble 785 (June 1677); 2 Levinz 201 (Trin. 1677); 1 Ld Ray 147.
Chamberlain than John Witham had known a decade earlier. Though he admitted that Willoughby had fallen victim to the sins of a “licentious and vicious Age,” King praised the deceased planter for “a most excellent act of Charity” – baptizing his slaves. Indeed, in King’s telling at least, Chamberlain wanted “to have a Law made to oblige our Plantations to baptize their Negro Slaves.” African slaves were, like English subjects, “capable of being made Eternally Happy, and Instruments of praising God as well as we.” Baptism was the least planters could do for “those poor Souls whose Bodies labour to enrich them: and whose circumstances being so narrow in this, ought to have better provision made for them in the next Life.”

As King’s sermon made clear, Chamberlain, like many English slaveholders, did not see baptism and slavery as incompatible. The Christian slaves’ circumstances would remain narrow in this life – they could look forward to freedom only in the next. When Bartholomew Shower took up the question of conversion before the King’s Bench, he echoed his client and drove a wedge between Christianity and manumission. Here, however, Shower seems to have known he was on contested ground. His argument presented no relevant common law precedent. Indeed the only English case law on the issue, the Butts and Gelly cases, could be read as allowing emancipation through baptism. All he could muster was a tortured analogy to villeinage. For Shower and Chamberlain, the crucial issue was not baptism but consent. Once again, Shower argued that, “what the villein does without the consent of the lord, cannot acquire a manumission.” In a sense, the relationship between baptism and emancipation was not even the issue – anything done to or by the dower slave since his removal from the Chamberlain estate in Barbados

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220 John King, A Sermon Preached at the Funeral of Sir Willoughby Chamberlain, Knt... (London: 1697), 12-15.
was illegitimate, because Willoughby had not given his consent to any of it. He had no qualms about baptizing his own slaves, but Christian baptism, it seemed, would not trump English property rights.

Common law precedent, natural law, the ancient constitution, and the rhetoric of English liberties had all been brought to bear to prove that Chamberlain’s wayward slave was a legitimate article of property. The coup de grace, however, was that central pillar of the English proslavery argument – economic interest. Hoping to settle the issue once and for all, Shower put the point bluntly. “If baptism should be accounted a manumission,” he said, “it would very much endanger the trade of the plantations, which cannot be carried on without the help and labour of these slaves.” If the tedious minutiae of English villeinage law had lulled King William into a daze, this would certainly have snapped him out of it. Customs and excise duties on colonial trade were one of the main sources of revenue for the king’s costly European wars in support of the international Protestant cause. It was not that Chamberlain or Shower were opposed to baptizing slaves. They believed that planters, as good Protestants, were “bound to baptize them as soon as they can give a reasonable account of the christian faith.” The problem was, “if that would make them free, then few would be slaves.” In Chamberlain’s mind, baptism was an individual act of charity by consenting slave owners – Christ would be restored to His rightful property in the souls of all nations, and Africans would be exposed to the civilizing influence of (ideally High Tory Anglican) Christianity, all without disturbing planters’ individual interests in the bodies and labor of slaves or the state’s colonial revenue stream. If ever there was an argument designed to sway a cash-strapped and
notoriously pragmatic monarch, this was it. But the issue was not yet settled, and other arguments were still to be heard.

Robert Harvey’s attorney, a Mr. Dee, began his argument with a bold assertion – “that it is against the law of nature for one man to be a slave to another.” Though a discourse of natural law and natural rights had begun to emerge in English thought during the run-up to the Glorious Revolution and continued to blossom in the 1690s, Dee’s claim was radically universalist for its day. It was a crucial starting point for his argument, however. Dee readily admitted that slavery certainly existed in certain places, but flatly denied that England was one of them. “A man may lose his liberty by a particular law of his country, or by being taken in war...or where a man voluntarily sells himself,” he argued, but it was “by the constitution of nations, and not by the law of nature, that the freedom of mankind has been turned into slavery.” To Dee, as to many Whig thinkers, the common law was “called Libertates Anglia, because [it makes] men free” – English law was natural law.\textsuperscript{221} So powerful was the English legal bias in favor of freedom, that only a “particular law” could override natural law, as expressed through the ancient constitution, and establish slavery.

Dee then set out to prove that no such positive law had ever existed in England. Turning Shower’s argument on its head, he argued that, “even in the time of villeinage here, the lord had not such an absolute property” as Chamberlain claimed in his slave. To prove his point, Dee turned to the most basic marker of English subjecthood – access to the courts. Even a villein “might have an action against his lord” in court to protect his or

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her family, property, and person, something slaves obviously could not do.\textsuperscript{222}  
Furthermore, Dee argued, if Chamberlain and Shower wanted to use villeinage as legal cover for slave property in England, they needed to be much more specific about what type of villeinage they meant. Was this slave a villein in gross or was he regardent to a specific estate? Clearly he could not be the latter, “for then the plaintiff and his ancestors must be seised of this negro and his ancestors time out of the memory of man.” Since “Barbados was acquired to THE ENGLISH within time of memory,” villeinage regardent was out. Nor could he be a villein in gross, because his parents, held as real property in Barbados, were not villeins, nor did Chamberlain claim them to be.\textsuperscript{223}

Drawing on the full arsenal of Whig thought, Dee also argued that servitude, like all social relations, was reciprocal and, in a sense, contractual. Even if natural law and free English air had not freed Chamberlain’s slave, Witham’s dismissal was a tacit act of manumission. Living independently, Chamberlain’s wayward slave was “not allowed sustenance” and was forced to make his own way. Since “food and cloathing are the only recompence for servitude,” and Chamberlain provided neither to his alleged slave for quite some time, he had broken his end of the bargain, and the slave was thereby manumitted. In servitude, unlike in slavery, the relationship between master and bound

\textsuperscript{222} Dee, citing Littleton’s *Tenures*, specifically noted cases that protected villeins in each of these senses. Villens, who he calls “slaves” in his argument, could “appeal for the death of his father,” [a way to protect family members and maintain family integrity?]; could bring an action against a lord as executors of testamentary estates; and female villeins or neifs would have “an appeal of rape, being ravished by her lord.” (5 Mod. 189.) Obviously, by implication, slaves could do none of these, once again illustrating how crucial access to basic legal protection was to the English understanding of subjecthood and legal personhood.

\textsuperscript{223} Villeins in gross had to be descended from villein stock on the paternal side from “time out of the memory of man.” On the fine distinctions between types of villeins, see Baker, *English Legal History*, 468-472.
laborer was a two-way street – servants may have owed their labor, but masters had obligations too, and failure to live up to them could result in a servant’s freedom.

Harvey’s counsel did not set out to prove that masters had no claim to their slaves, but they did want to be very clear about what masters owned. Did Chamberlain “have an absolute or a qualified property” in his slave? Dee believed the answer was obvious – “he could not have an absolute or general property, because by MAGNA CHARTA, and THE LAWS OF ENGLAND, no man can have such property over another.” Chamberlain could only have “a qualified property” in his slave’s labor through writ of trespass per quod servitium amisset ['for the lost service’]. This remedy could compensate masters for the lost labor of servants, but, crucially, did not recognize a proprietary interest in a slave’s person. Whether he had read their work or not, Dee was indebted to early antislavery thinkers like Henry Parker for this conceptual separation of person and labor, source and output. Furthermore, even the limited remedy of a per quod servitium amisset was off the table, Dee argued, because of the limited reach of colonial law. 224 Chamberlain may have had a sufficient interest in the slave to support a more robust claim in Barbados, where he clearly owned far more than the slave’s labor, but “that is only lex loci, and adapted to that particular place...and extends only to that country, so long as he is occupied in service on that plantation.” 225 Once the slave left Barbados, “that law has no effect, [and] that amounts to a manumission,” with or without

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224 In his summation, Dee also noted that a trespass writ should not lie in this case on technical grounds of usage. As he put it, “if this negro be part of the real estate, then Sir John Witham was a disseisor by bringing him into England, and a diseseisee cannot have an action of trespass before a re-entry, because the freehold is in the disseisor.” Here again the legal fiction defining a person as real estate exposed a weak point in the proslavery argument. A trespass would only lie once the disseisee, Chamberlain, had ‘re-entered’ his property. But how would one re-enter the property in a case like this?

225 Note again the centrality of labor to this antislavery argument – the property interest only adhered so long as the slave was “occupied in service.”
Chamberlain’s knowledge or consent. Indeed, Dee argued, bringing a slave “into
England discharges him of all servitude or bondage” – English air made men completely free.

Although Dee did not cite or refer to it, the very 1668 statute Shower had referred to in support of Chamberlain’s property claim contains a clause that tacitly acknowledges the jurisdictional fluidity of slave property and supports Dee’s claim that local colonial slave law was not extraterritorial. While the act clearly defined slaves as real estate within Barbados, “any merchant, factor or agent, bringing negro slaves” would be exempted and would “possess and enjoy such slaves or negroes in such condition as they might have done” before coming ashore. Only once the “sale of such slave or slaves hath been made in the island” would their new status as real estate take effect.226 Butts v. Penny had illustrated that the definition of slaves as chattels under the “custom of merchants” could be a potent weapon for proslavery advocates, but, as the Barbados statute makes clear, this mercantile definition ended at the point of sale, where local law determined the exact contours of slave property. Dee’s argument is potent evidence that antislavery thinkers could use the empire’s legal diversity to advance an emancipatory agenda by cordonning off England as a zone of natural freedom.

Since masters only owned the labor of slaves, their physical dominion would, like the absolutist pretensions of the Stuart monarchs, have to be curbed and brought under the control of the rule of law. Again reflecting the Whig discourse surrounding the rule of law that emerged during the Glorious Revolution, Dee argued that the common law was always “careful of the liberties of men under its protection,” and would protect

226 As cited in 3 Ld. Ray. 132.
slaves from masters’ attempts at dominion. A master, for example, could not send a slave out of England without the slave’s consent. Dee argued that a “lord could not send a 
villein in gross [typically saleable as chattels] out of the kingdom, because the king had a right in him.” Masters could not remove apprentices from the realm, even though “they voluntarily submit themselves to serve...unless it be the agreement.” Even the king himself, despite his “right to the duty and service of his subjects” could not “send anyone out of England against his will to serve in any other place.” If slaves, as Dee argued, were simply persons held to labor, not absolute articles of property, then they must fall under the protection of the law in the same way as villeins, apprentices, or any other subjects.

Echoing Henry Parker’s argument about the state’s “publike and sublime propriety” in the persons of subjects, this line of thinking illuminates the tension between increasingly absolute individual property claims and an older but still resonant corporate humanist understanding of property, where individual ownership rights were inseparable from the broader common weal. Where proslavery thinkers leaned heavily on the former, antislavery lawyers like Dee argued that property-in-man was illegitimate because it impinged on a broader societal interest in the persons of subjects. Ideas of self-ownership implicit in Whig ideology certainly played a role in turning some Britons against the chattel principle, but the dominant strand in antislavery thought, expressed so clearly in Dee’s argument, was still the incompatibility of property-in-man and the duties of subjecthood. Particularly in an era where “the people” claimed the ultimate mantle of sovereignty, denying basic rights to any person threatened the entire community.
If these secular arguments were not enough to sway the court and the monarch, Dee had one more crucial point to put forward – “Being baptized according to the rite of THE CHURCH, [the slave] is thereby made a christian, and christianity is inconsistent with slavery.” Villeins who absconded and took religious orders, he noted, though considered “dead in law,” could not be forcibly removed from their cloisters because “then he could not live according to his religion.” Since open access to Anglican baptism was “incorporated into the laws of the land,” none who desired it should be excluded. And if “the duties which arise thereby cannot be performed” by a slave without altering the master’s property claim, then religious obligation must be privileged over property rights – “the baptism must be a manumission.” Access to Anglican baptism brought slaves, who, like villeins, were “dead in law,” into the community of English subjects, all of whom were “enjoined by several acts of parliament to come to church.” Such social and religious obligations were entirely incompatible with the kind of absolute individual property claims made by slave owners like Chamberlain. If “the Turks” and other “Mahometans” granted freedom to slaves who converted, “then baptism in a christian nation, as [England] is, should be an immediate enfranchisement to them, and they should thereby acquire the privileges and immunities enjoyed by those of the same religion, and be intitled to THE LAWS OF ENGLAND.” Once again the rights and obligations of membership in a corporate body, particularly one so integral to the state as the Church of England, trumped any individual property claims by lords or masters. Conversion was potent evidence of the legal personhood of African slaves, and in the context of the revolutionary settlement, legal personhood guaranteed the protection of the common law.
The decision Lord Holt and the King’s Bench handed down the following Hillary term was a clear and almost complete vindication of Dee’s antislavery argument. Holt flatly declared that “trover will not lie for a Negro,” a direct refutation of the earlier decisions in *Butts v. Penny* and *Gelly v. Cleve.* Nor would Chamberlain’s trespass writ hold, declared the court, “because a Negro cannot be demanded as a Chattel, neither can his Price be recovered in Damages in an Action of Trespass, as in Case of a Chattel.” The King’s Bench could not have been clearer – in England, a person could not be property. They did not, however, deny that masters had a legal claim to the *labor* of what Holt called “slavish Servants.” Just as “any man may maintain a trespass for another,” slave owners could claim lost time from these slavish servants, but only through a trespass *per quod servitium amisit,* just as Dee had argued. Holt and the King’s Bench clearly established the central premise of English antislavery thought in law – one might have a claim to a person’s *labor,* but no one could own another as *property.* Chamberlain and Shower’s attempt to legitimize slavery through English villeinage had failed, turned on its head by Dee and Lord Holt.

What the record left unsaid was the explicit reasoning behind the court’s decision. Indeed, Holt studiously avoided many of the central issues raised by counsel in *Chamberlain v. Harvey.* Since the alleged slave in question was resident in England at the time of the suit, the jurisdictional reach of the court’s decision was limited. Bartholomew Shower’s arguments about the *lex loci* of Barbados and the economic importance of colonial trade likely played a role here. Holt would certainly have been

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227 1 Ld. Ray. 147.
228 Carth 396.
229 1 Ld Ray 147.
hesitant to broach delicate questions of imperial jurisdiction that might have destabilized the empire and endangered the king’s revenue. The court was also, however, unwilling to fully embrace some elements of the antislavery position. They did not, for example, include the language of natural law that undergirded Dee’s argument, though it is likely that the justices, like Dee, saw English common law as an expression of the law of nature. Nor did they explicitly endorse Dee’s Whig contractualism, though again Holt’s definition of slaves as the equivalent of servants implies tacit agreement. Perhaps the most puzzling silence concerned the now legally freed slave’s Christianity. As one report noted, the case had been “argued upon that Point...Whether the Baptism was a Manumission,” but “as to that the Court gave no Opinion.”

The Holt court took up the question of property-in-man once again a few years later in Smith v. Brown and Cooper. This case differed from Chamberlain in a number of significant ways. First, Smith initiated his suit with a writ of *indebitatus assumpsit* “for a Negro sold by the Plaintiff to the Defendant” in St. Mary-le-Bow, Cheapside, London for £20. Apparently Brown and Cooper did not make good on their payment, leading Smith to sue before the King’s Bench. Smith, unlike Chamberlain, did not claim the slave in question as his property – rather, he sought damages for Brown and Cooper’s debt. The only extant report of the case is brief and does not include arguments of counsel, but the court’s decision reveals many of the central issues at stake. It appears that the slave in question was held in Virginia, though the sale had been registered in London, forcing questions of imperial jurisdiction back into the court. As in

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230 Carth 397.
231 Most secondary sources date Smith v. Brown and Cooper to 1702, but the only extant report of the case (2 Salk 666) is undated, though it was certainly heard sometime before the court’s decision in Smith v. Gould and Shaw (1706) discussed below.
Chamberlain, the record suggests that villeinage was once again offered as an argument in favor of slavery in England. Once again, however, the Holt court tilted toward liberty and reaffirmed the freedom of English air.

In his decision in *Smith v. Brown and Cooper*, Chief Justice Holt declared that “as soon as a negro comes into England, he becomes free; one may be a villein in England, but not a slave.”232 Justice Sir John Powell, who had handed down the proslavery decision in *Gelly v. Cleve* as a Common Pleas judge just over a decade earlier, now concurred with the Chief Justice. Lords might have had a property interest in their villeins, and guardians had a form of property in their wards, but “the Law took no Notice of a Negro.” Here Powell clearly meant that English law did not recognize distinctions based on race – if slaves became free upon entering England, and the law took no special notice of Africans as a separate category of persons, then the “Negro” at issue must be considered as a legal person living within English jurisdictions with access to the basic protections of English law. As such, Holt and Powell agreed, Africans were not saleable commodities in England, therefore the sale in question and the debt it produced were both void. Smith’s claim was dismissed.233

While the court’s decision in *Smith v. Brown and Cooper* was certainly a straightforward assertion that slavery was illegitimate in England, Holt did make one crucial qualification that deserves some attention. The case appears to have gotten bogged down in the minutiae of Virginia slave law and its legitimacy in England – no

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232 This and all subsequent quotations from *Smith v. Brown and Cooper* are drawn from 2 Salk 666.
other issue is addressed in such depth in the court’s decision. Holt advised counsel for Smith that, had they argued that the title at issue had been established in Virginia, not England, they might have had a case because “the Laws of England do not extend to Virginia, being a conquered Country.” While many colonists would certainly have disputed Holt’s claim, implying as it did total metropolitan control over colonial law, this doctrine of conquest was commonly invoked by imperial planners and bolstered royal authority throughout the empire by placing colonial law under the royal prerogative. 234 Whatever English law said, a slave could be property in Virginia because “their Law is what the King pleases” and local assemblies, the colonial expression of the king’s prerogative, had established that species of property. 235 Clearly, Holt believed that while a master might retain rights to a “slavish” servant’s labor even in England, rights to property-in-man were jurisdictionally bounded and could exist only where sovereign authority had established them through positive law.

Possibly to remove the troublesome case from the courts, the Attorney General argued that as real property under Virginia law, slaves could only be transferred by deed – in the end, “nothing was done.” 236 On this technicality the court refused to record judgment, leading one scholar to describe Smith v. Brown and Cooper’s antislavery credentials as “dubious.” 237 It is true that, unlike in Chamberlain v. Harvey, it does not appear that the slave in question actually gained his or her freedom in any meaningful

235 Van Cleeve, “Somerset’s Case”, 617. Van Cleeve claims that Holt’s separation of Virginia law from English Common Law was a “fictional distinction” that “weakened [his] practical position but preserved his theoretical position that slavery per se was not recognized by English law” (618). While this fits with his thesis that slaves were a distinct form of “imperial property,” it does not fully account for the two separate strands of Smith v. Brown and Cooper; that regulating the labor status of “negroes” in in the empire, and that delimiting the legitimacy of slaves as property within England.
236 2 Salk 666
way. It is entirely likely that he or she had already been shipped off to Virginia, where the *lex loci* would determine their status. Close attention to the language regarding a slave’s status as property, however, illustrates that Holt maintained the conceptual distinction between personhood and property that was so central to the English antislavery argument. As he had done in *Chamberlain v. Harvey*, Holt addressed the labor status of slaves in England and the property rights of masters as separate issues.\(^\text{238}\)

A slave’s *labor*, like that of a villein, could be owned, but his *person* could not, at least within the realm of England.

The Holt court was even clearer two years later in *Smith v. Gould* (1706). The case began with a straightforward trover claim for several chattel properties taken from Smith, including an enslaved man. Gould demurred to all charges but argued that he could not be held liable for the slave, bringing a motion in arrest of judgment because “the Owner had not an absolute Property in him.”\(^\text{239}\) The motion also touched on the physical dominion of slave owners, arguing as proof of a limited property relation that Smith “could not kill [his slave]” legally. Interestingly, William Salkeld, Smith’s attorney, shied away from making absolute property claims on his client’s behalf.

Perhaps Salkeld, an active case reporter who had been present for the court’s

\(^{238}\) Both Wiecek and Van Cleeve appear to miss this crucial distinction. Van Cleeve argues that “by ‘slave,’ the court meant a servant whose master could have a right to kill or maim it with impunity (i.e. a ‘pure’ chattel).” ("Somerset’s Case," 618.) By eliding the legal differences between physical dominion and property ownership, Van Cleeve winds up taking the position that unfree labor and physical coercion were the central elements of slavery. While Wiecek does not provide a comparable definition of slavery, his analyses of slave law in the colonies and the jurisprudential antecedents of *Somerset* often elide the difference between control of labor and property-in-man. It is clear that Holt was addressing these two elements as distinct from one another.

\(^{239}\) 2 Salk 666. See also the report in 2 Ld Ray 1274 – “one could not have such a property in another as to maintain [trover].” Salkeld participated in the case as counsel for Smith, and so his report of the case was likely taken directly from his own case notes and is therefore likely the most reliable source on *Smith v. Gould*. Unless otherwise noted, all subsequent quotations are drawn from 2 Salk 666-667.
deliberations in *Smith v. Brown and Cooper*, knew that Holt was unlikely to look kindly on such arguments. Whatever the reason, he clearly separated the kind of claim Smith was making from the power men might claim over “Beasts, fowl and fish, which were made Property of Mankind by the Act of God, and have a natural Existence.” Slavery, as a civil status, not a natural state, dealt with “Things incorporeal, which consist in jure tantum [in law only].” Therefore, “being a property ex Instituto only, the [slave] Owner has only a Power according to the Measure of this instituted Right” – slave owners could not have absolute ownership of slaves. In this sense, Salkeld argued, property-in-man was the legal analogue of wardship, villeinage, or other forms of servitude. Spurred on by the increasingly persuasive antislavery argument, Salkeld coopted the central premise of English antislavery thought to proslavery ends. As we shall see, however, this cooptation did not imply an endorsement of the antislavery argument – Salkeld turned the logic of the antislavery separation of labor and person into a thoroughly proslavery legal position.

Having once again attempted to make slavery palatable to the court by couching the institution in the limited language of villeinage and servitude, Salkeld now turned to another, more ruthless line of argument. First, he reminded Holt that his predecessors had seen no problem with defining slaves as property. Alongside the now standard citation to *Butts v. Penny*, Salkeld also cited “The Case of Monkeys” as precedent. Heard back in 1610, *Grymes v. Shack* established that exotic animals, in this case “one hundred musk-cats, and sixty monkies,” were “merchandise, and valuable,” and therefore were liable to trover.240 How could Salkeld, who had just admitted that masters could not have

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240 2 Cro 262.
absolute dominion over slaves, now reduce enslaved persons to the level of wild animals? The answer comes in his ingenious, if insidious, co-opting of antislavery logic. If slavery were merely a civil status, established by law, then masters could safely concede their claims to the “incorporeal” elements of their slaves, their Christian souls and civic personhood for example, without disturbing their property rights to what they really wanted anyway – the labor power of enslaved bodies. Furthermore, this civil definition of enslavement also accomplished the other central goal of slave owners – barring slaves’ access to legal protection. As Salkeld argued, neither habeas corpus, despite its recent codification as an essential and basic right of English subjects, nor the vaunted principles of Magna Carta would apply to slaves because one “must be Liber homo [a free man]” to enjoy these rights. Appropriating the antislavery tactic of separating natural personhood from civil status allowed Salkeld to argue that villeins and slaves were the legal equivalent of monkeys.

It should come as no surprise that Holt and the Queen’s Bench disagreed with Salkeld’s reasoning. Throwing out the court’s earlier decision in Butts v. Penny, the justices of Queen’s Bench unanimously stated that trover would “not lie for a negro, no more than for any other man.” Indeed, Holt continued, English law was colorblind – “the common law takes no notice of negroes being different from other men.” As persons under the protection of the common law, Afro-Britons, like all subjects, could never be slaves because “there is no such thing as a slave by the law of England.” Although there were “special cases” where an English subject might “have a property in another,” forms of bondage like villeinage or servitude remained limited by law. An

241 2 Ld Ray 1275. All subsequent quotes in this discussion of Smith v. Gould are drawn from Lord Raymond’s much more detailed report of the court’s decision unless otherwise noted.
action for trespass *quare captivum suum cepit* might provide compensation to masters for lost labor, as Holt had previously suggested, but not lost property. In a swipe at European war slavery doctrine, Holt also argued that “the taker cannot kill” his captive, but only “sell them to ransom them.” Though the Lord Chief Justice was certainly aware that the “captives” purchased on the African coast were not being ransomed, and his decision did nothing for the hundreds of thousands of Africans carried into bondage in the English slave trade, he *had* once again reaffirmed the uniquely free nature of English air.

The arguments presented by counsel and the decisions reached by the Holt court in *Chamberlain v. Harvey*, *Smith v. Brown and Cooper*, and *Smith v. Gould* clearly illustrate the contours of English pro- and antislavery thought at the turn of the 18th century. The antislavery argument, drawing on revolution principles that stretched back to the 1630s, flatly denied that persons could be property. The constitutional settlement of the 1690s shared many of the core tenets of antislavery thought – all legitimate authority stemmed from “the people” and must be delimited by law; any limitations on the rights or liberties of “the people” must have their consent; all persons must have access to the common law. Drawing on the corporate humanist strand of revolutionary thought, antislavery jurists argued that Afro-Britons, as legal persons and subjects of the British state, could not be defined as property and must share in the rights protected by the Glorious Revolution. Slavery might exist in Barbados or Virginia, where local law defined slaves as property, but English law would not condone the kind of dominion implied by property-in-man.

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Massachusetts had anticipated the Glorious Revolution. Even before news of William’s arrival in Britain had reached Boston, settlers incensed by the high-handed absolutist pretensions of Sir Edmund Andros and the hated Dominion of New England government arrested the royal governor and clapped him in irons. They had to, Bay colonists argued – the alternative was the surrender of their most cherished liberties and the destruction of their peculiar local political and social arrangements. Even with Andros shuffled off to Virginia and a new charter in place guaranteeing many of the privileges they had enjoyed before Dominion rule, many Massachusetts settlers remained uneasy. It appeared that their godly republic was faltering. In 1691, for example, Joshua Scottow, an octogenarian Puritan who had emigrated to the Bay Colony in its infancy, worried about the future of the city on a hill in his pamphlet *Old Mens Tears for their own Declensions*. What, Scottow wondered, had happened to the “Primitive Zeal, Piety, and Holy Heat” of the Puritan fathers? The “Power and Practice of Godliness” had been “turned into the form and substance of it,” the colonists’ “Soul lively Thirstings and Pantings after God and his Ways, Metamorphosed into Land and Trade breathings, ... transformed into conformity with the present evil world, lusts of the flesh, pride of life.” Rather than a moment to celebrate deliverance from popery and absolutism, the Glorious Revolution provoked an outpouring of pious self-denunciation.

Declension theorists past and present are surely right to insist that the old Congregational way was threatened by civil innovations. Though the 1691 Massachusetts Bay charter included many elements that must have pleased the Puritan

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243 Joshua Scottow, *Old Mens Tears for their own Declensions Mixed with Fears Of their and Posterities further falling off from New-England’s PRIMITIVE CONSTITUTION...* (Boston, 1691), 3-4.
fathers – the extension of the colonial state’s authority into Plymouth, Martha’s Vineyard, and the Canadian Maritimes, for example – but other elements were less welcome. For one, the colonial governor would no longer be elected by the settlers, as had been the case before Dominion rule, but would instead be appointed by the king. Though Bay colonists rejoiced to see their distinctive local governments protected, they worried that the extension of political rights to non-Puritans would corrupt their godly republic. Metropolitan planners had looked askance at Massachusetts’ exclusionary suffrage laws for decades, however, and the logic of the Glorious Revolution required that the political rights of all property owners be respected. Forced expansion of political subjecthood or the presence of a royally appointed governor under the new charter were not as immediate a threat as Andros’ Dominion had been, but Bay Colony Puritans were not simply being paranoid when they claimed their godly republic was under attack. With newly appointed royal officials now on hand to enforce the Navigation Acts, the colony was also further integrated into the imperial economy. While this certainly benefitted a growing class of well connected merchants, the godly were not wrong to worry about the influence this new wealth would have on their city on a hill. 244

Despite these very real changes, Massachusetts remained a distinctive colony. Puritan cultural norms mitigated social change through the continued dominance of partible inheritance, keeping estates relatively small and ensuring broad access to freeholds. Samuel Sewall, a prominent jurist and vocal opponent of slavery, noted that local courts regularly intervened to dock entails and prevent land from being engrossed by a few wealthy colonists. Governors may have been royally appointed, but the

244 Miller, New England Mind; Bushman, Puritans to Yankees.
Assembly still held the purse strings and could exert substantial influence over appointees. Massachusetts colonists may have seen declension all around them, but the continued cultural importance of Congregational churches and Puritan social norms effectively moderated the impact of broader structural political and economic transformations. If a broadened political suffrage threatened to wreck the Bay Colony’s godly republic, local patterns of settlement and the retention of substantial local legal autonomy meant that the political and legal culture of Massachusetts retained a definite Puritan inflection. Though the colony was more thoroughly integrated into the political economy of the English and then British Empire, patterns of property ownership and continued cultural pressure for a rough equality between church members filtered the acquisitive individualism of the rising generation through more communitarian cultural mores. Declension, in other words, did occur in Massachusetts, and can largely be attributed to some of the revolution principles promulgated throughout the empire. But countervailing local and imperial forces mitigated the decline of puritan godliness, and many of the more corporate humanist elements of early Massachusetts settlement remained alive and well in the commonwealth. When it came to the development of slavery in the Bay Colony, this moderating influence had a tremendous impact.245

The 1690s saw the final death knell of Native American slavery in Massachusetts. Relations with local Indians had grown increasingly fraught since the bloodlettings of King Philip’s War in the mid-1670s. Native peoples were increasingly seen as semiautonomous sovereign nations living under English jurisdiction, with relations between settlers and Indians regulated through treaties. English settlers and local natives

may have been “subjects unto the same king,” but relations between them became increasingly asymmetrical and coercive as demographic pressures and economic concerns drove the frontier of English settlement ever deeper into Native lands. In another sign of Massachusetts’ declension, the Puritan mission to the Indians that had been so important to John Winthrop and John Eliot was largely abandoned. The 1698 demolition of Eliot’s now-abandoned Indian College at Harvard was a telling portent of this shift in attitudes toward Natives. The building was dismantled and the bricks used to construct Old Stoughton Hall, a dormitory for the increasingly elite student body, scions of a rising generation less concerned with converting and assimilating Native Americans than the college’s Puritan founders.

Treaties and legal subordination had taken the place of Eliot’s Indian Bibles and inclusive godly republicanism. In August 1693, for example, Governor William Phips negotiated a treaty with a number of local sachems that brought four years of local bloodletting associated with King William’s War to an end. The document laid out the new contours of colonial sovereignty and clearly defined the status of Natives living within Massachusetts’ borders. The twelve sachems present pledged their “hearty subjection and obedience to the Crown of England,” and all Indians residing between the Penobscot River and the Atlantic Coast were specifically defined as “within their said Majesties Soveraignty.” Indians, in other words, were quasi-autonomous nations subject to English royal sovereignty. The terms of the treaty required Native warriors to lay

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down their weapons, recognize the land claims of English settlers in the area, submit to new trade regulations, and “abandon and forsake the French Interest.” As subjects of the English crown, Natives also agreed to abandon “private Revenge” in disputes with white settlers. Instead, they would make “proper application” to have their differences heard “in a due course of Justice.”

In return, all the Bay Colonists offered was a flimsy promise “to cease and forbear all Acts of hostility,” so long as the terms of the treaty were followed “without fraud or cover, and no breach made.”

This was a harsh peace, to be sure, but the treaty also emphasized that, as persons living under English jurisdiction, Natives had legal rights and must give their consent to the terms. The text of the treaty was “deliberately read over” and “interpreted unto the Indians” who “well understood, and consented” to its provisions. In agreeing to be ruled by Massachusetts law, local Native Americans also expected “to have the benefit of the same.”

One wonders what choice the conquered Natives really had in the matter, but to Phips and the English negotiators, the consensual nature of the treaty and the legal inclusion of Natives were crucial. Like white English subjects, Natives could not be bound by any terms without their consent and would have the full “benefit” of local law.

This emphasis on the consensual basis of Indian relations and the access of Native subjects to basic legal protections is also evident in the treatment of Native Americans in Massachusetts courtrooms. Unlike in the 1660s, when special Indian Courts heard cases concerning local Natives, after 1689 Native Americans were brought more fully into the

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248 The Submission and Agreements of the Eastern Indians, 11 August 1693, British National Archives, Kew (hereinafter BNA), CO 5/731/37.I.

249 William Phips, Proclamation of the Submission and Agreements, 11 August 1693, BNA, CO 5/731/37.IV.

250 Submission and Agreements, BNA, CO 5/731/37.I.
regular course of justice in Massachusetts. In September 1709, for example, two Indian men were tried for murder in Bristol and found guilty. When Samuel Sewall, the judge in the case, related the conviction to the governor and council, there was some question of whether the conviction was legitimate. Colonel Samuel Vetch, in Boston to raise a force for a proposed invasion of New France, protested that there was “no malice prepense” and the felony murder charge should have been dropped. Sewell assured Vetch that evidence had been taken and witnesses examined, as in any other case, revealing that the accused had “kick[ed] his wife into the fire.” 251 Even the fear of Native attacks during another round of warfare did not disturb the ordinary course of Massachusetts justice.

At the Plymouth quarter court session in March 1712, a Native servant girl named Mehetabel or Hittee was brought before the court charged with setting her master Thomas Little’s house on fire. Hittee was convicted of arson and the attempted murder of her master, but when the court sentenced her to death, Little begged the court to show mercy. The girl was, after all, “under sixteen years old,” and may not have set the fire intentionally. Unwilling to let the sentence pass without a thorough investigation, the court closely examined Hittee’s indenture appointed Hittee’s former master Colonel Otis 252 and Major Nathan Bassett to “take Affidavits concerning her Birth.” 253 Though the final determination of Hittee’s case is not recorded, she certainly had the full benefit of due process from local courts. Even a Native girl, an accused arsonist, had access to the protection of local law.

252 Likely judge John Otis of Barnstable, who was also a colonel in the militia and a member of the colonial council from 1708 on.
253 Sewall, Diary, II: 683-684. See also the case of William Hutchinson’s “Indian woman,” who was acquitted of murdering her own child but acquitted by the court. Ibid., II:659.
Massachusetts law was even more solicitous to the few Praying Indians who remained in the colony. Despite the dismantling of most of the “Praying Indian” towns following King Philip’s War, substantial Christianized Native communities remained in Natick, Gay Head, Nantucket, and Mashpee. With frontier hostilities escalating, however, the strategy of using Praying Indian towns as a buffer between English settlements and the French allied Natives of the interior was abandoned in favor of more closely monitored internal reservations. Still, limited efforts at conversion and assimilation continued. Samuel Sewall rejoiced when a manuscript copy of an Indian Bible was rescued from a fire in his home in July 1709, and the council gladly received “Wellcom Orders” to print the manuscript the following October. In 1711, a number of reservations were established for local natives on Martha’s Vineyard, and the colonial government went to great lengths to protect and promote the orderly settlement of the reservations.

To further this objective, Judge Samuel Sewall and Major Samuel Thaxter made an extensive tour of the new reservations in the April 1714, hoping to settle a number of property disputes and reinforce the centrality of English law in Native life. In many ways, the Natives had made tremendous progress in adapting to English legal culture – they conceived of their “body politick as a town,” elected local magistrates and Justices of the Peace, and appointed boards of trustees to oversee each town. In other particulars, however, particularly the subtleties of English property law, the Praying Indians were less enthusiastic. The Christian Natives of Gay Head, for example, had

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254 Ibid., II:621, 626.
some difficulty proving title to their land. Jonas Aosoe and Elezer Sonomag, two praying Indians, claimed ownership of lots allegedly purchased in the mid-1680s. Both assumed that because they had been assigned specific lots and continually occupied the land, their ownership was secure, but Sewall didn’t believe they had “any Evidence” of their purchase. He construed their occupation as a lease. Indeed, all land in Gay Head was technically leased, and Sewall reminded the Natives that it was “very necessary that the Town speedily join together as one Man...[to] pay what is owing.”

Though he certainly expected Natives to adapt to English property law, Sewall was equally concerned that English settlers not use their legal experience to cheat neighboring Indians. In a discussion with Ebenezer Allen, one of the landlords to the Gay Head Natives, Sewall insisted that land should only be leased out “if it may stand with the Main design of benefitting the aboriginal Natives.”

Despite these legal difficulties, Sewall must have been pleased by the progress of Christianity among the Gay Head Indians. The judge attended a prayer meeting on 7 April 1714 led by Joash Pannos, the Native minister of the Gay Head church, and Isaac Ompane, a local Native magistrate and minister, who concluded the meeting with a prayer. Sewall estimated that at least one hundred Natives attended the meeting, many of them women and children, and took the opportunity to distribute psalm books and New Testaments to the crowd. The judge even gave his own personal psalm book to a literate Native who read aloud for the congregation. Just before his departure from Martha’s Vineyard, Sewall noted with approval that Elisha Sonamog had “administer’d the Lord’s

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256 Sewall, Diary, II: 751-752.  
257 Ibid., II: 750.  
258 Ibid., II: 750-751.
Supper” to a large Native congregation. The conversion and assimilation of Native Americans certainly had not progressed as John Eliot or Samuel Sewall might have hoped, and local institutional support for conversion continued to wane, but the example of the Gay Head Praying Indians illustrates that Natives were not simply defined out of Massachusetts society.

In this legal and diplomatic climate, the outright enslavement of Indians was practically impossible. As they had in earlier New England wars, English and Native armies took captives during both King William’s and Queen Anne’s Wars, and the return of these prisoners was a critical element of treaty negotiations. Illustrating the asymmetry of Anglo-Indian peace terms, the 1693 treaty stipulated that all English captives “be set at liberty and returned home without any Ransom or Payment” – not only was no provision made for the return of Native captives taken during hostilities, additional captives were taken from among the kin of the Indian signatories, “to abide and remain in the custody of the English...as Hostages or Pledges for [their] fidelity.” As diplomatic hostages, given “with a great deale of ffreedom,” however, these captives were not considered or defined as slaves. Such a definition would have been highly impolitic, especially when “the ffrench...used their utmost Endeavours” to induce local Natives to break the treaty and attack Massachusetts settlements. Captive Indians were valuable diplomatic capital, not enslaved chattels, and poor treatment could easily scuttle an uncertain peace.

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259 Ibid., II: 754.
260 Submission and Agreements, BNA, CO 5/731/37.I.
261 William Phips to Board of Trade, 18 January 1694, BNA, CO 5/731/40.
When a new round of hostilities sparked by the War of the Spanish Succession erupted in New England in 1703, the status of Indian captives still held by the English became a potentially dangerous liability. With the French actively courting local Natives, a number of sachems complained to Governor Joseph Dudley that one of their captive kinsmen had been “carried into England” by former governor William Phips back in 1694. Dudley petitioned the Board of Trade on the sachems’ behalf and directed Sir Henry Ashurst, the Bay Colony’s agent in London, to make arrangements for the captive’s return, hoping it would “be a great benefit...in our Treaties.”

Even among the captives taken during hostilities, then, there is no record of Natives being sold out of the colony as slaves in the wake of King William’s War, or during Queen Anne’s War a decade later. Native Americans could be, and were, transported out of the colony, but only after trial and conviction in a colonial court.

Diplomatic relations with local Natives and the continued access of Indians to the courts combined to make the enslavement of Native Americans impossible in the Bay Colony by the early 18th century. By 1712, Massachusetts colonists had not only repudiated local Native slavery, they also refused to import Indian slaves from abroad. “An Act Prohibiting the Importation or Brining into this Province Any Indian Servants or Slaves”, passed in August 1712, banned all imports of Native Americans, limited the sojourn of Indian servants to one month, and required registration and a L50 bond for any Indians brought into the colony. Violation of the act’s terms would result in state seizure and sale of the Indian slaves out of the colony. The assembly explained this extreme act as a prophylactic against the “divers conspiracies, outrages, barbarities, murders,

262 Joseph Dudley to Board of Trade, 10 May 1703, BNA, CO 5/731/48.
burglaries, thefts, and other notorious crimes” committed by the colony’s “over-great number” of Native slaves. In addition to security concerns, Native slavery was also “a discouragement to the importation of white Christian servants,” Massachusetts’ preferred labor source. Native slaves might be desirable commodities in other colonies, but Massachusetts was “differently circumstanced from the plantations in the islands,” and did not want or need the same numbers of bound laborers.

Bay Colony magistrates were serious about enforcement of the statute as well. When Samuel Penhallow, master of the Neptune, brought a Native woman and three children into the colony from Carolina in April 1713, the four Indian servants were seized under the terms of the 1712 act. Pleading ignorance of the law, Penhallow applied to the governor and council for relief. Governor Dudley “urged the Council vehemently” to grant an exemption from the law, but Samuel Sewall and the other councilors voted against granting Penhallow amnesty. As Sewall noted, “if [Penhallow] could not do it lawfully, the council could not make it Law.”

Massachusetts had definitively turned against the Native slave trade and recognized the basic rights of Indians living within its borders. New imports of Indian slaves were outlawed and the status of internal Natives more clearly defined under law. There were certainly Native American servants remaining in Massachusetts, but they were not classified as slaves.

The legal status of Africans in the Bay Colony is somewhat more difficult to define. Unlike in earlier decades, when only a few Africans entered the colony, usually from Barbados, Massachusetts ships took on a more active role in the slave trade, making

263 “An Act Prohibiting the Importation or Brining into this Province Any Indian Servants or Slaves”, in The Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay... (Boston: Wright & Potter, 1869), I: 698. [Hereinafter cited as MA A&R.]

264 Sewall, Diary, II: 712.
at least seven slaving voyages to Africa between the Glorious Revolution and the Hanoverian Succession, bringing the issue of slavery into the Bay Colony as never before. All but one of these slaving voyages disembarked in Barbados, delivering over 600 enslaved persons to the island’s booming sugar plantations. Unlike all other Massachusetts slaving voyages in this period, however, the brigantine *Friendship* delivered African slaves directly to the Bay Colony in the early months of 1700.265

Thomas Windsor, the captain and owner of the *Friendship* took advantage of Parliamentary liberalization of the slave trade in 1698, making slaving voyages from Boston each year between the passage of the so-called Ten Percent Act and 1701. Like most slave traders, Windsor preferred to sell his cargo in the West Indies – his 1698, 1699, and 1701 voyages landed a total of 245 enslaved Africans in Barbados, having lost 40 souls to the middle passage.266 For some reason, however, Windsor appears to have had difficulty acquiring any slaves on his 1700 voyage – only 31 enslaved Africans made the return trip across the Atlantic in the *Friendship*’s hold. With such a small cargo, Windsor likely decided to cut his losses and return directly to Massachusetts, delivering the 25 surviving enslaved Africans directly to the Bay Colony. Slaves that ended up in Massachusetts, then, tended to be those who were least desirable in prime slave markets in the West Indies, or had proved unfit for plantation labor. Governor Dudley explained to the Board of Trade in 1708 that these so-called “refuse” slaves “brought in from the West Indies, are usually the worst servants,” and sold at very low prices – £15 to £25 a head.267

267 CSPC, XXIV: 110.
But sell they did, and a recent spate of legislation ensured that when slaves like those imported on the *Friendship* were sold on the Boston market, they were defined as personal property. To pay for fortifications during King William’s war against France in 1695, the Massachusetts assembly classified all “Negro mulatto and Indian servants” alongside livestock as personal estate for purposes of taxation. All male slaves over age 14 were assessed at £20, females at £14.268 This statute marks a crucial shift in Massachusetts slave property law – all earlier taxes, starting in the 1640s, had classed African servants as polls, not personal property. Indeed, only one year earlier the assembly had recognized the humanity of “all negro’s molatto’s and Indian servants” by taxing them as polls alongside other dependent members of Massachusetts households.269 It appears that this transition confused many tax assessors, who had to be reminded in subsequent instructions that “all Indian, molatto and negro servants [were] to be estimated as other personal estate.”270

The assessors’ confusion is understandable – the language of the statutes continued to describe bound Africans as “servants,” not slaves, and generations of local practice had recognized the humanity of African slaves. A 1707 statute cleared up any uncertainty by taxing slaves and servants separately. “Indian, molatto and negro slaves” would be rated “proportionably as other personal estate,” but “servants” of the same races would be “numbered and rated as other polls, not as personal estate.”271 This definition of slaves as ratable chattel properties for tax assessments remained the norm throughout the colonial period, its language virtually unchanged until after the American Revolution.

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269 Ibid., I:167.
270 Ibid., I:278. Similar instructions were issued in all subsequent tax assessments.
271 Ibid., I:615.
When the tax rates came up for revision in 1716, however, Samuel Sewall protested its reenactment “to prevent Indians and Negroes being rated with horses and hogs” – the dehumanization inherent under such a definition was too much for some Bay Colonists to stomach.272

Whatever the pious Reverend Sewall may have thought of the practice, the colonial state continued to recognize claims to property-in-man. Massachusetts wills and probate records routinely listed enslaved persons alongside other chattel properties and livestock, governed by the common law of inheritance and descent. Slave sales were conducted and protected by law under the same terms as any other simple commodity transaction.273 Liberal revolution principles demanded respect for individual property rights, even, or perhaps especially, when state interference with property was involved. During King William’s War, a number of New England slaves were pressed into service in the Royal Navy, raising tricky questions at the heart of English revolution principles. Could the state seize property in this way, even without the consent of owners? Should an individual property right bend in order to secure the common wealth of the empire?274 These issues were raised in Massachusetts when Sambo, an enslaved man belonging to Philip Knile of Charlestown who had been “impressed into his majestie’s service on board a ship of warr” in the Port Royal expedition of 1690, died of a “mortal distemper.” Sambo’s death is a testament to the harsh nature of a life at sea in the late-17th century –

272 Sewall, Diary, II: 822.
274 The right of belligerents to commandeer slave property during war was, and would continue to be, hotly contested. See Christopher Leslie Brown and Philip D. Morgan, *Arming Slaves: From Classical Times to the Modern Age* (New Haven, CT: Yale University Press, 2006); James Oakes, “The War over Waratime Emancipation,” in *The Scorpion’s Sting: Antislavery and the Coming of the Civil War* (New York: W. W. Norton, 2014), 104-165.
Knile alleged that his slave was “young, strong & able & in very good health” before he was impressed “by force, against [Knile’s] consent.” To Knile, who was in ill health, this was an economic loss he could not bear, for Sambo was about to be leased out as a foremastman on a small merchant ship bound for Barbados, earning wages of 30 shillings a month for his owner. Despite Knile’s repeated protestations, Sambo was sent out on a second tour of duty in Governor Phips’ abortive expedition against Quebec. The combined exactions of two rounds of naval combat duty had sapped young Sambo’s strength, and he died shortly after returning to Massachusetts.275

Philip Knile, on death’s door an hoping to provide for his wife, petitioned the Assembly for compensation in 1693, claiming that he could not “rationally Estimate his damage...at Less than One hundred pounds,” an exorbitant request considering that current market values for Massachusetts slaves topped out at £25. The petition took two tacks in justifying this claim. First, Knile reminded the Assembly, Sambo was his “proper Estate,” and property could not simply be taken from subjects without their consent or compensation. If this liberal claim to property rights proved insufficient, Knile could turn to local Puritan legal practice to gain redress. Age and infirmity prevented him from working for himself, and “many Cross & afflicting providences [reduced] him Low in Estate” – without compensation for the loss of Sambo, both as property and as a productive laborer, Knile and his wife would be thrown onto the parish relief rolls. When Knile died in 1695, his widow, Ruth, continued to press the Assembly for action, and in November 1697, she finally received £20 in compensation for her lost property from the colonial state.276 In the wake of the Glorious Revolution, magistrates

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276 Ibid.
had to be cautious when meddling with the property rights of individual subjects without their consent, even in the service of the greater imperial common wealth.

Despite their hesitance to tamper with individual property rights, there was one facet of property-in-man that Bay Colony magistrates were eager to regulate—manumission. The 1703 Act Relating to Molato and Negro Slaves sought to address the “great charge and inconveniences” entailed on town governments when masters freed their slaves, particularly those who “by sickness, lameness or otherwise, [were] rendered incapable to support him- or herself”—no small problem in one of the least attractive slave markets in the Atlantic basin. The statute required that masters post a bond of at least £50 for each slave freed “to secure and indemnify the town or place from all charge,” and any unsecured manumission would be considered void. Masters would remain financially liable for any improperly freed slaves and, if they could not provide sufficient support, the town selectmen were empowered to bind out any former slaves who could not support themselves.277

On the surface, this local limitation on manumissions appears to be in line with broader imperial practice—indeed, as we shall see, Virginia also imposed new restrictions on manumission in this period as part of a new round of statutes legitimating racialized chattel slavery. In the local context of the Bay Colony, however, where children and the indigent were regularly bound out by the colonial state, the 1703 statute appears less as a disincentive to manumission than another of many attempts by Massachusetts magistrates to police their town labor forces. Though £50 was certainly a substantial bond, and suggests that Bay Colonists were particularly worried about

whether freed slaves would put down roots and become stable, productive members of the community, other strangers without ties to a particular town underwent similar levels of scrutiny before they were allowed to settle, lest they become a drain on the town’s resources.\textsuperscript{278} Whatever disincentives the 1703 regulations posed, they did not do much to slow the Bay Colony’s high rates of manumission.

For some of these Massachusetts critics, distaste for slavery was likely rooted in an increasing awareness of the dangers an enslaved population could pose to their frontier settlement. In 1690, for example, just as Philip Knile’s slave Sambo was being impressed into service for the raid on Port Royal, Massachusetts was thrown into a panic when rumors of a conspiracy by local Natives, African slaves, and French spies swept the colony. The panic started when Isaac Morrill, recently arrived in Newbury from New Jersey, and George Major, another New Jersey resident, attempted to persuade James, an African slave belonging to a Mr. Dole, and Joseph, an Indian slave, to steal a small boat and make for French Canada. Morrill and the slaves planned to join a joint force of three hundred French Canadians and over five hundred Native allies for an attack on the Massachusetts frontier. Morrill later testified that he believed such a force “might easily destroy such small towns as Haverhill and Amesbury,” and admitted that none would be spared “but the negroes and Indians.”\textsuperscript{279}

Though no organized rebellion by Natives and African slaves occurred in 1690, Bay Colonists were right to worry about the safety of their frontier settlements. Sporadic


\textsuperscript{279} For reports of the 1690 Newbury conspiracy, see Joshua Coffin, \textit{The History of Newbury, Newburyport, and West Newbury from 1635 to 1845} (Boston: Samuel G. Drake, 1845), 153-154; Duane Hamilton Hurd, \textit{History of Essex County, Massachusetts with Biographical Sketches of many of its Pioneers and Prominent Men} (Philadelphia: J. W. Lewis & Co., 1888), II:1946.
Indian raids and occasional bouts of outright warfare with the neighboring French did occur, and outlying towns bore the brunt of this frontier violence.\footnote{The Native American raid on Deerfield, MA in 1704 has received close attention from historians, for example. See Richard I. Melvoin, \textit{New England Outpost: War and Society in Colonial Deerfield} (New York: W. W. Norton, 1989); John Demos, \textit{The Unredeemed Captive: A Family Story from Early America} (New York: Alfred A. Knopf, 1994).} Fears of servile insurrection surfaced again in 1703, as colonists braced for a new round of conflict with French Acadia during Queen Anne’s War, the North American theater of the War of the Spanish Succession.\footnote{On the broader European context for Queen Anne’s War, see John B. Hattendorf, \textit{England in the War of the Spanish Succession: A Study of the English View and Conduct of Grand Strategy, 1702-1712} (New York: Garland Press, 1987).} In order to prevent the “disorders, insolences, and burglaries” they feared might ensue during the chaos of war, the General Court passed a 9 p.m. curfew for all “Indian, negro or mulatto servant[s] or slave[s].” White colonists were empowered to seize and detain any suspicious servants or slaves, but were then to deliver them to a justice of the peace, who would examine them before sending them along to the house of correction for punishment. In towns without a workhouse, offending slaves or servants were to be “openly whipped...not exceeding ten stripes.” If they were charged with any other crimes aside from breaking curfew, the accused slave or servant would be remanded to the proper authority for trial.\footnote{\textit{The Charters and General Laws of the Colony and Province of Massachusetts}... (Boston: T. B. Wait & Co., 1814), 746-747. [Hereinafter cited as \textit{MA Statutes}].}

Fearing servile insurrection and frontier war, Bay Colonists began to turn the police power of the colonial state against their few Native and African slaves and servants. Statutes passed in 1690, 1693, and 1698 imposed harsh penalties on slaves accused of stealing. Enslaved people who attempted to sell stolen goods would be given up to twenty lashes and could also be prosecuted under colonial theft laws if the goods
were not recovered. A 1705 statute declared that any black colonists, enslaved or free, who struck a white settler would be “severely whipped” – the precise punishment was left to the discretion of individual magistrates. Routes to freedom were also closed off for enslaved Bay colonists by new restrictions on manumission. In 1703, the General Assembly passed a statute requiring masters to pay a £50 bond to indemnify towns from the “inconveniences” of supporting indigent former slaves – any enslaved people manumitted without this bond would not be considered free, and could be bound out by town selectmen to defray the cost of their support. This restrictive manumission policy may have been a real hindrance to emancipations in a political economy where Massachusetts towns regularly warned out outsiders who could be a drain on community resources. With economic opportunities closely guarded by town selectmen, formerly enslaved people would surely have found it difficult to build independent lives and often ended up forced back into servitude.

Even the heightened tensions in the colony, however, did not lead to the total dehumanization of slaves under local law. As we shall see, Virginians chose to deal with the same threats in a very different way, by delegating broad disciplinary powers directly to individual slave owners – to Massachusetts colonists, a high act of physical dominion like whipping had to be enacted by the state, and only after magistrates had examined the specific circumstances of the case. Despite increasingly racialized lines of exclusion, Massachusetts slaves were not fully chattelized. With African slaves entering Massachusetts directly in ever-greater numbers in the early 18th century, Bay Colonists

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283 *MA A&R*, I:156, 325.
284 Ibid., I:578.
285 Ibid., I:519.
were faced with a startling new variant of slavery and attempted to reconcile property-in-
man with existing local practice. As we shall see, however, with their world changing
rapidly around them, some Massachusetts colonists saw in this new definition of slavery
another harbinger of declension from their initial godly mission.

This tension between liberal property rights and corporate humanist tendencies is
evident in a 1705 statute entitled “An Act for the Better Preventing of a Spurious and
Mixed Issue,” the Bay Colony’s first miscegenation statute. The act laid down draconian
punishments for interracial sexual relations – offenders would be “severely whipped at
the discretion of the justices of assize,” and the “negro or mulatto” party would be sold
out of the colony. European women who bore children by African men would be liable
for the support of the child to prevent mixed-race children from becoming burdens on the
community. White men who impregnated African women were financially responsible
for the upkeep of their children, and were liable to a £5 fine. Other elements of the
statute further illustrate the increasing racialization of Massachusetts police law. Any
black or mulatto who struck a white colonist would be “severely whipped,” and
interracial marriages were banned.287 Together with the 1703 curfews, the miscegenation
statute marks a dramatic shift in Massachusetts police law. All African colonists –
regardless of whether they were slaves, servants, or freemen – were singled out in penal
legislation for the first time.

This racial exclusion, however, sat uneasily with the still-potent belief that
Africans, even the enslaved, were persons under law. Not all Bay Colonists were pleased
about this restrictive legislation however. Samuel Sewall disliked the “extraordinary

penalties” the miscegenation statute imposed, fearing it would “be an Opression
provoking to God.” Despite the draconian measures directed at black Bay Colonists,
other elements of the 1705 miscegenation act explicitly recognized the basic legal rights
of all African settlers, slave and free. As with the 1703 curfew law, punishment was
meted out by the state, not individual masters, and then only when wrongdoing could be
proved. Duly appointed magistrates could only punish black colonists when “the
conviction shall be [made].” Though the statute outlawed interracial marriage, it also
mandated that no master could “unreasonably deny marriage to his negro with one of the
same nation; any law, usage or custom to the contrary notwithstanding.” Furthermore,
this statute, while criminalizing interracial marriage, did not annul any interracial
marriages that did occur.

Puritanical Bay Colonists may have recoiled at the prospect of interracial sex, but
the legal humanity of Africans, even the enslaved, led them to recognize black settlers’
access to one of the most basic of all civic institutions – marriage. On 23 November
1710, for example, Caesar and Fidella, two slaves belonging to Benjamin Lynde of Salem
were married. The process by which their relationship was recognized by the Bay
Colony followed the same procedures as any other wedding – their marriage banns were
published locally to ensure there were no objections to the union, and they were legally
wed in a civil ceremony. The realities of slavery made these marriages tenuous,
however. Marriage could not prevent the breakup of enslaved families through sale, and

288 Sewall, Diary, I:143.
291 William H. Whitmore, ed., Report of the Record Commissioners of the City of Boston, (Boston:
Municipal Printing Office, 1898), XXVIII:29 [Hereinafter cited as Boston Recs.]; Greene, Negro in
residence in the homes of separate masters made cohabitation difficult. In September 1700, for example, Samuel Sewall had to broker a deal between John Wait and Debora Thair before their slaves, Sebastian and Jane, could marry. Thair wanted a guarantee that Sebastian would “have one day in six allow’d him for the suport of Jane...and her children,” but Wait “wholly declin’d” to give up Sebastian’s valuable labor. Instead, at Sewall’s urging, Wait agreed to pay Thair £5 a year towards Jane’s upkeep – Wait left Sewall’s home and went directly to the town clerk to have Sebastian and Jane’s marriage banns “published according to law.”292 Though certainly colored by the dictates of the chattel principle, such an admission of enslaved persons’ legal humanity would have been almost inconceivable in Virginia’s slave society.

As access to marriage illustrates, enslaved Bay colonists also had access to the central cultural institution of colonial Massachusetts – the Congregational Church. They may not have been seen as fully equal members, and their roles may have been limited, but people of African descent were never excluded from communion in Puritan congregations. Samuel Sewall’s diary, for example, records numerous black baptisms, and Cotton Mather, the colony’s leading divine, published a pamphlet trumpeting the virtues of christianizing enslaved people. Mather, who had unsuccessfully lobbied for a law guaranteeing that baptism would not free a slave back in 1694, argued in his The Negro Christianized (1706) that converting enslaved people was “the noblest Work, that ever was undertaken among the Children of men.” Like many Britons back home and settlers in the plantation colonies, however, Mather saw Christianity and slavery as

292 Sewall, Diary, II:22. Wait was apparently quite eager for Sebastian and Jane to marry – he visited Judge Sewall again in January 1701 “and earnestly desired...to hasten consumating the Marriage between his Bastian and Jane, Mrs. Thair’s Negro.” Ibid., 29.
perfectly congruent. There was “no such thing” as emancipation through baptism, the
great divine argued, because the law of God “allows of Slavery.” Nor would the “English
Constitution” free a slave – “Villains, or, Slaves” could be “granted for Life, like a Lease”
and “passed...like other Goods or Chattels.” 293

Mather recognized that slaveholders legitimately had a property interest in and “A Despotick Power” over their enslaved people, but he also argued that this must be
mitigated by the shared humanity of master and slave. “They are Men, and not Beasts
that you have bought,” Mather reminded his readers, “and they must be used
accordingly.” Indeed, those slaves who attained a true “measure of Christianity” were
owed “comfortable circumstances” as “Children of Adam, [and] our Brethren, on the
same level with us in the expectations of a blessed Immortality.” Slaves might remain in
bondage, but good Puritan slaveholders would recognize their common humanity and
treat “not as Bruits but as Men, those Rational Creatures whom God has made your
Servants.” If Bay colonists seriously hoped to live up to the divine injunction to “Love
thy Neighbor as thy self,” they must recognize that “Thy Negro is thy Neighbor.” 294

Though legally it may have been slavery, what Mather was describing hewed far closer to
English norms of servitude than Virginian practice of slavery. The reciprocity implied by
Christian brotherhood made the total denial of enslaved personhood

For at least some Massachusetts colonists, uneasy with slavery’s increasing role in
local life, the only viable solution was to prevent the continued growth of the colony’s
enslaved population. A 1701 resolution by the Boston selectmen called on the

293 Cotton Mather, The Negro Christianized (Boston, 1706), passim. On Mather’s proposal of a statute
decoupling baptism and manumission, see Greene, Negro in Colonial New England, 267.
294 Mather, The Negro Christianized, passim.
government to redouble its efforts at recruiting white servants and “put a period to negros being Slaves.”\textsuperscript{295} To be sure, this falls well short of a ringing abolitionist program, and there was certainly more than a little racial exclusivity at play in the selectmen’s resolution. Indeed, much public condemnation of the slave trade focused not on humanitarian concerns but on the undesirable presence of so many Africans in the colony. A June 1706 article in the \textit{Boston News-Letter}, for example, described Africans as thieves and liars, and called for new bounties for the importation of white servants.\textsuperscript{296} Whatever their motivations, however, Massachusetts legislators were among the first Anglo-American colonists to restrict the importation of African slaves. The miscegenation statute of 1705 included a clause requiring all ships to register imported slaves with the government and pay a £4 duty on each slave. If slave traders failed to register their slaves, they were liable to a fine of £8 per slave illegally imported.\textsuperscript{297} Given that slaves in the colony were commonly assessed at around £20 each at the time, the 1705 slave importation duty appears to have been intended as a sort of protective tariff, a prophylactic measure making the cost of slave importation prohibitive.

The 25 Africans who disembarked the \textit{Friendship} in late 1700, then, arrived at a complex moment of transition in the structure of slavery in Massachusetts. As their arrival itself illustrates, African slaves were entering the colony in larger numbers, forcing Bay Colonists to confront the legality of property-in-man in new ways. For increasing numbers of colonists, slavery was a morally unproblematic institution that

\textsuperscript{295} \textit{Boston Recs}, XI: 5.
\textsuperscript{296} \textit{Boston News-Letter}, June 3-10, 1706. The piece was likely written by merchant, judge, and councilor John Saffin as part of an ongoing dispute with Samuel Sewall and Cotton Mather over the legitimacy of slavery and the character of Africans. For more on this dispute, see infra, [page #s?] and the references cited therein.
\textsuperscript{297} \textit{MA Statutes}, 478-479.
bolstered their individual wealth and status. Following the lead of the plantation colonies, Massachusetts legislators defined slaves as articles of personal property and enacted racialized police laws to control their growing, and increasingly restive, enslaved population. This same body of law, however, also recognized the essential humanity of the enslaved – extreme physical force could only be meted out by state authority, the right of enslaved persons to marry was recognized, and slaves were welcomed into Puritan churches. By the 1710s, then, Massachusetts colonists had reconciled the imperial practice of property-in-man with their own peculiar local modes of slavery. Slaves were classed as personal property, but they were not socially dead or legally non-human. Local law saw enslaved Africans as both articles of property and persons with rights. How did Bay Colonists perform this seemingly impossible feat of mental gymnastics? A contentious debate involving some of colony’s leading lawyers, judges, merchants, and ministers over the legitimacy and desirability of slavery and the slave trade sheds substantial light on the how Massachusetts colonists reconciled legal personhood with property-in-man.


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land to grow tobacco for his own use – the slave made over £3 annually for himself
selling the crop – and brought him into his household, setting him “at his Table to eat
with himself, his Wife & Children.”299 The promise of freedom and Shepherd’s
economic inducements did not have the desired effect on Adam’s behavior, however.
Though Adam worked “indifferently well” for a few years, on the whole Shepherd
described him as “a very disobedient Turbulent outrageous and unruly Servant.”300
Witnesses later testified that Adam once threatened “to Cut off [Shepherd’s] head” with
an axe, struck Shepherd’s daughter Sarah, and shirked his labor by injuring himself.301
Unable to “keep him nor bear with his evil manners any Longer,” Shepherd and Saffin
transferred Adam to the service of John Wilkins of Bristol. Adam got on better with
Wilkins, who later testified to the slave’s “sobriety and fidelity,” and the erstwhile slave
continued in his employ for some time.302 By late 1699, however, Adam had left
Wilkins’ service and bounced from one master to another until he wound up back in
Saffin’s Boston home in the early months of 1700, “where he had nothing to do but work
in the garden, make Fires and the like, was kindly used, [and] did eat of the same as the
English Servants did.”303 Adam was still in Saffin’s household on 25 March 1700, the
day his promised freedom was to be granted.

Saffin, however, argued that Adam’s refractory behavior under Shepherd’s
employ had voided the initial offer of manumission, and ordered the slave to serve yet
another master in Swansea. Unwilling to continue in slavery, Adam “absolutely refused”

299 Goodell, “John Saffin and his Slave Adam,” 104.
300 Ibid., 90.
301 See testimony of Thomas Shepherd, Hannah Shepherd, and Sarah Shepherd in ibid., 106-110.
302 Ibid., 91.
303 Ibid., 104.
to go and took the first opportunity to abscond from his master’s service. Saffin, following what, in a typical slave society, would have been standard procedure for recapturing a runaway slave, simply attempted to seize Adam and force him to depart for Bristol County. Saffin also had the weight of local precedent on his side – Bay Colony magistrates regularly reallocated the bodies of children and servants to households where their labor would be most productive. Judge Saffin had erred in one crucial regard, however. Regulation of labor and policing of the town political economy were the shared responsibilities of all freemen, not subject to the whim of individual masters. As Judge Saffin was learning, Massachusetts was not a typical slave colony, and Adam was not one to sit by and watch his long-awaited freedom slip away. Indeed, likely aware of the contours of local practice, he steadfastly asserted his legal personhood and sought the protection of local magistrates as a subject of the British Empire.

With Saffin away from Boston on business in late March of 1700, Adam absconded and “wend about the Town at his pleasure.” Perhaps he took on wage work along the docks to support himself, or took shelter in the homes of one of the town’s growing number of free black families. When Saffin arrived back in Boston and demanded that his restive property return to his household, Adam defiantly told his master that he would not return – he had submitted his indenture to Judge Samuel Sewall, who argued that Adam had fulfilled the terms of the contract and was thereby effectively manumitted. To Sewall, “Liberty was a thing of great value, even next to life,” and the prominent jurist argued that the law ought to tilt in favor of freedom. A furious Saffin confronted Sewall and magistrate Isaac Addington to protest this “Negromantick

304 Levy, Town Born, especially chapter 7.
Summons,” arguing that Adam’s poor behavior had voided the manumission offer. Besides, if even this one slave were freed, then “all the men in the Country are as much obliged to set their Negroes free.” Though Addington agreed that Adam had behaved poorly, he argued that allowances had to be made for the behavior of African slaves because they were “so ignorant, rude and brutish.” Sewall stressed the sanctity of the indenture contract that Saffin and Adam had agreed to, and “very gravely admonished” his fellow judge that, since he had “given such a thing under [his] Hand and Seal, [he] ought to stand to it, and perform it.”

Judge Saffin, however, had no intention of letting Adam go, and used his ample authority as a justice of the Superior Court and member of the Council to secure his erstwhile slave. The next day, he returned to Sewall with Colonel Penn Townsend, a prominent military commander, member of the Governor’s Council, former Speaker of the House, and future Chief Justice of the Superior Court, who he had convinced to assist in Adam’s rendition. Following local practice, Saffin believed that two justices of the peace could determine the matter directly without a full hearing in a court of law, thus overriding Sewall’s objections. Sewall and Townsend disagreed, however, and in the end Adam was bound over for trial at the upcoming Superior Court session. As he awaited determination of his case, Adam lived independently of Saffin’s household. Perhaps he was staying with Dick, “another Negro said to be free,” who posted bond for his appearance in court. Adam almost certainly found other employment on the labor-hungry Boston waterfront – his occupation is listed as “Laborer” on most subsequent

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305 Goodell, “John Saffin and his Slave Adam,” 105-106. Goodell’s article consists primarily of direct quotations from primary source records. Unless otherwise noted, all quotations below are to primary sources transcribed in the article, not Goodell’s editorial commentary.
court records. When the case came before the Suffolk County Superior Court, jurisdictional issues came to the fore. Sworn witnesses from Bristol did not appear in court to testify, leaving the jury with only written affidavits to consider, and the court decided a change of venue was in order. The case was remanded to the next Superior Court session in Bristol, the site of Adam’s alleged crimes, where witnesses could give oral testimony.306

When the Bristol sessions convened in September 1701, Saffin summarized the central issue in the case succinctly – the question was “whether the Negro should be free or not, and that he might have all the benefits of Law as an English man.” In terms of his access to trial by jury, Adam certainly appeared to have the benefit of English law. He pleaded not guilty to the indictment and “for Tryal put himself on God and his Country.” A regular jury was empaneled and, “the Prisoner making no Challenges,” the trial proceeded following typical legal forms – like all defendants in the Bay Colony, Adam could challenge the jurors assigned to hear his case. In addition to hearing the 1693 manumission agreement and Saffin’s testimony read in open court, the jury heard from Thomas Shepherd, his family, and numerous neighbors who testified to Adam’s violent temperament, “to the great satisfaction of the Jury.” Though Adam’s defense was also “fully heard” and considered by the jury, they sided with Saffin and handed down a guilty verdict.307 This outcome should not be surprising – with the case framed as an assault, the immediate question of Adam’s freedom was not at issue, and the jurors were

306 Ibid., 106. Given that much of the testimony recorded in Saffin’s account of the case focused on Adam’s alleged physical assaults on the Shepherd family, it appears the charge was either assault or attempted murder, but pending further research I cannot confirm the exact charges. On the life and career of Penn Townsend, see Henry F. Waters, Notes on the Townsend Family (Salem, MA: The Essex Institute, 1883), 8-12.
307 Ibid., 110-111.
restricted to the matter at hand. In addition, Saffin was an extremely powerful man, and he used the full weight of his influence to guarantee a favorable verdict. Samuel Sewall believed Saffin had “tampered with Mr. [Joseph] Kent, the [jury’s] Foreman” and “Conived at his Tenant Smith’s being on the Jury.” Saffin may even have sat as a judge in his own case – he was a justice of the Superior Court, where he sat until early 1702. Adam may have had nominal access to the Bay Colony’s courts but, when facing off against a weighty and unscrupulous settler like Saffin, a courtroom was far from a level playing field.

The justices of the Superior Court, however, appear to have disagreed with the jury’s verdict and balked when Saffin demanded that they enter judgment – though they ordered Adam to return to his master’s service, they also sought to limit Saffin’s authority over his slave. The justices dragged their feet on registering final judgment in the case, and when they finally did so on 9 September 1701 they set aside the jury’s decision and ordered the case to be retried at the next Superior Court session. In the mean time, “the Negro was rendered to be [Saffin’s] Servant still,” but the justices required Saffin to “promise before the Court, not to send [Adam] out of the country.” Furious, Saffin sent his slave back to Boston to work at the fortifications on Castle Island. Again, Adam proved an ornery servant. In early October, he got into a physical altercation with one of the fort’s officers, Captain Timothy Clark. When Clark attempted to discipline the reluctant slave, giving him “a stroke or two with his stick,” Adam “took hold of the Stick and brake it, and took up his Shovel and struck at Captain Clark, and had like to have spoilt him” if the other laborers had not broken up the fight. Saffin

\[308\] Sewall, *Diary*, I:41.
seized the opportunity to do what he had likely wanted all along – sell Adam out of the colony, offset the financial losses occasioned by his restive slave, and quiet the growing chorus of criticism leveled at him by his enemies. Transportation out of the colony, or worse, was standard punishment for slaves who assaulted white settlers in most slave colonies after all.309

Again, however, Massachusetts jurists stepped in and prevented Adam’s sale. Isaac Addington, now Chief Justice of the Superior Court, protested that transportation out of the colony was a penalty that only the courts could impose, and Adam was imprisoned pending trial at the next Quarter Court. Though the disposition of this case is not recorded, Adam was clearly not sentenced to transportation since the scheduled retrial in his original case, now styled “Dom. Rex. v. Adam,” resumed in the Bristol Superior Court in September 1702. Much had changed since the last Bristol hearing, however, and Saffin must have been far less confident of his chances of success. Newly arrived Governor Joseph Dudley had removed Saffin from the bench, perhaps as a punishment for the irregular proceedings in Adam’s first trial, and the court was now stacked with political rivals. Since Adam was sick with smallpox when the court adjourned, the trial was once again rescheduled for the November session, when the Superior Court would once again sit in Boston.310 Besides, the justices argued, the form of the suit did not fit the circumstances of the case. As Judge Sewall noted, “Adam’s Freedom could not be Tryed by Mr. Saffins complaint” when the queen, not the disgraced Bay Colony jurist, was registered as the complainant – as one later commentator noted, “Saffin was the real

309 Goodell, “John Saffin and his Slave Adam,” 111-112. Though no legislation had yet been passed in Massachusetts requiring transportation for slaves who assaulted white settlers, it was likely already practiced by individual slaveholders. Such a law would be proposed in the 1710s.
310 Ibid., 92-93.
party in interest – the virtual plaintiff.” Saffin’s case floundered once again at the Boston trial in November and, likely emboldened by the favorable treatment he had received from the Superior Court, Adam “preferred a petition for his Enfranchisement.” Though the Superior Court demurred and did not answer the petition directly, they recommended that Adam bring a suit against Saffin in the Court of Common Pleas and appointed prominent local attorneys Thomas Newton and Joseph Hearne to represent him “in order to his Regular proceeding in the affair.”

After years of living restively under Saffin’s power, the shoe was now on the other foot – Adam brought a suit against his master in the Suffolk County Court of Common Pleas on 14 December 1702. The form of the writ Adam’s attorneys filed followed all English common law procedural norms, and is remarkable only for the confidence with which the alleged slave asserted his English rights. “[B]eing a freeman and ready to prove his liberty,” Adam claimed that Saffin’s “claiming him as his slave, doth unjustly vex him” and asked for a substantial £100 in damages. The writ was duly served on Saffin by the sheriff of Bristol four days later but it appears that Saffin did not answer it and, with Adam’s suit abated on a technicality, the justices of the Common Pleas refused his appeal to continue the charges. Emboldened by the court’s dismissal of the suit, Saffin once again attempted to seize Adam and sell him out of the colony. Again, however, Newton and Hearne intervened and petitioned the Superior Court in May 1703, explaining that, contrary to the court’s order, Adam was “dayly threatened

311 Sewall, Diary, II:64 and Goodell, “John Saffin and his Slave Adam,” 93.
312 Goodell, “John Saffin and his Slave Adam,” 93.
313 Ibid., 93.
314 Goodell argues that the issue was jurisdictional, “probably because...the court for Bristol County had exclusive jurisdiction of the parties.” The appeal was denied because the issue of whether appeals would lie for writs in abatement had not yet been determined by the Massachusetts courts.
by...Mr. Saffin, to be sent out of this province in to forreigne parts to remaine a slave during his life.” All Adam asked for was his day in court, “the Tryall of his liberty.” Likely remembering Saffin’s earlier dirty tricks, the justices of the Superior Court now interposed their authority between their former colleague and his slave, registering their displeasure that “notwithstanding the former Order of this Court [Adam] is pursued by Mr. Saffin as his Slave and has Endeavoured to Transport him beyond Sea” and ordering “That Adam negro be in peace untill by due process of Law he be found to be a Slave.”

Here was Massachusetts’ bias in favorem liberatis spelled out clearly – in the absence of proof to the contrary, the courts would presume freedom.

Spurned by the courts, which were packed with personal and political enemies, Saffin now turned to the legislature, where he hoped he would wield more influence, for redress. The General Court, Saffin argued, as “an embleme or similitude” of the sovereignty of the imperial state, had the authority to remedy all “grievances oppressions Male Administrations and Tort actions of the greatest Persons or Courts of Judicature subordinate to this Grand Assembly.” Complaining that he had exhausted his options in lower courts and could find “no other Remedy” in a matter “wherein he is greatly Injured & oppressed...in such a manner...[as] there hath not been the like done in New England,” Saffin mobilized the Whig rhetoric of English liberties to bolster his case. At its heart, Saffin argued, this was a simple question of property rights – his slave had been “withheld or taken from him...under countenance of authority (not collour of law),” depriving him of a valuable property right and making him “a meer Vassal to his slave.” Saffin requested a new hearing before the Assembly or a special committee, and hoped

315 Ibid., 94-95.
that the General Court would “[restore] his said Negro to [him] that as an English subject he may Dispose of his said Negro, as he shall see cause for his own safety, and all other of her Majestys good subjects that may be exposed to any Detriment by the sd Negros villainous practices.” The General Court could do justice only by recognizing the unrestricted property rights of an Englishman and protecting the community of subjects from violent, dangerous outsiders. Besides, the eyes of the colony were firmly fixed on the case, so the Court’s decision could have dramatic repercussions. Setting Adam free would be an “evill example of all Negros both in Town and countrey whose eyes are upon this wretched Negro to see the Issue of these his exorbitant practices.” To Saffin, the future of slavery and order in the Bay Colony hung in the balance.

The Assembly, perhaps swayed by Saffin’s flatteries and Whig rhetoric, consented to the petition and scheduled a hearing before the General Court in June 1703, but the Council refused their assent, and ordered the case back to Court of General Sessions of the Peace. Samuel Sewall noted the new trial order in his diary, along with a few lines of doggerel verse aimed at Saffin:

Superanu rated Squier, wigg’d and powder’d with pretence,  
Much beguiles the just Assembly by his lying Impudence.  
None being by his bold Attorneys push it on with might and main  
By which means poor simple Adam sinks to slavery again

Sewall was right to worry about the outcome of a new trial. By countering Adam’s freedom suit with a property claim, Saffin had retaken the initiative and reframed the essential issue. Adam’s freedom was no longer presumed, and the question of whether he

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316 Ibid., 93-97. Saffin might have expected a more favorable hearing from the General Court, but should have known that his political star was waning – Governor Dudley had dismissed him from the Council earlier in the year.

317 Sewall, Diary, II:79.
had fulfilled the terms of the old manumission agreement became the central question in the case. After yet another trial on 3 August 1703, once again rehashing all the old arguments presented in the earlier cases, a jury found that “Adam negro hath not performed the condition for which he was to be Enfranchized & therefore is to continue a servant.” Yet again it seemed as though the logic of English property rights and the political power of a prominent white settler had trumped the natural right to freedom of an Afro-British settler.318

Adam’s attorneys appealed the verdict once again, however, and Adam posted “sufficient suretyes for his appearance...and for his good behaviour in the mean time” and was released on his own recognizance. The official appeal presented by Newton and Hearne in October 1703 claimed that the verdict handed down in August was “wrong & erronious and ought to be reversed” since Adam had served Saffin “faithfully & honestly” during the seven-year term specified in the 1693 manumission agreement. Besides, even if Adam had been refractory, there was “no provisoe or Condicon” in the agreement stipulating that he would “forfeit the freedom or liberty thereby intended” if he behaved poorly. “The Enffranchisemt,” Newton argued, “is positive & not conditionall.” Besides, “liberty being a priviledge the greatest that can be given to any man save his life, it ought not to be forfeited upon trivial and fivolous matters” like those proffered by Saffin. Adam’s legal team put forward an extremely narrow reading of Saffin’s manumission offer, treating it as a binding legal contract, and hoped that the Superior Court would “Reverse the former sentence and give [Adam] his freedom.”319

318 Goodell, “John Saffin and his Slave Adam,” 97-98.
319 Ibid., 98-99.
When the court met in Boston in November, Saffin should have known that his case was lost. Samuel Sewall, the vocal antislavery jurist who had first sheltered Adam when he absconded back in 1700, now sat as Chief Justice of the Superior Court. Saffin had certainly hurt his case further by engaging in a rancorous pamphlet war with Sewall over the previous two years. Written largely in response to the controversy over Adam’s freedom, Sewall’s *The Selling of Joseph*, published locally in late 1700, is well known as one of the first public calls for emancipation in Anglo-American history and presented a thoughtful argument delegitimizing the peculiar institution, particularly in the local context of the Bay Colony, and pointed to Adam’s case as a specific example of the problem of slavery.  

In response to Sewall’s accusations, Saffin penned *A Brief and Candid Answer...,* a baldly racist tract that refuted *The Selling of Joseph* point by point. The crux of Saffin’s argument was that, while white Christians were bound to “love, honour and respect all men according to the gift of God that is in them,” applying this rule to blacks was a mistake since they were “not our own natural Kinsmen.” Indeed, in a short poem attached to the pamphlet, Saffin described Africans as the repository of all evil and vice:

Cowardly and cruel are those Blacks Innate,  
Prone to Revenge, Imp of inveterate hate.  
He that exasperates them, soon espies  
Mischief and Murder in their very eyes.  
Libidinous, Deceitful, False and Rude,  
The spume Issue of Ingratitude.  
The Premises consider’d, all may tell,  
How near good Joseph they are parallel.

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To “tender Pagan Negroes with all love, kindness, and equal respect as to the best of men” would be the equivalent of treating “a Prince like a Peasant.” This was not a public stance that Judge Sewall, on record as a vocal opponent of slavery, was likely to look upon kindly.

Happily for Adam, the jury that convened to hear his appeal in August 1703 seems to have shared Sewall’s antipathy toward slavery. After the succession of previous court decisions were entered into the record and the grounds of the appeal read aloud, “all things touching the [case were] fully heard,” and the jury returned quickly with a decision. Their verdict overturned Adam’s earlier convictions, awarded him court costs for his many lawsuits as damages, and declared that “Adam & his heirs be at peace & quiet & free with all their Chattles from...John Saffin Esq. and his heirs for Ever.” Finally, after over three years of litigation, Adam gained his freedom. Though Saffin tried desperately to hold on to his slave property, even petitioning Governor Dudley, his political enemy, directly in November 1703 and receiving assent from the Assembly for another trial, the governor and Council quashed the matter and refused to allow another round of appeals. The message from the Council was clear – Saffin was “referred to the law” for redress. Facing personal and political enemies on the Council and the bench, Saffin finally gave up and recognized Adam’s freedom.

We can only speculate at what life as a freedman was like for Adam. To be sure, many Bay Colonists would have agreed with Saffin’s description of the character of Africans in A Brief Reply, and Adam’s reputation for violent resistance must have limited...
his employment options. Especially given the assertive, of not willful, streak he
exhibited in court, Adam must also have chafed under increasingly punitive legislation
regulating the lives of free black Bay Colonists. A [YEAR] statute, for example, required
that free blacks perform public labor in lieu of militia service – “Adam Saffin” was
required to do three days’ labor repairing Boston’s highways in June 1711.323 Still,
despite the many difficulties he must have faced, Adam was free, and it appears he
became a settled resident of Boston and an active participant in the town’s growing free
black community. In 1714, for example, he and four other free blacks offered to post
bond to indemnify the town in case “Madam Leblond,” a recently arrived free black
settler, should become a drain on the poor rolls.324 As a result of his own assertive
demands for freedom and the Bay Colony courts’ bias in favor of liberty, Adam emerged
from slavery and became a stable, productive, free member of Massachusetts society. He
had certainly been purchased and held as a slave, an article of property, as more and more
Africans were in turn of the century Massachusetts, but the Bay Colony’s emphasis on
the rule of law, its distinctive political economy, and its local ideals privileging the
freedom of residents created legal space where Adam and other black settlers could
assert, establish, and defend their legal personhood. Justice Holt at King’s Bench and
Judge Sewall in Massachusetts were of like mind.

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324 Ibid. Though the Boston selectmen rejected Adam’s offer, it appears Madam Leblond was eventually
admitted to residence in Boston. A Robin Lablond (also spelled Labloom and Lablong), perhaps Madam
Lablond’s husband, appears on the registers of free blacks required to do public labor between 1718 and
1725. See chapter 5, infra, and the sources cited therein for analysis of these work rolls.
Unlike their cousins to the north, Virginians did not immediately experience the transformative potential of the Glorious Revolution. The great planters of the Old Dominion, with the memory of Bacon’s Rebellion still fresh in their minds, watched in horror as their neighbors rose in open rebellion against Stuart imperial governance. Indeed, by 1690, as the revolutionary settlement was being hashed out back in England, Virginia was the only English royal colony left on the North American mainland. With its 1624 royal charter still intact, its civil institutions still operating, and its local elites unwilling to fall in behind yet another embattled Stuart king, the revolution at home barely registered to Virginia colonists – the disgraced James II was replaced by the heroic William III and business went on as usual. Great planters continued importing ever more enslaved Africans and planting ever more tobacco. Lesser planters and poorer whites continued to enjoy the enhanced political and social roles they had wrested from the great planters in the aftermath of Bacon’s Rebellion. Enslaved Africans were bought and sold, rented out and bequeathed in wills – they toiled in tobacco fields and served in the imposing manor homes of the great planters. The 5th of November 1688 was just another Friday in Virginia.

Before long, however, the impact of the Glorious Revolution would be keenly felt in the Old Dominion. Beginning in 1696, the Board of Trade, under the direction of John Locke and a cadre of like-minded reformers, would attempt to fundamentally remake the Virginia society, promoting the breakup of large estates, economic diversification, and imperial regulation of the local practice of slavery. Though many elite Virginians initially resisted this centralizing reform plan, the recurrent structural cycles of boom and

bust inherent to tobacco monoculture lead to calls for local regulation of the slave trade, and brought many leading planters in line with the imperial reformers on the Board of Trade. The reform impulse generated by the Glorious Revolution dovetailed nicely with these local concerns over Virginia’s political economy, resulting in a pronounced moment of debate over the place of slavery in the colony. This moment was brief, however — by 1705 King William was dead, Locke was off the Board of Trade, and many of the local advocates of reform had either been ousted by political opponents or abandoned the political field. They were replaced by a new imperial administration, dominated by Queen Anne’s chief minister — Robert Harley, who sought almost single-mindedly to gain English dominance in the slave trade — and other colonial officials zealous to protect their human property. It should come as no surprise, then, that John Locke’s Virginia reform plan gave way to a new, comprehensive slave code in 1705, once again placing the institution of slavery on firm legal ground in the Old Dominion.

As Britons at home and in New England set to remaking their political institutions between 1689 and 1696, the Virginia gentry continued the processes of social and economic consolidation begun during the Restoration and, at least initially, metropolitan planners paid little attention to the colony. With Whitehall distracted by continental wars and domestic uncertainty, the Virginia elite moved to further cement their grip on the colony’s best lands, using the entail to guarantee the integrity of their estates. Though earlier generations had used the entail as well, turn-of-the-century Virginians did so far more often than their fathers or grandfathers — close to twenty-five percent of all probated estates between 1680 and 1700 contained entails, cementing the gentry’s grip on nearly
one quarter of Virginia’s arable land. This strategy was so successful that, by the turn of the 18th century, the great planter class had amassed truly staggering amounts of land. William Byrd I, a leading beneficiary of the boom years of the Restoration, controlled nearly 19,500 acres in Henrico County alone by 1704. The comprehensive 1704 quitrent rolls compiled by the colonial administration illustrate the tremendous levels of inequality created by generations of primogeniture, entail, and insider land deals. Virginia could boast 121 estates of over two thousand acres, the economic and social base of the gentry, but even these paled in comparison to the holdings of the great planters – seventeen Virginians had estates of over 5000 acres, and four grandees, including Byrd and Robert “King” Carter, held truly massive holdings of over ten thousand acres.

The Virginia elite’s massive estates were both cause and consequence of their dominance in local politics. As we have seen, the gentry benefitted tremendously from the local custom of allowing headright grants for the importation of African slaves. While technically only allowable for the importation of servant labor, the great planters’ stranglehold on the Assembly and Council gave the corrupt practice of granting slave headrights a tinge of legitimacy. With a generation of mostly unchallenged local practice behind them, the Virginia elite applied for unprecedented numbers of headright grants – over ninety-five thousand acres of real estate, primarily in the fresh and productive lands of the Virginia piedmont, were claimed on at least 1900 slave imports in the early 1690s.

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327 Parent, Foul Means, 32, 36.
In such a lopsided social and economic context, indentured servitude continued its long decline in the Old Dominion. England’s maturing manufacturing sector required ever more hands to produce the finished goods so crucial to imperial trade, and with few economic incentives to draw English men and women to the Chesapeake, white laborers grew increasingly scarce. With the cost of indentured servants rising nearly sixty percent in the decade after the Glorious Revolution, and the price of slaves on the local market dropping as more direct imports arrived, the polarization of Virginia society between an elite landowning class and an enslaved laboring population increased dramatically.329

Feeding this demographic shift was a dramatic rise in slave imports to the Old Dominion. Despite the increasingly robust market for slaves in the Chesapeake, the Royal African Company paid little attention to the Virginia market – only six company ships docked in Virginia in the first decade of the 18th century, delivering less than seven hundred enslaved laborers, and even this relatively meager trade was larger than that of the 1690s. The coastwise trade that had traditionally supplied slaves from the West Indies also slowed, with Governor Edmund Jennings estimating in 1709 that only three ships had arrived from Barbados, previously a key source of Virginia slaves, in the previous decade, carrying only 236 slaves into the colony. Supply only caught up with demand after the Royal African Company’s monopoly was relaxed in 1698, opening the trade to the separate trading ten-percent men. In a 1709 report to the Board of Trade, Jennings recorded 5,692 imports by the separate traders since the trade was opened,

328 Parent, Foul Means, 44.
nearly ten times the RAC’s total. And the pace of imports was only quickening – over 800 new slaves were sold annually by 1707.\textsuperscript{330} In total, fifty-six slaving voyages carried well over 10,000 enslaved Africans into Virginia between the Glorious Revolution and the Hanoverian Succession.\textsuperscript{331}

The impact of this robust slave trade on Virginia’s demographics was dramatic and visible. There were already approximately five thousand slaves in Virginia by 1698, amounting to nearly one-tenth of the total colonial population, but representing over half of the total bound labor force. The growing enslaved population was most obvious in the fertile tidewater region, where slaves made up over forty percent of the population by the turn of the eighteenth century. With the slave trade opened to all Britons in 1712, the trend only intensified – by 1710 there were over fifteen thousand slaves in Virginia, comprising roughly twenty percent of the total settler population and the vast majority of the bound labor pool.\textsuperscript{332}

Even before this influx of new imports swelled Virginia’s enslaved population, however, local masters and magistrates already struggled to control their restive slaves. Fugitives were a persistent threat to the stability of the plantation regime. A group of runaways led by Mingoe, possibly a fugitive from Ralph Wormeley’s Rosegill plantation, marauded through Middlesex and Rappahannock Counties for nearly two years, pillaging local plantations and terrifying local magistrates when they got their hands on “two guns, [and] a Carbyne” in November 1691.\textsuperscript{333} While the immediate discipline of recalcitrant

\textsuperscript{331} \textit{TASTD2}, www.slavevoyages.org, (accessed 15 September 2015).
\textsuperscript{332} Parent, \textit{Foul Means}, 78-79.
slaves remained with individual masters, outlying slaves like Mingoe posed so great a threat that, as they had during the Restoration, Virginia elites used the full police power of the colonial state to track down fugitives and mete out exemplary punishments designed to quell future disturbances. Lieutenant Governor Francis Nicholson made this clear in a 1691 proclamation, admitting that most fugitives “canot be taken by the Masters or any Single person.” To remedy this problem, Nicholson empowered county sheriffs to deputize local residents as a posse commitatus “without any further order or warrant,” delegating extraordinary power and discretion to county magistrates. The Assembly passed a statute in April 1691 reinforcing Nicholson’s proclamation. In addition to empowering local magistrates to raise posses, the statute allowed any white settler “by lawfull authority employed to apprehend” runaways to “kill and distroy” any fugitives who resisted recapture – the owners of slaves killed in this way would be compensated for their lost property with four thousand pounds of tobacco from the public treasury.

This same statute also moved to further consolidate the racial basis of Virginia slavery by outlawing interracial unions and criminalizing interracial sex. The act attempted to prevent “that abominable and spurious issue,” mixed race children, that resulted from marriages between Native or African settlers and whites. Rather than simply targeting settlers of color, however, this statute also sought to punish white settlers who engaged in interracial sex – white settlers who married persons of color were

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banished from the Old Dominion. By more clearly defining the racialized boundaries of subjecthood and severely punishing those, black or white, who transgressed these boundaries, Virginians sought to break the possibility of cross-racial solidarity and prevent challenges to property-in-man. Restrictions on private manumissions passed in 1691 served a similar purpose. Slaveholders who wanted to free slaves had to obtain legislative approval first, and were required to post a substantial bond to indemnify parish poor rolls from the expense of supporting an indigent former slave. Manumitted slaves were also required to leave the colony within six months – the masters of former slaves who remained in the colony would be fined £10 to defray the cost of forced transportation. Like the 1691 miscegenation statute and the many Restoration-era statutes, these onerous manumission regulations sought to limit the size of Virginia’s free black population and thus eliminate nagging questions about free black subjecthood.

It seems, then, that the Williamite moment and the ensuing legal contest over slavery it provoked had little immediate impact on the Old Dominion – Virginia planters, if anything, were even more secure in their dominion over the bodies of enslaved persons than they had been just a decade earlier. Closer examination, however, reveals a growing tension over the institution, pitting a reform-oriented Board of Trade and the royal colonial officers charged with the implementation of metropolitan policy against the entrenched political and economic interests of Virginia’s great planters. This tension was already evident in the early 1690s. As the drive for greater imperial centralization intensified, culminating in the creation of the Board of Trade in 1696, it became ever

336 Parent, Foul Means, 117.
337 Hening, SAL, III: 87-88.
more evident that the interests of Virginia’s planter elite were not always in line with the goals of metropolitan planners at Whitehall.

This conflict of interests moved to the very center of Virginia politics for nearly a decade between 1696 and 1705, when the Board of Trade’s far-reaching reform plan, profoundly shaped by the ideals of its secretary, John Locke, ran up against the entrenched economic interests and political power of the Old Dominion’s slave-owning elite. The basic problem was that Virginia was dominated by men cut from much the same cloth as the deposed James II, petty plantation monarchs who saw themselves as absolute masters over their dominions. In February 1697, the Board of Trade summed up the complaints that had been trickling in about the state of affairs in the Old Dominion. In a letter to governor Edmund Andros, the Board protested both the political power of Virginia grandees and the social basis upon which this power was built. Like the absolutist Stuarts, Virginia elites claimed that their status precluded them from prosecution in “any action for any cause whatever.” Worse yet, many of these planters sat on the General Court, though they had not “taken the oath of a judge.” The overweening power of these planters made a mockery of justice and ensured that “a plaintiff in any cause against a Councillor can have no remedy at law.” Locke and the Board of Trade, not surprisingly given their Whig credentials, described this corrupt judiciary as “unreasonable and hardly to be credited,” and pressed Andros for an explanation of local legal practice. The Board, it seems, recognized that this political dominance was closely linked to and rooted in “the engrossing of too large tracts of land” by the planter elite. Such huge landholdings “hinder[ed] others from settling thereon” and retarded the economic development of the colony. If the crown were to realize the
maximum potential revenue from its colonial possessions, the engrossment of such political and economic power in a few hands would have to be overcome and, despite their hesitance to “meddle” with the “property of many private persons” in the colony, the Board of Trade began framing measures that might, if fully implemented, lead to “more regular planting and improvement in [the] future.”338

At the heart of these economic problems was the Old Dominion’s slave-based tobacco plantation system. The Board of Trade began to question the wisdom of tobacco monoculture, as cyclical booms and busts repeatedly destabilized the colonial economy and strained the royal treasury, and imperial officials also began to promote economic diversification on the ground. Edmund Andros came under fire from tobacco planters and merchants in March 1697 for the “encouragement [he had] given to cotton-planting in Virginia,” and a number of royal officials worked to promote the development of mines in the west, but few of the colony’s planter elite supported such schemes.339 Francis Nicholson, then serving as governor of Maryland, observed that “the cursed thing called self-interest too much governs” in neighboring Virginia. Large landowners were protective of their property rights, particularly their landed estates, and feared being “compelled to part with some of it,” a particularly objectionable possibility during a boom period in the tobacco market. Nicholson worried that without “some measure to restrain them,” the elite of the Old Dominion would continue to monopolize economic and political power – if immediate action were not taken to engage more subjects in the

338 Council of Trade and Plantations to Andros (1 February 1697), CSPC, XV: 660. Even at this early date, elements of the Lockean reform agenda are apparent. The Board’s letter to Andros hinted that lands in arrears on quitrent payments – which included a great many of the Virginia elite’s estates – might be seized by the crown for nonpayment and redistributed through “forfeiture and new division.” See also Francis Nicholson to Board of Trade, CSPC, XV: 880.
339 CSPC, XV: 857.
colony’s economic development, Virginia’s future governor could “not see how it is to be planted, in this age or the next.”

Before long, Nicholson would be charged with implementing just such a measure.

The chief author of this initiative was John Locke, who set to work framing a plan that would fundamentally reorder Virginia society. Implementation of this plan began in 1699, when instructions from the Board of Trade to governor Francis Nicholson called for a wholesale remaking of the Old Dominion – “all the laws” of the colony were to be reviewed, revised, and submitted to the Board for approval. The first order of business was restructuring the very basis of Virginia society – land ownership. Nicholson was to end the Virginia “land grab” by pressing for payment of quitrents in arrears and ending the practice of allowing “Negro rights,” or headright grants for slave imports. In the future, headrights could not be claimed on any migrants except “Xian Subjects comeing to reside” in the colony. Any estates with more than seven years of unpaid quitrents were to be seized, and all future grants were to be “founded on settlement rather than the importation of servants.” If the target of these measures were not already clear, the Board also instructed Nicholson to compile a list of all settlers holding more than 20,000 acres. The Navigation Acts were also to be more strictly enforced, and official depot “towns” were to be built to rate, price, and tax all tobacco exports. If adopted, these policies would hopefully lead to economic diversification, with support industries springing up around the “towns.” Former servants turned freeholders would implement long-desired Board alternatives to tobacco monoculture, altering their crop mix to supply

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340 Francis Nicholson to Board of Trade (13 July 1697), CSPC, XV:1178.
342 McIlwaine, EJCCV, I:420.
343 BoT instructions to Nicholson (13 September 1699), CSPC, XVII:819.
the royally-sponsored export towns with foodstuffs and engaging in small-scale manufactures to support these commercial hubs, finally breaking free of the cyclical tobacco market.

Less explicit but also crucial to the Lockean reform plan was a renewed focus on the rights of settler-subjects in the Old Dominion. One of the most damning indictments of the Virginia elite was their usurpation of nearly absolute political power in the colony, dominating the Council and the General Court, exempting themselves from prosecution, and even sitting as judges in their own cases. The 1699 reform plan sought to curb the political power of elites by making the appointment of councilors “amenable to civil process,” and to bolster the legal security of subjects by “ascertaining the qualifications of jurors.”

In other words, Locke and the Board hoped to do for Virginia what the Glorious Revolution had done for England – firmly and definitively establish that all legitimate authority was bracketed by law and consent, and protect the basic rights of all subjects. If enacted, Locke’s land plan in and of itself would have done much to achieve this goal by ensuring that all settlers would have access to productive lands, and thus to full subjecthood and access to formal politics.

When he arrived in Virginia in early 1699, Governor Nicholson’s initial popularity and the support of the lesser planters in the House of Burgesses made reform look like a real possibility. After spending two years in various legislative committees, the Board’s reform recommendations began to pass into law in August 1701, laying out a blueprint for economic development in the Old Dominion. While it was difficult to tamper with the vested property rights of the tidewater elite, expansion into the piedmont

344 Ibid.
provided an opportunity to experiment with new property regimes. To better protect and develop Virginia’s western frontier, one statute granted “societyes of men” between ten and thirty thousand acres to be held “as tenants in comon and undivided.” Individuals could claim two hundred acres each for planting, along with a half-acre “to seat upon and live in” within a “cohabitation” or town. Frontier settlers would receive a number of economic benefits, such as tax and quitrent forgiveness, along with exemption from military service outside the settlement, as long as “one christian man” was “continually...kept upon the land” for every five hundred acres claimed. If these conditions were not kept, the land would revert to the crown. To be sure, the expected benefit of such settlements was primarily military – an early warning system for Native incursions on the frontier – but the way in which the Lockean reform agenda envisioned Virginia society was fundamentally at odds with the established tidewater plantation system.

What, then, might this reforming impulse have meant for enslaved Afro-Virginians? In the immediate context, very little changed – the natural rights of individual slave owners to their vested property, protected by local law, could not easily be tampered with, even by reform-minded planners on the Board of Trade. But the economic and political implications of the Lockean reform plan, if carried to their logical end point, might have destabilized Virginia’s slave-powered plantation economy. By keeping estate sizes small and promoting economic diversification, the Board’s plan would likely have decreased the demand for bound labor in the colony, and this meager demand would be met, ideally, by the importation of European servants who would

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345 Hening, SAL, III :201-209.
eventually become freeholders themselves. Regulation of the slave trade might also have hampered the further development of the plantation regime. Starting in 1699, Virginians repeatedly enacted small duties on the slave trade. The twenty shilling impost levied between 1699 and 1706 was intended to fund the construction of new royal College of William and Mary in Williamsburg, not to stop slave imports, but it also set a clear precedent that the local government could, if it chose, regulate the slave trade. The legislature was serious about enforcement of the impost as well – the fine for evasion was £100.346

There is even evidence that the most draconian elements of Virginia’s slave police law might be altered. In 1699, for example, the colonial legislature amended the 1691 statute detailing legal process for trying slaves accused of felony crimes discussed above. The 1691 statute had made a number of minor crimes, including “hog stealing,” felonies punishable by death when committed by slaves. The 1699 law now rolled back this provision, mandating a whipping for the first offense, and pillorying and ear-cropping for the second, though it maintained a separate standard of proof in slave cases – an enslaved hog thief could be convicted “by one evidence or by his owne confession.”347 While it is hard to see this minor alteration as meaningful for enslaved persons themselves, and though it was motivated just as much by concern for the property rights of slave owners as any concern for the natural rights of slaves, the 1699 statute does represent another attempt by the colonial state to regulate the kind of justice slaves would have access to.

346 Hening, SAL, III: 194. The imposts of 1699-1706 were clearly intended as revenue taxes – as Anthony Parent has noted, there is “no indication that [the duty] was intended to restrict the slave trade.” (Foul Means, 87) Beginning in 1710, however, the duty was raised to £5, a prohibitive tax intended to curtail the influx of slaves. This prohibitive duty will receive greater attention in Chapter 5.
347 Hening, Statutes at Large, III:179.
Even planters as bloodthirsty as Robert “King” Carter recognized that, in this specific instance, Virginia police law had gone too far.

The immediate impact of Board of Trade’s reform policies, then, was certainly limited, but they held out the possibility of a fundamentally different Virginia, one much more in line with the political economy of New England and the legal culture of post-Glorious Revolution Britain. Given time, the Virginia reform package might have broken up large landed estates and diversified the colonial economy, easing demand for bound labor, while the legal definition of enslaved Afro-Virginians as subjects with some basic rights might have chipped away at the dominion of slave owners. By privileging the corporate humanist strand of English revolution principles over its liberal individualist counterpart, reformers on the Board of Trade and their allies on the ground in Virginia could have made the Old Dominion as inhospitable to plantation slavery as the Bay Colony.

This, of course, was not to be. By 1703, the great planters mobilized the revolutionary language of vested property and individual rights and moved to beat back the metropolitan reform plan. Governor Nicholson was forced out of office in 1703 by a cabal of elite slave owners, including William Byrd II and Robert “King” Carter, and his replacements, despite continued calls for reform from the Board of Trade, were largely unable to break the Virginia plantocracy’s stranglehold on local law and politics.348 Besides, priorities were changing back in England – King William was dead, John Locke had retired from the Board of Trade, and a new imperial administration, orchestrated by

348 For the continuing presence of the basic reform impulse on the Board of Trade, see BoT Instructions to Edward Nott, CSPC, XXII:1051.i; BoT Instructions to Alexander Spotswood, CSPC, XXV: 247, 437, 449.
Queen Anne’s chief minister, Robert Harley, was less interested in the internal economic development of the colonies than in extracting revenue from commodities production and taxation. Anne was, after all, a Stuart, and her notorious conservative streak endeared her to leading Tories and shaped her imperial policies. As they had during the Restoration, Virginia planters took advantage of a friendly metropolitan administration and doubled down on plantation slavery as the basis of their society.

It was in this context – the rejection of reform and a shift in imperial administration – that Virginia enacted its notorious 1705 slave code, often described as the first comprehensive body of slave law in the Anglo-American world. The timing of this comprehensive code, however, has always been somewhat of a mystery to historians – why would Virginians need such a body of law if earlier statutes had already established the legal basis of slavery in the colony? A general trend toward imperial oversight of colonial law and desire for more cohesive bodies of statute law certainly played a role, but it is also possible, indeed likely, that the 1705 Virginia slave code was also an attempt to entrench slavery more firmly in local law, beyond the reach of metropolitan jurists and reformers like Chief Justice Holt and John Locke.

The basis of this slave code was, of course, the definition of “Negro, Mulatto, and Indian slaves” as a species of property. As they had during the Restoration, Virginia legislators defined enslaved persons as “real estate (and not chattels),” giving slave owners access to the full panoply of English legal protections for landed estates. In some cases, however, treating slaves as realty could prove a disadvantage to planters, and so the 1705 slave code allowed for slaves to be treated as chattels in certain circumstances. Slaves could be seized for debt “as other chattels or personal estate,” and slave sales
within the colony did not need to be recorded as land sales did, facilitating the transfer of
slave property. Slaves were not liable to escheat, as other real property, but would be
treated as chattels if an owner died without heirs. To guarantee the integrity of the great
planters’ enslaved labor forces, the 1705 code also regulated the descent of slave
property. Since many planters had turned to the entail to protect their landed estates, it
was crucial that slave property not be distributed among heirs as other chattels would –
instead, the heir to the estate must also inherit its bound labor force. In order to provide
for younger children, executors would assess the value of the slaves, which would be
divided equally among younger siblings and paid out by the heir. To promote further
slave importations, and in keeping with imperial practice, Virginia law recognized the
separate property claims of merchants importing new slaves through the transatlantic
trade and mandated that local Virginia property law would only adhere once slaves were
sold in the colony. By refining their definition of property-in-man, Virginia legislators
cemented the central premise of Anglo-American slavery in local, black letter law –
slaves were the legal property of their masters.349

Having restated what slavery was – a property relation – the Virginia legislature
next turned to enumerating who could and could not be enslaved. Again drawing on
earlier statutes, the 1705 code stated that all non-Christians, except “Turks and Moors in
amity” with England, were subject to enslavement, “notwithstanding a conversion to
christianity afterwards.” Race and enslavability, then, were not yet fully equivalent, and
the law specifically exempted anyone who could “make due proof of their being free in
England, or any other christian country” from enslavement. Coming close on the heels of

349 Act XXIII, “An act declaring Negro, Mulatto, and Indian slaves within this dominion, to be real estate,”
in Hening, SAL, III:333-335.
Lord Holt’s antislavery decisions at King’s Bench, these clauses may be a tacit acknowledgement of the metropolitan freedom principle – any Christian Afro-Britons wrongly enslaved could claim their freedom in Virginia courts on the basis of religious affiliation and prior residence in England.\textsuperscript{350} Other elements of the 1705 code, however, seem to have been intended as direct refutations of the Holt Court’s decisions. In direct contrast to Holt’s ruling in \textit{Chamberlain v. Harvey}, the Virginia legislature declared that “a slave’s being in England, shall not be sufficient to discharge him of his slavery, without proof of his being manumitted there.” As proslavery lawyers had argued before the King’s Bench, even English air could not free a slave without the active consent of his or her owner. The local law of the slave colonies, built upon a solid foundation of royal prerogative, was here construed as extraterritorial in force, just as applicable in Westminster as in Williamsburg. To squash any remaining doubts about the liberating power of Christianity, Virginia also reenacted its Restoration-era statute declaring that “baptism of slaves doth not exempt them from bondage.”\textsuperscript{351}

With non-Christian emigrants, practically all of whom were Africans, defined legally as slaves, all that remained for the Virginia legislature was to define the rights that slaves and slave owners could claim under law. Here the 1705 slave code reiterated and refined earlier 17\textsuperscript{th} century law barring enslaved Virginians from the rights of subjecthood. The mobility and independent economic activity of enslaved persons was severely limited by pass laws and restrictions on trading with slaves. Enslaved settlers were explicitly barred from ownership of their own separate property – all “horses, cattle,

\textsuperscript{350} Pending further research, it is unclear whether any Afro-Britons were able to gain their freedom under this clause in Virginia itself, though no evidence for such a freedom suit exists in the published records of the colony.

\textsuperscript{351} Hening, \textit{SAL}, III: 447-448.
and hogs” owned by enslaved people were confiscated and sold by the state, and ownership of weapons was also proscribed.\textsuperscript{352} The legal rights most subjects could expect in court were also revoked from enslaved settlers. Defined as property, not as subjects or legal persons, slaves could not initiate suits and had no standing as persons before Virginia courts. Slaves who committed crimes were tried before a magistrate, not a jury, and could be convicted on the testimony of two white witnesses, or only one in “pregnant circumstances.” Masters could mount a defense for their slave, but were restricted only to matters of fact – they could not challenge the irregular trial procedures employed in slave cases.\textsuperscript{353} Testimony by enslaved or free black settlers was also outlawed – “not being christians,” they were “deemed and taken to be persons incapable in law, to be witnesses in any cases whatsoever.”\textsuperscript{354} Though countervailing impulses from metropolitan planners continued to press for recognition of slaves as subjects in Virginia courtrooms even after the Board of Trade’s initial reform plan was defeated, the 1705 slave code reinforced the piecemeal legislation of the 17\textsuperscript{th} century by barring Afro-Virginians from the possession and benefit of the properties of English subjecthood.

Perhaps the most shocking element of Virginia’s 1705 slave code is the unprecedented police power it delegated to local magistrates, individual slave owners, and the white settler community more broadly. Again reiterating earlier statute law, the new code gave tremendous discretionary power to individual owners, re-enacting laws exempting owners and overseers from prosecution for the death of a slave during “correction,” mandating harsh penalties for any person of color who dared “lift his or her

\textsuperscript{352} Ibid., III: 459-460.  
\textsuperscript{353} Hening, SAL, III: 269-270.  
\textsuperscript{354} Ibid., III:298.
hand, in opposition against any christian,” and allowing any white settler to “kill and destroy” any fugitive slave. All of these provisions had appeared in earlier legislation, but the new 1705 slave code outstripped even these earlier laws in its brutality. To deter runaways, slave owners could appeal to county courts to have habitual absconders publically punished “by dismembering, or any other way...as they in their discretion shall think fit, for...terrifying others from the like practices.”

Robert “King” Carter, the largest land and slave owner in the colony, was particularly brutal in his application of this exemplary punishment – he had Dinah and Bambara Harry dismembered in 1710, and later bragged that he had “cured many a negro of running away by this means.”

Perhaps the most compelling illustration of the failure of reform in Virginia was the case of Rose, an enslaved woman killed by her mistress, Frances Wilson, in the autumn of 1713 in Isle of Wight county. A coroner’s inquest found that Rose, a “hail [sic] Negro,” had died as a result of “hard usage...finding no mortall wounds but only stripes.” Deaths like these were all too common in a legal context where a master’s individual right to destroy his own property outweighed the right of an enslaved person to her own life in the scales of Virginia law – Frances Wilson was well within her legal rights under the 1705 slave code when she whipped Rose to death. But, as we have seen, the reform attempts initiated by John Locke and sustained by newly arrived royal officials like Alexander Spotswood had challenged many of the underpinnings of Virginia’s slave law. Perhaps suspicions were piqued when Rose’s body was “suddenly and secretly Buried,” suggesting that something more than “Moderate Correction” had contributed to her death. A coroner’s inquest, called by justice of the peace Andrew

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355 Ibid., III:459-461.
356 Parent, Foul Means, 125.
Woodley, looked into Rose’s death in November 1713 and, perhaps surprisingly to most slave owners, the jury returned “a Verdict of Murder.” Even after the defeat of reform through the 1705 slave code, there were still some Virginians who asserted the basic subjecthood of enslaved persons, challenging the absolute individual dominion of masters over their slaves.

If the brief glimpse we get of him in Rose’s case is any indicator, Andrew Woodley appears to have been one of them. A recently arrived settler, Woodley patented six hundred acres in 1693 and settled his household, including five slaves – Cowberry, Isabella, Maria, Ruben, and Jenny – along Pagan Creek outside Smithfield in Isle of Wight county. Woodley quickly made a name for himself in the community, and was appointed as surveyor in 1694 and justice of the peace by 1707, but he never attained the kind of wealth that would mark him as one of the great planters. Perhaps resentment of the advantage his neighbors gained from their large slave labor forces made Woodley hostile to their unchecked power, or perhaps he had internalized the antislavery potentialities of English revolution principles and could not countenance the wanton killing of a fellow subject – the fact that he specified the manumission of two slaves in his will certainly suggests some unease with slavery. Whatever the reason, Woodley brought the case to the attention of John Clayton, the newly appointed Attorney General, in the spring of 1714.

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358 When Woodley died in 1718, he left only modest landholdings – probably no more than 1,000 acres – to his heirs. He also specified that eleven slaves descend to specific heirs, though it is likely that more slaves simply descended to his eldest son Thomas with the family seat at Little Neck. Two of these slaves were also to be manumitted under the terms of Woodley’s will – “a Negro girl Diana, and a negro girl Lucy” were left to his granddaughter Elizabeth Copeland on the condition that they be freed on her twenty-fourth birthday. See “Isle of Wight County Records,” WMQ, vol. 7, no 4 (April, 1899): 306-307.
Clayton, who had studied at the Inns of Court in Westminster and argued cases at the bar during Lord Holt’s tenure as Chief Justice, built a lucrative local practice after his arrival in Virginia in 1705 as private attorney to such notables as William Byrd II. Perhaps he had imbibed some of Lord Holt’s legal antislavery principles, because he now sought to limit the physical dominion of his slave-owning clients – Clayton approached Lieutenant Governor Spotswood about prosecuting Frances Wilson for felony murder, arguing that “no Subject has power over the Life of his Slave.” Despite local statutes proclaiming that the death of a slave during the usual course of correction was no felony, Spotswood agreed with the attorney general and empaneled a grand jury to hear Rose’s case. When the grand jury convened in March 1714, Spotswood gave them very clear instructions that could just have easily have come from Lord Holt or Judge Sewell. Spotswood avowed it “indispensably my Duty” to ensure that “a legal Tryal” was held, and told the grand jurors in no uncertain terms that:

“...in this Dominion no Master has such a Sovereign Power of his Slave as not to be liable to be called to an Account whenever he kills him; that at the same time, the Slave is the Master’s Property, he is likewise the King’s Subject, and that the King may lawfully bring to Tryal all Persons here, without exception, who shall be suspected to have destroyed the life of his subject.”

Spotswood clearly wanted Frances Wilson, and those like her “who delight in inhumane Severitys,” brought to justice. Here was the Revolutionary case for slave subjecthood clearly stated. All persons living within the king’s dominions were subjects entitled to at


least the barest of rights, and no master could legitimately wield the power of life and death over another subject.

If it seemed for a moment that justice might be done in Rose’s case, the reality of slaveholder power quickly became obvious. Indeed, there had been stiff opposition to Frances Wilson’s prosecution from the start. Had Spotswood and Clayton not pressed the issue, the case likely would not have come before the court at all – no local warrant was served on Frances Wilson after the coroner’s inquest, and it was only pressure from the Attorney-General and Lieutenant Governor that had forced the issue. Great planter John Custis IV, empaneled as a grand juror, certainly tried to dissuade some of his less weighty peers from handing down an indictment. After hearing testimony from Mary Lupo, a white neighbor who described the “mortal strokes” Frances Wilson gave Rose and “plainly accused” her of murder, however, the grand jury moved to indict Wilson, over Custis’ objections. When the case came before the General Court in October 1714, the court was presided over by yet another great planter – William Byrd II, who questioned the validity of the indictment and argued that Wilson “ought not to be tried” for her crimes since local law precluded charges of murder in the death of a slave.361

As in the slavery cases heard by the Holt court and Adam’s case in Boston, the central question in Rose’s case was the balance between the property rights of some subjects – slave owners – and the rights to subjecthood of others – enslaved Africans. Arguing for the former were the great planters of the Old Dominion, the wealthy slave owners who had leveraged their political and economic power to dominate Virginia society over the past two generations. The latter position had less powerful supporters –

361 CSPC, XXIX: 248-249.
a handful of royal appointees, a politically marginalized class of smallholders, and, of course, enslaved people themselves. Despite a decade of attempts at reform that sought to check the power of the great planters and empower royal officials and common subjects, then, the outcome of Rose’s case was never really in question. Frances Wilson was acquitted and released. There would be no justice for Rose, for her friends or family. Indeed, John Clayton reported to the Board of Trade two years later that “the plain and whole truth of [the] matter” was that no other slave owner had been “prosecuted for the death of a Slave by Correction” since at least 1710.362 Despite repeated instructions from the Board of Trade to prosecute settlers who killed the king’s enslaved subjects, and the attempts of magistrates like Andrew Woodley, John Clayton, and Alexander Spotswood to make these instructions a reality, the property claims of freeborn Anglo-American slave trumped the rights of enslaved Afro-Virginians. In the Old Dominion, unlike in England and Massachusetts, revolution principles proved to be just as conducive to slavery as Stuart absolutism.

362 John Clayton to BoT (20 December 1716), CO 5/1318/95.
Chapter V – “Britons Never Will be Slaves”: The Passions and the Interests of Late Colonial Slavery, 1715-1754

On the evening of 1 August 1740, a coterie of finely dressed Britons assembled at Cliveden, the opulent Buckinghamshire estate of Frederick of Hanover, Prince of Wales and heir to the British throne. On this warm evening the gathered notables, many of whom, like the prince himself, were in open opposition to George II and the Walpole ministry, were treated to the debut of *Alfred*, a new masque about the 9th century king of Wessex who repelled Viking invasions and united the English people. David Mallet and James Thomson’s libretto made obvious comparisons between the great English hero and the current Prince of Wales that must have pleased Frederick and his opposition court. *Alfred’s* patriotic message was that the English-cum-British were a particularly free people, and under a heroic, manly ruler like Alfred the Great, or the presumptive heir Frederick, the virtues of British civilization would be both safeguarded at home and promoted abroad.¹

As the final act drew to a close, the players reiterated this point in a musical setting by Thomas Arne:

> When Britain first, at Heaven’s command  
> Arose from out the azure main;  
> This was the charter of the land,  
> And guardian angels sang this strain:  
> ”Rule, Britannia! Rule the waves:  
> Britons never will be slaves.”

We can imagine Frederick and his court joining the cast in greater numbers with each succeeding refrain, repetition cementing lyrics and message more firmly in their minds.

By the end of the fifth verse – “To thee belongs the rural reign/Thy cities shall with

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commerce shine/All thine shall be the subject main/And every shore it circles thine” – the spacious halls of Cliveden must have swelled with patriotic British voices. With the Protestant succession and the liberties of subjects secure at home, and the bounty of a growing empire flowing into the metropole from abroad, Britons could finally and permanently be freed from the slaveries of popery, arbitrary government, and economic privation.²

This message would have held special salience for Frederick and the opposition figures gathered around him in 1740. To these Opposition or Patriot Whigs, the timid, effeminate foreign policies of George II and Sir Robert Walpole threatened both the liberties of Britons at home and the nation’s manly reputation abroad. “Rule, Britannia!” was more hope than reality in 1740, but the lyrics held the solution. Other nations, “not so blest” as Britain, were falling to tyranny all around, but whenever slavery reared its head in fair Albion, it would “arouse [the] generous flame” of Britons’ “manly hearts” to “guard the fair.” This assertive, manly nation would protect the essential liberties encapsulated in the near-hegemonic Revolution principles of 1688, ensuring that Britain would “flourish great and free” and never be “tame” or “bend...down” to tyrants. But to guarantee this domestic outcome, Britain must enter fully and manfully into international imperial competition. Empire would make the cities shine with commerce, unman the tyrants of the continent by stripping them of their possessions, and make Britain “the envy of them all.” In the zero-sum game of 18th-century European imperialism, British dominion over the “subject main” and the “shore it circles” was the key to ensuring that Britons never would be slaves.³

³ Ibid.
The irony of “Rule, Britannia!” is obvious to modern commentators. Even as Frederick and his court took up the refrain for the first time in 1740, British subjects and British capital were busy overseeing and financing the massive expansion of the Atlantic slave trade and the colonial plantation complex. The power and prosperity the new imperial anthem celebrated rested on the commodification and labor power of ever more socially dead, chattelized African bodies. But how could an empire based on the brutal extraction of labor from tens of thousands of enslaved Africans claim that its subjects never would be slaves? Again, the answer is in the lyrics. The idealized Briton of Thomson’s verse fit a very specific mold – manly but sensible; commercial and industrious but not grasping; rational, polite, and Protestant. To growing numbers of colonial planters and imperial planners, it was self-evident that African slaves could never be Britons under this definition. Emasculated, lazy, and irrational Africans were fitted only for slavery, not British freedom, and their enslavement served the ultimate cause of furthering the common wealth. A stream of legal opinions, imperial and colonial statutes, and public pronouncements made this image of African slavery as a positive good for both the “benighted African” and the British nation nearly hegemonic.

But not quite hegemonic – there were other conceptions of empire and subjecthood circulating in the mid-18th century Anglophone Atlantic as well. Some Britons believed that international competition necessitated a more open definition of the British nation and greater access to traditional English liberties. Debates over the naturalization of foreigners, the rights of colonists throughout the empire, and the legal status of British Jews all necessitated a rethinking of the boundaries of British-ness, and often spilled over into discussions of the nature of personhood and subjecthood more
generally. The continuing efforts of the Society for the Propagation of the Gospel to Christianize and “civilize” the imperial slave population, despite the SPG’s deep complicity in enslavement, also challenged dominant ideals of Africans as socially dead outsiders. Others worried about the effect grasping, individualistic consumerism had on the British nation. A true Briton used his property not for individual gain, as West Indian planters did, but to benefit the common wealth of all subjects, an argument with startling antislavery potential. Dovetailing with an emergent critique of the Walpolean political economy of empire emanating from Patriot Whig circles, this denunciation of the economic dangers of slavery proved particularly potent in the 1730s and ‘40s. And, of course, the actions of enslaved people consistently defied simple classification, forcing Britons to confront the contradictions underlying their imperial project. Continuing instances of large and small scale rebellion, the self-evident rationality of the enslaved, and the conversion of some Afro-Britons to Protestant Christianity put the lie to facile racist stereotypes and challenged British justifications for property-in-man.

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Mid-eighteenth century Britons were acutely aware of the importance of the colonies to their daily lives and, increasingly, the role of slavery in shaping the economic, political, and moral contours of empire. Virginia tobacco; Jamaican sugar and coffee;

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Indian tea and cotton; African mahogany, ivory, and people; shipped in vessels made from New England timber – all flowed into the metropole in ever greater quantities. English aristocrats and wealthy merchants had long enjoyed the benefits of empire, but these were now available to a growing cross-section of the British populace, bringing colonial commodities into the homes of artisans, small farmers, and even common laborers for the first time. Nor was this simply a metropolitan phenomenon – provincial and colonial Britons also saw rising standards of living and levels of material consumption in the mid-eighteenth century boom years. The material good of the British nation, it seemed, hinged more than ever on the economic health of the empire.7

All of this economic success, of course, came with a price. Those Britons who cared to look past the veneer of unprecedented material wealth to the substance of their imperial economy must have been struck by the central role played by slavery and the slave trade. When the Royal African Company’s monopoly privileges expired in 1712, Britain’s independent traders, and the “ten-percent men” who had already begun to edge in on the African trade in the 1690s, dove into the slave trade with vigor. Before the expiration of the RAC monopoly, mainland American planters often carped about how Company ships bypassed them in favor of more lucrative markets in the West Indies, but by mid-century they could have no such complaints. Virginia alone imported some 54,000 enslaved Africans in the middle half of the 18th century – by comparison, only about 10,000 slaves were imported in the years between the Glorious Revolution and the

death of Queen Anne in 1714. Indeed, the half-century between the Hanoverian Succession and the outbreak of the Seven Years’ War saw a stunning revitalization of the English slave trade. In this period, British vessels made 3,269 slaving voyages, carrying over 830,000 enslaved persons into colonial bondage. The human cost of this increased slave trade activity was truly staggering – nearly 150,000, or roughly 17 percent, of the enslaved men, women, and children laded on British slavers in Africa died in the hellish middle passage. Here was a human tragedy to make even a Stuart blush.

Yet the British imperial state remained committed to the slave trade throughout the mid-18th century. It was good business to do so. African slaves were purchased with British manufactured goods, bolstering the domestic manufacturing sector of the imperial economy. The purchase price of African slaves in the colonies alone amounted to an infusion of nearly £15 million into the British colonies, and the labor power of enslaved persons produced ever more marketable commodities for sale on the home market and re-export to the continent. The imperial state also benefited directly from the slave trade and the plantation complex it fed – customs duties on Jamaica sugar alone provided from £200,000 to £300,000 to the Treasury per annum. Whatever moral or political qualms Britons may have had about the slave trade, there was far too much money at stake to

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8 TASTD2, [www.slavevoyages.org](http://www.slavevoyages.org), (accessed . The vast majority (over 70%) of enslaved persons carried in British slave ships were male, and nearly 80% were adults at the time of their purchase in Africa. On the increase in British participation in the slave trade in this period, and particularly the role of North American planters in pushing for the deregulation of the slave trade, William A. Pettigrew, Freedom’s Debt: The Royal African Company and the Politics of the Atlantic Slave Trade, 1672-1752 (Chapel Hill, NC: University of North Carolina Press, 2013).

9 The total capital stock in slave property carried in the mid-18th century trade was computed by assigning a purchase price of £25 for slaves sold in the British colonies, multiplied by the number of slaves delivered to the British colonies in British ships between 1715 and 1754, which the TASTD2 reckons at 585,465. Even these rather conservative estimates come to £14,636,625. To be sure, the price for a prime field hand fluctuated over time, but still represent a remarkable capital investment.

turn away from slaving, and imperial policy was, in no small measure, designed specifically to protect the transatlantic trade in human flesh.\textsuperscript{11}

Slave trade policy, however, was only one element of a larger imperial vision that garnered support from a series of metropolitan planners including Robert Harley, Queen Anne’s chief minister, and Sir Robert Walpole, Prime Minister and architect of Establishment Whig policy. Unlike the proponents of the turn-of-the-century Lockean imperial reform agenda, Harley the High Tory and Walpole the Establishment Whig agreed that the advantages of empire came not from “greatness of people,” as Locke had argued, but from increased territories and control of commodities production. By conquering territory in the West Indies and ensuring that these were well stocked with African slaves, Walpolean political economy sought to dominate the European market for the 18th century’s prime commodity – sugar – thus reaping increased state revenues through re-export taxation and rewarding Whig-leaning British merchants with a bigger slice of the imperial fiscal pie. Meanwhile, colonial economic development had to be curtailed to ensure an outlet for the growing metropolitan manufacturing sector, preventing the plantation colonies from diversifying and relegating New Englanders to the carrying trades. Dominating foreign and imperial policy from the Hanoverian succession into the 1740s, and retaining substantial influence even longer, it was this Establishment Whig political economy, in many ways dependent on plantation slavery and the transatlantic slave trade, which undergirded the high age of British mercantilism.

The economic boon of the slave trade, however, was not an unalloyed benefit to the British nation. Some metropolitan planners believed the imperial common wealth would be better served not through the acquisition of new territories and the expansion of the plantation complex, but rather through intensive economic development in the colonies, diversification of commodities production, and free trade to all New World colonies, where British and colonial commodities and manufactures would find a ready market, pumping hard money into the Anglo-American economy and supporting domestic manufacturing. While this political economic critique of empire, tentatively developed by the Country Whigs of the 1720s and fully embraced by the Patriots of the ‘30s and ‘40s, was not directly critical of slavery or the slave trade, it did espouse prescriptions for imperial development that often ran directly counter to the interests of slave owners and traders. It is no coincidence that many leading Patriot Whigs – men like William Pulteney, John Barnard, William Kieth, and George Lyttleton – also supported antislavery programs like Georgia’s free labor experiment and the Society for the Propagation of the Gospel’s mission to colonial slaves. Hidden beneath the veneer of political stability and Establishment Whig hegemony of the mid-18th century, then, lay a roiling debate over the future of slavery in the British Empire, a debate that came repeatedly to the surface of imperial politics.12

Indeed, the slave trade was at the heart of one of the worst financial crises in British history – the South Sea Bubble of 1720.13 In the peace negotiations at Utrecht

13 Julian Hoppit has recently argued that popular and scholarly perceptions of the South Sea Bubble have been exaggerated, and the true history of the bubble has become shrouded in “mythology.” See Julian Hoppit, “The Myths of the South Sea Bubble,” Transactions of the Royal Historical Society, vol. 12 (2002): 141-165. For general treatments of the South Sea Bubble, most of which tend to be rather
that brought the War of the Spanish Succession to a close in 1713, the fate of the *asiento*, an exclusive contract to deliver enslaved Africans to Spanish America, was “a major part of the negotiations,” and Queen Anne’s chief minister and architect of the peace plan, Robert Harley, insisted that the contract go to the British. Under the terms of the *asiento*, British merchants would deliver 4,800 slaves a year to the Spanish colonies, and the rights to fulfill this lucrative contract were granted exclusively to the newly-formed South Sea Company, founded in 1710 and headed by none other than Robert Harley, now Earl of Oxford and Lord High Treasurer.  

Despite the questionable business ethics of the South Sea Company, Britain’s acquisition of the *asiento* contract was widely hailed as a major economic victory, even if it was the only tangible benefit of the notorious “Tory peace.” This victory was made all the sweeter by the fact that France, the previous *asientists*, would lose out in the zero sum game of imperial competition. Even the Whig press, typically critical of Queen Anne’s Tory ministers and their foreign policy, hailed the *asiento* as one of the great achievements of her reign. Tory supporters were even more effusive. Joseph Trapp, for example, in his *Peace: A Poem*, heaped praise on Queen Anne and Harley for the Peace of Utrecht and, implicitly, their acquisition of the *asiento*:

\[
\text{Pleas’d with the Prospect pious ANNA smiles,}
\text{Restoring Plenty to her happy Isles:}
\text{Annexes new Dominions to her Crown,}
\]

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Increas’d in Empire, deathless in Renown.
To Her each World it’s Wealth and Strength resigns,
_Europe_ it’s Forts, and _India_ yields it’s Mines.

The terms of the peace would serve the national good by increasing material wealth and imperial power. Alexander Pope, in his peace poem _Windsor-Forest_, was just as laudatory, hoping that Britain’s new international power would “stretch thy Reign, fair _Peace!_ from shore to shore,/Till Conquest cease, and Slav’ry be no more.” The “Slav’ry” Pope hoped to see extinguished, of course, was the political slavery of French absolutism, not the very real human slavery into which British ships now delivered ever more enslaved Africans.\(^{16}\) The _asiento_, and by extension the slave trade more generally, were rhetorically positioned as positive benefits to the British nation.

When the South Sea Bubble finally burst in 1721, it shook the entire imperial economy and shook the confidence of Britons throughout the empire. In the wake of this spectacular economic collapse, popular opinion began to turn, not only on the South Sea Company itself, but also on the growing cross-section of Britons whose ill-gotten wealth derived from the slave trade. To be sure, some still supported the South Sea Company, with one pamphleteer heaping praise on the “_South Sea_ Saviours of the Realm” in verse. “[T]ho’ some unprovided Accidents/Have brought the soaring Project lower,” the poet argued, critics were being unfair:

> Where Praise is due, that Satire’s the Reward;
> That Men, who act the Patriots like These,
> Make it their _Pains_ to give a Nation _Ease_,
> Should, just like Slaves, by _Britons_ treated be,
> Because their Study was to set them free.\(^{17}\)

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\(^{16}\) Quotations drawn from Richardson, *Slavery and Augustan Literature*, 80, 84, _passim_.

\(^{17}\) Mr. Arundell, *The Directors, A Poem: Addressed to Mr. Stanhope...* (London, 1720), 16-17. Arundell also went to great pains to defend the wealth some South Sea investors gained, arguing that “The richest
The South Sea Company’s directors deserved praise, not scorn, since they only sought to free Britain from the slavery of economic backwardness.

Others, however, were not so sanguine in their evaluation of the South Sea Company’s directors. John Trenchard, for example, described South Sea directors as “Harpies and Publick Robbers...Pickpockets and Stock-jobbers: A sort of Vermin” who had duped “ignorant and unwary, but industrious Subject[s]” by their “merciless Villainy and consuming Avarice.” Trenchard’s solution was simple, if brutal – “let us have the only Satisfaction they can make us, their Lives, and their Estates.”

William Hogarth turned his biting visual satire against the Company as well in a 1720 print entitled The South Sea Scheme, where Throngs of Britons flocked to “ye Devils Shop,” rendered as a market in human flesh, while “Honour” is flogged by “Vilany” and “Honesty” is broken on a wheel by “Self Interest.” The Country Whig critique of the South Sea Company was closely linked to a larger unease with the perceived corruption, profligacy, and self-interest associated with the Court. Britons would surely have known that critics like Trenchard and Gordon were being hyperbolic when they claimed that Court corruption would reduce the nation to slavery, but they would also have understood that Court policies enabled the very real enslavement of countless thousands of Africans.

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*Briton most is Britain’s Friend,” and depicting those who were ruined by the South Sea Bubble as “plaister’d Rakeshell[s]” and “worse-essenc’d Fop[s].”* Ibid., 7, 21. For another defense of the South Sea Company even after the bubble burst in 1720, see the contributions to *The True Briton*, no. 4 (June 21, 1723).


In the wake of the South Sea crisis, a number of colonial assemblies attempted to regulate slave importations. In 1723, for example, South Carolina and Virginia passed slave trade duties, both of which were resolutely opposed by metropolitan merchants and imperial planners on the Board of Trade. Four years later, with slave trade restrictions spreading to the more profitable sugar colonies, merchants aligned with the South Sea Company protested Jamaica’s slave trade impost. Directly opposed to the imperial economic policies being promulgated by the metropole, all of these local slave trade duties were denounced by the Board of Trade and eventually struck down by the Privy Council. Few if any of these imposts were intended as a real challenge to slavery per se – indeed, in many cases they were designed primarily to consolidate the economic power of select planters and merchants who could better control the inflow of new slaves – but they all clearly illustrated the very real conflict of interest between colonial legislatures and imperial planners when it came to the slave trade.

Though the immediate political crisis over colonial slave importation duties appeared to have been resolved, it had raised troubling questions about the future of slavery if left under local colonial control. Thus far, despite attempts at imperial centralization made during the Interregnum, again at the Restoration, and even in the wake of the Glorious Revolution, slavery had remained a creature of local law and, as the colonial drive to regulate the slave trade illustrated, many colonists hoped to retain local control over the institution. This legal diversity, however, was now seen as a barrier to

Court Whig mercantile policy, and the Crown, the Walpole ministry, and the West India merchants all hoped that a more uniform slave law would promote commodities production and increase customs revenue. In 1729, a group of merchants closely tied to the Walpole ministry approached Sir Philip Yorke, the Attorney General, and Charles Talbot, Solicitor General, to obtain a legal opinion supporting this position. They had come to the right place. Both lawyers had risen to prominence through close connections with leading figures in the Walpole ministry and could be relied on to toe the administration line.23

Indeed, Yorke had already proved his willingness to give independent legal opinions outside of the courtroom that supported the Walpole ministry’s imperial policy. In 1724, for example, just after taking up the office of Attorney General, he opined that Jamaica could be taxed directly by the crown without local consent, and later, in 1728, argued that Massachusetts’ Congregational establishment violated the repugnancy clause of its charter. Talbot, as Solicitor General, collaborated with Yorke in crafting the 1728 opinion, and was equally committed to the administration policy of imperial centralization.24 When presented with the West India merchants’ petition for an opinion on the imperial legality of slavery in 1729, then, there was little question how the crown’s attorneys would respond. The crown, ministry, and merchants got all they could have hoped for:

24 Harris, Life of Hardwicke, 89-91. Yorke also played an important role in supporting the Walpole ministry in the Excise Crisis in 1733, speaking in favor of the administration policy in the Commons on a number of occasions and eventually representing the ministry to announce the withdrawal of the controversial bill.
We are of opinion, [wrote Yorke and Talbot,] that a slave, by coming from the West Indies, either with or without his master, to Great Britain or Ireland, doth not become free; and that his master’s property right in him is not thereby determined or varied; and baptism doth not bestow freedom on him, nor make any alteration in his temporal condition in these kingdoms. We are also of opinion, that the master may legally compel him to return to the plantations.25

The Yorke-Talbot opinion was straightforward and devastating. With a stroke of the pen, it turned assumptions about slave property that had informed the Holt Court’s decisions on their head, undermining the legal foundation of English antislavery.

Though little direct contemporary commentary on the Yorke-Talbot decision survives, examination of its clauses illustrates the extent to which proslavery arguments born in the plantation colonies had penetrated metropolitan legal opinion. First, it established slave property as an extraterritorial right. Unlike earlier decisions, the Yorke-Talbot opinion implied that, once established, property claims to slaves would adhere throughout the empire and would not be “determined or varied” by passage through local jurisdictions. Furthermore, since it was irrelevant whether the slave entered England “with or without his master,” and since masters could “legally compel [slaves] to return to the plantations,” the Yorke-Talbot opinion essentially created an imperial fugitive slave law.26 Defined only as rightless articles of property, and protected as such throughout the empire, slaves could no longer hope to gain their freedom in English courts as some had done a generation earlier. The potential for emancipation through Christianization was closely linked to this question of the extraterritorial reach of slave property, and the Yorke-Talbot opinion sought to close off any possibility of

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26 Catterall, Judicial Cases, I:12.
emancipation through baptism. Though already closed in the plantation colonies, this window had been left open a crack by the King’s Bench decision in *Butts v. Penny* and opened more fully by the Holt court.27

Unlike many modern historians, mid-18th century Britons well understood the significance of the Holt court’s rulings that Christianized Africans would be protected by common law in England. An anonymous pamphleteer from the Leeward Islands admitted as much in his 1730 treatise, *A Letter to the Right Reverend Lord Bishop of London*. Displaying a canny awareness of recent legal developments in England, *A Letter* provided a detailed description of how colonial slaves might gain their freedom through baptism. A planter who brought a slave to England ran the risk that “some of [the slave’s] own Colour...or the Servants of the Family” would teach the slave Christianity and bring them “to some Minister, attended with some Persons (of his own Colour belike) to stand as Witnesses,” for baptism. The baptized slave, still advised by his “Country-folks,” might then steal away to “some remote County” or remain in the master’s service until the time came to return to the colonies, when the Christian slave would “give [his or her owner] the Slip.” This left the owner with two dangerous and expensive options: he might “get [the slave] decoy’d on board some Ship...[and] shut him up under the Hatches till the Ship is fallen...in her Way to the West-Indies”; or “carry [the slave] before a Magistrate to shew Cause why he refuses to return” to bondage. These, however, were not desirable options – everyone knew “the Danger of carrying a Man from England against his Will.” Faced with these unpalatable choices, many owners simply walked away from their valuable slave property, thus increasing England’s

27 On the bias toward liberty in the Holt Court, see Chapter 4, *supra*. 
putatively free black population and providing more experienced allies upon whom future slaves brought to the metropole could rely.\footnote{\[Anon\], *Letter to the Lord Bishop of London*, 36-38. It is also worth noting that these two scenarios foreshadow, almost to the letter, the circumstances that would bring *Somerset v. Steuart* before the King’s Bench in 1772 – James Somerset and other slaves brought to England would have had allies, both among their own “Country-folks” and the growing number of white critics of slavery, who were familiar with these contested routes to freedom.}

If this were not bad enough, the anonymous West Indian author argued, planters faced an even more terrifying possibility. Under the terms of the Holt court’s decisions, a slave might come before a judge and, as “a Christian, and a Subject of *England*,” invoke “the Liberty and Protection of a Subject” and have his master “carried before a Magistrate to shew Cause why I pretend to transport him...against his Will.” The unnamed judge, clearly modeled on Chief Justice Holt, might then chastise the slave owner, reminding him “that England is a Land of Liberty; that either surely [he] must never have known its happy Constitution, or else by being long accustom’d to tyrannize over [slaves] in the *West-Indies*, have forgot it.” Drawing directly on Holt’s language, the hypothetical judge might remind the erstwhile slave owner “that a foreign Slave brought into *England*, is, upon landing, *ipso facto* free from Slavery” because “this now happy Nation is so sensible of the Sweets of Liberty, that it would spare neither for Blood nor Treasure to procure the same, if possible, for the rest of Mankind every where.” As in the Holt court, baptism was key to this emancipatory agenda, “Not that Christianity frees them from slavery, but the Law and Usage of the Land, made and continu’d by Christians, does.”\footnote{Ibid., 39-40. Again, the congruence with the details of the later *Somerset* case is striking.} If baptism never freed a single slave in the British empire, as many scholars have claimed, the anonymous *Letter* was much ado about nothing. In the years
since the Holt court’s rulings, however, the hypothetical scenario described in A Letter to the Lord Bishop of London was all too real to imperial planters.

It was precisely this problem that the Yorke-Talbot opinion sought to address by extending colonial laws decoupling Christianity and freedom to the metropole by ruling that baptism would not “make any alteration in [a slave’s] temporal condition” in Great Britain.30 Were Holt’s rulings to stand, “the Sugar-Planters would either refuse to buy them at the same Rates as before, or buy no more of them at all, and then what would become of the Nation’s Trade to Guinea and the Sugar-Colonies?” With the Yorke-Talbot opinion now in place, however, planters could simply “take it for granted that the Nation or Community does approve...of the Sale and Purchase of...Men and Women-Slaves...by Laws made here [in the colonies], and ratified in England.”31 London had become as conducive to slavery as Kingston or Jamestown.

Yet despite the apparent strength of the Yorke-Talbot Opinion and its congruence with the crown’s colonial policy, its precedential value was dubious. The opinion was simply a response to a petition by private merchants, with Yorke and Talbot scribbling their response in Lincoln’s Inn Hall over supper, not an official decision by a court of record.32 The Opinion left an important question unanswered as well. Though it argued that entry into Great Britain would not alter masters’ property claims to their slaves, the Yorke-Talbot Opinion did not mandate a specific, uniform definition of slave property. This was no small matter, as each colony continued to reclassify slaves as real property,

30 Catterall, Judicial Cases, I:12.
31 [Anon.], A Letter to the Right Reverend Lord Bishop of London..., 34, 35.
32 Lord Mansfield later made note of the unusual circumstances under which the Yorke-Talbot Opinion was issued during the proceedings of Somerset v. Steuart. Unlike Lord Mansfield, many modern scholars take the Yorke-Talbot Opinion as both officially binding on the empire as a whole, and as consistent with the longer scope of English imperial policy, rather than as a diversion from earlier law.
chattels, and special forms of mixed property throughout the colonial period. These patchwork legal definitions of property-in-man, however, created headaches for metropolitan merchants and creditors, who continued agitating for further policy refinements.

Parliament attempted to address exactly this problem three years later through the Debt Recovery Act of 1732. As we have seen, individual colonies had defined and refined the particular forms slave property would take within their jurisdictions. By the mid-18th century, most plantation colonies defined slaves as a special mixed form of property. Slaves were classified as real estate for most purposes, guaranteeing that plantations would retain a sufficient labor force when sold or bequeathed, but in cases of intestate descent slaves were treated as chattels and estate administrators could keep, sell, or distribute them as they saw fit. This system certainly benefited colonial planters by providing both stability and flexibility, but defining slaves as realty was a serious problem for metropolitan creditors. Under English common law, real estate was generally not subject to seizure for the collection of unsecured debts, and colonial assemblies had passed further legislation shielding realty, both in land and slaves, from debt collectors. Making the situation even more complicated, the Walpole ministry, hoping to woo the landed interest to establishment Whiggery by reducing the land tax, was embarking on a new and controversial taxation plan. With the national debt decreasing and the imperial economy rebounding from the South Sea bubble, Walpole

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hoped to cement his political base by shifting the tax burden from the landed gentry to rising commercial interests, particularly the free traders associated with the Patriot opposition. As the subsequent excise crisis illustrates, questions of national and imperial finance were hot-button political issues, and the Debt Collection Act of 1732 was no exception.\(^{35}\)

Perhaps in an attempt to placate mercantile interests in preparation for the excise, “An Act for the more easy Recovery of Debts in his Majesty’s Plantations and Colonies in *America*” eased the process of debt collection by allowing metropolitan creditors to prove colonial debts through a simple declaration before any British magistrate. In addition, valuable “Houses, Lands, Negroes, and other Hereditaments and real Estates” would no longer be exempt from seizure for debt. Colonial real estate was now “liable and chargeable with all just Debts, Duties and Demands” and could be seized “as Assets for the Satisfaction thereof” by “any Court of Law or Equity” in the plantations. In other words, real estate would now be considered “in like Manner as Personal Estate in...the said Plantations” when it came to debt collection.\(^{36}\) Though some contemporaries worried about the “summary Way” in which debts could be collected under the statute, especially its denial of jury trial to debtors, the Debt Recovery Act must have pleased metropolitan creditors.\(^{37}\) Land and slaves, the principal forms of colonial wealth, were now subject to seizure to satisfy unsecured debt. Indeed, as Claire Priest has pointed out, the Debt Recovery Act “came close to abolishing the age-old distinctions between real


\(^{36}\) 4 Geo. 2, c. 7.

\(^{37}\) For uneasiness about the terms of the Debt Recovery Act, see Jacob Giles, *The Mirrour: or, Letters Satyrical, Panegyrical, Serious and Humorous, on the Present Times...* (London, 1733), 66-68.
and chattel property” altogether, contributing to an increasingly commercialized Anglo-Atlantic economy by facilitating the alienability and transferability of colonial real estate. Additionally, the Debt Recovery Act, like the drive to overturn colonial slave trade duties a decade earlier, reinforced the tendency toward greater metropolitan regulation of colonial law in the interest of the imperial common wealth.

Imperial centralization and the further metropolitan regulation of slave property regimes within the colonies remained important issues as the English economy emerged from the long recession sparked by the South Sea Bubble, and the English courts did their part in promoting economic recovery by rejecting the antislavery ideals promulgated by the Holt court a generation earlier. In October 1749, Philip Yorke, recently made Lord Chancellor Hardwicke, had an opportunity to reinforce the proslavery principles he had laid out over dinner with Charles Talbot two decades earlier. Sitting as the king’s justice in the Court of Chancery, Hardwicke handed down a decision in *Pearne v. Lisle* that entered the Yorke-Talbot opinion into the judicial record.

Robert Pearne, a wealthy absentee West India planter with a number of holdings in Antigua and St. Kitts, in addition to an opulent home in Isleworth outside London and an estate in Evenly, Northamptonshire, brought a writ of *ne exat regno* to prevent [William?] Lisle, a near

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38 Priest, “Creating and American Property Law,” 390. It is important to note, however, that the Debt Recovery Act, much like earlier English court decisions, did not mandate a specific status for colonial slave property within the colonies except in cases of debt collection. Indeed, the transition of slave property from real estate to chattels would not be complete until well after American independence. See Morris, *Southern Slavery and the Law*, 63-71.

39 Though Chancery, as an equity court, did not follow the same strict precedential procedures as the common law courts, the jurisdictional and procedural distance between law and equity continued to diminish over the course of the 18th century. See J. H. Baker, *An Introduction to English Legal History, 4th ed.* (New York: Oxford University Press, 2007), 375-376. Thus the precedential value of *Pearne* in common law courts may have been more important than other scholars have argued.
relative on his mother’s side, from leaving England and returning to Antigua. The family squabble was over fourteen enslaved laborers Lisle had rented from Pearne’s agent back in Antigua for £100 a year. Lisle, who had nowhere near the wealth of his cousin, either could not or would not pay up, and since he was threatening to return to Antigua with the matter still unsettled, Pearne brought the writ. The wealthy absentee planter sued in Lord Hardwicke’s equity jurisdiction rather than the common law courts because he claimed to have “no remedy at law, his witnesses being abroad.” Lisle’s attorneys, however, moved to have the writ discharged, and Lord Hardwicke obliged – Pearne could have had Lisle arrested and held on bail under common law, so the ne exeat was unnecessary and improper for a “mere legal demand for money.” Besides, even if Lisle left England and returned to Antigua, Pearne could have “justice done him in the Courts there” just as well as in London.

It was not sympathy with the fourteen enslaved persons, however, that led Hardwicke to discharge Pearne’s writ, and in a lengthy explanation he elaborated on the principles underpinning the Yorke-Talbot opinion and the Debt Collection Act. First, and most importantly, the Lord Chancellor declared that “trover will lie for a Negro slave”

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40 The Pearne-Lisle connection apparently went all the way back to England. Robert’s father, Robert Sr., and his mother, Mary Lisle, both hailed from Evenly in Northamptonshire, and his aunt, Elizabeth, married Mary’s sister, Captain Toby Lisle. Though the direct relation between Robert and his Lisle relative is somewhat unclear, the wealthy planter Pearne may have rented a small plot of land on one of his plantations to his poorer cousin, or perhaps Lisle took to the sea like Captain Toby. Either way, the close connection between the Pearne and Lisle families, both in England and Antigua, suggests that the litigants in the case knew one another. See Vere Langford Oliver, The History of the Island of Antigua, One of the Leeward Caribbees in the West Indies from the First Settlement in 1635 to the Present Time (London: Mitchell and Hughes, 1899), III:16-22.

41 Ambler, 75. It should be noted that Ambler’s reports are notoriously inaccurate, and his language must be treated with caution. The congruence of Hardwicke’s ruling in Pearne and the earlier Yorke-Talbot opinion, however, makes the substance of Ambler’s account a bit more reliable. Pearne was well connected with the law courts of Westminster as well – he was close friends with Lord John Willes, Chief Justice of Common Pleas, and his son, Sir John, a prominent lawyer and MP, both of whom received generous bequests in Pearne’s will. See Oliver, History of Antigua, 18-20 for Pearne’s will.
because “it is as much property as any other thing.” Here was the chattel principle baldly stated. Not only were slaves a form of property, they were rhetorically signified as unhuman, rendered as “it,” a “thing,” rather than a person. As chattels, it was not even necessary that the specific slaves in question be returned to Pearne. Unlike “a cherry-stone, very finely engraved” or “an extraordinarily wrought piece of plate,” enslaved bodies were standardized commodities, interchangeable parts in the vast plantation machine. Asking for the “specific delivery of the Negroes” was unnecessary because “as [with] diamonds, one may be as good as another.” Demanding return of the actual slaves would disrupt production in the plantation complex because, “like stock on a farm,” small planters “could not do without [slaves]” and “would be obliged...to quit the plantation” if courts required restitution of specific slaves. Seeking to regain specific slaves was also bad business for wealthy planters like Pearne. Though they may have been as valuable as diamonds, enslaved bodies were not forever – “they wear out with labour, as cattle or other things.”

But what of Lord Holt’s ringing antislavery decisions following the Glorious Revolution? Were they not the law of the land? Hardwicke turned aside all objections by arguing that Holt’s ruling in *Chamberlain v. Harvey* had “no weight” to it. Based on a very narrow reading of Holt’s decision, the Lord Chancellor asserted that the case turned on a technical issue of wording and was “determined on the want of proper description” – the claim in *Chamberlain* had been for a “Negro, without saying slave; and the being

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42 Ambler, 75.
Negro did not necessarily imply slave.” Words mattered, and in this case the simple omission of the word ‘slave,’ despite all parties’ clear understanding of the institution, had allowed Holt to issue his ringing dicta about free English soil. But if Holt was correct, then slaves would be “equally [free] when they set foot in Jamaica, or any other English plantation” because “All our colonies are subject to the laws of England, although to some purposes they have laws of their own.” Holt had used the legal diversity of the English empire to limit property-in-man to the colonies, cordonning off the British Isles as a pocket of free soil, but now the drive for imperial centralization and the harmonization of colonial and metropolitan law forced Hardwicke to explicitly justify property-in-man under English law.\(^{43}\)

The Lord Chancellor made sure to cover all his bases. First, Hardwicke argued that the common law of servitude allowed for slavery, noting that the claim in *Pearne* was “for the use of Negroes” and English law clearly allowed subjects to “hire the servant of another, whether he be a slave or not.” But servitude was not slavery, and the Lord Chancellor knew it. Likely aware that arguments from the law of master and servant had repeatedly failed in the Holt court, Hardwicke turned to villeinage, the old standby of English apologists for slavery. After briefly rehearsing the distinctions between villeins *regardent* in villeins *in gross*, he argued that “although [feudal] tenures are taken away, there are no laws that have destroyed servitude absolutely.” Since “Trover might have been brought for a villain,” and there was “no law to abolish it,” slavery could exist in English law under the cover of villeinage.\(^{44}\) This was precisely the argument that Holt had demolished, and the logic antislavery lawyers had turned into a

\(^{43}\) Ibid.
\(^{44}\) Ibid.
tool of emancipation a generation earlier, but the political and economic context had changed. Lord Hardwicke was arguing in an echo chamber. Neither Perne, nor Lisle, nor any other immediate party to the case was likely to dispute his basic assumptions about the legitimacy of property-in-man. Furthermore, these assumptions were now clearly supported by Parliamentary legislation and imperial policy. There was not even an antislavery argument presented to the court. Even still, Hardwicke could not pass up an opportunity to finish off the old antislavery argument from baptism once and for all. He admitted that “there was once a doubt, whether, if [slaves] were christened, they would not become free by that act,” but now there could be no such doubts. “Precautions” had been taken in the colonies “to prevent their being baptised,” and the Yorke-Talbot opinion dictated that Christianity “did not alter their state,” even in England itself.45

Whatever the crown’s lawyers, Parliament, or the courts said about the legality of imperial slavery, however, not everyone was convinced of its desirability. Though Britons’ moral and political arguments against slavery were as old as their involvement with the institution, the outsize role slavery played in the mid-18th century imperial economy provoked new economic arguments as well, the first stirrings of a cohesive free labor critique of chattel slavery. A remarkable pamphlet by an anonymous Jamaican settler of clear Patriot Whig sensibilities, published in London in the late 1740s, illustrates the ways in which earlier moral arguments intersected with new economic considerations, increasingly racialized ideologies, and the demographic realities of

45 Ibid.
settlement to shape 18th century English arguments against the slave trade and, even if only haltingly, slavery itself.

The author of An Essay Concerning Slavery claimed that the English plantation complex in Jamaica was in grave danger “owing to the too great Number of Negroes.” Though he admitted to being “affected with the moral [argument]” against slavery, and wished “with all my Heart, that Slavery was abolish’d entirely, and hope in Time it may be so,” he admitted that “to do it at once, would be itself a great Evil.”

Instead, he proposed “hindering the further Importation of Slaves,” and initiating a gradual shift to free labor in some sectors of the plantation economy. The slave trade to the Spanish colonies might still continue and West Indian plantations should still produce marketable crops, but by banning further slave importations Jamaica would be spared economic decline and the devastation of servile rebellion – as the author wryly noted, “let us be Wicked still, but let us not be Fools.”

An Essay’s antislavery argument was rooted in a thoughtful reading of contemporary political philosophy and expressed in the language of Whig revolution principles, citing authorities including Locke, Puffendorf, and Wollatson. The anonymous author began with a simple (and increasingly ubiquitous) statement – “in a State of Nature, Men are equal in respect of Dominion [and] free by Nature.” This “Birth-right” of liberty could certainly be lost or limited, however. It could be “sold...for a certain and more plentiful Maintenance” as in English servitude, “forfeited...by...Crimes” under law, or “taken away...by Force.” The first two routes to

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46 [Anon.], An Essay Concerning Slavery and the Danger Jamaica Is expos’d to from the Too great Number of Slaves... (London, [1748?]). Introduction [np]. Though the pamphlet is undated, it certainly appeared after the Jacobite rising of 1745, which is referenced at a number of points in the text.

47 Ibid., np.
bondage were “agreeable to Nature” and scripture, and were regulated by legislation. The third, however, which the author termed “the Right of War,” was “contrary to the Law of Nature, and...the Law of God.” Though this war slavery doctrine had been “introduc’d with great Solemnity into the Law of Nations, and supported by grave Authorities,” An Essay argued that this reasoning was “built upon a false Foundation.”

The problem, the anonymous author argued, was a conflation of the law of war and the rights of conquest. Though he admitted that the law of war conferred the power of life and death upon enemy combatants, the traditional basis for war slavery doctrine, when combat ends “the State of War ceases, and consequently its Rights cease with it.” After a war ends, then, “a Conqueror...cannot, by the Right of Conquest, take away his Adversary’s Life, and consequently cannot take away his Liberty, his Right to the latter being founded on his Right to the other.” There was a practical reason to abandon war slavery doctrine as well. If slavery was merely a state of war continued, then “it must be owned the Conqueror has a Right to kill the other, but the other has likewise the same Right, though not the same Power to kill him.” War slavery doctrine might justify chattel slavery, but it also justified violent servile rebellion.

Basing slavery on the power of life and death conferred by the law of war also undercut the principles of consent and limited authority upon which human society, and particularly post-Glorious Revolution British constitutionalism, rested. As An Essay argued, “all social Rights must be founded upon Compact...between Persons that are free,

48 Ibid., 5-16, passim.
49 Ibid., 5-16 passim. In this way, the anonymous Jamaican did away with the philosophical origin of slavery enunciated in Locke’s Two Treatises. “Mr. Locke, who seems to allow Slavery, allows it upon the Supposition, that the Life was forfeited first, and indeed it cannot be supported upon no other Principle: But that Supposition being proved...to be without Foundation, his whole Argument falls with it to the Ground.” See the discussion of Lockean war slavery doctrine on page 9.
and in their own Power.” The threat of death might extort a promise of service “out of Fear” and the natural instinct for self-preservation, but “no Right to a Man’s perpetual Service can be founded upon it” because such a compact would be “in its Nature void, as obtained by Duresse.” Slavery, like servitude, could not exist without the free consent of the enslaved.  

Claiming a right to perpetual servitude through war slavery doctrine also perverted the course of justice by granting the power of life and death as a “divine right” to individual masters. All persons had the power of life and death in a state of nature, where the right of self-preservation and the pre-civil war of all against all required violence to safeguard life, liberty, and property, but this dominion could only belong to those powerful enough to subdue the weak, and “Power gives no Right.” The physical authority masters lorded over their slaves, then, was not a right but the mere consequence of brute force. This unchecked physical violence made English slave owners responsible for a continuing state of war on imperial plantations, “for all the Murders the Negroes commit on White Men,...[and] all the Executions we make of them, whether in the Field, or on the Gibbet.” Masters might exercise this kind of physical dominion in a state of nature, “but the Magistrate is alone invested with it in a civil Society.” With war slavery doctrine thoroughly discredited, the philosophical basis of slavery disappeared – restored to their natural freedom, enslaved persons must give consent to their servitude and be subject only to the bracketed authority of duly appointed magistrates, just as other British subjects were.

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50 Ibid., 5-12, passim.
51 Ibid., 5-16, passim.
Despite its lengthy discussion and dismissal of the philosophical basis of slavery, the main concern of *An Essay* was far more prosaic. The anonymous author spent the majority of his pamphlet addressing the “Proportion of Freemen (of one Colour or another, white black or yellow...) to Slaves,” and the impact this demographic ratio had on the economic productivity and physical security of Jamaican plantations.\(^{52}\) Jamaican planters, in their “Rage...for buying Negroes” and “total Unconcern for every Thing that doth not regard their immediate Interest,” had sowed the seeds of slave rebellion and stifled economic opportunity for free settlers of more modest means.\(^{53}\) Since these self-interested planter grandees were unlikely to remedy the situation on their own, the author called for a ban on the “further Importation of Negroes...by a British Act of Parliament.” With new importations ended, planters would be forced to “make the most of the Negroes they have” by sending their “lazy House-Slaves” and skilled laborers “into the Field, their proper Place.” With all slaves relegated to field labor, and further regulations passed excluding slaves from skilled trades, “Business within Door” would be done by “White and Free-People.”\(^{54}\) By the author’s reckoning, Jamaica’s skilled labor market was dominated by “two or three white Men...and about a Score of free Negroes and Mulattoes, with their slaves.” The use of slave labor allowed this handful of artisans to “monopolize all the Work” and “[keep] up the Price of Labour.” Competition in a free labor market would bring down the price of skilled labor and attract new white settlers, who otherwise would not come since they “doth not care to be put upon the same Foot with Negroes, and serve with them under another.”\(^{55}\) Ending the slave trade would be the

\(^{52}\) Ibid., np.
\(^{53}\) Ibid., 18, 22.
\(^{54}\) Ibid., 23-24.
\(^{55}\) Ibid., 40-44.
first step in securing a free, white labor force in Jamaica and implementing Patriot Whig political economy.

There was also space for free black labor in this new Jamaica, however, and selective emancipation was a crucial element of the anonymous author’s free labor argument. *An Essay Concerning Slavery* proposed that, since substantial white migration was unlikely in the short term, planters should free “a limited Number of Slaves in each Plantation” to be brought up as artisans and slave drivers under indentures of “fourteen Years, or some large Term.” The “Negroe Towns” could also supply “many Children fit for some Trade” who would be apprenticed, “taken by Degrees out of that savage Way, and made useful to the Community.” These children would “be in a manner Hostages for the Fidelity of the Parents,” once again extracting a double benefit to the planter class. Once these indentures or apprenticeships were complete, emancipated slaves would be given small plots of land “at an easy Rent, or some Service” and become stakeholders in Jamaican society. As a “Freeholder and Tenant, under certain Conditions to the State,” a former slave would “be still useful” to the colony. This system would “effectually secure [the] Fidelity” of the freed people, “oblige [them] to live upon their own Work” and prevent them from becoming a “Nusance to the Community,” and provide an incentive to “keep the rest [of those still enslaved] in Obedience.”

Barring further slave imports and initiating selective, gradual emancipation would also bring another benefit – increased physical security from slave rebellion and foreign invasion. *An Essay Concerning Slavery* argued that a controlled and limited emancipation plan would guarantee “a proper Number of Freemen, White, Black, or

56 Ibid., 42-49, 59.
Yellow” on each plantation. Having one free resident for every ten or twelve slaves would guarantee that the enslaved “would be better kept to their Work and do twice as much” and prevent them from “running into the Woods” or rebelling. Furthermore, controlled gradual emancipation would provide every plantation with “a tolerable Company of free Negroes fit for Arms, which would be of vast Service” in putting down rebellions and repelling invasions. “A free Negroe that has fifteen or twenty Acres of his own,” the author avowed, “will defend it with his Life against the French or Spaniards.” Rather than facing the “Danger of every Slave’s turning against” them to seek freedom during an invasion, planters could “be sure of the free Negroes” standing with them in defense of Jamaica. Planters would even benefit financially from a free black militia – rather than purchasing costly insurance on their estates in times of expected invasion, often at “10 per Cent. and that for six Months,” planters could save money by “Mak[ing] one of your best Negroes out of every ten free...that is the best 10 per Cent. Insurance.”

Though it falls well short of a call for the total abolition of slavery, the plan proposed by An Essay Concerning Slavery – a slave importation ban coupled with small-scale conditional emancipation and the promotion of Patriot Whig free labor political economy – illustrates how older English antislavery arguments stressing the moral and political costs of slavery were integrated into a new economic vision of the imperial common wealth. As will be illustrated below, the author of An Essay also had deep moral qualms with slavery that bear a striking resemblance to those expressed by Henry Parker, Morgan Godwyn, Samuel Sewall, and the antislavery lawyers so conspicuous in the Holt Court. And despite the racial exclusivity of his rhetoric, the anonymous

57 Ibid., 47.
58 Ibid., 51-52.
pamphleteer could still conceive of free black Britons as active members of Jamaica’s settler community – as artisans, as landowners, as militia members, as fellow subjects. He and a growing number of like-minded Britons welded the economic necessities of empire to already-potent arguments about the illegitimacy of property-in-man and the inclusion of Afro-Britons in the community of subjects.

Indeed, it was next to impossible to consider the place of slavery in the mid-eighteenth century British Empire without addressing questions of subjecthood, for such questions were already in the air. A number of factors informed the increased attention to the boundaries of the British nation in Hanoverian England. The ascension of the house of Hanover in 1714 brought yet another foreign-born monarch to the throne of Great Britain – the second in a generation – raising the specter of foreign influence in the royal court and further destabilizing the accident of birth within British dominions as a basis for subjecthood. Furthermore, the official state policy of Protestant toleration made membership in the Church of England an increasingly problematic foundation for subjecthood, opening up the possibility of full British subjecthood to dissenting Protestants and even, for a short time, British Jews. The budding field of political economy also played a crucial role in shaping debates over subjecthood. As competition with continental and imperial rivals intensified, many Britons came to believe that an open naturalization policy would bolster the common wealth by attracting skilled labor, foreign capital, and military prowess to Britain and its colonies. In a political context where the Protestant succession remained threatened by Stuart Pretenders and their Jacobite allies, and in a global economy where French Catholic absolutism appeared
poised to seize the initiative in Atlantic commerce, expanding the boundaries of the nation made good sense.

In this new context, the basis of subjecthood shifted decisively away from religious conformity or birth on British soil to an increased focus on allegiance and economic productivity. To promote this imperial vision of loyal, industrious Protestants working for the commonwealth of the whole British nation, Parliament passed a series of naturalization acts that refined and expanded on earlier legislation passed after the Glorious Revolution. Even before this flurry of legislation, Britons worried that their relatively small population – only 7 million people inhabited the British Isles, as compared to well over 22 million in France – put them at a serious disadvantage in European economic competition.59 In his 1718 *A Survey of Trade*, for example, William Wood, despite his later adherence to mainline Walpolean Whiggery, argued that liberal naturalization policies, along with free trade for all Britons and general religious toleration, would put “*all the Subjects of Great Britain on an equal foot*” and be “of happy Consequence to this Nation.” Since “PEOPLE are the real Strength and Riches of all Nations,” attracting foreigners would only benefit Britain – “by a *quick Vent* and *Consumption* of the *Product* of the Country, the *Value* of all home Commodities would be *raised*, Land and Houses yield *greater* Rents, and *Money* by its Increase and quick Circulation be *plentiful*.”60

Here was a policy to please all sectors of British society – merchants and craftsmen would benefit from an overall increase in trade, the landed classes from increased rents, and financiers from a freer circulation of money and credit. If this

economic boon was not enough to convince skeptical Britons, there were political benefits to consider as well. Writing only three years after the abortive 1715 Jacobite rising, Wood stressed that these new subjects would have to demonstrate their allegiance and live “under as strict an Obligation of Loyalty and Duty as any of the Native Subjects,” but, once they experienced “the Excellency of our Constitution and Laws,” naturalized Britons would become patriotic subjects and rally to defend their adopted homeland from foreign enemies and Stuart pretenders.  

The British Nationality Act of 1730, the Plantations Act of 1740, the British Subjects Act of 1751, and the short-lived Jewish Naturalization Act of 1753 all put this impulse into action, opening British subjecthood to broader masses of strangers, and the debates surrounding these pieces of legislation illustrate the continuing contest over the boundaries of national and imperial identity in Hanoverian Britain. The Nationality Act of 1730, for example, dealt with the issues raised by an increasingly mobile imperial population by declaring that any children of British fathers born outside the king’s dominions were natural-born subjects. Reflecting continued fears of Jacobite influence and the increasing salience of political loyalty as a basis for subjecthood, the Nationality Act specifically exempted the children of any fathers who had been attainted for treason or employed by a foreign prince – neither the Old Pretender or Bonnie Prince Charlie.

61 Ibid. For another early pro-nationalization tract, see Josiah Child, A New Discourse of Trade, 3rd ed. (London, 1718), 140-144. Child devoted a full chapter of his tract to the benefits of liberal naturalization policies, and even went so far as to advocate the naturalization of foreign Jews, a decidedly unpopular position at the time. See ibid., 141-145. Another pro-nationalization work that shares much with Wood and Child includes [???] Molloy, De jure maratimo (London, 17??), 403-413. For opposition to open naturalization, see Thomas Gordon, Supplement to Three Political Letters (London, 17??), 23-26; [???] Braddon, The Miseries of the Poor a National Sin (London, 17??), 124-125; the 1694 speech of John Knight reprinted in [???], Eight Speeches Made in Parliament (London, 1733), 1-25. See also, Armitage, Ideological Origins of the British Empire, 164-168. Cf. Colley, Britons, passim.
could be a Briton under this definition.\textsuperscript{62} The British Nationality Act of 1751 went even further and removed proscriptions on the ownership of landed property from the children of aliens who inherited British real estate.\textsuperscript{63} Blood ties remained important in determining British subjecthood – lineal descent through a male line was still necessary to inherit landed estates and the political power that came with them – but loyalty and economic utility had clearly supplanted geography and religious conformity as the basis for subjecthood by the mid-18\textsuperscript{th} century.

This tendency was even more explicit overseas in Britain’s demographically diverse empire. As we have seen, colonial governments had always had a great deal of leeway in granting naturalization to settlers, but the increasing centralization of the imperial bureaucracy led Parliament to codify naturalization procedures in the Plantation Act of 1740. The act echoed the pro-naturalization position of political economists like William Wood and Josiah Child, stating that “the Increase of People is a Means of advancing the Wealth and Strength of any Nation or Country” and arguing that the “Lenity of our Government, the Purity of our Religion, the Benefit of our Laws, the Advantages of our Trade, and the Security of our Property” would cement the loyalty of “Foreigners and Strangers” to their naturalized homeland. To guarantee these benefits to both the empire and its foreign settlers, the Plantation Act decreed that any strangers who resided in a British colony for seven years without an absence of longer than two months, took an oath of allegiance affirming the Protestant succession, and paid a nominal fee of two shillings, would be accounted “his Majesty’s natural born Subjects.” To ease the naturalization of colonial Quakers, the requirement for oath-taking was relaxed – Friends

\textsuperscript{62} 4 Geo. 2, c. 21.
\textsuperscript{63} 25 Geo. 2, c. 39.
were required only to affirm the substance of the oath through a Declaration of Fidelity – and colonial Jews were allowed to omit the words “upon the true Faith of a Christian” from the oath. To be sure, there were still glaring omissions in this colonial naturalization procedure. Catholics were expressly excluded, and naturalized colonial subjects were barred from holding office or owning real estate in Britain itself.64

Taken as a whole, however, the Plantation Act illustrates how the dictates of imperial economic competition altered earlier ideals of colonial subjecthood. Even marginalized and oft-oppressed groups like Quakers and Jews could now enjoy the full benefits of British subjecthood, as long as they proved their loyalty and allegiance. The Plantation Act was so successful that at least a few Britons hoped to open naturalization even further and introduce similar legislation in the British Isles as well. In 1747, for example, George Coade, a successful wool merchant from Dorset, urged a “universal Naturalization of the whole Race of Mankind, of whatever Kingdom or Nation under Heaven, without Exception,” and the access of “People, from all Corners of the World, the Jew, the Pagan, the Mahometan, the Persian, [and] the Chinese” to “the Protection of our Laws” as the surest way to guarantee continued economic success and “Balance the Greatness of any other Country in Europe.”65

These extremely open colonial naturalization policies, however, were not so easily transposed to the metropole, where traditional links between popular Protestantism, cultural ‘English-ness,’ and subjecthood were far stronger. This tension between popular xenophobia and liberal naturalization was most evident in the debates over the so-called

64 13 Geo. 2, c. 7.
65 George Coade, A Letter to the Honourable the Lords Commissioners of Trade and Plantations, wherein the Grand Concern of Trade is Asserted and Maintained (London, 1747), 55.
‘Jew Bill’ of 1753. There had long been some support for Jewish naturalization among British political economists. Josiah Child, for example, in his New Discourse of Trade, argued that since “All men [are] by Nature alike,” it was mere prejudice that prevented Britons from accepting Jews as fellow subjects. “Fear is the cause of Hatred,” Child asserted, and British xenophobia led proscribed outsiders “to Sedition and Rebellion” rather than patriotic love of country. If Britons would only practice that “Perfect Love that casts out Fear” and shed their anti-Semitic bias, British Jews, who like “all men are in love with Liberty and Security,” would prove themselves loyal, industrious, and productive subjects.66 To Child and other advocates of Jewish naturalization, the absorption of new subjects into the community of the realm would have to be accompanied by a turn away from British cultural exclusivity.

The Jewish Naturalization Act of 1753 put this ideal into practice, decreeing that “Jews, upon Application to Parliament, may be naturalized without taking the Sacrament.” This was a costly procedure, to be sure, and without a weighty patron in Westminster it could be difficult to get a naturalization bill before Parliament, but the Jewish Naturalization Act broke with centuries of legal tradition in opening up subjecthood to Jewish immigrants. Any Jewish foreigner resident in Britain or Ireland for at least three years could apply for Parliamentary naturalization. The rationale behind the act was simple – the sacramental test prevented “many Persons of considerable Substance professing the Jewish Religion” from adding their economic clout to the British nation. Besides, the statute noted, such procedures were already in place in the colonies under the terms of the 1740 Plantations Act, and the presence of Jewish settlers

66 Child, Discourse of Trade, 142-145.
there had done nothing to hurt the imperial economy or undermine Christian religion. The Jewish Naturalization Act passed easily through the House of Lords and, despite stirrings of popular dissatisfaction and Tory fears for the Anglican establishment, was pushed through the Commons by a solid Whig majority. Outside the halls of Westminster, the popular press also showed some enthusiasm for Jewish naturalization, with one author arguing that it would “bring an Addition of Men, Money and Trade into the Kingdom...[and] tend to a general Advantage.”

Not all Britons agreed that open naturalization, particularly for cultural outsiders like Jews, would benefit the nation, however. In the wake of the passage of the Jewish Naturalization Act, a hefty dose of anti-Semitism was added to this potent mixture of xenophobia and fear of economic competition. Under the pen name ‘Britannia,’ one author laid out a litany of grievances against British Jews, calling them a “brutish, stupid, ungrateful, Covenant-breaking Nation; a Seed of Evil Doers, a Generation of Vipers” who delighted in crucifying Christian children and sought to “over-balance the Interest of the Natives by their prodigious Purchases.”

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69 A. Z., A Letter to the Publick on the Act for Naturalizing the Jews (London, 1753), 19. A. Z. also noted that the act would apply only to “Alien Jews” since “those who are born here...are natural Subjects of Course.” Ibid., 9. For other pamphlets supportive of Jewish naturalization, see [OTHERS?]; Friend to the Nation, An Address to the Friends of Great-Britain: Occasion’d by the Debates among the People and the Answer to Considerations on the BILL for Naturalizing the Jews (London, 1754). A more ambivalent but still not hostile stance is taken in Bystander, A True State of the Case Concerning the Good or Evil which the Bill for the Naturalization of the Jews may bring upon Great-Britain (London, 1753).
70 Britannia, An Appeal to the Throne against the Naturalization of the Jewish Nation (London, 1753), passim. For more opposition to Jewish naturalization, see Briton, The Crisis, or An Alarm to Britannia’s True Protestant Sons (London, 1754); [Anon.], A Collection of the Best Pieces in Prose and Verse Against the Naturalization of the JEWS (London, 1754);
debates had to spill over into broader fears of general naturalization, other Britons worried that George Coade’s earlier plans would come to fruition and Jewish naturalization would serve as an opening wedge in offering the benefits of British subjectionhood to “the Mahometans,...Turks, Tartars, Persians, or Indians” as well.71

Another pamphleteer, supportive of Jewish naturalization, claimed to have overheard opponents worrying that “in time we shall have the first Offices in our State and Capital, occupied by Jews, that they will purchase and over-run our Land, and, that we shall become their Slaves.”72 Arguments about fundamental human equality or the national economic good could not withstand such withering prejudice.

In the end, these anti-Semitic arguments, combined with the political pressure of an impending Parliamentary election, led to the repeal of the Jewish Naturalization Act in 1754 – British Jews would not again be considered full subjects until 1858. Still, if the economic dictates of imperial competition could force a reconsideration of the status of Jewish subjects, other excluded groups might have hope as well. Though the Jewish Naturalization Act only impacted foreign Jews, many Britons responded as though all Jews, even those born in Britain itself, were permanent outsiders who could never be true British subjects. Against this argument, some supporters of open access to subjecthood revived the old argument about birthright subjecthood elucidated in Calvin’s Case back in the early 17th century. In his Appeal to the Friends of Great-Britain, one pamphleteer, writing under the pen name “Friend to the Nation,” stated this position boldly and

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71 [Anon.], A Candid and Impartial Examination of the Act...for Permitting the Foreign Jews to be Naturalized (London, 1754), passim. In language very similar to that applied to African slaves, the anonymous author also worried that “Gypsies...a strong, hardy-bodied People, fit to endure the Toils of Labour” would be granted subjecthood should this tendency continue. Ibid., 27.

forthrightly. “What Law in Nature can there be,” he asked, “against any Person’s enjoying the common Privileges of a Society, or Nation into which they are born; and to which they were join’d by their...loyal Obedience to the Rules of that Polity[?]” 73 The mid-18th century debates over naturalization had spilled over into a more general consideration of the nature and basis of subjecthood. Natural law, some argued, dictated that all persons born into British society must be subjects as long as they were loyal and obedient, and Britons like George Coade hoped to see the benefits of subjecthood extended to “all People upon the Earth.” 74 Under this rubric, could colonial Afro-Britons, or even slaves, be considered subjects as well?

This question, of course, could not easily be answered. Under the terms of the Yorke-Talbot opinion and Hardwicke’s logic in Pearne v. Lisle, slaves were classed as articles of property without access to even the most basic rights, clearly beyond the pale of British subjecthood. As we shall see, most Virginians, like other colonial planters, certainly continued to view their enslaved population in this light. But in other colonies, relatively large free black populations continued to actively assert their subjecthood, while in Massachusetts the peculiar local history of slavery dovetailed with this new emphasis on open access to subjecthood to reinforce the access of even enslaved Africans to basic legal rights. In the context of this imperial debate over naturalization, the antislavery significance of the anonymous Jamaican Essay concerning Slavery becomes far more obvious as well – political economic arguments about population growth and national productivity; metropolitan debates over naturalization and access to subjecthood;

73 Friend to the Nation, An Address to the Friends of Great-Britain: Occasion’d by the Debates among the People and the Answer to Considerations on the BILL for Naturalizing the Jews (London, 1754), 7.
74 Coade, A Letter to the...Commissioners of Trade and Plantations, 54.
public criticism of the profligate luxury and vice associated with slave trading and the South Sea Bubble; and older moral and legal arguments against property-in-man were woven together to produce a coherent critique of the plantation complex, and this in its very heart. The principles that had informed the Holt court’s antislavery decisions in the wake of the Glorious Revolution had not disappeared entirely. The Yorke-Talbot opinion, the Debt Collection Act of 1732, and Hardwicke’s decision in *Pearne v. Lisle*, however, did much to put these antislavery principles on the defensive. Indeed, these legal maneuvers amount to nothing less than a near-total shutdown of English imperial antislavery.

There was one group of Britons, however, that did begin to channel antislavery sentiment into an institutional structure capable of enforcing an emancipatory agenda – the Society of Friends. Historians have long noted the central role Quakers played in the development of Anglo-American antislavery thought, and there is much to recommend this position. Committed to a radically egalitarian reading of scripture, a total disavowal of the “carnal sword,” and a belief that the golden rule should govern all human relations, Quaker theology, born amidst the upheaval of the English Civil Wars, was, in many ways, inimical to human slavery. George Fox, founder of the Society of Friends, first testified against slavery after a trip to Barbados in the 1660s, and the 1688 antislavery petition from the Quakers of Germantown, Pennsylvania, is one of the earliest recorded institutional stands against human slavery. In the mid-18th century, growing numbers of Quakers, including Ralph Sandiford, Benjamin Lay, and John Woolman, publically denounced slavery in a series of pamphlets circulated throughout the empire. These few,
however, were lone voices crying out in the wilderness, unable to gain a serious hearing beyond their own local meetinghouses, nevermind in the empire as a whole.\(^{75}\)

Or so we are typically told. The Friends’ principled religious stand against slavery needed the upheaval of the American Revolution and its infusion of natural rights rhetoric into political discourse before it could take root and blossom into true American antislavery. When read in light of earlier English antislavery arguments and in the context of the mid-18\(^{th}\) century, rather than backward from the American Revolution and early republican gradual emancipation, however, these Quaker testimonies appear far less exceptional. It is certainly true that mid-18\(^{th}\) century Friends took a relatively novel tack in linking arguments about slavery’s illegitimacy with the New Testament’s emphasis on the so-called golden rule – “Therefore all things whatsoever ye would that men should do unto you, do ye even so to them” – and pointing out that “Tyranizing over and making Slaves of our Fellow Creatures, the Negroes, every one knows...is not the way they would be done unto.”\(^{76}\) Other critics also stressed the violence inherent to human slavery

\(^{75}\) The scholarly focus on Quakers as the originators of Anglophone antislavery has its roots in David Brion Davis, *The Problem of Slavery in Western Culture* (New York: Oxford University Press 1966), though Davis was careful to point out that the Friends’ antislavery shared much with other “devout British Protestants.” (333). More recent scholars, however, have seen the Society of Friends as a lone voice repudiating slavery, and often emphasizes the lingering racism of Quakers. For a sampling of recent work in this vein, see Brycchan Carey and Geoffrey Plank, eds., *Quakers and Abolition* (Urbana, IL: University of Illinois Press, 2014).

\(^{76}\) Matthew, 7:12 and Luke, 6:31; John Hepburn, *The American Defence of the Christian Golden Rule, or, An Essay to prove the Unlawfulness of making Slaves of Men* ([New York], 1715), 2. See also [Ralph Sandiford], *The Mystery of Iniquity; in a Brief Examination of the Practice of the Times* ([London], 1730), passim; Benjamin Lay, *All Slave-Keepers That Keep the Innocent in Bondage, Apostates* (Philadelphia, 1737). Earlier biblical opposition to slavery tended to focus on Old Testament arguments and precedents, rather than the gospels. In this way, the Quaker critique of slavery prefigured later shifts from literal scriptural hermeneutics to interpretations from the “spirit” of the gospels. See Mark Noll, *America’s God: From Jonathan Edwards to Abraham Lincoln* (New York: Oxford University Press, 2002), esp. 386-401, which argues that African Americans were central in constructing this alternative to biblical literalism. It may be just as apt to argue that debates over slavery more broadly, in addition to the development of a uniquely African American Christianity, served to push Anglo-American Christians away from the Old Testament’s justifications for slavery. This tendency should not be overstated, however – Quakers also continued to use arguments from the Old Testament in support of their antislavery convictions.
as fundamentally incompatible with Quaker nonviolence. To Friends, the Golden Rule required that they “do violence to no Man, without excepting either Indian or Ethiopian”77

Mid-18th century Quakers were also in the vanguard in taking action against slavery within their own “nation,” crafting arguments for the gradual emancipation of slaves held by Friends.78 Ralph Sandiford laid out a clear plan for individual Quaker meetings to begin gradually divesting themselves of their slaves. Rather than simply selling off enslaved people to “worse Masters, thereby to add Sin to Sin,” but rather to manumit slaves “in their Youth” and provide them with “a Trade and Necessaries.” Sandiford, likely speaking for many Quakers, clearly preferred “with their Consent [to] send [freed people] back into their own Country.” Even without colonization, however, Quakers were obliged by the “Spirit of the Gospels” to “proclaim the Jubilee...unto them, that they may go forth freely.” If formerly enslaved people who remained in Quaker households as servants, it could only be by “their own Consent” and could not be a “Covenant for their Children.” These children were to be raised with “a humane and a Christian Education, that they may be capacitated at a proper Age, of doing for themselves, both for this World and the World to come.”79 Renounce absolute proprietary interests in the persons of slaves and ensure the legal freedom and education of the children of gradual emancipation – Sandiford’s recommendation presaged later legislation that finally abolished slavery throughout much of revolutionary and early

77 Sandiford, Mystery of Iniquity, 60.
79 Sandiford, Mystery of Iniquity, 97-98.
national America. This was a crucial step in the history of antislavery thought. A clear agenda for abolition was emerging from the Society of Friends.80

In other ways, however, Quakers were perfectly in line with the earlier English antislavery tradition developed during the Civil Wars and refined by the Holt Court. First, as we have seen, early English antislavery thought had a robust moral element that prefigured and paralleled the Quakers’ principled stand against human bondage. It would be difficult to accuse Henry Parker, Morgan Godwyn, or Samuel Sewall with moral turpitude when it came to outright chattel slavery, and they all drew special attention to the physical plight of slaves on the ground in the colonies, just as the Quakers now did. The Friends’ fellow mid-18th century critics of slavery, from all denominations, had a strong moral component to their antislavery as well, and Quaker authors regularly appealed to broader audiences in their tracts.

John Hepburn, for example, praised Cotton Mather’s stance on slavery, lauded the few “excellent souls” scattered throughout the colonies who “openly...declare against” slavery, and cited a number of non-Quaker printed sources. Indeed, Hepburn argued, “neither Church-men or Presbyterians have generally agreed in making Slaves of Negros; For some of both have preached and some have printed against it here in North-America.”81 Ralph Sandiford, in his 1730 Mystery of Iniquity, pointed out that there were “man-stealers” in “sundry places of worship” throughout the empire, but also noted that “the Righteous in all Churches are undefiled with [slavery]” and called on “the bishops


81 Hepburn, American Defence, preface [np], 14.
and ministers of all churches” to take action against slaveholding. He also drew on earlier English antislavery arguments, specifically citing Morgan Godwyn as precedent, and admitted that his antislavery ideals grew from his “Education...in the Church of England” before his conversion to Quakerism. In closing his pamphlet, Sandiford appealed not only to his fellow Friends, but to “the king...and his council” and the “true British Spirit” of “the whole realm.”82 Antislavery Quakers knew they had potential allies scattered throughout the empire, and their arguments were tailored to convince not only their fellow Friends, but to all members of “the true catholick church of Christ” and “such as are concerned in the government.”83

Nor were the moral arguments put forth by Quakers foreign to their broader Anglophone audience. The anonymous Jamaican author of the Essay Concerning Slavery for example, almost certainly not a member of the Society of Friends, admitted to being “tinged with that Passion” against slavery, much as Quakers were, and argued that human bondage was “contrary to the Law of God and Nature.” He illustrated from biblical text that, since Christ “broke down the Bounds that separated the Jew from the Gentile, all Nations that believe the Gospel are obliged...to observe the same Rules of Behaviour towards those of other Nations, as the Jews were obliged to observe one towards the other” – a golden rule for international relations.84 He also provided readers with grim descriptions of the tortures visited on enslaved bodies. Some slaves “pine away and are starved.” Others, to sate their hunger, “go a stealing, and are shot as they are caught,” while still others “are whipt, or even hang’d for going into the Woods, into

82 Sandiford, Mystery of Iniquity, 7-8, 53, 96, 108-109.
83 Ibid., 7-8.
84 [Anon.], Essay concerning Slavery, introduction [np.], 15.
which Hunger and necessity itself drives them to...keep Life and Soul together.” “Are the Lives of human Creatures,” the anonymous Jamaican asked, “to be play’d with...as a giddy thoughtless Planter thinks fit?”85 One need not stretch too far to imagine how Ralph Sandiford or Benjamin Lay would respond. Clearly, Quakers did not have a monopoly on moral and theological arguments against slavery.

Nor were Quaker arguments rooted exclusively in their unique theological perspective – Friends also drew on and refined earlier political arguments against slavery as well. Ralph Sandiford, for example, echoed earlier arguments by Henry Parker and Morgan Godwyn in stressing “the Injury” slavery did to “the Common-Wealth” by “setting up the Rich in Arbitrary Power.” Avaricious slave owners, having sacrificed their “Publick Spirit” on the altar of “Power and Riches,” would think it a sign of their “Honour” to “subvert Justice” and reduce their fellow subjects “into the same Captivity” as their African slaves. Such men “must needs be corrupt in the Government, and more especially in Offices of Trust,” and Sandiford recommended that subjects “reject such out of the Legislative Power” to chasten haughty slaveholders and protect traditional English liberties.86 New Jersey Quaker John Hepburn also indicted slavery on political grounds, arguing that slave ownership led masters to lose all “regard to the lawfulness of what they do.”87 In this sense, Quakers shared a great deal with other imperial critics of slavery.

85 Ibid., 38. These quotes about the brutal treatment of enslaved persons are expressed in the form of a dialogue between a Planter and an Officer (representing the anonymous author). After the Officer describes the torturous punishments meted out to slaves, the dialogue is interrupted by “the squawling of a Negro under Correction,” whipping the narrator into a fury of self-righteous rage against “that Jew” for “eternally whipping and tormenting his Negroes.” The Officer then pledges, “No! I’ll not be a Villain... Otaway; - Negroes I will befriend you, - ye poor black Devils, I will redress you.” [39] Later in the pamphlet, the Officer claims he would rather be martyred at the hands of infuriated slave owners than abandon his moral opposition to slavery.
86 Sandiford, Mystery of Iniquity, 108-109.
87 Hepburn, American Defence, 5.
Our anonymous Jamaican pamphleteer, for example, argued not “from a moral View only...but from a political one too.” Here, admittedly, his analysis did depart from the typical Quaker argument. As we have seen, An Essay concerning Slavery presented a sophisticated political argument rooted in natural rights ideology, the disavowal of captivity in war as a legitimate basis for slavery, and the bracketing of legitimate authority by law. This detailed dissection of the philosophical origins of slavery, however, was not a repudiation of Quaker claims, but an elaboration of earlier antislavery ideals upon which Friends also drew.

Quakers also shared the growing imperial concern over the economic dangers of slavery. As we have seen, the anonymous Jamaican author of An Essay concerning Slavery based his critique, in no small part, on the unfair competition between slave and free labor, and colonial Friends also decried the damaging influence of slavery on their ideal free labor economies. John Hepburn argued that slavery inculcated a love of luxury in masters, who raised “their Sons and Daughters in Idleness and Wantonness, and in all manner of Pride and Prodigality, in decking and adorning their Carkasses with pufft and powdered Hair, with Ruffles and Top-knots, Ribbands and Lace, and gay Cloathing.” Meanwhile, in a “Country [that] abounds which [sic] Negros,” common subjects would “want Imploy, and must either beg or steal for their Living.” A generation later, Ralph Sandiford urged that the colonies should be “an open country (were slaves kept out) for our own poor to come...and to enjoy to themselves the fulness of the earth.” The growth of slavery meant that the “meanest of...subjects” were

88 [Anon.], Essay concerning Slavery, introduction [np].
89 Ibid., [pages for political economic critique].
90 Hepburn, American Defence, 4, 35.
necessarily “reduced where slaves abound, [and] have starved for want of business, for
the rich need not [their labor], and the poor could not employ them.” Allowing slavery to
continue would prevent colonists from enjoying “the Riches of the Earth, wherewith we
might be of general Service in the Body, by employing of our own Poor, many of
whom...want Bread; Labour being reduced that they cannot live by it.” Because the slave
labor economy “levels [all] Labour at the Price of Bondslaves,” Sandiford was left to
wonder, if slavery continued to grow, “where shall we and our Children then be?”91
Imperial settlers like the Jamaican author of An Essay concerning Slavery and the
colonial legislators who attempted to regulate local involvement in the slave trade clearly
shared these economic concerns.

Even the Quakers’ gradual emancipation plans appear less unique in the context
of a longer Anglophone antislavery tradition. Ralph Sandiford drew directly on Morgan
Godwyn’s antislavery principles for precedent in framing his proposal for the
emancipation of the children of enslaved people.92 Nor were Quakers the only mid-18th
century Britons to espouse a form of gradual emancipation. The anonymous author of An
Essay concerning Slavery, while certainly not calling for a universal gradual
emancipation as some Quakers now did, argued that “if no more Slaves be imported, and
those we have put under good Regulations” by the imperial state, then “Time will do the
rest, which is the best Mender, when Things are put in a good train...doing its Business
by imperceptible Touches and Degrees.” Much as Quakers did, he advocated gradually
freeing small numbers of slaves, training them in a trade, and integrating them into a free
labor economy. Though his ten-percent plan would only have freed a handful of slaves,

91 Sandiford, Mystery of Iniquity, 8, 103-104, 109.
92 Sandiford, Mystery of Iniquity, 97-100.
the anonymous Jamaican outdid even the Quakers in one regard – unlike Ralph Sandiford, who called for the repatriation of freed slaves to Africa, he could envision an imperial economy of free laborers “of one Colour or another, white black or yellow” working side by side as fellow subjects for the good of the empire.93

Though refined and elaborated over time, this antislavery argument, shared by Britons of many faiths, was essentially the same as that proposed by Henry Parker in *Jus Populi* a century earlier – interpose the power of the state between master and slave, limit the power of the former and recognize the legal humanity of the latter, and slavery would cease to exist. Admittedly, it is difficult to confirm whether individual antislavery thinkers drew directly on Parker or Godwyn, or the extent to which mainstream English antislavery drew on arguments elaborated within the Society of Friends, but the congruence of Anglophone antislavery arguments across geographic, temporal, and denominational space is striking nonetheless. Perhaps what makes the Quakers most significant, then, is not the particular moral stance they took against slavery, but the presence of an institutional structure that could disseminate antislavery ideals and, eventually, force compliance with emancipation within the Society of Friends. While antislavery thinkers in other institutional contexts continued to run up against entrenched proslavery ideals that precluded such action, the Quakers could use their consensus-based theology to pressure individual Friends to emancipate their slaves. This was no small feat, to be sure, but the *impetus* behind Quaker antislavery was far more widespread than their reputation as a lone voice crying out in the wilderness suggests.

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93 [Anon.], *Essay concerning Slavery*, introduction [np],
In the autumn of 1730, the largest slave rebellion in Virginia’s colonial history broke out. It was mid-September, one of the most demanding moments in the annual tobacco cycle, a time when enslaved people often ran off to escape the most grueling labor, so perhaps the first few escapes went relatively unnoticed. A small-scale rebellion was put down relatively quickly in the first week of the month, and all seemed as usual in the Old Dominion. But with a rumor circulating along the slave grapevine that recently returned Alexander Spotswood carried orders from the crown to emancipate Christianized slaves, the tension in the colony was palpable. On a Sunday in September 1730, while their masters attended church, hundreds of enslaved men and women in Norfolk and Queen Anne counties massed together, selected officers, and ran off “in order to obtain their freedom.” Perhaps they planned to make for the Blue Ridge, where a maroon community had been broken up only a year earlier, or for the Great Dismal Swamp on the border with North Carolina, long home to small fugitive communities.\textsuperscript{94} Whatever their ultimate plan, these well-organized bands of rebels “committed many outrages against the Christians” and “did a great deal of Mischief” as they progressed through the Virginia countryside.\textsuperscript{95}

Then the Old Dominion’s system of slave police law sprung into action, swift and brutal. Details are scarce, but by the end of the month hundreds of enslaved people had been rounded up by militia and slave patrols and given “severe chastisement,” while the purported leaders of the conspiracy were rounded up and publically tortured and executed. Other enslaved people, like the twenty-four men and women James Brickell

\textsuperscript{94} Parent, \textit{Foul Means}, 160-161.
\textsuperscript{95} John Brickell, \textit{The Natural History of North-Carolina...} (Dublin, 1737), 357; William Gooch to BoT, \textit{CSPC}, XXXVII: 434.
saw hanged in a forest along the North Carolina border, met their death at the hands of vigilantes empowered by Virginia law to kill any resisting slave with impunity.\textsuperscript{96} With a coordinated insurgency breaking out nearly simultaneously throughout the colony, planter elites had good reason to be anxious, but in the end the apparatus of slavery worked precisely as it was designed to – it detected and quelled the rebellion and meted out exemplary, often extralegal violence to the enslaved men and women involved (along with many who were not). Virginia planters may have been anxious about a great many things, but, outside of their nightmares, a large-scale slave rebellion does not seem to have been one of them. They were supremely confident in the coercive power of the slave system they had constructed.\textsuperscript{97}

Some Virginians, however, were somewhat less confident about the long-term future of the economy slavery had built. Tobacco monoculture left them subject to the whim of distant and increasingly impersonal economic forces, and the cyclical boom-bust market for Virginia leaf left many planters teetering on the brink of bankruptcy. As William Byrd II noted, “some of the poor Planters are already So in debt for necessarys for their familys that the Slavery of their whole life will never pay for it” – another nightmarish prospect.\textsuperscript{98} The tobacco economy could be profitable, but only with substantial protection and support from metropolitan planners, and these were not guaranteed. The solution, at least according to most of Virginia’s great planters and the Walpole ministry, was to double down on slavery and the slave trade, producing as much


\textsuperscript{98} Quoted in Parent, \textit{Foul Means}, 99.
tobacco as possible for re-export to European markets. The Walpolean commitment to commodities production reinforced Virginia’s gentry-dominated and slave-reliant tobacco culture, where the great planters hid their anxieties behind a facade of honor and self-possession, their passions veiled (or inflamed) by the cold logic of economic interest. 99

As we have seen, however, not everyone agreed that plantation slavery and commodities production were in the best interest of the imperial common wealth. The Patriot Whigs, along with a small but growing number of Virginians, hoped to see the Virginia economy develop and diversify. Lesser planters and free laborers would certainly have benefited from these recommendations, and even a few of the great planters, William Byrd II notable among them, came to see the logic of Patriot political economy. 100 While this economic critique did little to threaten slave owners’ control over their enslaved property, its long-term implications for the institution of slavery must have made many planters anxious. Moral and political objections to slavery had not disappeared either. The Anglican Church continued to call for increased proselytization to the enslaved population, keeping the debate over the connection between Christianity and freedom alive in spite of the Yorke-Talbot Opinion. 101 And, as the 1730 rebellion illustrated, enslaved people themselves responded to these broader imperial debates, rising in rebellion when the freedom they believed they had been granted was withheld. The system of slavery, it seems, was the wellspring of most Virginians’ anxieties.

100 Pincus, “Patriot Fever”.
In mid-18th century Virginia, the center of this system was the trans-Atlantic trade. Though the enslaved population began to grow by natural increase in the first decades of the 18th century, the productivity of the plantation system still relied on access to new slave imports. With the slave trade now open to all British subjects, however, access to slaves was not the problem it had once been. Indeed, the total enslaved population of Virginia grew rapidly between 1715 and 1754, from approximately 30,000 to well over 150,000.\textsuperscript{102} A large proportion of this enslaved population was African born, as at least 54,000 slaves were imported into Virginia on 284 slaving voyages in this period.\textsuperscript{103} By 1760, the nearly 200,000 enslaved people in the Old Dominion made up nearly forty percent of the total colonial population, and the vast majority of the bound labor pool. The white indentured population, meanwhile, continued to dwindle in significance. Likely deterred by the lack of opportunity in Virginia’s gentry-dominated society, free in-migration also slowed. The mid-century influx of African labor, then, primarily benefitted the great planters.\textsuperscript{104}

The same economic structure that undergirded the fabulous wealth of Virginia’s planter elite, however, also created recurrent cycles of boom and bust that left even the greatest planters, enmeshed in local and imperial webs of debt, exposed to metropolitan creditors. When times were flush, as they were in the 1690s and into the early years of the 18th century, planters imported greater quantities of slaves to clear and cultivate more land, hoping to cash in while the tobacco market was strong. During the boom years

\textsuperscript{103} \textit{TASTD2}, \url{http://www.slavevoyages.org/voyages/XU2KWhOk} (accessed 20 October 2015).
\textsuperscript{104} On the consignment system and its impact on Virginia social relations, see Breen, \textit{Tobacco Culture}, 118-122.
from 1703 to 1708, Virginians dramatically increased slave imports from less than two hundred to well over one thousand enslaved people per year, leading to a spectacular increase in tobacco cultivation. This orgy of production, however, glutted the market and sent tobacco prices into a tailspin. By 1708, the recession had only deepened, and with metropolitan creditors calling in Virginia debts, the House of Burgesses began to debate raising their meager forty-shilling duty on slave imports, hoping to restrict the amount of tobacco produced and bring prices back up. In 1710, the burgesses raised the colony’s slave trade impost to a more prohibitive £5, a measure that clearly favored Virginia elites who could afford to pay it (or could borrow enough from their English merchant contacts) and maintain production to take advantage of rising prices. But lesser planters, hoping restrictions on slave imports might help them compete with the great planters, also supported slave trade taxation. With such broad support the £5 duty was easily reenacted in 1712 and 1714 and quickly had the desired effect – fewer than three hundred slaves were imported to Virginia between 1710 and 1713, and tobacco prices began to rebound.\footnote{TASTD2, \url{http://slavevoyages.org/tast/database/search.faces?yearFrom=1700&yearTo=1715&mjslptimp=21100} (accessed 20 October 2015); Parent, 91-92.}

Metropolitan planners and crown officials were always skeptical of these imposts, however, worried they might slow output in a lucrative primary commodities production zone, lessening royal revenues from re-export duties. Lieutenant Governor Spotswood was initially wary as well, worried that the £5 duty might be “Interpreted as a prohibition” and draw the ire of his metropolitan superiors.\footnote{Parent, 91.} Spotswood eventually came around to support the imposts – perhaps not coincidentally at the same time he
became a weighty planter himself – but he did so primarily for economic reasons. As he explained to the Board of Trade, without the slave trade duty to assist in raising tobacco prices, Virginians would be unable to repay their debts, forcing them to diversify their local economy to satisfy their metropolitan creditors. While this might have benefited a great number of Virginians, and might in the long term have lessened the Old Dominion’s reliance on African slavery, it would be a disaster as far as imperial planners were concerned. Virginia was meant to be a commodities production zone, not a diversified economy of self-sufficient farms and manufactories. The position adopted by Spotswood and the Board of Trade, then, anticipated the Establishment Whig political economy touted by the Walpolean regime – plantation commodity production and taxation for re-export – but used a critical element of what would later become Patriot Whig political economy – restrictions on the slave trade – to achieve its ends.

By 1715, the tobacco market had entered another boom phase, and the demand for slaves increased apace. Over 1500 enslaved people were carried into the Old Dominion each year between 1718 and 1721, with peak imports reaching 2,301 souls in 1721.

By the early 1720s, in the wake of the South Sea Bubble, tobacco’s wheel of fortune made yet another turn, sending prices on European markets plunging. As they had fifteen years earlier, the planters once again attempted to staunch the influx of slaves and bring tobacco production under control. The imperial context had changed, however, and with the Walpole/Townshend ministry ascendant and Britain at peace, colonial restrictions on

107 Parent, 92.
108 On restrictions on the slave trade as central to Patriot political economy, see Pincus, “Patriot Fever”. On the ongiong debate over the slave trade and the emergence of anti-slave trade sentiment, see Pettigrew, Freedom’s Debt, 198-207.
the slave trade were a direct challenge to the emergent mercantilist system. Unlike they had done in the 1710s, in 1723 the House of Burgesses sought only a modest forty-shilling impost, a return to the levels of taxation associated with the revenue duties of the 1690s. Even this modest duty came under attack from metropolitan merchants and imperial planners. Noting that earlier imposts had proved “a great hindrance to the Negroe Trade, as well as a Burthen upon the Poore Planters,” the Board of Trade worried that the 1723 impost would have “ill Consequences” and “Discourage the Planting and Cultivating [of] Naval Stores.”

Facing such staunch opposition from the metropole, Robert Carter, then a member of the Virginia Council, sagely predicted “there’s no doubt but the African Company will break the neck of this law” – the forty-shilling duty was disallowed by the Privy Council on the grounds that it would cut into the profits of their merchant allies and repealed by royal proclamation on October 27, 1724.

When Virginians erected a new slave trade duty in 1732, they avoided this criticism by taxing slave purchasers rather than importers. Unlike the imposts of the 1710s and ‘20s, which were payable by imperial slave merchants, the new duties imposed a five-percent tax on colonial slave purchasers. When pressed by the Board of Trade to explain the new slave impost, Governor Gooch framed it as a simple revenue measure with no discernable impact on imperial trade. Indeed, Gooch bragged, the duty raised nearly £1000 in annual revenue, defraying the crown’s costs in supporting the colonial government, and benefitted metropolitan merchants who “receive the same, if not a better price, for their slaves, as if there were no such duty.”

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112 Gooch to Board of Trade (26 November 1735), *CSPC*, XLII: 176.
apparently persuaded by this argument, because they let the duty stand, and the House of
Burgesses renewed it with little opposition in 1734 and 1738. The duty was even
increased to ten-percent of the purchase price in 1740, with the additional revenue used to
bolster colonial defenses and provide incentives for enlistment in the war against Spain,
and was renewed again in 1742 and 1745, with Virginians arguing that the tax was “very
necessary...in order to discharge the public debt.” Though the duty lapsed in the summer
of 1751, it was revived again in February 1752 and was not set to expire until 1756.113
Unlike the prohibitive duties of the 1710s and ‘20s, these revived slave trade duties fit
perfectly within the Walpolean vision of empire, offsetting the expense of colonial
administration without overly restricting the inflow of slave labor necessary for
plantation agriculture.

When restriction of slave imports proved untenable, Virginians turned to local
regulation of tobacco production and marketing to stabilize their economy. As had been
the case with the slave trade duties, debates over tobacco regulation hinged on
fundamental differences over political economy. Most of the great planters, men like
Robert Carter and John Custis, supported a thoroughly Walpolean vision of imperial
economy, promoting measures that would bring the tobacco market under control and
protect their dominance in Virginia’s consignment system, where they acted as go-
betweens for smaller planters and metropolitan merchants.114 The “stinting” laws passed
in 1723 and 1728 are examples of this position. These were intended to improve the
quality and price of Virginia tobacco by limiting production to six thousand plants per

113 William Waller Hening, The Statutes at Large: Being a Collection of all the Laws of Virginia... (New
114 Breen, Tobacco Culture, 118-122.
laborer. This policy clearly privileged the Virginia gentry at the expense of smaller planters in the newly settled Piedmont and independent yeoman producers. Large-scale plantation owners like Carter and Custis had such massive enslaved labor forces that the six thousand plant cap would have only a minor impact on their economies of scale. Despite their attempts to regulate the local slave trade, the institution of slavery itself remained the very heart of Walpolean great planter political economy.\textsuperscript{115}

As in England, however, this position did not go unopposed, and a local hybrid political economy began to develop that melded elements of the Patriot Whig imperial vision with Virginia’s distinctive tobacco culture. Adopted primarily by middling planters, royal officials, and a few dissident Virginia gentlemen like William Byrd II, this alternative model called for even greater regulation of tobacco production and the promotion of urbanization and economic diversification in the Old Dominion. This unlikely coalition came together in 1730, under the leadership of Byrd and Governor William Gooch, to pass the Tobacco Inspection Act, the most thoroughgoing attempt to regulate tobacco production in Virginia’s colonial history. Limits on production were lifted, but all tobacco would now have to be inspected, graded, and stamped at one of sixty-two public depots to prevent the export of “bad and trash tobacco.” Any tobacco rendered as payment for debt also had to be registered and inspected at one of these warehouses.\textsuperscript{116}

William Byrd II, Virginia’s most vocal proponent of Patriot political economy, hoped that these regulations would improve quality and raise tobacco prices on the international market, yielding sufficient profits for Virginia planters to begin diversifying

their local economy. Tobacco depots would ideally develop into thriving market towns for the produce of the hinterland and entrepots for European imports. A stabilized tobacco economy would also allow planters to reallocate labor and capital to new crops like hemp, flax, and wheat, and even to local manufacturing in support of British shipping. In contrast to the Walpolean political economy espoused by his fellow great planters, Byrd saw a profitable tobacco economy not as an end in itself, but as a crucial first step in the further development of the local and imperial economy. While clearly not an antislavery position – Byrd was himself one of the colony’s largest slave owners and employed slave labor in myriad roles on his diversifying plantations – in the long run this distinctive Virginia Patriot political economy pointed toward an alternate future, one less reliant on tobacco monoculture and plantation slavery.117

On questions of Virginia political economy, however, Byrd and the Board of Trade were clearly in the minority. Most imperial planners and the vast majority of Virginians still saw tobacco production and plantation slavery as the surest route to imperial wealth and colonial social status, and their revisions to the Tobacco Inspection Act over the years illustrate how they turned it into a prop for the existing plantation society. As might be expected, the great gentry of Virginia’s tobacco culture believed their personal seal and reputation as “planters” carried more weight in the market than an inspector’s stamp, and resented accusations of poor quality. By guaranteeing all planters some access to public trade depots, the 1730 Inspection Act also cut into the great planters’ control over the consignment system by giving independent Glaswegian merchants greater direct access to small and middling planters.118 By opening up the

117 Pincus, “Patriot Fever,” 33-34 and passim.
118 Parent, Foul Means, 190-195; Breen, Tobacco Culture, 62-65.
tobacco trade to middling planters, however, the Tobacco Inspection Act ended up reinforcing their commitment to slavery by keeping the Virginia economy hitched to tobacco monoculture which, in the Old Dominion, meant increased demand for slaves.

Debates over Virginia’s political economy, then, ended up doing precious little to push the colony in an antislavery direction. Other forces, however, continued to keep the question of slavery near the center of Virginia politics. The presence of SPG missionaries, for example, kept alive the old debates over the connections between Christianity and personal freedom, debates that were supposed to be scotched by the Yorke-Talbot Opinion and local Virginia statutes. Crucially, enslaved people also continued to force the issue, using conversion to Christianity as a basis for individual and collective claims to legal personhood. As we have seen, the great 1730 Chesapeake rebellion was inspired in part by enslaved peoples’ belief that imperial planners had declared emancipation for Christian slaves – a particularly ironic belief given that Yorke and Talbot had issued their famous opinion that baptism would not free a slave only a year earlier. Christianity may not have directly freed any slaves in mid-18th century Virginia, but this did not prevent enslaved Christians from pushing for their liberty.¹¹⁹

Nor was the 1730 rebellion the only instance of mass resistance by the enslaved. A large conspiracy involving over two hundred slaves was uncovered in Rappahannock County in 1722.¹²⁰ That same year, three enslaved men – two named Sam and one Cooper Will – planned a conspiracy that intended to “kill murder & destroy very many” Virginians before making for the Blue Ridge. A conspiracy of enslaved people in Gloucester and Middlesex counties in 1723 aimed to burn towns and plantations before

¹¹⁹ Glasson, Mastering Christianity, passim.
¹²⁰ Aptheker; Coffin, 19.
making a break for freedom. Seven of the conspirators were sold out of the colony as punishment. Slave runaways were a persistent thorn in Virginia planters’ collective side, and a small maroon community even began to form along the western frontier in the Blue Ridge Mountains before it was destroyed by militia in 1729.\textsuperscript{121} However draconian their police law, then, Virginians lived in near-constant fear of an ever-present internal enemy.

Virginians may have disagreed about the political economic future of their colony, but in their response to slave resistance the white settlers of the Old Dominion spoke with one voice. Two sets of laws passed in 1723 and 1727 restated and refined the core elements of the colony’s comprehensive 1705 slave code. Issues of slave property ownership were most directly addressed in 1727 when the House of Burgesses laid out a comprehensive code regulating the purchase, tenure, transfer, and descent of slaves. As they had in earlier codes, the Burgesses once again defined slaves as a special form of real estate. This definition protected slave property from forfeiture for debt or sale by executors of estates, and the 1727 statute explicitly allowed for slaves to be entailed to an estate, shielding Virginia slave owners from their creditors and guaranteeing a steady labor supply on large plantations. Once again, as earlier statutes had done, the 1727 act also gave slave owners maximum flexibility by allowing masters to “transfer the absolute property of such slave or slaves” to purchasers without the cumbersome legal devices typical of real property sales. As a special mixed form of property – real estate in some cases, chattels in others – slave property was doubly protected under “the rules of the common law.”\textsuperscript{122}

\textsuperscript{121} Aptheker; Coffin, 18.
\textsuperscript{122} Hening, SAL, IV: 222-228.
Slaves were still defined as a species of property in the Old Dominion, and the burgesses continued to bolster the physical power of masters over their enslaved property. A series of acts passed in 1723 restated key elements of the comprehensive 1705 code, barring slaves from congregating in groups larger than five without white supervision, setting down special procedural rules in cases where slaves were accused of crimes, and preventing slaves from testifying in cases involving white settlers. Owners could present a defense for any slaves accused of crimes, but were limited to matters of fact – challenges to the irregular legal proceedings in slave trials were beyond objection. Earlier police powers allowing any white settler to kill runaway or resistant slaves with impunity were restated, and masters would be compensated for any slaves killed during recapture or “correction.” The right of masters to mutilate or dismember particularly recalcitrant slaves was also upheld.

To clarify the earlier code, however, the Assembly also now included a clause allowing for prosecution when slaves were killed “willfully, maliciously, or designedly” by a non-slave owner. In such cases, however, the white murderer would typically be tried not for a felony, but rather in a civil suit where the owner could sue for “recovery of damages for such slave or slaves so killed.” In the rare instance where a white settler might be tried for the death of a slave, convictions for felony homicide by a jury of colonial planters were unheard of, and convictions on lesser charges of manslaughter carried no “forfeiture or punishment for such offence.”“123 Virginia justice held the property rights of slave owners in higher esteem than the lives of enslaved Afro-Virginians. Unlike the close attention imperial planners gave to issues of taxation and

123 Ibid., 126-134, quotes at 132-133.
trade, Virginia’s increasingly draconian slave police law drew little opposition from the Board of Trade – colonial slave owners could do largely as they wished with their own property.

Colonial legislators also targeted Virginia’s small free black community, and sought to further limit their access to the traditional rights of British imperial subjects. To prevent the growth of the free black population, the Burgesses once again limited access to private manumissions, allowing owners to free their slaves only in cases of particularly “meritorious services” to the colony, and even then only with the approval of the governor and council. Any slaves improperly freed under the earlier 1690 manumission regulations were to be seized by parish churchwardens and reenslaved, the proceeds from their sale going to the parish vestry, and any slaves manumitted in the future would have to leave the colony within one month or face the same fate. Black freedom was difficult to attain in mid-18th century Virginia, and even harder to keep.

The few free Afro-Virginians already resident in the colony were barred from testifying or bringing suit against white settlers. Under particularly “pregnant circumstances,” black testimony could be considered, but only in cases involving other non-white colonists, and even here Afro-Virginians were on dangerous ground – any black settler found to have given false evidence would be subjected to gruesome physical torture, their ears nailed to the pillory and cropped, followed by a severe public whipping. The few free black settlers with sufficient property to qualify for suffrage were also disfranchised on explicitly racial grounds. While the 1723 Virginia black code did roll back some earlier restrictive legislation – allowing free black householders, particularly those in frontier regions, to own guns; and requiring free Afro-Virginians to serve the
militia as “drummers or trumpeters...and to do the duty of pioneers, or...other servile labor” in cases of rebellion or invasion – on the whole it continued the trend, evident since at least the Stuart Restoration, toward the exclusion of free black settlers from imperial subjecthood.124

Unlike statutes targeting enslaved Virginians, however, some of these restrictions on the free black population met with objections from imperial planners. Richard West, serving as a legal advisor to the Board of Trade, called the legitimacy of the 1723 disfranchisement of black freeholders into question as soon as the Virginia laws arrived at Whitehall for review in January 1724. Though he admitted that “slaves are to be treated in such a manner as the proprietors of them (having a regard to their number) may think necessary for their security,” he found it difficult to understand “why one freeman should be used worse than another meerly upon account of his complexion.” To West, the “severall negroes” who had legally obtained their freedom and acquired sufficient property to vote in the colony could not be deprived of the “incidentall rights of liberty” that were “actually vested in [them].” As imperial subjects, free Afro-Britons must be subject to a colorblind rule of law. West advised the Board of Trade that “it cannot be just by a Generall Law...to strip all free persons of a black complexion (some of whom may perhaps be of considerable substance) from those rights which are so justly valuable to every freeman.”125 The Board of Trade finally acted on West’s recommendation a decade later. In 1735 they asked Lieutenant Governor Gooch to explain how Virginians justified a law that “carries [such] an appearance of hardship towards certain freemen, meerly upon account of their complection, who would otherways enjoy every privilidge

124 Ibid., IV: 131-133, 326-327
125 Richard West to Board of Trade (28 November 1735), CSPC, XLII: 182.
belonging to freemen.” Stripping rights from enslaved persons defined as property was one thing, but depriving subjects and freeholders of their rights did not sit well with the broad vision of imperial subjecthood being elucidated at the metropole.

The response Gooch sent to the Board of Trade in May of 1736 affords a remarkably clear view of the ways in which slavery, race, and subjecthood became entwined in the Anglo-American plantation colonies. Limiting the rights of free Afro-Virginians, Gooch claimed, was essential to the physical security and economic productivity of the Old Dominion. Passed in the aftermath of a number of attempts by “the negros to cutt of the English,” the 1723 restrictions on free blacks were rooted in fear. “The free negros and mulattos were much suspected to have been concerned [in the rebellions] (which will for ever be the case),” and, despite the fact that “there could be no legal proof so as to convict them,” the “insolence of the free negros” stirred up resistance among the enslaved and threatened the security of the colony. Virginia slavery was threatened by black solidarity and cooperation. Free black Afro-Virginians, Gooch claimed, “always did, and ever will adhere to and favour the slaves.”

Slavery itself, however, was not at issue here – West and the Board of Trade had no real criticism of Virginia’s brutally racialized slave police law. The problem was the Old Dominion’s treatment of free Afro-Britons, of imperial subjects deprived of the cherished rights of English freemen. Gooch replied to this charge by linking the security of Virginia’s plantation economy directly to white supremacy. As they always had in Virginia, black freedom and the fluid nature of “race” provided a basis, however narrow, for Afro-Virginians to press claims to subjecthood. It was precisely this assertive pursuit

126 Alured Popple [Secretary to Board of Trade] to William Gooch (18 December 1735), CSPC, XLII: 216.
127 William Gooch to Alured Popple (18 May 1736), CSPC, XLII: 308.
of legal personhood that worried Virginians most. “[T]he pride of a manumitted slave,” Gooch argued, led free Afro-Virginians to think themselves “as good a man as the best of his neighbours,” asserting claims to civic and personal rights, “especially if he is descended of a white father or mother, lett them be of whatever mean condition soever.” Indeed, Gooch claimed, “most” free Afro-Virginians were “the basterds of some of the worst of our imported servants, and convicts,” the dregs of Virginia society who the great planters were, at this very moment, also working to disfranchise. Making the racial basis of exclusion clear, Gooch argued that “time and education” might eventually alter “the indication of their spurious extraction” – Afro-Virginians would quite literally be ‘whitened’ – and work “some alteration in their morals” that would force the House of Burgesses to “consider to what degree of descent this incapacity shall extend.” For the time being however, the Lieutenant Governor argued, “there is a necessity of continuing of it on the foot it is.” Local statutes excluding free Afro-Virginians from the rights and privileges of imperial subjecthood, barring their testimony and stripping them of the franchise, regulating their households and limiting their economic opportunity, were crucial to protecting slavery and maintaining the imperial economic interest.  

To perpetuate plantation slavery and promote economic growth, Virginia legislated near-total white supremacy. Free Afro-Virginians had to be made “sensible that a distinction ought to be made between their offspring and the descendants of an Englishman, with whom they were never to be accounted equal.” Writing away the long debate over black subjecthood in the Old Dominion, Gooch flatly stated that Virginia law “fix[ed] a perpetual brand upon free negroes and mulattos by excluding them from that

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128 Ibid.
great priviledge of a Freeman[.]” Local statutes barred Afro-Virginians from civic participation and courts of law on the grounds that their race “excluded [them] from being good and lawful men,” leaving free blacks subject to the coercive power of masters and the state “as villains were of old by the Laws of England.” Besides, there were so few Afro-Virginian property owners in the colony that it was “scarce worth while to take any notice of them in this particular.” Though Gooch recognized that Virginia’s racialized law might “seem to carry an air of severity to such as are unacquainted with the nature of negros,” he argued to the Board that it was “in no ways impolitick...to preserve a decent distinction between them and their betters, to leave this mark on them” as a distinct subordinate class excluded from imperial subjecthood. In the end, the Board of Trade was persuaded by Gooch’s argument and “the present disposition of the Country” to continue racially proscriptive legislation – on the 15th of October 1736, Secretary Alured Popple recorded the Board’s decision to let the 1723 black codes “lay by.”

A subsequent round of statutory revisions in 1748 made no substantive alterations in the status of enslaved and free black Virginians. Despite the growing sense that something was fundamentally wrong with their plantation economy, with its overreliance on a single, distant, and fickle market, the Old Dominion’s planter elite was structurally bound to their social order. The dictates of the broader imperial context prevented diversification and stymied plans for the development of a free labor economy. Nor were the Virginia gentry really willing to make the kinds of changes necessary to create such a system. Numerous and repeated violent clashes with rebellious slaves and generations of state-sanctioned racial violence left many Virginians unable to think their way out of

129 Ibid.
continued reliance on slavery. Despite the increasingly clear economic critique of slavery emerging from the metropole, and its acceptance if not promotion by a number of important local figures, Virginia’s economy was too reliant on slavery in the short term to move against the institution, however beneficial it might have been to do so over the longer term.

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If the Glorious Revolution brought Massachusetts within the bounds of a politically centralized empire, the mid-18th century saw the acceleration of the Bay Colony’s transformation into a critical hub in the empire of goods. Fears of declension that emerged in the 1690s seemed to be confirmed by the 1750s. Bay colonists were far less culturally distinct and far more closely linked to the British mercantilist system than at any point in the 17th century. This certainly did not improve the colony’s image with imperial officials, however. One noted in 1739 that it was “impossible to get twelve honest men” to execute “the King’s Justice” and, despite the 1691 charter revision, complaints about exclusion from political rights on religious grounds remained. The lingering influence of Massachusetts’ Puritan heritage gave a peculiar inflection to local cultural norms and provided fertile ground for criticism of the new imperial economy and its adjunct – the expansion of human slavery.

As Bay Colonists became more culturally English, they, like their cousins back in Britain, increased their direct participation in the Atlantic plantation system to finance their consumption of the mother country’s manufactures. On forty-one recorded slaving voyages, Massachusetts ships carried over 5,000 people away from kith and kin on the

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African coast, delivering just over 4,000 survivors of the middle passage into colonial slavery. The only way slave traders could profit despite such staggering mortality rates was to sell their enslaved cargo where it was in highest demand – the West Indian sugar plantations. Though the point of slave sale on these voyages is often absent from the record, at least half of all recorded Massachusetts slavers sold their human cargo in the sugar colonies, with Antigua and Barbados prominently represented, while others found ready markets for slaves on Virginia tobacco plantations. One Captain Ellery made at least two voyages to the African coast, aboard the Anne in 1750 and the Britannia in 1753, delivering 257 enslaved persons to St. John, Antigua. In 1730, Captain Samuel Moore laded 166 slaves purchased on the Senegambia coast into the hold of the Friend’s Adventure, selling the 142 persons who survived the middle passage in Barbados – he delivered an additional 56 persons to Virginia aboard the sloop Bumper three years later. By contrast, Massachusetts ships had made only seven slaving voyages between the Glorious Revolution and the Hanoverian succession, all but one of which disembarked in Barbados. Bay Colonists were not simply deepening their involvement in the slave trade – the geographic reach of their slaving, now freed from burdensome metropolitan restrictions, also increased.

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132 TASTD2, voyage #25199, www.slavevoyages.org (accessed 5 February 2015). Only 18 of the 41 recorded voyages in the database include a point of disembarkation. Of these voyages, half terminated in the plantation colonies – four in Antigua, two in Barbados, one in St. Kitts, and two in Virginia. The other recorded voyages, as will be discussed below, disembarked in New England – eight in Massachusetts and one in Rhode Island. It is likely that many of the voyages without a recorded disembarkation point also sold most of their enslaved cargo in the plantation colonies. Of the 23 voyages without a clear point of slave sale, only 8 were skippered by a captain who had imported slaves directly to New England, making it likely that the remaining 15 voyages disembarked somewhere in the plantation colonies.
133 Ibid., voyages #25158 and #25132.
134 Ibid.
The economic impact of Massachusetts slaving went far beyond the direct sale of slaves – the secondary and tertiary sectors of the New England economy were imbricated in the slave trade as well. With its abundant timber, Massachusetts was quickly becoming an important center of the ship building industry, and many of these New England vessels were employed in the slave trade. Both the *Friend's Adventure* and the *Bumper*, captained by Samuel Moore, were constructed in Massachusetts, as were at least 49 other vessels active in the slave trade between 1714 and 1754. Collectively, these Massachusetts-built ships made at least 88 slaving voyages in this period, delivering well over 18,000 people to the plantations. Each of these vessels needed to be outfitted, employing hundreds more Bay Colonists in the ropewalks, cooperages, and sailmaking shops of the colony’s seaport towns. Massachusetts distilleries also played a crucial role in the triangular trade, transforming West Indian molasses into rum that could be exchanged for slaves in West Africa. Given the structure of its mercantile economy, it is hard to imagine how Bay Colonists could have avoided complicity in the slave trade, even if they had wanted to do so.

Though the vast majority of Massachusetts slavers delivered their human cargo to the West Indian sugar islands, the growing volume of the New England slave trade guaranteed that an increasing number of Africans would arrive the Bay Colony as well. In stark contrast with the years following the Glorious Revolution, when only one recorded vessel landed African slaves in the colony, Massachusetts saw a marked

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135 Ibid. It is likely these numbers are vastly underestimated, as many of the vessels listed in the TASTD2 do not have a recorded point of construction.


137 Williams, *Capitalism and Slavery*, passim.
increase in direct slave importations in the mid-18th century. Many of these importations are difficult to trace since so few slaves arrived direct from Africa. Responding to requests for slave import statistics from the Board of Trade, Lieutenant Governor John Wentworth noted in April 1727 that Massachusetts “kept no record of the importation of negroes, not haveing any commerce with Affrica.” The slaves who were brought into the colony were “supply’d from Barbadoes, Antigua and the Leeward Islands,” and there were very few of them, “seldom...more than four or five in the space of a year.” A minor market in the trans-Atlantic slave trade, the few slaves who were carried into the Bay Colony came through the coastwise inter-colonial trade rather than direct from Africa. The few African-born slaves who were purchased in Massachusetts tended to be “refuse slaves” who, for one reason or another, were not purchased in the West Indies. This rather anemic slave trade meant that, by Wentworth’s reckoning, there were “not more than one hundred and fiftty negroes...in this province.” Wentworth’s estimate was surely low – Governor Dudley had estimated that there were at least 550 Bay Colonists of African descent in 1708 – but whatever the actual numbers, it was clear that Massachusetts’ black population was growing. The Lieutenant Governor also noted that “Boston, New York, and Rhoad Island, have of late years sent vessells to the coast of Africa, and bro’t their slaves directly to their own ports,” a harbinger of things to come.

At least fourteen voyages imported African slaves directly to Massachusetts during the period under consideration. The vast majority of these voyages were

138 CSPC, XXXV: 498.
140 Dudley to BoT, 1 October 1708, CSPC, XXXV: 151.
141 CSPC, XXXV: 498.
concentrated in the 1740s, when, as we shall see, enforcement of local regulations on the
slave trade was effectively banned by the Board of Trade, making direct importations
economically feasible for the first time since prohibitive import duties were enacted in
1705. The most prolific of these Massachusetts slave importers was Robert Ball of
Boston, who made at least five voyages to Senegambia and the Gold Coast, delivering
nearly 600 Africans to the Bay Colony. All told, the fourteen recorded voyages that
delivered slaves to Massachusetts carried over 1,200 enslaved persons into bondage in
the Bay Colony, an unprecedented level of slave imports. This explosive growth in the
Bay Colony’s slave trading operations left a visible imprint on the colonial population.
By 1755, at least two percent of Massachusetts’ population was of African descent, in
Boston nearly eight percent. While these numbers paled in comparison with the
massive enslaved populations of the plantation colonies, there had been a visible increase
in Massachusetts’ black population since Governor Wentworth’s day.

Facing the specter of a growing enslaved population, Massachusetts legislators
hoped to staunch the influx of African slaves by continuing their prohibitive £4 duty on
slave imports. Rather than serving as a mere revenue tariff to fund the governor’s salary,
the Massachusetts slave import duty was put in place explicitly to prevent further slave
imports, to “put a period to negroes being slaves” as the Boston selectmen put it. But
the Bay Colony was, as ever, under close scrutiny from the Board of Trade.
Massachusetts was notorious for its “antimonarchical traders” and their regular voyages

(accessed 5 February 2015).
1942), 81.
144 William H. Whitmore, ed., Report of the Record Commissioners of the City of Boston, (Boston:
Municipal Printing Office, 1898), XI: 5. [Hereinafter cited as Boston Recs.]
to “the French and Dutch Settlements in the West Indies where it may be suspected a
great deall of illegall trade is carryed on.”¹⁴⁵ Nor did repeated bouts of warfare against
Spain and France slow Massachusetts’ smugglers – though New England vessels
“appear[ed] wholly English,” some were “commanded and navigated by ffrench
Refugees naturaliz’d” and “carried the English Provisions to their owen Enemies...in the
Ports of Spain” during the War of Jenkins’ Ear. Worse yet, Bay Colonists were
importing finished cloth from Holland and France, a practice that would “destroy the
Vital parts of the British Commerce” if left unchecked.¹⁴⁶ New England’s evolving role
as a commercial hub made these evasions of the Navigation Acts more conspicuous, and
local trade restrictions like the Massachusetts slave trade duty were anathema to the
Board of Trade’s mercantile policy.

When the Assembly attempted to renew the colony’s slave importation duty in
1718, then, they did so under the watchful eye of the Board of Trade. As we have seen,
the 1705 slave importation duty had been challenged by the Board of Trade, but was
never expressly disallowed, and Massachusetts legislators now hoped to ramp up
enforcement of the impost. A special committee tasked with promoting trade included
among its recommendations “That the Importation of White Servants be encouraged &
that the Importation of Black servants be discouraged.”¹⁴⁷ Promoting the migration of
white servants would bolster the Massachusetts economy by increasing the number of
potential consumers and contribute to local defense through service in the militia. The
committee drafted a bill to achieve this goal, and presented An Act for Encouraging the

¹⁴⁵ CSPC XXXV: 528; CSPC XXXV: 21.
¹⁴⁶ [????] to BoT, 26 February 1742, CO 5/753/1.
¹⁴⁷ Abner C. Goodell, ed., The Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay... (Boston: Wright & Potter, 1869), II:125. [Hereinafter cited as MA A&R.]
Importation of White Male Servants, and the preventing the Clandestine bringing in of Negroes and Molattos on June 16, 1718. The bill received a second reading the following day, but failed to garner the votes needed for a third reading. Perhaps increased oversight by the Board of Trade caused the legislature to back down – the Bay Colony’s import duties for 1718 were all overturned by the Board anyway – or maybe pressure from local merchants forestalled further action against the slave trade. Whatever the circumstance, local enforcement of the 1705 slave trade duty continued despite opposition from imperial planners in London. Worse yet, from the Board of Trade’s perspective, the tax was having the desired effect. Lieutenant Governor John Wentworth, writing to the Board from New Hampshire, noted in early 1728 that there were “more negroes imported [to New Hampshire] this last year then in ten years before.” The explanation for this sudden increase in New Hampshire slave imports was simple – “in the Massachusets they pay an impost of four pounds p. head, and in this Province they are imported free.”

The question of slave import taxation arose again in 1728 when the Assembly passed An Act More Effectually to Secure the Duty on the Importation of Negroes. Despite the Board of Trade’s disapproval of the import duty, the Massachusetts legislature continued to act as though the impost had never been disallowed, citing the original 1705 legislation in the preamble. The 1728 slave import duty continued the £4 impost, and required all merchants to register their imported slaves with the customs

148 Worthington Chauncey Ford, ed., Journals of the House of Representatives of Massachusetts (Boston: Massachusetts Historical Socieity, 1921), II:25, 27. [Hereinafter cited as MHJ.]
149 CSPC, XXXI: 160 and XXXI: 196. In 1719, Governor Samuel Shute received a “severe reprimand” for consenting to the Massachusetts duties. See CSPC, XXXI: 197.
150 John Wentworth to Board of Trade, 20 February 1728, CSPC, 36/59.
collector. To prevent slaves’ being “landed in the neighbouring provinces or colonies, and brought thence into [Massachusetts] in order to save the duty,” anyone bringing a slave into the Bay Colony overland was required to register their slave with the town clerk within two weeks. In all cases, failure to register a slave or pay the £4 duty would garner a fine of £8. As a concession to merchants, the duty could be drawn back on any imported slaves who died within a year.151

Once again, Massachusetts’ attempt to prevent the importation of slaves drew the ire of the Board of Trade. In December 1731, the Board of Trade advised King George II that, despite being repeatedly disallowed, a number of colonies, including Massachusetts Bay, continued to place import duties on slaves.152 To remedy the situation, explicit instructions were once again sent to all colonial governors requiring them to withhold their consent for any such measures. The instructions sent to Massachusetts governor Jonathan Belcher, for example, complained that local slave trade duties exacerbated the “Discouragement of the Merchants trading thither from the Coast of Africa” and instructed the governor to refuse his assent to any further slave trade imposts.153 The instructions did not, however, explicitly repeal the 1728 duty, and, once again, local customs officers continued to collect the impost. And despite the king’s explicit instructions, Belcher gave his assent to another slave trade duty in 1739. In addition to restating the terms of the 1705 and 1728 imposts, the new slave trade duty imposed a fine of £100 on any importers who falsified the required import lists and shortened the drawback term in case of the death of an imported slave to six months.154

152 CSPC, XXXVIII: 536 and XXXVIII: 540.
Despite attempts by imperial planners to prevent local regulation of the slave trade, then, Massachusetts continued to defy metropolitan mandates and repeatedly passed prohibitive duties on slave importation. To be sure, there was a good deal of racially exclusionary motivation for this policy. As Governor Belcher noted in a 1739 letter to Lord Egmont, one of the trustees of the fledgling Georgia colony, “there is such a natural & general aversion in whites to blacks, that they will never mix or sodder.” Belcher and other Bay Colonists certainly had a marked preference for white servants, since “From every white we may hope for a good man to add to the common wealth.” White migrants, the governor believed, would contribute to the economic health and military security of the colony in a way black colonists could not. There was also a clear strand of antislavery thought informing this position, however. Belcher noted the Georgia trustees’ “generous & noble” decision to ban slavery “with a great deal of pleasure.” The governor explained that he had long been “in that way of thinking, that no part of mankind was made to be slaves to their fellow creatures,” and lamented that “even Christians [do not] treat them much better than they do their horses & other cattle.” Writing only two months after he assented to another slave import duty in the Bay Colony, Belcher was not tilting at windmills when he noted that “We have but few [slaves] in these parts, and I wish there were less” – he and the Massachusetts Assembly were taking concerted action to translate antislavery principles into policy.\(^{155}\)

The Bay Colony’s slave importation duties, then, were politically contentious, and drew unwanted attention from the Board of Trade back in London. Despite regular statements of disapproval from the metropole, however, local customs agents continued

to collect the import duty, even after repeated royal attempts to end the practice.

Lieutenant Governor Wentworth’s observation that the £4 Massachusetts duty contributed to increased slave imports in New Hampshire, for example, came six months before passage of the 1728 slave importation tax, at a time when the original 1705 legislation had lapsed and a decade after the 1718 *An Act for Encouraging the Importation of White Male Servants, and the preventing the Clandestine bringing in of Negroes and Molatts* failed to pass into law.

Applications by individual slave owners to draw back the impost due to financial hardship or the lameness or death of an imported slave illustrate that, whatever the Board of Trade thought of the practice, Massachusetts’ slave trade duty was consistently enforced throughout the mid-18th century. In July 1715, for example, Archibald Stobo, a Presbyterian minister and refugee from the Yamasee War on the South Carolina frontier, petitioned the Assembly for abatement of the import duty he had paid on “Eleven Negro Women and Children by him Imported.” Two days later, Mary Haddrell and Magdalene Beauchamp, also refugees driven from South Carolina, asked that the import duty on the “Eight Negro Slaves” they brought with them to Massachusetts be refunded. In August 1723, John Welland of Boston petitioned the legislature for remission of the importation duty on grounds of financial hardship. Welland had been taken captive by notorious pirate Edward Low some years earlier and now, with Low’s accomplices on trial for piracy in Rhode Island, he asked the Assembly to draw back the duty on “a Negro lately imported here from Jamaica” to offset the “considerable Expence in Travelling to Rhode Island, to be at the Tryal of those Pirates.” The Assembly assented to all of these
petitions, even though no official slave importation duty was on the books at the time they were made.\textsuperscript{156}

Not all petitioners were so fortunate, however, even when their requests fell within the letter of the law. Hugh Hall, for example, petitioned the assembly in November 1718 for abatement of the import duty when “a Negro Boy he lately Imported...Died in Ten Weeks after his Arrival.” Technically, such a request fit the criteria for remission to the letter – unforeseen death or injury were the only cases in which exemptions could be made – but the Assembly denied Hall’s petition anyway.\textsuperscript{157} In January 1727, again a time when no official impost was on the books, another slave imported by Hugh Hall died shortly after his arrival. Samuel Smith, a Cambridge innkeeper, sought to draw back the duty on a slave he had purchased from Hall who “died within ten Weeks from his being Landed in this Province.” Perhaps Hall’s unsuccessful petition nine years earlier convinced the Assembly that he was habitually cheating his customers by selling sickly slaves. Whatever their reasons, the legislators rejected this petition as well.\textsuperscript{158} The Assembly rejected another such petition in July 1731, when Samuel Royall, a Dorchester merchant and brother of Antiguan planter Isaac Royall, was denied a refund on the impost paid for six slaves, again at a time when no official duty was in force.\textsuperscript{159}

Despite continuing debate over the desirability of slave importation, the legal status of African slaves living in Massachusetts was clear. Under local law, enslaved

\textsuperscript{156} MHJ, I:48, 52; V:137. For more examples of successful slave trade duty abatement petitions, see Ibid., I:48, 52; II:242, 301; V:164; VII:333, 369; VIII:26.

\textsuperscript{157} MHJ, II:67.

\textsuperscript{158} MHJ, VIII:99.

\textsuperscript{159} MHJ, X:206.
persons were clearly defined as personal property, as they had been since at least 1696. Following the practice adopted in the 1690s, all “Indian, negro and molatto servants” were classed alongside livestock and rated “proportionably as other personal estate” for the purposes of local tax assessment.\(^{160}\) Beginning in 1729, the language of annual tax assessments changed slightly, defining “Indian, negro and molatto servants or slaves” as personal property, and Massachusetts’ taxation apportionments continued to follow this formula into the 1750s, illustrating increasingly racialized distinctions between white and black laborers and flattening the distinction between African servants and slaves.\(^{161}\) Despite their servile status, all white servants were consistently defined as polls in Massachusetts. Operating in an imperial context where blackness and enslavement were increasingly linked, Bay Colony legislators began to associate even putatively free black colonists with the concept of property-in-man.

This taxation system, however, elided the critical distinction between slaves as articles of property and servants as laborers that earlier jurists like Samuel Sewall had been careful to parse. While annual tax assessments continued to define all non-white servants as personal property, periodic inquiries by the Assembly into the total taxable property in each town were far more precise in their attention to personal status. The Assembly’s 1718 inquiry, for example, tackled this ambiguity head on. All slaves in the Bay Colony, termed “servants for life,” would be assessed as personalty – male slaves over 14 years of age were rated at £15, females at £10, commensurate with contemporary market values – but all “Indian, negro and molatto male servants for a term of years”

\(^{160}\) MA A&R, II: 21, 56, 84, 106, 117, 147, 216, 256, 298, 357, 374, 394, 447, 476.

would be “rated as other polls, and not as personal estate.”

This fine legal distinction between slavery and servitude, however, seems to have been abandoned by the 1730s, bringing inquiries into ratable estates into line with local tax assessments. In 1735, for example, the Massachusetts Assembly included “all Indian, negro and molatto servants, as well for term of years as for life” alongside other ratable properties, including lands and farm implements. Fine distinctions in status that had been so important to earlier Bay Colonists were now subsumed under an increasingly racialized system of slavery.

The growing number of bound Africans in the colony, whether enslaved or putatively free, contributed to unrest and resistance by black Bay Colonists, likely exacerbated by this changing definition of black servants. When a number of suspicious fires broke out in Boston in 1723, the local black community was made the scapegoat, leading to the passage of a number of legal restrictions on enslaved and free black Bay colonists. In 1755 two slaves, Phillis and Mark, were executed for poisoning John Codman of Charlestown – Mark was drawn and quartered while Phillis was burned to death. These troubling instances of servile resistance led some Bay Colonists to push for closer regulation of the daily lives of enslaved and free black settlers. At their annual town meeting in March 1722, for example, the freeholders of Boston created a committee to draft a code of laws “for the Better Regulating Indians, Negroes & Melatooes.” The committee’s recommendations amounted to a near-total disavowal of black settlers’ subjecthood, an attempt to deprive enslaved and free African colonists of many basic

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162 Ibid., II: 106.
163 Ibid., II: 736. See also Ibid., III: 61, 98, 166, 233, 288, 354, 400, 425, 592, 633, 693.
164 Boston Recs, VIII: 173-175.
166 Boston Recs, VIII:170.
rights they had enjoyed throughout the 17th century. Though local curfew statutes were already in effect, the selectmen called for closer invigilation of bound settlers’ mobility, forbidding slaves and servants of color from leaving their masters’ property between sunset and sunrise, loitering on the training field after dark on militia training days, or “Idling or Lurking together” in groups larger than two persons. The punishment for infractions would be a “Sever Whipping at the Hou[se] of Correction.” Other proposed regulations sought to prevent violent resistance by the enslaved. Servants or slaves of color found in possession of “any manner of armes or weapons Clubb Stave Cane or knives” would receive a “Severe punishment.” Any African or Indian servant or slave who should happen to “assalt Strike Beat wound or mame any of his Majesties Subjects” would be “Severely Punished at the Discretion of the Court before whom Convict” and transported out of the colony.167

These proposed regulations were, in many ways, illustrative of changing views of African slaves and the tensions created by the evolution of slavery in the Bay Colony. In one sense, the Boston selectmen’s recommendations bore a striking resemblance to local police laws passed generations earlier in the plantation colonies. “Indian, Negro, or Molatto Servant[s] or Slave[s]” were rhetorically counterpoised against “his Majesties Subjects,” reinforcing cultural assumptions about people of color as perpetual outsiders, and leaving punishment to the “Discretion of the Court” mirrored the arbitrary police powers delegated to individual slave owners in Virginia and the West Indies. In other ways, however, these statutes continue to bear the imprint of earlier ideals of bracketed authority and the rule of law. Though the punishments handed down under these

167 Ibid., 174.
municipal regulations were unquestionably draconian, and diverged from the usual course of Massachusetts justice by granting broad discretionary power to the courts, they still preserved many of the basic legal forms associated with the rule of law. In the case of assaults by slaves or servants upon free white settlers, for example, punishment could only be meted out once the alleged assailant was “Convict” following an official inquiry into the incident in question, and the punishment itself would be enacted by a duly constituted court of law, not an individual master.\textsuperscript{168} While it is likely that many individual slave owners in Massachusetts took the discipline of their slaves or servants into their own hands in\textit{practice}, the letter of the\textit{law} continued to impinge on the absolute authority of masters by routing punishment through the courts, whose authority must always be bracketed by the rule of law.

It should not be surprising to see such punitive regulations placed on enslaved Bay Colonists, particularly in an era when local Massachusetts practice was coming increasingly into line with imperial norms of enslavement. Many of the Boston selectmen’s proposed regulations, however, focused on Massachusetts’ growing free black population, a largely unprecedented limitation of the rights of free subjects in the Bay Colony. Likely fearing alliances between slaves and free black settlers, much of the proposed legislation aimed at breaking ties of community and kinship that connected enslaved and free blacks. Free black colonists were forbidden to entertain or shelter any slaves or servants of color on their properties, making cohabitation difficult if a slave married a free black colonist. Perhaps the most shocking proposal, particularly given the Bay Colony’s cultural emphasis on stable household units, required that “every free

\textsuperscript{168} Ibid.
Indian Negro or Molatto...bind out, all their Children...to Some English master” from ages four to twenty-one. If free black parents refused to comply, the Overseers of the Poor were empowered to find suitable placements for children of color.\textsuperscript{169} Though Massachusetts magistrates were similarly empowered to bind out the children of indigent white households, targeting \textit{all} free settlers of color in this way, regardless of their ability to support their families, was an unprecedented intrusion into the family lives of free Bay Colonists.\textsuperscript{170}

Another set of proposed statutes, targeting the underground economy of the black community, imposed draconian penalties on free blacks for fencing goods or provisions stolen by slaves – “upon Conviction” in a court of law, any free settler of color found in possession of stolen goods would be banished from the colony, and if they returned “Sent to the House of Correction...there to Remain and abide during life & keept to hard Labour.” The economic possibilities for free settlers of color were further curtailed by a statute forbidding any “free Indian Negro or Molatto” to sell any “Strong drink Cakes or any other Provision” on public days. Each of these proposed regulations would also give unprecedented police powers to white settlers – “any two freeholders” were empowered to enter the homes of free black settlers to search for stolen goods, and to seize any provisions sold by black colonists in contravention of the law to be sold for the benefit of the poor. Free black households were also forbidden to “keep any manner of weapons fire armes, Powder or Ball,” a particularly punitive regulation at a time when the Bay

\textsuperscript{169} Ibid., 173-174.
\textsuperscript{170} On the forced separation of indigent white families, see Levy, \textit{Town Born}, 45-48, 237-244.
Colon, particularly its western frontier settlements, was under continual military threat from hostile natives and imperial rivals.\footnote{Boston Recs, VIII: 173-174.}

Perhaps the clearest illustration of the increasing racialization of Massachusetts law is the way in which the Boston selectmen’s proposed regulations elided distinctions between enslaved and free settlers of color. A proposed statute aimed at preventing thefts, for example, required that “any Indian, Negro or Molatto bond or free [who was] Convict[ed]” of theft be “Transported beyond Sea” in addition to making the usual restitution “as the Law Provides.” A similar elision is evident in a proscription that would prevent both enslaved and free settlers of color from working as porters in Boston without gaining the approval of the selectmen and posting a hefty bond of £50. Fear of rebellion by settlers of color clearly motivated one proposed regulation. In response to “Sundry fires...wickedly contrived and Designed by Some Evel Instruments” that had recently destroyed a number of homes and businesses in Boston, the selectmen recommended that all settlers of color, whether free or enslaved, be confined to their homes if a fire broke out “unless his or his masters House or Estate be on fire or in great hazzard thereof.” Any settlers of color found outside during a fire would be “Secured and Sent to the Comon Gaol” where they would be whipped for three days, apparently without trial.\footnote{Ibid., 174-175.} In their desire to protect their own properties and livelihoods, the Boston selectmen sought to limit the rights of even free black colonists, subjecting them to racialized local police laws that would, in many ways, reduce free settlers of color to the level of slaves. If the Boston selectmen had their way, free Bay Colonists of color would have been stripped of many of the properties of mid-18th century British subjecthood –
their persons, property, and families would be subject to the increasingly arbitrary police power of Massachusetts’ freemen and courts; their capacity to contribute to the imperial common wealth through productive labor would be limited; and their ability to defend themselves and their colony would be eliminated.

Despite the Boston selectmen’s recommendations, however, the Massachusetts Assembly ultimately refused to enact such punitive legislation. In June 1723, the Assembly appointed a committee of prominent politicians, jurists, and merchants – including Elisha Cooke, Jr., a leading figure in the “popular” faction of colonial politics and perennial thorn in the side of colonial governors, Jonathan Remington and John Menzies, justices of the Superior and Vice-Admiralty Courts, William Dudley, son of former governor Thomas Dudley, and John Quincy of Braintree – to draft a bill “for the better Regulating Indians, Negroes and Molattoes” based on the selectmen’s recommendations.173 The bill the committee proposed, An Act for the better Regulating Indians, Negroes, and Molattoes, and preventing many mishcievous Practices which [they] have of late in a most Audacious manner to the great Disturbance and grievous Damage of His Majesty’s Good Subjects, more especially in the Town of Boston addicted themselves unto, passed the Assembly on 21 June 1723 and was sent to the governor and Council for concurrence.174 For some reason, however, the Council returned the bill to the Assembly in August with a number of amendments, and when the revised bill came up for a vote on 27 August, the Assembly voted it down.175

173 MHJ, V:18.
174 Ibid., V:36, 43, 48.
175 Ibid., V: 114, 121, 138, 145.
Undeterred by this legislative failure, Elisha Cooke, Jr. proposed limiting the scope of these regulatory statutes to Boston only, and presented *An Act for reducing Indians, Negroes & Molattoes, residing in, and belonging to the Town of Boston, to good Order* to the Assembly on 4 December 1723. After two readings, the bill was returned to committee, and “sundry Amendments” were added to the proposed statute. Debate on the bill continued for nearly two weeks before the Assembly finally voted down the proposed measures on 17 December.\(^{176}\) Had either of Cooke’s bills succeeded, they would have amounted to nothing less than a comprehensive black code for colonial Massachusetts, or at least the town of Boston, mirroring many of the measures enacted in the plantation colonies generations earlier. Bay Colony legislators, however, despite their uneasiness with the “*mischeivous practices*” that slaves and free blacks seemed to be “addicted...unto,” refused to enact such punitive statutes.

Refusal to enact a comprehensive black code, however, did not mean that the Massachusetts Assembly had given up legislating the daily lives of enslaved and free colonists of color – indeed, the Bay Colony enacted a number of statutes to regulate the public behavior of enslaved and free black settlers. A 1745 law, for example, made it illegal to sell “strong drink” to slaves.\(^ {177}\) The 1746 *Act...to Prevent Profane Cursing and Swearing* attempted to stamp out the “horrible, impious and execrable [vice] of profane cursing...so highly displeasing to Almighty God” by sentencing any slave convicted of profane speech to pay a four to eight shilling fine or suffer a public whipping of between ten and twenty lashes.\(^ {178}\) A flurry of statutes passed in 1752 made it illegal for “negro

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\(^{176}\) Ibid., V: 258-259, 264, 274, 286, 292.

\(^{177}\) *MA A&R*, III:257. The same clause was included in excise laws passed in 1748 and 1751-1754. See *Ibid.*, III:414, 571, 613, 676, 785.

\(^{178}\) *MA A&R*, III:319.
servants” to extinguish or “wilfully break, remove or damnify” streetlamps, on pain of ten to twenty lashes; to congregate in groups larger than three or participate in any “public shew” in the streets of Boston, on pain of ten lashes; or to light bonfires in public spaces, again on pain of ten lashes.\textsuperscript{179} With the bonds of kinship already strained and opportunities for communal celebration limited by regulations on their use of public space, life for Bay Colonists of color must have been particularly lonely and isolated. It would have been far more onerous, however, had Elisha Cooke’s 1723 recommendations become law.

Though the Assembly refused to enact far-reaching punitive regulations on black life, individual municipalities did begin policing their free and enslaved black populations more closely in the mid-18\textsuperscript{th} century. Even the most punitive of these municipal laws, however, paled in comparison to the draconian slave police laws of the plantation colonies. A 1723 resolution by the Boston selectmen, attempting to prevent “great numbers of Indians Negros & Molattoes” from gathering for funerals, forbid the burial of any settler of color in the municipal burial grounds after sunset or on the Sabbath except in “Extraordinary cases.”\textsuperscript{180} Enforcement of earlier curfew laws was ramped up in 1736, when the Boston selectmen required two watchmen to patrol the streets after ten in the evening at least three times a week to “take up all Negro and Molatto Servants” who were “unseasonably Absent” from their masters’ homes, and appointed additional watchmen to

\textsuperscript{179} Ibid., III:646, 648.
\textsuperscript{180} Boston Recs, VIII: 176-177; Ibid., XIII: 114. A 1741 Boston municipal law setting fees for grave diggers also recognized a racialized distinction in burials – laborers were paid nine shillings to dig graves for “a white Person, man or woman,” but were paid only six shillings for the graves of black adults, and five shillings for those of black children under twelve. See Boston Recs, XV: 287. Burial fees were altered again in 1745 and 1748, but also paid lower rates for the burial of black settlers. See Boston Recs, XVII: 120, 207.
prevent “Profanation of the LORD’S Day, by loose vain Persons, Negro’s, &c.” The mobility of black settlers was further limited by local magistrates’ vigilance in “warning out” strangers who lacked immediate ties to the community. In October 1716, for example, Peter Negro, a servant in the household of John Grafton of Salem, was ordered to leave Boston and return to Salem once his treatment by a local surgeon was complete. Again in November 1718, “Katherine & Mary two Negro women” who had arrived in Boston from Haverhill some months earlier were warned out of town. Ever mindful of the strangers in their midst, the Boston selectmen were quick to expel unwanted settlers from their community.

This exclusionary tendency, however, was not limited to settlers of color – Bay Colony magistrates closely regulated the admission of all new settlers to their towns. In the same month that black settlers Katherine and Mary were warned out of Boston in 1719, for example, two full shiploads of British immigrants were ordered to leave town as well. Indeed, many of the local regulations enacted by Boston magistrates to police the local black population were compatible with the broader corpus of police law in the Bay Colony. Though settlers of color must have chafed under local curfew laws, it appears that they were not always enforced, particularly when it came to free black householders. On 10 June 1740, for instance, John Woodby, a “free Negro Man” of Boston, was “taken up...Bound and Imprisoned” by John Rice, one of the town’s night watchmen, as he was returning home after a long day’s labor. Just over a week later,

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181 Boston Recs, XII: 139; Ibid., XV: 2.
182 Boston Recs, XIII: 11, 64. For other instances of black settlers being warned out of Boston, see Ibid., XIII: 5, 37, 68, 72, 86, 101. Warnings out of black settlers appear to have waned substantially after 1721, perhaps a function of the increasingly stringent colonial regulations on black mobility, or the growing demand for labor on the waterfront.
183 Levy, Town Born, 35-45 and passim.
184 Boston Recs, XIII: 63-64.
Woodby, who had regained his liberty after paying thirteen shillings in fines, appeared before the selectmen to lodge an official complaint against his jailor. The problem, according to Woodby, was that Rice had imprisoned him “without any legal process.” Woodby rightly pointed out that, unless he was convicted in a court of record, his imprisonment was “against Law and Justice.” The selectmen agreed – when Rice appeared to answer Woodby’s accusation, he was officially reprimanded and warned “to Act prudently in all such matters” in the future. Though local magistrates certainly attempted to invigilate their daily lives and limit their mobility, the access of black settlers like John Woodby to the usual course of justice in the Bay Colony made absolute control difficult to attain.

Boston’s freemen also sought to circumscribe the economic activity of local slaves and free blacks but, yet again, they were only partly successful. Citing the “Inhanced...Price of provisions,” a proposed 1728 bylaw would have banned black servants or slaves from buying or selling produce in the market, though it would still have allowed black settlers to participate in the local economy by directing “any Country People to his or Her master...or other white Servant,” who could legally conduct the transaction as a proxy. Like so many other attempts to limit black life in the Bay Colony, this proposed regulation never passed into law, though the 1746 Boston town meeting did proscribe the ownership of hogs by settlers of color, arguing that separate property ownership by the enslaved led to “very great Wast” and “Loss of time” to slave

185 Boston Recs, XV: 244-245. As we shall see, John Woodby appears to have been a relatively prominent figure in Boston’s black community, which may have influenced the selectmen’s handling of his case – as a particularly trusted black Bostonian, the magistrates likely took Woodby’s complaints more seriously, and were more solicitous of his rights, than those of the broader black population.

186 Boston Recs, VIII: 223, 225.
owners. These proposed limitations on the economic activities of black Bostonians, however, ran up against the increasingly important role of black labor in the local economy and, for Bay Colonists as for Britons back home, economic productivity was a crucial element of social inclusion.

Admittedly, the occupations typically plied by black settlers were among the least desirable in the community. Mingo Walker and Great John, free black Bostonians, worked as chimneysweeps alongside enslaved laborers Toby and Jack in 1720.

Starting in 1716, the Boston selectmen put free black settlers to work maintaining and repairing roads, usually for between three and six days a year, as “an Equivalent” to the watch duty or militia training required of white settlers. Though their contributions were certainly segregated, free black Bostonians, like all settlers, were expected to labor “for ye comon benefit of this Town.”

One of the clearest illustrations of the value of black

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188 *Boston Recs*, XIII: 62, 76.
189 For listings of free black Bostonians required to labor repairing highways in 1716, 1718, 1719, 1721, and 1725, see *Boston Recs*, XIII: 8, 42-43, 59-60, 82-83, 145. These listings provide an interesting glimpse into the free black community of colonial Boston. At least 47 individual free black men were assigned to highway maintenance between 1716 and 1725. Among them were the chimneysweeps Mingo Walker and Great John, both of whom appear on all five lists in the *Boston Recs*. In fact, nearly all of the 47 individuals listed appeared on multiple work rosters, suggesting that the Boston’s active and assertive free black community had already put down stable roots. These lists of free black residents are also notable for the changes they exhibit in naming conventions. In the 1716 list, all but five of the 22 individuals are identified by first name and surname, and most had adopted conventional English surnames, like Mingo Quinsey and Exeter Foxcroft. By 1725, this convention had been inverted – only 5 of the 26 individuals have a recorded surname, and many men who had earlier been identified by first and last name were now listed only by their first names, and often in the diminutive. Exeter Foxcroft became Exeter Negro; Mingo Quinsey was now just Mingo. The 1725 list also includes many more traditional slave names – Sambo, Cezar, Sampson, Coffee, Fortune, and Onesimus appear for the first time. Though admittedly impressionistic, this evidence suggests that two overlapping and at times contradictory developments were taking place. Boston slave owners were regularly manumitting their slaves, apparently with increasing frequency in the mid-1720s – at least twelve previously unlisted individuals appear on the 1725 work list, and most of them bear traditional slave names, suggesting they were recently imported slaves, not the descendants of earlier free black Bostonians. On the other hand, the 1725 work assignment also explicitly degrades many of the free black men listed by removing their surnames, using diminutives or traditional slave names, listing the surname of a white household or former owner, or some combination of the above.
labor to the common good came when waves of smallpox intermittently plagued Boston between 1739 and 1741. As Onesimus, Cotton Mather’s black servant, had been a generation earlier, free black settlers were on the front lines fighting the disease. Betty Woodby, the wife of laborer John Woodby discussed above, was employed by the Boston selectmen as a nurse in a makeshift hospital on the west end of town for wages of fifteen shillings a week. As the epidemic stretched on into the early months of 1741, the selectmen also hired John Woodby to stand watch outside the hospital and prevent infected patients from leaving and spreading the disease further – he was paid thirty shillings a week, and Betty’s wages were also raised to thirty shillings weekly. Though the work was dangerous, it provided an economic windfall for the Woodby family – Betty’s stint as a nurse in the winter of 1739-1740 alone earned her £4.10, a tidy sum for six weeks of work.\footnote{\textit{Boston Recs}, XV: 216, 219, 250, 278-279. John Woodby was again employed as a guard at the smallpox hospital in the winter of 1744, when he was paid an even higher wage of eight shillings per day. See \textit{Boston Recs}, XVII: 96. A recently arrived “Negro man...[who] came from Tertudos,” likely a slave, was identified as patient zero in a 1721 smallpox scare – this slave seems to have infected a slave belonging to Captain Wentworth Paxton of Boston, leading to a lengthy quarantine and fear that the disease was spreading. See \textit{Boston Recs}, XIII: 81. Again in 1736, the arrival of the \textit{Joseph} from Newcastle sparked a panic when “A negro Boy [on board] broke out with the Small Pox,” spreading the disease to two white servants – the ship was quarantined on Spectacle Island in Boston harbor to prevent an outbreak in the city. See \textit{Boston Recs}, XIII: 308-309.} To be sure, the vast majority of black Bay Colonists, free and enslaved, toiled in some of the least desirable jobs in the colony – in the ropewalks and on the docks of Boston; as servants in the homes of well-to-do merchants; as sailors on the Bay Colony’s ships – but, in a cultural climate that put a high value on productive labor for the good of the community, the contributions of settlers of color to the common wealth were a marker of their inclusion in Massachusetts society.\footnote{\textit{For work patterns among free and enslaved black Bay Colonists, see Greene, \textit{Negro in Colonial New England}, 100-113.}}
Free and enslaved black settlers were also welcomed into the Bay Colony’s churches – indeed, colonial law required that all masters provide religious instruction for their servants and slaves, and all heads of household were enjoined to bring dependent household members to church. As members of Massachusetts churches, free and enslaved black settlers had access to the sacrament of marriage, and their marriages were protected by local law and custom. Between 1715 and 1751, Boston ministers and magistrates performed at least 109 weddings involving black settlers – an additional 51 black couples had their marriage banns published, but records of their weddings have not survived. Many of these marriages involved prominent white Bay Colonists, either as officiants or as masters to the bride or groom. Cotton Mather, for example, conducted at least six black weddings between 1715 and his death in 1728. Samuel Sewall, chief justice of the Massachusetts Superior Court and avowed critic of slavery, married at least five black couples by the power vested in him as a Justice of the Peace – black Bay Colonists had access to civil marriages as well as church ceremonies – and his son, Rev. Joseph Sewall, was one of the most prolific officiants at black weddings, conducting at least twenty-two ceremonies between 1716 and 1751. Among the Bostonians listed as masters of the “Negro servants” being married were such notables as Peter Faneuil, Josiah Quincy, Thomas Hutchinson, and Thomas Cushing. Unlike their cousins in the plantation colonies, Bay Colony elites saw legal unions between black settlers as crucial to the social stability of their commonwealth and actively promoted slave marriage.

192 A 1705 statute that forbid interracial marriage had explicitly recognized the right of all colonists, regardless of race, to marry. See Chapter 4, supra; Greene, Negro in Colonial New England, 192-208.
193 For black marriages in Boston, see Boston Recs, XXVIII: passim.
What is more, the legal recognition of black marriages seems to have had the intended effect – black settlers who married put down roots in Boston and become fixtures in the local community. Anthony Negro, a free black Bostonian, married Priscilla Negro on 23 May 1717, and remained on the list of free blacks required to maintain the town highways well into the 1720s. Robert Cumings married Margaret Negro the following year – in 1725 he was still on the list of free black Bostonians laboring for the town. And Ned Hubbard, who had been on the Boston free black lists since 1716, finally married Martha, a free black woman from Lynn, on 21 September 1727. When Andrew Mingoson and Naomi Sutton, both free people of color, married on 9 January 1746, they marked the rise of a second generation of free black Bay Colonists, coming of age as free settlers in a colony that, by and large, recognized them as fellow subjects.\footnote{Ibid., \textit{passim}. Nearly twenty percent of the recorded marriages or banns publications in the Boston marriage records involved two free people of color. Though it is difficult to say for certain, Andrew Mingoson was likely the son of either Mingo Walker, the Boston chimneysweep, Mingo Quincy, who appeared on multiple free black highway labor lists before 1725, or the Mingo listed at “Keats’ House” on the 1725 work list. Three other Mings – Mingo Caesar, Mingo Negro, and Tom Mingo – are also listed as having married before 1721, and it is possible that any one of these could have been Andrew Mingoson’s father. Of all these possible fathers, only Mingo Caesar was enslaved. As Sarah Gronningsater has pointed out about a later period, the “children of gradual emancipation” – in this case, freeborn black children in a society that still condoned slavery – were crucial figures in shaping antislavery agitation. Sarah L. H. Gronningsater, \textit{Delivering Freedom: Gradual Emancipation, Black Legal Culture, and the Origins of Sectional Crisis in New York, 1759-1870} (Ph.D. diss.: University of Chicago, 2014). As we shall see, second-generation free black Bostonians like Andrew Mingoson likely played such a role in late colonial Massachusetts as well.} These free black settlers were clearly not the wandering strangers Massachusetts magistrates feared – they were the basis of a god-fearing, stable, economically productive black community.

Even for many enslaved Bostonians, a recognized marriage must have provided a degree of solace and comfort in their bondage, particularly when circumstances allowed them to live together. When “Negros Tom & Jenny” married in June 1734, for example,
their masters, Rev. Peter Thatcher and Rev. Joshua Gee, appear to have facilitated the couple’s cohabitation – both Tom and Jenny are listed as Gee’s servants in the marriage records. Sam and Kate, as “Negro Servants” to the same master, Captain Nicholas Davis, likely cohabitated as well. While the sanctity of these enslaved marriages could never be entirely sure – Bay Colony slaves, defined as articles of personal property, were liable to sale, and even the legal recognition of slave marriages could not prevent the separation of enslaved families – in situations like those of Tom, Jenny, Sam, Kate, and the dozens of other Boston slaves who built families in bondage, a recognized marriage provided a modicum of stability and companionship in an uncertain and often hostile world.

Of course most married black Bay Colonists faced serious challenges to their unions. Nearly seventy percent of all black couples in the Boston marriage records, for instance, probably lived most of their married lives in separate households. Of the eighty-five married couples whose personal status was specified in the marriage lists between 1715 and 1751, forty-nine served different masters at the time of their weddings. When Dick and Clarinda married in 1745, then, they had little opportunity to see one another – Dick was a servant to Peter Cade of Charlestown, while Clarinda served in Col. Benjamin Pollard’s household in Boston. Ownership by different owners could also be a substantial obstacle to marriage. When Toney and Ginney published their banns in January 1717, for example, the fact that they served in separate households intervened and prevented their union – Mary Thomas, Ginney’s mistress, forbid the marriage, likely because she feared losing Ginney’s valuable service in her own household. Another

195 Gee also performed Tom and Jenny’s wedding, as he did for numerous of his black servants. Of all the couples who were either married or published their banns in the Boston marriage records, only 13, or 9.8% of those whose status was listed, were servants to the same master. See Boston Recs, XXVIII: 188, 204, and passim.
fifteen marriages involved one partner who was free and another who was a servant, meaning that the couple was likely separated much of the time. There is much, of course, that we simply cannot know about these marriages – how many were arranged by owners, for example, or the fate of children born to couples serving in separate households – and black families in the Bay Colony certainly faced many challenges their white counterparts never experienced. What is striking however, particularly in light of restrictions on the black family imposed in the plantation colonies, is how often black Bay Colonists, enslaved and free, took advantage of open access to marriage to formalize their unions.

Local churches and magistrates closely monitored these free and enslaved black couples, as they did all married Bay Colonists, to ensure their compliance with the rigid strictures of Puritan morality. [fornication/adultery cases from Bailey?] If these minor sexual indiscretions shocked white Bay Colonists, they must surely have been appalled when Joseph, a free black Bostonian, murdered his wife Nanny in the autumn of 1720. Shocked by the “barbarous manner” of the crime, and fearing the expense of keeping Joseph in jail until the next scheduled court session the following May, the governor and Council recommended a “speedy Tryal” and asked the Assembly to empanel grand and petit juries to try the case immediately. However horrified the Assembly may have been

196 There is an interesting gender imbalance in these free/servant marriages – servant men marrying free women account for nearly 10% of the total black marriages, while free men marrying servant women made up fewer than 5%.

197 Even the incomplete lists in the Boston Recs illustrate how often black colonists formalized their marriages. The 160 marriages listed in the Boston Records mean that at least 320 black Bostonians were officially married between 1715 and 1751 in a period when Boston’s black population was certainly below 1000 individuals.

198 Joseph and Nanny had lived in Boston since at least 1716 – one “Jo. Bl. nannes husbd” is listed on all the Boston free black work lists from 1716 to 1720. See Boston Recs, XIII: 8. At a time when many free black couples were establishing independent households in town, Nanny’s murder must have been a shock to Boston’s black community as well.
at the heinous nature of Joseph’s crime, they would not alter the regular course of justice – the Council’s request for an immediate trial was denied, and Joseph’s trial proceeded according to usual legal procedures.\footnote{MHJ, II: 286-287. It is also possible that the Assembly simply balked at the expense of recalling jurors – the Council’s request specified that Suffolk County and the town of Boston would pay all costs. The final disposition of Joseph’s case is unknown pending further research. It is likely that he was convicted and either executed or transported from the colony as, he disappears from the Boston free black work lists after 1720 and death or banishment were the typical sentences for murder in colonial Massachusetts.}

As the disposition of Joseph’s trial indicates, when black Bay Colonists entered courts of law, they received substantially the same treatment as any other settler. Local law certainly impinged on free and enslaved black life in unprecedented ways in the mid-18th century, but when charged with or the victims of a crime, black settlers were tried according to the normal course of colonial justice. Though the Boston selectmen recommended limiting the applicability of testimony by colonists of color in their proposed 1723 black codes, this legal disability failed to pass into law. The wording of the proposed statute is telling, however. The selectmen recommended that “Indian Negro and Molatto Evidence only with Concurring Circumstances Shal be proof Sufficient to Convict Indian Negro or Molattos.”\footnote{Boston Recs, VIII: 175.} Here the selectmen seem to imply that, though testimony from settlers of color might be sufficient to convict other Indian, black, or mixed-race colonists, it would not be applicable in trials of whites. This assertion, however, flies in the face of the usual practice in most Massachusetts courts. As we have seen, black Bay Colonists consistently had a great deal of access to Puritan justice. Even the punitive restrictions proposed by the Boston selectmen in 1723 required that offenders be tried and convicted “as by Law...provided.”\footnote{Boston Recs, VIII: 174.} Of course, for any crimes that did not have separate specified punishments for colonists of color – the vast majority...
of major and petty crimes under Massachusetts law – black settlers would be tried, convicted, and punished under the same body of law as any white colonist, just as Joseph was when he killed Nanny in 1720.

Black Bay Colonists, at least those who were free, also maintained the right to appeal convictions to higher courts. Joseph Woodel, a free black farmer from Tiverton, Bristol County, initiated an appeal in a civil suit filed by Samuel Snell, likely a trespass dispute over land boundaries. Woodel petitioned the Massachusetts Assembly for a new trial in the Superior Court in December 1740, revived his appeal again in August 1741, and finally, in June 1742, received an answer from the Assembly and Council – his appeal was denied. We can only speculate at the reasoning behind this denial. Perhaps the magistrates were convinced by Snell’s response to Woodel’s petition. The Assembly was in the midst of debating new laws to regulate appeals in civil cases and prevent the “unnecessary Cost” of judicial reviews, so the politics of the moment may have played a role. Or maybe the decision was racially motivated, privileging the property claims of a free white settler over a colonist of color. Regardless of the final disposition of Woodel’s petitions, however, the fact that he was able to so aggressively pursue a judicial appeal is yet another potent illustration of the legal rights afforded to black settlers in the Bay Colony.

Massachusetts law also protected black settlers who were the victims of crimes. If a black colonist died under suspicious circumstances, local governments regularly

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202 Though Woodel’s petition is not included in the printed records, the Assembly’s response notes that the appeal was directed at “a Report of Referees” upon which the Bristol court had based its decision. These reports were typically filed in trespass cases to determine the exact boundaries of landed estates. Later colonial law did away with the kind of appeal Woodel made here by making the reports of referees final and beyond the scope of judicial appeals. See entry for ‘referee’ in Henry Campbell Black, Black’s Law Dictionary, 10th Edition, Bryan A. Garner, ed. (St. Paul, MN: Thomson West, 2014).

performed inquests into the circumstances of their deaths.\textsuperscript{204} Even the lives of slaves were protected under Bay Colony law. In the summer of 1719, for example, Samuel Smith of Sandwich was arrested and “imprisoned for the Murther of his Negro Servant.” When Smith petitioned the Assembly for a special Court of Oyer and Terminer to hear his case because the county court would not meet again for nearly a year, the Assemblymen refused his request – Smith had to languish in jail until the following spring before his case was heard. Though the final disposition of Smith’s case is unknown, the fact that he was held to account for the death of his own slave is potent evidence of the protections afforded to black settlers by Massachusetts law – such a situation was all but unimaginable in Virginia and the other plantation colonies.\textsuperscript{205}

As it had in the 17\textsuperscript{th} century, Massachusetts law also followed settlers onto the high seas, and its protection of black lives with it. Samuel Rhodes, captain of the slave ship \textit{Africa}, for example, ran afoul of the law after a disastrous voyage in 1734-36. En route to the Senegambia from the Cape Verde islands, the \textit{Africa}’s cargo of rum sprung a leak, a loss of over 3500 gallons and £4500 to Boston merchant and ship-owner Samuel Waldo, and things only got worse from there. Rhodes traded the remainder of his cargo for some beeswax, ivory, and about two hundred slaves along the Gambia and the Gold Coast, but soon the flux broke out among the \textit{Africa}’s human cargo, killing many of the slaves and weakening the rest. When the slaver finally arrived at the Dutch island of St. Eustatius in late 1735, Rhodes was forced to sell the remaining “ageing and meagre” slaves for a pittance. Incensed by the captain’s losses, Waldo eventually sued Rhodes to

\textsuperscript{204} On inquests in the deaths of free and enslaved black Bay Colonists, see Bailey, \textit{Race and Redemption}, 112-113.

\textsuperscript{205} \textit{MHI}, II: 169.
recoup his lost investment in a case that dragged on in the Vice-Admiralty courts for years.206

Waldo’s lawsuit was the least of Capt. Rhodes’ problems in the summer of 1737, however. On June 7th, the Special Court of Admiralty filed “certain Articles of Felony and Murder” against the slaving captain. The slaving captain stood charged with “killing and murdering a Negro Man called Frederick’s Slave, on the 2d. of January 1735, upon the high Seas, and within the Jurisdiction of the Admiralty of Great Britain.” Perhaps Rhodes had lashed out in frustration at his economic losses, or perhaps, as so often happened on slaving vessels, Frederick’s slave resisted the captain’s authority and, weakened by the diseases that ravaged the ship, died during punishment. Whatever the circumstance, Rhodes was now called to account by a Massachusetts court for a criminal act committed halfway around the world. In his defense, Rhodes simply argued that the destruction of an article of property on the banks of the Gambia was “not in the Jurisdiction of the Court.” The justices of the Admiralty attested to the “great and uncommon Difficulties” of the case, and asked the Assembly for advice.207 Though the Assembly’s response is not recorded, the case of Frederick’s Slave illustrates that, unlike in the plantation colonies, the lives of enslaved Bay Colonists, even those far from New England, were protected under local law.

Perhaps the most potent evidence of Massachusetts’ continued bias in favor of the legal humanity of black settlers was the prevalence of individual and state manumissions.


207 MHI, XV: 44-45.
Though a 1692 statute had laid down strict requirements for manumission, the practice continued unabated well into the 18th century, and Bay Colony magistrates often relaxed manumission requirements to ease enslaved settlers’ transition to freedom. The substantial bond required to indemnify towns in case a manumitted slave ended up on poor relief, for example, was often dispensed with when the enslaved person in question could provide for themselves. In November 1716, for instance, William Brown, son of a free black man and an enslaved woman, who had been “sold as a Slave” to Andrew Boardman, petitioned the Assembly to allow his manumission without bond since he was “a young and able bodied Man, & it cannot be suppos’d that he is manumitted by his Master to avoid Charge in supporting him.” The Assembly gave their assent to the petition, decreeing that Brown would be “deem’d free when sett at Liberty by his Master, altho no Security be given to Indemnify the Town.”

Again in December 1719, Scipio, servant of the late Rev. William Brattle of Cambridge, petitioned the legislature, “Praying the favour of this Court as to his Manumission” – the Assembly obliged, indemnifying Brattle’s estate from any charges that might arise from the manumission and declaring Scipio free.

When enslaved Bay Colonists demonstrated that they could support themselves without the assistance of local poor relief, colonial magistrates were more than happy to facilitate their transition to freedom, another stark difference from the practice of slavery in the plantation colonies.

Not all manumissions sailed so easily through the Massachusetts courts, however, and protests by white heirs could tie up manumission cases for years. In December 1735, James, a “Negro Man...formerly a Servant for life” to Samuel Burnell of Boston,

208 MA A&R, IX: 492.
209 MHJ, II: 224.
petitioned the Assembly, requesting that they ensure his freedom in accordance with Burnell’s will. Though he had served his master “faithfully near forty years,” and it was Burnell’s “constant intention” to free James at his death, the unfortunate slave was “unhappily considered as part of the Intestate’s Estate, and the property of [his master’s] Widow and Children.” When James asked that “upon his producing lawful Security he may enjoy that freedom which he is now so unfortunately deprived of,” the petition sparked a two-year legal battle pitting the Bay Colony’s bias *in favorem liberatatis* against the property rights of Burnell’s heirs.210

At first glance, James’ petition appears to have had a shaky foundation. Though he claimed to have been promised his freedom upon his master’s death, none of Burnell’s four wills were ever proved, and no physical copy could be produced – Samuel Burnell, Jr., who stood to inherit James as part of his father’s estate, “by some ill Acts, conveyed away and probably destroyed” the documents in order to maintain ownership of his slave property. Even without a physical will, however, the Assembly sided with James and declared that freedom, once promised, could not be revoked. Though the Assembly ordered James to return to the Burnell household and “serve the Widow...faithfully, during her life,” they also required Samuel Burnell Jr. to “give bond not to molest or disquiet the petitioner during that term.” Should Burnell refuse to post bond, the full power of the colonial state would protect James through a “Writ of Protection to secure and defend him from all Warrants, Claims, Writs, Actions, or Demands whatsoever...as any part of the [Burnell] Estate.” Upon the widow Burnell’s death, James would be afforded “reasonable time to make application for his freedom, which he insists on as his

right.” When the widow Burnell passed away in the autumn of 1737, the Assembly declared that James was “fully and absolutely Manumitted and set free from his Servitude, and...discharged from all Claims and Demands whatsoever...as a Servant, or as Part of...Burnell’s Estate.” By fighting so tenaciously to secure and protect his manumission, in spite of Samuel Burnell Jr.’s property claims, James made himself a free man.

The individual agency and desire for freedom exhibited by enslaved Bay Colonists like James was not, however, enough to challenge the imperial system of slavery on its own. What made the actions of colonists of color like James, Joseph Woodel, and John and Betty Woodby so significant was the context in which they occurred. Whereas Virginia and the other plantation colonies, not to mention the metropolitan courts, consistently denied Afro-Britons access to the basic rights of subjecthood, in Massachusetts these rights were regularly upheld and reaffirmed. It is hard to imagine a Virginian or Jamaican slaveholder recognizing the legality of enslaved marriages, being charged with the murder of a slave as Samuel Rhodes was, or allowing a state manumission when no physical evidence could be produced. To be sure, Massachusetts slavery was changing rapidly, bringing the Bay Colony more closely in line with imperial practice over the course of the mid-18th century. Enslaved and free black Bay Colonists must surely have chafed at the increasing restrictions on their lives, but their resistance to bondage, their stable families and productive economic lives, and most importantly their access to the basic rights of English imperial subjects, made slavery intensely problematic in late colonial Massachusetts. It would not be long before

211 MHI, XV: 172, 174-175; MA A&R, XII: 413-414.
similar issues arose throughout the British Empire, shaking the foundation of imperial slavery and setting the stage for the first wave of mass emancipations in Anglo-American history.
Our story ends, as it began, with an assault. In the evening gloom of 26 November 1771, James Somerset was accosted by slave catchers in the darkening alleyways of St. Giles parish in London. The street toughs employed by Charles Stuart, Somerset’s quondam owner, beat and bound the erstwhile slave and dragged him aboard the Anne and Mary, a merchant ship sitting quayside in the Thames and scheduled to sail for Jamaica, where Stuart hoped to sell his troublesome property. Somerset, however, had friends and allies in London who refused to see him treated with such inhumanity. Granville Sharp, a stalwart ally to Britain’s growing black community, procured a writ of habeas corpus for James Somerset’s release, setting the stage for the most important court case in the history of Anglo-American slavery. Just as Cartwright’s Case had way back in 1569, James Somerset’s legal battle for freedom pitted the physical dominion and vested property rights of a slaveholder against the legal personhood and basic rights of an enslaved person. And as it had over two centuries earlier, the free air of England once again trumped the claims of a slaveholder to property-in-man. In a watershed moment in the history of Anglophone antislavery thought, Lord Mansfield, Chief Justice of the Court of King’s Bench, declared that claiming a person as property was “odious” to English law and, therefore, “the black must go free.” With that simple statement, a centuries-long

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debate over the legitimacy of slavery came to a close – at least in England itself, Britons never again would be slaves.2

The imperial crisis that destroyed the first British Empire and birthed the new United States was a deeply transformative moment that opened up political and legal space from which to challenge human slavery. Drawing on English republican ideals that had historically been hostile to property-in-man, American Patriots founded a new nation devoted to the basic precept of fundamental human equality and the rule of law. To many British policymakers, shaken by the rebellion of their North American colonists, the imperial crisis required a thoroughgoing rethinking of the basis of empire and the rights of all subjects both at home and overseas. Both sides in this conflict drew heavily on the rhetoric of freeborn English rights and liberties and, increasingly, the inalienable natural rights of all humanity. Without question, this dramatically transformed political and intellectual climate played a crucial role in shaping Anglo-American ideals of slavery and freedom, preparing the ground upon which James Somerset and thousands of other enslaved Afro-Britons could stake their claims to legal personhood and the protection of the law. Revolutionary transformations bred revolutionary antislavery. Mansfield’s decision in Somerset and the context from which it sprung inaugurated a new phase in the struggle to destroy human bondage.3

As the long line from Cartwright to Somerset illustrates, however, the imperial crisis also represents the culmination of a much longer debate over the legitimacy of
property-in-man. Reinvigorated in a new political, legal, and cultural climate, long-held English antislavery tendencies burst into active life in an Anglo-American world transformed by revolution. The principle of fundamental human equality that had always been at the heart of Anglophone antislavery was now enshrined in the founding document of a new nation committed to the “self-evident” truth that “all men are created equal, and are endowed by their Creator with certain unalienable rights, and that among these are life, liberty, and the pursuit of happiness.”

Acting on this foundational belief, Britons and newly independent Americans started to turn on the institution of human slavery. Combining the moral, political, and economic critiques of property-in-man produced by their forebears over the previous two centuries, Anglo-American abolitionists crafted a coherent and powerful argument against human slavery and, slowly but surely, transformed argument into action. By the time the War for Independence came to a close in 1783, thousands – perhaps tens of thousands – of enslaved people throughout the British Empire had been freed through a combination of their own assertive claims to liberty, the receptivity of common law courts to their claims, and the exigencies of war. In several of the new United States, and in England itself, the cornerstone of the institution of slavery – property-in-man – was destroyed completely. The first phase in the long Anglophone debate over slavery, then, reached its culmination in the transformative context of Anglo-American revolution.

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All revolutions are in a sense, however, unfinished – the lofty ideals of revolutionaries are rarely implemented to perfection. The American Revolution and the broader British imperial transformation it wrought are no exceptions to this rule.Indeed, to many American Patriots, securing the private property of individual citizens was the very foundation of their revolution. How could such a revolution legitimately destroy a species of property that accounted for more American wealth than any other besides the land itself? When Virginian Patrick Henry called for American liberty, even at the cost of his own life, he did not have enslaved persons in mind. Thomas Jefferson drafted the charter of American liberty by the light of candles lit by a slave, with a quill sharpened by a slave, in ink prepared by a slave, on paper procured by a slave, and though he proposed gradual abolition a number of times he did not emancipate his own slaves, even his own enslaved children. The wealth George Washington and Edmund Randolph fought to protect had been amassed by the exploitation of thousands of enslaved people. Whatever philosophical discomfort American slaveholders may have had with human bondage – Henry described slavery as “totally repugnant to the first impressions of right and wrong” while Jefferson worried that “the rights of human nature [are] deeply wounded by this infamous practice” – most could not envision a way to end it. Devoted to the natural right to property, the American Revolution also laid the foundation of the largest and wealthiest slave society in human history.

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7 See Douglas Egerton, Death or Liberty: African Americans and Revolutionary America (New York: Oxford University Press, 2008), 41-43.
However fundamentally the imperial crisis transformed Anglo-American slavery, then, the problem of property-in-man remained. The long conflict between slavery and legal personhood was not yet over. The American Revolution had, however, altered the institutional structures and ideological frameworks in which this conflict would play out in the future – it reframed the terms of debate. Despite the loss of the thirteen mainland colonies, the British Empire remained a powerful force and, with its administration effectively centralized in ways Cromwell or Charles II could only have dreamed of, it now stood poised to use its moral capital to swell the bounds of its dominions in the name of universal liberty. For Americans, as we shall see, their new independent nation, an intentional experiment in decentralized power, channeled the English antislavery impulse in strikingly different directions – some new states moved to regulate or abolish slavery while others dove headlong into its expansion. All of these outcomes were a function of the ways Britons and Americans re-forged older moral, political, and economic arguments for and against property-in-man.

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The imperial crisis was, in its origins, a dispute between two conflicting systems of political economy that were deeply linked to questions of property rights, civil liberty, and human slavery.\(^9\) Conservative Whig and Tory policymakers Grenville and North favored a strict mercantilist political economy that limited colonial economies to specific

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roles designated by metropolitan planners and relied on large-scale production of plantation commodities, and thus required continued access to the trans-Atlantic slave trade and support for colonial slavery. Strict mercantilist policy had the added benefit of tying the plantation colonies more firmly to the empire even as the mainland broke out in open rebellion. One absentee planter noted that Jamaica was “weak and feeble...from its very small number of white inhabitants and its peculiar situation” – with its “incumbrance of more than 200,000 slaves, it cannot be supposed that we now intend, or ever could have intended resistance to Great Britain.” Reliance on access to the slave trade and military protection against slave rebellion tied the plantation colonies tightly to the metropole. Tory political and economic policy suited most West Indian planters perfectly.

To some colonists and a significant number of Britons at home, however, strictly enforced mercantilism both impoverished the empire and violated the basic rights of subjects. The antislavery implications of this political and economic framework come through clearly in the work of Adam Smith. Drawing on long-held Whig assumptions about the fundamental equality of rational mankind and the limited nature of authority, Smith constructed a political economy which was, like that of his Patriot forebears, fundamentally hostile to the concept of property-in-man, and often explicitly so. To Smith, slavery was an anachronism that retarded economic development. In *Wealth of Nations*, for example, following a meditation on how large landed estates limit economic

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10 On the politics of British policy during the imperial crisis, see Andrew Jackson O’Shaughnessy, *The Men Who Lost America: British Leadership, the American Revolution, and the Fate of the Empire* (New Haven, CT: Yale University Press, 2013).
growth, Smith leveled a direct indictment against the plantation complex, arguing that “if great improvements are seldom to be expected from great proprietors, they are least of all to be expected when they employ slaves for their workmen” because “work done by slaves, though it appears to cost only their maintenance, is in the end the dearest of any.” With no incentive to labor beyond what could be “squeezed out of him by violence,” a slave “who can acquire no property” would “eat as much, and...labour as little as possible.” “Freemen,” on the other hand, “have a plain interest that the whole produce be as great as possible, in order that their own proportion may be so.” Though the spectacular short-term profitability of sugar or tobacco might “afford the expence of slave-cultivation” in the colonies, the British Empire as a whole – polite, commercial, and free – required the labor of industrious freemen for its further development.12

To illustrate both the historical development of free labor and its economic superiority over slavery, Smith drew on one of the central elements of the long Anglophone debate over property-in-man – the conceptual separation of slavery and villeinage. At first glance, it appears that Smith conflated the two institutions, describing European serfdom as a “species of slavery.”13 Their enslavement, however, was “of a milder kind than that known among the ancient Greeks and Romans, or even in our West Indian colonies.” The crucial difference was that while feudal villeins or Eastern European serfs, like slaves, could not own their own separate property, they were not

12 Smith, Wealth of Nations, III:2.8-2.12. For an important re-evaluation of Smithian political economy, see Isvan Hont, Jealousy of Trade: International Competition and the Nation-State in Historical Perspective (Cambridge, MA: Harvard University Press, 2005), esp. 185-266, 354-446.

defined as property themselves as colonial slaves were. Villeins, legally tied to their master’s estate, could “be sold with it, but not separately” – every English colony, in contrast, allowed for the transfer of slaves as private property. Furthermore, villeins, despite their degraded status, retained the basic rights of subjecthood. They could marry, albeit only with their masters’ consent, and masters could not “dissolve the marriage by selling the man and wife to different persons.” Masters who “maimed or murdered” their villeins were “liable to some penalty” in courts of law. In Smith’s reading of English economic history, feudal villeinage never implied the kind of property right inherent to New World slavery, and even the most debased serf retained access to the basic protections of English common law.14

With no economic impetus to labor, however, Smith argued that serfdom was doomed. Emerging in tandem with the decline of villeinage, however, was another social basis for production – tenantry. Since tenants, “being freemen,” were capable of property ownership in the form of a lease, they would have an economic incentive to produce a greater surplus, benefitting both the landlord and tenant. Smith argued that this basic difference separated free labor from feudal serfdom (and imperial slavery) and paved the way for the gradual disappearance of human bondage. Tellingly, the rights of English subjects and the interest of the sovereign in the common wealth – central pillars of the long English antislavery argument – were crucial in this development. Desire for increased productivity and limitations on the power of the nobility led to “encroachments of the sovereign” on feudal lords’ dominions. Indeed, Smith argued, English kings “encouraged their villains” to make claims “upon their [the sovereign’s] authority” rather

than that of their lords. Together, the productivity of free labor, the assertive claims of
English men and women to the rights of subjecthood, and the receptivity of the sovereign
to these claims “rendered this species of servitude altogether inconvenient.” Villeins,
transformed into free cultivators and tenants, were freed to contribute their labor and
collection to dynamic English economic growth.

The lesson Smith took from this narrative was that slavery was economically
backward because “it diminishes the number of free men even to a degree beyond
imagination, for every slave takes up the room of a free man,” limiting the potential for
both production and consumption in the British Empire, just the argument Patriot Whigs
had made earlier in the century. While landed elites like colonial planters might appear
to spur consumption by spending “what would maintain a thousand men,” in reality “he
eats or wears no more than the rest.” Hoarding wealth limited the potential of more
subjects to become active consumers. The owners of such vast wealth might be “really
useful,” however, if through their consumption they employed free people in “refining”
this private wealth “by an infinity of ways so as to make it worth the whole.” As Smith
pointed out, this redeployment of wealth would “[give] room for all kinds of
manufactures” and stimulate economic growth. Slave economies, however, inhibited this
type of growth by edging out free labor. “Where slaves are employed,” Smith argued,
“one must be a tailor, another a weaver, a third a smith, and thus each takes up a free
man’s place.” Unlike free artisans, slaves would never become active consumers,
retarding economic growth and development. In this Smithian developmental schema,

15 See also Smith, Lectures on Jurisprudence, 40, 100-101.
the long-term benefits of free labor in distributing wealth more equitably far outweighed
the short-term gains that accrued to a tiny number of slaveholders.\textsuperscript{16}

Despite his abiding faith in the emancipatory potential of a free labor economy,
however, Smith had a deep pessimism about the immediate prospects for abolition.
Indeed, “[a] small part of the West of Europe is the only portion of the globe that is free
from it, and is nothing in comparison with the vast continents where it still prevails.” The
problem with abolition, Smith argued, was that it would require tinkering with vested
property rights. Indeed, in societies where slaves made up “the most considerable part of
the nation’s property,” abolition would be seen as an infringement on the rights of
subjects and “occasion a general insurrection.” In an absolute monarchy, where “one
single person is lawgiver, and the law will not extend to him, nor diminish his power,”
slavery might be “gradually softened” by the sovereign’s regulation of slave treatment,
but respect for the property rights of slave owners made it difficult for the institution to
be “entirely abolished.” The problem was even worse in “free governments” – where
“every law is made by [slave] masters,” citizens would never “make a law so hurtful to
their interest, as they might think the abolishing of slavery would be.” Indeed, Smith hit
on the central contradiction between English liberty and colonial slavery. “Freedom and
opulence,” Smith argued, “contribute to the misery of the slaves. The perfection of
freedom is their greatest bondage; and, as they are the most numerous part of mankind,
no human person will wish for liberty in a country where this institution is established.”
The freedom of some relied on the slavery of others.\textsuperscript{17}


\textsuperscript{17} Smith, \textit{Wealth of Nations}, III: 2.15-2.18.
Great Britain, however, had bucked the global trend and taken steps to insulate itself from the dangers of slavery. Demonstrating his close if selective attention to the history of English slave law, Smith drew on the emancipatory logic of the Holt court and stated flatly that “a negro in this country is a man,” not an article of property. If a “negro servant” was stolen or absconded from service, an owner could “have no action for the price, but only for damages sustained by the loss of [a] servant.” A master could own the labor of another subject, but not his or her person. And since “a negro servant is entitled to the privileges of a freeman while here [in England],” Afro-Britons must be under the protection of the common law of subjecthood. “If a negro is killed,” then, “the person who does it is guilty of murder.” Technically, Smith was flat wrong – though his position was nearly identical to that taken by Chief Justice Holt in his post-Glorious Revolution antislavery decisions at King’s Bench, the subsequent Yorke-Talbot Opinion and a handful of lower court decisions had declared property-in-man to be operative throughout the empire. Smith largely ignored these proslavery rulings. In a nod to the imperial chattel principle, he did admit that a master might have the power to “oblige [a slave] to return to America and keep him as formerly,” but carefully delimited this property right to the colonies alone because “from the laws of this country...[a slave] enjoys freedom, because there is no such thing as slavery among us.”\(^{18}\) Considering his linkage of free labor and economic development, one need not stretch too far to imagine Adam Smith’s desire to see the free air of England extended to the entire empire.

As Smith’s work illustrates, imperial free trade was conceptually linked to a number of older moral and political arguments against slavery. To many free traders and

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political radicals throughout the empire, the fundamental equality of all humanity required that the basic rights of all persons be protected through access to civic subjecthood. To at least some Britons informed by this position, these rights must be extended to all subjects, even the enslaved. The clearest illustration of the emancipatory potential of this broad vision of subjecthood is found in the work of Granville Sharp, the radical Whig and social reformer who transformed English antislavery opinion into an abolitionist movement. This was to be a limited abolitionism, to be sure – a broad-based social movement against slavery was still decades in the future – but, led by a cadre of committed antislavery lawyers, Sharp hoped his antislavery strategy would reframe the law of England in ways that had far-reaching emancipatory potential. Sharp did not, however, have to invent English antislavery from whole cloth, and he drew on ideas developed by a long line of antislavery thinkers, from Morgan Godwyn and Lord Holt to contemporary critics like Anthony Benezet and William Blackstone, in framing his argument for the illegitimacy of property-in-man.

As his antislavery forebears had, Sharp identified the twin concepts of property-in-man and civil death as the central problem of slavery – under colonial slave law, “the Negro [was] divested of his humanity, and rendered incapable of the King’s protection.” The first order, then, was to delegitimize “the modern unnatural claims of private property in the persons of men.” The ancient Roman laws of slavery, the basis for Continental civil law, “[did] not at all concern a Christian government,” nor did the institution’s continuing existence among “heathen nations.” The English common law favored liberty. Sharp also argued that English villeinage, so often invoked by proslavery Britons as an indigenous legal basis for slavery, must be “a matter of serious
consideration.” The old feudal serfdom could not be a valid precedent, however, because “modern bondage did not even commence, until the former had been many years extinct [and] customs cannot exist to things newly created.” “West Indian Slavery” was “sprung from a very different source.” Besides, villeinage was against “religion and morality, reason and the law of nature” in and of itself, and proslavery reliance on feudal law was tacit proof of the weakness of “modern” claims to property-in-man – why else would slaveholders be “obliged to go so far back for precedents”?19

Earlier antislavery thinkers had made all of these points before, but Sharp also stressed a relatively novel element of the English argument against slavery – he called into question the legitimacy of war captivity as a basis for bondage. Generations of jurists had found the conceptual and legal origins of human slavery in the power of life and death a victor gained over captives taken in a just war. According to Sharp, however, this “imaginary right of conquerors...to enslave their captives” could no longer legitimate bondage because, under evolving norms of European warfare, captors had no claim to the lives of prisoners. Instead, they were expected to hold captives “in safe custody, until there can be a convenient opportunity of ransoming, exchanging or of sending them away with safety to the public [at] the conclusion of the peace.” The radical implications of Sharp’s reasoning were clear – if there was no legitimate legal means to acquire a right to property-in-man, then “the derived power or right of the last master who detains the

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Slave, is certainly as unjust...as the unmerciful usurpation of the first possessor.” With its traditional bases stripped away, slave property everywhere was illegitimate.\(^{20}\)

Without a recognized property right to their slaves, Sharp argued, the kind of dominion claimed by slaveholders was illegitimate because enslaved persons, as legal persons and thus subjects, came under the protection of the law within England. Indeed, no topic receives more consideration in *A Representation* than the nature of British subjecthood. Sharp interpreted the ambit of English subjecthood in light of his fundamental assumptions about the congruence of common law and natural rights – the law saw “no distinction of *bond or free*; neither of colours or complexions, whether of *black, brown, or white*...[all] *are bounden by and unto the laws,*” and “every person, who in any respect is in *subjection* to the laws, must undoubtedly be a *subject.*” In this sense, every person within British dominions was “the King’s *property* in [a] *relative sense,*” and even the property claims of slaveholders could not a subject’s “*indispensible obligation and allegiance to the King and the laws.*” Subjecthood was a two-way street, however, and in return for their allegiance, all subjects, “black as well as white, *bond as well as free*...are entitled to personal protection” from the king’s courts. By excluding enslaved people from subjecthood and the protection of the courts, Britons not only committed a grave injustice against strangers but also undermined “the equitable force and reason of those laws, by which *we ourselves are protected.*” Property-in-man was

\(^{20}\text{Sharp quoted a lengthy passage from William Blackstone’s commentaries in support of his claims about the illegitimacy of war captivity as a basis for enslavement. Blackstone read *A Representation* in manuscript, and engaged in a productive critique with Sharp on a number of legal points, but he apparently agreed with Sharp’s use of his reading of the law of nations. William Blackstone to Granville Sharp (DATE?), MS, Granville Sharp Papers, New-York Historical Society. As we will see, this antislavery reading of international law would have enormous consequences on wartime emancipation policy during the American Revolutionary War.}\)
fundamentally illegitimate because it deprived the commonwealth of its proprietary rights in the persons of subjects, endangering the liberty of all.21

The claim that slavery conflicted with the proprietary claims of the sovereign (or state) in the persons of subjects was as old as English antislavery – this was precisely the position Henry Parker had taken in *Jus Populi* back in 1646 and had informed the Holt Court’s decisions at the turn of the 18th century.22 Sharp, however, also explicitly invoked a newer strand in antislavery thought: self-ownership. The “mere mercenary plea of private property,” Sharp argued, “cannot *equitably* (in a case between *man and man*) stand in competition with that *superior property*, which every man must necessarily be allowed to have in his own *proper person*.” Self-ownership was different from other kinds of property rights, however, and “the nature of every kind of *property* ought to be considered, before it can be lawfully claimed.” As Sharp noted, there were “many cases wherein *property* is *absolutely altered*” under English law, but nothing could erase “that blessing to which all mankind have an undoubted right, their *natural liberty*.” This self-proprietary right was “of much more value and consideration” to each person “than any other kind of property whatsoever can be to another,” and was certainly to be preferred to “the Slavemonger’s mere mercenary claim.” A slave’s “property in *his own person*, is certainly far superior,” Sharp argued, “and ought to be preferred to any claim whatsoever, that another person can possibly have upon him, on account of his having been formerly a Slave, private property, *possession*, or *mere chattel*.”23

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Far from repudiating the older corporate humanist antislavery tradition, however, this new invocation of self-ownership remained relied on and augmented it. Not only did the basic precept of self-ownership fit neatly into existing discourses of “freeborn” Englishness and the universal natural rights of mankind expressed in English common law, it allowed antislavery thinkers to counter proslavery arguments that slaves, as perpetual strangers, could not be subjects and had no claim on traditional English rights. As legal persons, even if not full subjects, “a Negro or Indian Slave in this general capacity of alien, must be accounted a subject…[notwithstanding] his particular state or condition of Slave, Negro, or Indian.” Even granting that enslaved persons might not be full subjects – a point Sharp was not willing to concede except for the sake of argument – as aliens they still came under the protection of the common law once in England. The only option left to slaveholders, then, was to “prove…that [a slave] is not a MAN.” Sharp argued that no servile status could erase a person’s fundamental humanity – even the “custom of the Colonies” defining a slave as an article of property could “make no alteration in his human nature.” Linking the liberal ideal of individual self-ownership to the longer antislavery tradition of broadly construed subjecthood, Sharp could now argue that whatever their status before arrival in England, “every Negro Slave, being undoubtedly either man, woman, or child, …immediately upon their arrival in England, …cannot [then] be out of the King’s protection.”

Sharp recognized, however, that the situation was not nearly as clear-cut in the colonies. In cases where “the question of property relates to Slaves remaining in the [colonies],” for example, the courts were bound to recognize the “plantation laws” in a

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24 Ibid., 154, 25, 19.
form of imperial comity. To Sharp, however, this made a mockery of the law. The courts must certainly recognize claims to the labor of servants who gave their free consent through contracts or indentures, but the “many-headed monster of tyranny” that was colonial slave law “subverts our most excellent constitution; because liberty and slavery are so opposite to each other, that they cannot subsist in the same community.” The solution was to broaden the geographic reach of free English air – “wherever the bounds of the British empire are extended, there the Common Law of England must of course take place.” If metropolitan courts declared their opposition to property-in-man, and this common law interpretation were exported to the colonies, the English freedom principle would be “so established in every province, as to include the respective bye-laws of each province, instead of being by them excluded.” Cognizant of their own liberties, Britons could not simply stand idly by as their “fellow-subjects” suffered in chains – whatever blame was rightfully due to American colonials, a “great share of this enormous guilt will [also] certainly rest on this side of the water!”^25

The crux of Granville Sharp’s sophisticated antislavery ideology, then, was the emancipatory potential of British subjecehood. United in their commitment to human freedom, Britons around the globe would ensure the protections of the common law to all persons. As Sharp eloquently put it:

“This law breathes the pure spirit of liberty, equity and social love; being calculated to maintain that consideration and mutual regards, which one person ought to have for another, howsoever unequal in rank or station. But when any part of the community, under the pretence of private property, is deprived of this common privilege, ‘tis a violation of civil liberty, which is entirely inconsistent with the social principles of a free state. True liberty protects the labourer as well as his lord; preserves the dignity of human nature, and seldom fails to render a province right and populous: whereas on the other hand, a toleration of Slavery is the highest breach of social virtue, and not only tends to depopulation, but too

^25 Ibid., 161, 82, 71-72, 52, 73.
often renders the minds of both masters and Slaves utterly depraved and inhuman, by the hateful extremes of exaptation and depression”

Only by repudiating human slavery could Britons make their empire a stable, productive, “free state.”

Slaveholders would have to be forced to remake the empire along these lines however, and, as Sharp’s argument made clear, the first venue in this battle would have to be the English courts. Sharp called specifically on “every lawyer who is a well-wisher to the civil liberties of mankind” to take up the cause of “publickly protesting against all doctrines which may tend to...the least right of property in...our fellow-subjects,” and reached out to prominent lawyers, including William Blackstone, for commentary on his legal antislavery theories. To force the issue of property-in-man into the courts, antislavery jurists must “strenuously contend” for the “absolute and immutable” rights of subjecthood, particularly trial by jury. Would not “the spirit and equity of this old English doctrine be entirely lost,” Sharp asked, “if we partially confine that justice to ourselves alone, when we have it in our power to extend it to others?” The lives of all subjects, “Slaves as well as others...even in the remotest parts of the British empire,” must be protected – “when any...are put to death, ‘WITHOUT THE SOLEMNITY OF A JURY,’...there is much reason to attribute the GUILT OF MURDER, to every person concerned.” Lawyers should also use the Habeas Corpus Act to challenge the physical detention of enslaved Britons. “ALL SUBJECTS; both natural born and alien, of every denomination, (without exception real or implied)” were guaranteed access to habeas writs under the revolutionary settlement of the 1690s, and so “every attempt to detain,

26 Ibid., 104.
imprison, or TRANSPORT any person whatsoever as a Slave...must inevitably be construed as an offence” against this central pillar of the English constitution.27

Well before the *Somerset* case, then, Granville Sharp had already formulated a clear legal argument against property-in-man, and in 1771 he had the opportunity to put this argument to the test in an English court in *Lewis v. Stapylton*, a crucial if underexamined case heard by the Court of King’s Bench in 1771. The arguments shaped by Sharp and presented by counsel, as well as Mansfield’s decision, all bore the imprint of much older English antislavery arguments. Thomas Lewis, a West Indian slave, escaped from his master, Robert Stapylton, while sojourning in England in 1770. The erstwhile slave likely found refuge in London’s growing Afro-British population and found work in the port city’s mixed race waterfront economy. Eventually, Lewis fell ill and paid a visit to Dr. Thomas Sharp. After hearing the story of Lewis’ escape, Sharp recommended that Lewis contact his brother, abolitionist Granville Sharp, who had numerous antislavery contacts who might shelter and employ the fugitive. This contact would prove to be crucial, for not long after his introduction to Sharp, Lewis was forcibly kidnapped by Stapylton’s agents on the streets of London, bound, gagged, and placed on a ship bound for Jamaica where he was to be sold.28 All of this was perfectly in keeping with the proslavery legal regime constructed by imperial planners since the Yorke-Talbot Opinion – as an article of imperial property, Thomas Lewis had no claim to the rights of British subjecthood, and the Stapylton’s power over him was just as extensive in the free air of England as it had been in the colonies.

27 Ibid., 50-51, 71-72.
28 On Lewis’ escape and connection to Sharp, see Wise, *Though the Heavens May Fall*, 59-68.
Just as the Captain Seward was about to leave the Thames estuary, however, another ship pulled alongside brandishing a *habeas corpus* procured by Sharp for Lewis’ release. The ship’s captain released Lewis into Sharp’s custody, but the abolitionist was not willing to stop there. He immediately moved for the indictments of Stapylton and the dockworkers that had seized Lewis for unlawful assembly, assault, and false imprisonment. Stapylton responded that the indictment was ridiculous – how could one assault and wrongly imprison his own property? Sharp responded by stressing the central element of English antislavery thought – property-in-man was illegitimate in England, therefore Lewis was a British subject, protected from Stapylton’s high-handed dominion by the English common law. Sharp’s intent was not only to punish the “wicked and evil disposed persons” who had roughly treated Lewis, but also to bring a test case before Chief Justice Mansfield that would address the broader question of slavery’s legitimacy in England.

The central tenet of the long English antislavery argument – the distinction between servile status and slave property – came into clear relief as counsel presented arguments before King’s Bench.29 Delivering his opening statement, former Solicitor General John Dunning stated that, simply because Lewis had “the misfortune…to be in point of color a black,” Stapylton believed that “he was not under the protection of the laws of this Country, and [had] a right to treat him as a horse or a dog to carry him where [he] pleased and do what [he] pleased with him.” But according to Dunning “they have no such right,” because “the laws of this Country admit of no such property. I know nothing where this idea exists, I apprehend it exists only in the minds of those who have

29 All arguments from counsel, unless otherwise noted, are from *The Case of Lewis, a Negro, v. Stapylton, His Master* (1771), MS, New-York Historical Society, [n.p.].
lived in those countries where it is suffered.” The “idea” of slave property, he argued, was dependent on jurisdiction, and was legitimate only where local law upheld it.

The only witness called by the crown was Thomas Lewis himself, and the question immediately arose as to whether his testimony was admissible. Lewis was alleged to be a slave; obviously a piece of property could not testify in court. Mansfield set aside this issue, proclaiming that he would “presume him free unless [the defendants] prove the contrary,” thus applying the English common law assumption in favorem liberatis to an African and an alleged slave. The Chief Justice flatly stated that “his being black will not prove the property.” Dunning proceeded to question Lewis about his life, and the alleged slave’s testimony spun a fascinating tale for the court, one that illustrated the depth of knowledge enslaved persons themselves had of the antislavery potential of English law.

Born on the Gold Coast of Africa to free parents, Lewis had been a servant to the local governor. A curious lad, he signed on with a ship sailing for the New World, where his servitude passed from one captain to another, each of whom, Lewis claimed, paid him wages. At some point in his travels, Lewis was baptized. Eventually, he was passed on to Richard Smith, an English merchant residing in New Spain, who asked if he would like to travel to Carolina with Stapylton. Lewis said that he “should like it very well,” and set off with his new master for the British mainland colonies. Before reaching their destination, however, Spanish pirates took the ship and Lewis eventually wound up in Havana, working as a waiter for wages. Shortly thereafter, Stapylton passed through Havana and, recognizing his lost servant, placed him on a ship bound for Philadelphia, where Lewis again worked for wages. The footloose young man found work in New
York, Santa Cruz in New Spain, Pensacola, and New England, all the while living independently of his erstwhile master and earning his own wages. Eventually, Lewis was once again seized by Stapylton, who took him to Carolina, Jamaica, and finally to England in 1770.

Throughout this odyssey, Lewis believed himself a free man, serving a series of employers through his own consent. He had been bound to ship captains and merchants, and to Stapylton, as a servant, but was never their property. Payment of wages seemed to suggest as much. He had agreed to accompany Stapylton to Carolina, but only as a servant, not a slave. When counsel for Stapylton argued that Lewis was a “servant” of Stapylton, the Chief Justice agreed, stating that “nothing he has said is inconsistent with that one way or another.” But what kind of servant was he? Stapylton’s counsel claimed he was a slave – an article of property – and provided as proof “from Captain Smith a regular transfer to Stapylton and at all the places he has claimed him, at Havannah, at New York and Pensacola, [Lewis] has never denied it.” Mansfield countered that there was “a great chasm” between the initial transfer and Lewis’ recent escape. Besides, “[w]hether [masters] have this kind of property or not in England never has been solemnly determined.” Mansfield had no inclination to resolve this question at present, however. The Chief Justice determined on a special verdict, and instructed the jury to “find whether [Lewis] is [Stapylton’s] property as a slave, and then put it in some solemn way to be tried.” In other words, the jury would first decide whether Lewis was a slave; only if they believed he was a free man would they proceed to the question of Stapylton’s guilt on the assault and imprisonment charges.
To prove that Lewis was Stapylton’s property, counsel for the defense called a series of witnesses, all of whom testified to Lewis’ servitude – none could conclusively prove that he had been property, however. Vigorous cross-examination by Lewis’ counsel proved that Stapylton’s alleged title was suspect, and none of the witnesses could swear that the document presented in court was legitimate. Numerous witnesses testified that they had heard Lewis admit to being Stapylton’s property. During cross-examination of Stapylton’s witnesses, however, the clever Dunning pressed this point to great advantage: “Did you hear [Lewis] say he was Stapylton’s property?” The witness replied, “I heard him say he was his master.” Dunning saw his opportunity. “But not the word property…. Did you ever hear him say he was his property?” “That he was his master,” was the witness’ only reply. No one denied that Lewis was Stapylton’s servant, but they could not prove that he was an article of property.

Dunning’s closing argument hammered home this distinction between servile status and property. He had hoped for “an opportunity of…insisting that no such property can exist…in any place and in any court in this kingdom,” but Mansfield interrupted to remind him that this was not the material issue in the case. Indeed, the Chief Justice openly stated in court, “I hope it never will be finally discussed, for I would have all masters think they were free and all negroes think they were not, because they would both behave better.” Undaunted, Dunning presented a ringing summation, arguing that, because Stapylton produced no clear title, “the boy is born as free as any man, and can never be otherwise than free, but by some act of those, that have power over one another, by captivity in war, or in other circumstance of that sort.” Furthermore, Dunning argued, race was not a salient issue in the case, asking rhetorically, “is it to be
distinguishable only by color that such right [to property] is to exist?” Jurors should not “suffer any man in a free country like this to be sold and conveyed to the place where he would be treated…with more inhumanity than would be applied to a dog.”

In his instructions to the jury, Mansfield openly advocated for Lewis. He pointed out that, since there was “no evidence of a bill of sale,” and “no evidence that [Stapylton] bought [Lewis],” they must find in favor of the plaintiff. The jurors complied, shouting “no property, no property!” Granville Sharp believed that, given the opportunity, the jury would have gone further and declared slave property illegitimate throughout England.\(^{30}\) Mansfield congratulated the jurors, saying, “I think you have done very right. I should have found the same verdict…for he was not the property.” If ever there was a Mansfieldian Moment, this was it.\(^{31}\) The Chief Justice also hinted to Dunning, and the many other lawyers who had gathered to hear the case, that they might “find more in the question than you see at present…. There are a great many opinions given on it.”

Thomas Lewis walked out of Westminster Hall a free man, while Granville Sharp and a crack team of legal minds set to work honing their arguments in preparation for a final climacteric battle over property-in-man.

On the very day the Lord Mansfield handed down his decision in *Lewis*, another *habeas corpus* came across his desk. This *habeas* writ, also filed by Granville Sharp, sought the release of another enslaved man, James Somerset. The details of the *Somerset* case are now so well known to historians that they require little direct commentary here. Lord Mansfield’s decision in the case, based on the “odious” nature of slavery and its


incompatibility with English common law, has been deeply studied, and most scholars now agree that *Somerset* formed the legal basis for future debates over slavery. What many of these scholars have missed, however, is the extent to which the *Somerset* case drew on the much longer debate over property-in-man that had been simmering since the very beginnings of the English empire. Close attention to arguments made by counsel for Somerset and Steuart, as well as Mansfield’s decision in the case, reveals the imprint of this long legal debate.

The argument presented by Charles Steuart’s lawyers, John Dunning and James Wallace, relied on centuries of proslavery legal thought. For Dunning and Wallace, slavery was precisely what generations of slave owners and imperial planners claimed it was – the reduction of persons to articles of property, and the absolute rightlessness of enslaved persons. These two tenets were essentially the only arguments put forth by Charles Steuart’s counsel in the *Somerset* case. The crux of John Dunning’s argument, for example, boiled down to one sentence – “his condition was that of servitude in Africa; the law of the land of that country disposed of him as property, with all the consequences of transmission and alienation; the statutes of the British Legislature confirm this condition, and thus he was a slave both in law and fact.”

Contemporary commentators certainly took note of Dunning’s change of position. Steuart complained that his lead attorney was “dull and languid” during the *Somerset* proceedings and “would have made a better figure on [Somerset’s] side.” Sharp was also upset that the illustrious barrister had switched sides, decrying the “abominable & insufferable practice of lawyers to undertake causes diabmetrically opposite to their own decided opinions of Law and Common Justice!!!” Quoted in Wise, *Though the Heavens May Fall*, 117-119.

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32 Notable exceptions to this general rule include George Van Cleve, “‘Somerset’s Case’ and its Antecedents in Imperial Perspective,” *Law and History Review*, vol. 24, no. 3 (Fall, 2006): 601-645; Holly Brewer, “Twelve Judges in Scarlet,” unpublished MS in possession of author.

33 Dunning, who had represented Lewis in *Lewis v. Stapylton*, presented pro-slavery arguments in *Somerset*. Contemporary commentators certainly took note of Dunning’s change of position. Steuart complained that his lead attorney was “dull and languid” during the *Somerset* proceedings and “would have made a better figure on [Somerset’s] side.” Sharp was also upset that the illustrious barrister had switched sides, decrying the “abominable & insufferable practice of lawyers to undertake causes diabmetrically opposite to their own decided opinions of Law and Common Justice!!!” Quoted in Wise, *Though the Heavens May Fall*, 117-119.
restive African slaves to behave like English servants, making demands on their masters and the state. For good measure, both Dunning and Wallace also offered a dose of economic realpolitik, perhaps the most potent weapon in the proslavery arsenal – “many thousands of pounds would be lost to the owners by setting [Somerset] free.”34 Drawing on a deep well of proslavery English law – Dunning and Wallace cited the definition of slaves as chattels in Butts v. Penny (1677), the Yorke-Talbot Opinion’s extension of the chattel principle to English soil, and Lord Chancellor Hardwicke’s assertion that English villeinage illustrated the potential for rightlessness in Britain – Stuart’s attorneys made a strong case for the legality of James Somerset’s rendition.

Just as Dunning and Wallace drew on a long history of English proslavery legal thought, James Somerset’s legal team – Francis Hargrave, John Alleyne, and James Mansfield – had ample legal precedent and tradition to draw on. The central element of this antislavery legal tradition, stretching back to the Holt Court and beyond, was the separation of property-in-man and control over labor. Hargrave, for example, drew a contrast between “service for life” and “the power of the master over the slave’s person.” Property-in-man, Hargrave argued, was plainly “incompatible with the natural rights of mankind, and the principles of good government,” but a “moderate servitude” was perfectly legal – Charles Stuart could own James Somerset’s labor, but not his person. Hargrave and Alleyne used this conceptual separation between ownership of labor and ownership of persons to dismantle the proslavery argument from villeinage. Though villeinage “had most of the incidents of slavery,” said Hargrave, it was not germane to the case – Stuart never claimed that Somerset was his villein, nor would such a claim

have implied the kind of property relation involved in chattel slavery.\textsuperscript{35} Serjeant William Davy, another attorney for Somerset, added that although “there had been a time when slavery was understood to exist” under the guise of villeinage, those days were long gone, and even then the kind of claims made by Steuart would “not have been endured.”\textsuperscript{36} Somerset’s legal team drew on the emancipatory logic of the long English antislavery argument to drive a wedge between servitude, even its basest form, and property-in-man. If Steuart wanted only to claim Somerset’s labor, he was going about it wrong. A trespass writ would suffice in that situation, as Chief Justice Holt had ruled nearly a century earlier, but claiming Somerset as property was an altogether different issue.

Having established that property-in-man was illegitimate under English law, Somerset’s legal team next worked to prove that, as a legal person living within English jurisdiction, James Somerset must have access to the basic rights guaranteed to all subjects. James Mansfield, a young barrister who would later go on to become Chief Justice of Common Pleas, argued that England was “a country where the laws of liberty are known and regarded” and the young barrister knew of no reason why Somerset should “not...be protected by these laws, but...carried away again to be sold.”\textsuperscript{37} John Alleyne argued that since Somerset, by “making choice of his habitation here [in England],” had “subjected himself to the penalties, and is therefore entitled to the protection of our laws.”\textsuperscript{38} Bound by the laws of England, James Somerset must be a subject. In some ways the question was moot – if James Somerset did not have access to

\textsuperscript{35} 1 Lofft 1.
\textsuperscript{36} 98 Eng. Rep. 499 (K.B. 1772).
\textsuperscript{37} New Daily Advertiser, 13 May 1772, quoted in F. O. Shyllon, Black Slaves in Britain, (London: Oxford University Press, 1974), 94.
\textsuperscript{38} 1 Lofft 1.
the rights of English subjects, his case would never have come before the court in the first place. *Somerset v. Steuart* was initiated when Somerset’s godparents filed a writ of *habeas corpus* with the King’s Bench protesting their godson’s wrongful detention. Had Mansfield wished, he could have rejected the writ outright on the grounds that Somerset was a slave. One did not file a *habeas* to retrieve lost property. Yet there James Somerset stood, before the highest court in the empire, invoking the most basic protections royal justice accorded a subject – protection of his person and recognition of his legal personhood.

The greatest obstacle to James Somerset’s freedom was jurisdictional. All English lawyers agreed that local law in the colonies, supported directly by the sovereign prerogative, could diverge from common law so long is it was not “repugnant.” To deny the local legitimacy of colonial law would be to deny the power of the monarch over his dominions, seen as largely outside Parliament and the courts’ purview. As one of Somerset’s lawyers put it, slavery was a “new species of tyranny…created entirely by Colony government.” This colonial legal diversity cut both ways, however – if Somerset was in Virginia, “there he might be the subject of property…but not here [in England].”

John Alleyne, a freshly minted barrister added to Somerset’s legal team, eloquently argued that slavery was “not a natural, [but] a municipal relation; an institution therefore confined to certain places, and necessarily dropt by passage into a country where such

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municipal regulations do not subsist.”

As Chief Justice Holt had said, “as soon as a negro comes into England he becomes free.”

But how could Somerset’s attorneys account for the many precedents that did seem to allow for property-in-man in England? As we have seen, the argument from villeinage fell apart once ownership of persons and labor were conceptually separated. Francis Hargrave turned aside the proslavery argument that the Navigation Acts established the chattel principle through parliamentary statute, arguing that they only “impliedly authorize the slavery of negroes in America; and it would be a strange thing to say, that permitting slavery there, includes a permission of slavery here.”

The Yorke-Talbot Opinion, as dicta, could easily be dealt with, and Hardwicke’s decision in Pearne v. Lisle (1749) dealt with slaves held in Antigua, not England, and was therefore not relevant precedent. Butts v. Penny, another crucial proslavery decision, was dealt with by simply dismissing its conclusion that slaves were chattels – Lord Holt’s decisions following the Glorious Revolution overrode the earlier decision in Butts.

In addition to these older antislavery arguments, counsel for Somerset also relied heavily on natural rights arguments of more recent vintage. Hargrave, for example, admitted that “moderate servitude” might be allowable under natural law, but “slavery in its full extent” was “incompatible with the natural rights of mankind.” In a truly novel move, Somerset’s attorneys also emphasized the importance of self-ownership as the basis of all rights. Hargrave, for instance, claimed that English law would not allow a person “to bind himself by contract to serve for life” and could certainly not “invest

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42 The quote is drawn from Smith v. Brown and Cooper, 2 Salk 666.
43 1 Lofft 1, 98 Eng. Rep. 499 (K.B. 1772).
another man with despotism” – one’s own person was unalienable. John Dunning, as
counsel for Stuart, summarized his opposing counsel’s arguments succinctly – Hargrave,
Alleyne, and Mansfield relied on the assumption that “natural relations...attend the person
of the man.” Bringing natural rights and self-ownership together, Alleyne asked
rhetorically, “what power can there be in any man to dispose of all the rights vested in
him by nature and society in him and his descendants?” The answer was clear: “He
cannot...part with them, without ceasing to be a man; for they immediately flow from,
and are essential to his condition as such.”

Both sides had marshalled old arguments and crafted novel ones, making the
Somerset case both a true summation of the long English antislavery argument and the
opening salvo in a new legal conflict over slavery. Lord Mansfield, despite any personal
misgivings he may have had, laid down a very clear ruling in the case:

The power of a master over his slave has been extremely different, in
different countries. The state of slavery is of such a nature that it is
incapable of being introduced on any reasons, moral or political; but only
positive law, which preserves its force long after the reasons, occasion,
and time itself from which it was created, is erased from memory: it is so
odious that nothing can be suffered to support it, but positive law.
Whatever inconveniences, therefore, may follow from a decision, I cannot
say this case is allowed or approved by the law of England; and therefore
the black must be discharged.

With that simple statement, the legitimacy of slave property under English common law
was finally and definitively voided. Arguments against the chattel principle first

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44 1 Lofft 1.
45 This version of Mansfield’s decision is taken from Lofft 1, 98 Eng. Rep. 499 (K.B. 1772). There has
been considerable controversy about the primary source material available for Mansfield’s decision.
While we may never know the exact words used by the Chief Justice, the sources agree on the substance
of the decision, particularly the emphasis on local positive law. Unless otherwise noted, all quotes from
the Mansfield decision are drawn from Lofft, which was the most widely circulated edition at the time.
Mansfield would have been familiar with this version, and he never repudiated it. For a full discussion of
the sources, see William Wiecek, “Appendix: Variant Somerset Reports” in “Somerset,” 141-146; Wise,
185-192.
developed in the earliest days of colonization had finally carried the day. When James Somerset left Westminster Hall and stepped into the free air of England, he not only gained his own freedom but that of *all* African slaves who reached English shores. Englishmen could now rightly claim that “Britons never will be slaves.”

Despite the clarity of Mansfield’s decision, there has been extensive scholarly debate about what, exactly, the *Somerset* decision did. Critics have pointed out that masters could still claim labor from their “slavish servants” through coerced indentures or apprenticeship agreements. If we define “freedom” as full access to political and social rights, then Mansfield’s ruling certainly falls well short of the mark. Besides, there were relatively few slaves in England itself – the *Somerset* principle left colonial slavery, established and protected by positive law, entirely intact. If we take Mansfield on his own terms, however, and situate the *Somerset* decision in the context of a long English antislavery argument, the outcome of the case appears both far more radical and far more predictable.

What Mansfield did with the *Somerset* decision was precisely what generations of English antislavery thinkers had advocated – he interposed the power of the state between

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master and slave, breaking the property relation between them and legally transforming slavery into a form of servitude. As the use of *habeas corpus* writs in *Lewis* and *Somerset* illustrate, this definition of slaves as legal persons opened up various ways to limit the physical power of masters, and allowed African servants to make claims on the English state through the courts. This was exactly what Henry Parker dreamed of in 1644, what Morgan Godwyn agitated for at the cost of his life in the 1680s, what Chief Justice Holt enshrined in law at the turn of the 18th century, what thousands of slaveholders throughout the empire dreaded and millions of enslaved persons longed for.

Mansfield’s decision in *Somerset* and the antislavery principles that undergirded it quickly made their imprint on mainstream English legal thought. This transformation can be seen most clearly in the evolving treatment of slavery in William Blackstone’s *Commentaries on the Laws of England*. At its publication in 1765, *Commentaries* already contained many of the legal principles that informed the antislavery thought of Granville Sharp, Francis Hargrave, and the other Somerset barristers. Blackstone, citing Chief Justice Holt’s decision in *Chamberlain v. Harvey*, flatly stated that “the law of England abhors, and will not endure the existence of slavery,” and therefore “a slave or negro, the instant he lands in England, becomes a freeman; that is, the law will protect him in the enjoyment of his person, his liberty, and his property.” As earlier English antislavery thinkers had done, Blackstone also distinguished between property-in-man, which was illegitimate and unsupported by common law, and servile status, which was explicitly allowed by English law. While a slave could not be property in England, any rights “to the perpetual service of John or Thomas” given to masters “by contract or the like” would remain “exactly the same.” A master could own a servant’s *labor*, “for this
is no more than the same state of subjection...which every apprentice submits to,” but could never own another subject’s person.\textsuperscript{48}

Though Blackstone’s discussion of the law of slavery fit nicely into the long tradition of English opposition to property-in-man, some contemporaries hoped for a more forceful repudiation of the power of masters over enslaved subjects. In the process of drafting \textit{A Representation}..., for example, Granville Sharp corresponded with Blackstone and contested the claim made in \textit{Commentaries} about a master’s right to “the perpetual service” of enslaved subjects brought to England. This criticism, in conjunction with Mansfield’s decision in \textit{Somerset}, led to an important alteration in the \textit{Commentaries} discussion of slave law. Where the first edition had argued that an enslaved person still owed service even in England itself, by the time a revised edition came out in 1775, Blackstone had inserted a crucial qualifier – the only legitimate claims masters had were based in “general and not...local law.”\textsuperscript{49} While this qualification may appear relatively minor, it brought Blackstone’s \textit{Commentaries} into line with the \textit{Somerset} decision by rooting claims to the labor or service of Afro-Britons in English common law, not colonial statute law. Whatever the case might be outside English jurisdictions, Afro-Britons within England might be servants but they never could be slaves.

Explicitly limited to England itself, the \textit{Somerset} decision had little immediate impact on slavery in the colonies. As the imperial crisis continued to deepen, however, many of the principles undergirding Mansfield’s decision were exported throughout the


empire in the form of military emancipation plans. Evolving international law norms proscribing the enslavement of war captives made their way into the mainstream of English common law in the late-18th century. In his *Commentaries on the Laws of England*, for example, William Blackstone repudiated earlier jurists who, following the civil law tradition, argued that slavery legally arose “*jure gentium,* from a state of captivity in war.” This justification for enslavement, Blackstone argued, was “built upon false foundations” because the captor’s power of life and death over a captive could only be exercised in “particular cases...of absolute necessity, for self-defence.” Since this necessity clearly did not exist – “the victor did not actually kill him, but made him prisoner” – then the law of war gave captors “no other right over prisoners, but merely to disable them from doing harm...by confining their persons: much less can it give a right to kill, torture, abuse, plunder, or even to enslave, an enemy, when the war is over.” With a captor’s “supposed right of slaughter” delegitimized, “the consequence drawn from it [slavery] must fail likewise.”\(^{50}\) Slaves might be freed by a war, but free persons could no longer be enslaved by one.

As colonial tax rebellion turned into open warfare in the summer of 1775, the question of military emancipation took on new significance, forcing the issue into Parliamentary debate in November. To supporters of the North ministry, military emancipation would bring the rebellious Americans to heel and force the colonial Patriots to accede to imperial policy. Lord North himself defended military emancipation as a necessary evil, denying that his ministry ever had “any idea of raising or employing the

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\(^{50}\) Blackstone, *Commentaries on the Laws of England* (Oxford, 1765), I: 411. While other elements of Blackstone’s treatment of the law of slavery evolved in subsequent editions of the *Commentaries*, the section on the illegitimacy of war captivity as a basis for enslavement remained substantially unchanged.
negroes...until the Americans themselves had first applied to them.”

Others were less circumspect. William Lyttelton, the former governor of South Carolina and Jamaica now seated in the Commons as MP for Bewdley, spoke from experience when he noted that “the southern colonies...were weak, on account of the number of negroes in them.” Imperial planners could easily exploit this weakness – “if a few regiments were sent there, the negroes would rise, and embrue their hands in the blood of their masters.”

Lyttelton was sure that rebellious Southern planters, faced with this bloody prospect, would quickly capitulate. Not everyone agreed that arming colonial slaves against their rebellious masters was good policy, however. Some worried that slaves would refuse to desert their “kind” masters, and that “the state of slavery [which] cuts off all the great magnanimous inventive powers of the human mind [and] strengthens fidelity and attachment” would prevent enslaved people from becoming effective soldiers. Besides, such a scheme was “too black and horrid to be adopted.”

At this very moment, however, John Murray, Earl of Dunmore and royal governor of Virginia, was implementing just such a scheme. Indeed, Dunmore had been hinting at his plans to emancipate the slaves of rebellious Virginians for years by the time Parliamentary debate over military emancipation began. As early as 1772, the royal governor had noted to Colonial Secretary Lord Dartmouth that Virginians worried about the fidelity of their slaves. Surrounded by “a body of men, attached by no tye to their...

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51 R. C. Simmons and P. D. G. Thomas, eds., *Proceedings and Debates of the British Parliaments Respecting North America, 1754-1783* (Millwood, NY: Kraus International Publications, 1982), I: 281. [Hereinafter cited as *Proceedings and Debates.*] North was speaking in defense of Guy Carleton’s employment of Iroquois troops to help defend Quebec against an expected American attack. The question of American employment of black troops will be discussed in further depth below, but it is possible that North was referring to the conspicuous presence of African-Americans among Massachusetts Patriots from the very beginning of hostilities.

52 *Proceedings and Debates*, VI: 96.

Master nor to the Country,” colonial planters knew that their slaves would “join the first that would encourage them to revenge themselves.” The message was clear – Dunmore believed that freeing and arming enslaved Afro-Virginians would result in “a Conquest of this Country...in a very short time.”

Though he received no explicit support for his emancipation policy from Dartmouth or other imperial planners, and a measure supporting military emancipation in the rebellious colonies failed to pass in Parliament, Dunmore remained convinced that freeing the slaves of Virginia rebels was both sound strategy and good policy. If pushed, there was little question how Virginia’s royal governor would proceed when faced with intractable resistance to imperial policies.

For Dunmore, the tipping point in this conflict with Virginia Patriots came in May of 1775. Stoked by the governor’s hints about military emancipation, rumors of an impending slave insurrection terrified white Virginians, and these fears were only exacerbated when Dunmore removed public reserves of powder and shot from the arsenal in Williamsburg. As Dunmore explained to Lord Dartmouth, he had hoped to “soothe [the Virginians] verbally” by assuring them that he had only removed the powder and ammunition “lest the Negroes might have seized upon it.” The real logic behind the governor’s removal of the public magazine was clear, however – Dunmore knew that, given “the ferment in which [the Virginians] then appeared,” it would be “highly improper to put it into their hands.” The actions of Virginia Patriots proved Dunmore’s fears were not exaggerated – in June an unruly mob drove the governor from Williamsburg and looted his home. Facing open rebellion, Dunmore informed Lord Dartmouth that his “fixed purpose” was to “annoyn [the rebels] by every means possible,

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...reducing their houses to ashes and spreading devastation wherever I can reach.” As he had earlier hinted, the most effective way to achieve this end was to “arm all my own Negroes and receive all others that will come to me whom I shall declare free.”

British subjects in open rebellion abrogated their rights to property-in-man – enslaved persons became free subjects through their fidelity and service to the crown.

When Lord Dunmore issued his famous emancipation proclamation from his headquarters aboard the HMS William off Norfolk on November 7th, 1775, then, he was not instituting a new policy, but rather ratifying a practice that had already been in use for months. Dunmore called all able-bodied male subjects “to His MAJESTY’S STANDARD,” and declared “all indentured Servants, Negroes, or others (appertaining to Rebels,) free that are able and willing to bear Arms.” The logic behind these emancipations was clearly spelled out in the proclamation. American rebels had become “Traitors to His MAJESTY’S Crown and Government” and were thus “liable to the Penalty the Law inflicts upon such Offences,” including confiscation of property. As such, the slave property “appertaining to Rebels” was liable to seizure, while enslaved persons held by “the well disposed Subjects” of Virginia were not. Indeed, enslaved people brought within British lines by the many Loyalists who flocked to Dunmore in the summer of 1775 remained the private property of their masters. The property rights of loyal subjects could not be tampered with.

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56 A Proclamation, 7 November 1775, Early American Imprints, ser. 1, no. 14592.
Dunmore’s proclamation stripped rebellious Virginians of many of their cherished rights while simultaneously bringing enslaved people within the ambit of British subjecthood.

The impact of Dunmore’s wartime emancipation policy was immediate and profound. Even before the official proclamation was announced, Virginia Patriots complained that Dunmore was raiding plantations and “[carrying] off the negroes,” and dozens if not hundreds of enslaved people took advantage of the chaos of war to break for British lines. Once military emancipation became official policy in November, the pace of escapes quickened – hundreds of enslaved people made for British ships in the weeks following Dunmore’s proclamation. By early December, at least three hundred enslaved Virginians had been enrolled in the British forces. With the slogan “Liberty to Slaves” emblazoned on their uniforms, Dunmore’s “Ethiopia Regiment” made up nearly half of total British forces operating in Virginia in the winter of 1775-1776. Other freed people, likely a majority of those who reached British lines, were employed as laborers in military camps and aboard warships, while others served as guides and pilots on foraging expeditions and guerilla operations. And though Dunmore’s proclamation was limited only to able-bodied men, this did not prevent women, children, and the aged and infirm from running to British lines as well.58

The freedom of all of these formerly enslaved people, however, rested on the success of the British military in subduing the rebellion, and the tide of war in the Chesapeake turned in favor of the American Patriots in the winter of 1775. Dunmore’s

Ethiopian Regiment saw its first real action on December 9, 1775 at the Battle of Great Bridge outside Norfolk. After a lopsided American victory in the short but furious engagement, Dunmore and his troops were forced offshore, where smallpox spread quickly through cramped quarters. By June of 1776, Dunmore reported that the pox had “carried off an incredible number of our people, especially blacks,” reducing his fighting force to “150 effective Negro men” – had disease not cut down so many of his troops, Dunmore estimated he would have had at least two thousand Afro-Virginians in arms.\(^59\)

By August, his supply lines cut and his forces ravaged by disease, Dunmore had no choice but to retreat from the Chesapeake Bay – the remnants of the Ethiopian Regiment, around three hundred strong, sailed with him, headed for further military service in other theaters of war. Thus, Lord Dunmore’s experiment in military emancipation came to an abrupt end. Doubtless many Afro-Virginians who had come within British lines were left behind when the British fleet sailed – the able-bodied men of the Ethiopia Regiment must have left families and friends behind them in the Old Dominion, and those not fit for combat were abandoned to their former (and future) masters. Without the military capacity to hold Virginia and enforce his emancipation policy, there was little Dunmore could do to establish or maintain the freedom of most Afro-Virginians. Despite its shortcomings, however, military emancipation in Virginia had resulted in the freedom of thousands of enslaved people.\(^60\)

Lord Dunmore’s emancipation proclamation has most commonly been interpreted as a conservative and short-lived policy dictated by wartime necessity – aside from


enslaved people themselves, few Britons as yet had any intention of abolishing the institution of slavery, and the military emancipations in Virginia were meant to bring rebellious colonists to heel, not eradicate human bondage. This interpretation, however, relies on the separation of wartime emancipation from broader British debates over slavery and often examines Dunmore’s proclamation its local Virginia context. From the perspective of the metropole, however, with its rapidly changing legal norms regarding slavery, wartime emancipation takes on a new light. Indeed, when linked to the broader imperial debate over emancipation policy during the American Revolution, Dunmore’s proclamation is indicative of the ways in which elements of the long English antislavery argument entered into the mainstream of British political discourse. In the hands of a number of committed antislavery Britons, the question of military emancipation even opened up space for more direct criticism of slavery itself.

In the winter of 1775, for example, with debates over arming enslaved Afro-Britons in defense of the empire still swirling, Parliament took up the question of the legal rights of imperial slaves. On December 7th, David Hartley, MP for Kingston upon Hull and friend of Benjamin Franklin, proposed a resolution to “establish the Right of Trial by Jury in all Criminal Cases to all Slaves in North America.” This measure, supported by many friends to the American cause, would have voided “all Laws of any Provinces repugnant thereto,” echoing Lord Mansfield’s language about slavery’s legal basis in colonial positive law. Though no such bill was ever framed – the resolution was voted down – its proposal in the midst of ongoing debates over military emancipation illustrates how some British policymakers linked questions of slavery and freedom to the

61 Egerton, Death or Liberty, 70-73; Jasanoff, Liberty’s Exiles, 48-49; Holton, Forced Founders, 156-159.
broader imperial crisis. To supporters of the North ministry’s coercive policies, military emancipation was simply another cudgel to be used in beating the American colonists into submission, but to some friends of the Patriot cause – men like Grenville Sharp, David Hartley, and Sir George Savile – it was an opening wedge to a broader attack on imperial slavery.

How did supporters of the rights of British Americans come to adopt such a coercive position? The answer lies in a reformulation of the very meaning of empire itself. Speaking in support of his proposal, Hartley made this connection clear. While admitting that it was “dangerous to disturb questions of the rights and extent of empire or obedience,” he argued that a resolution of the imperial crisis on equitable grounds would “be perhaps in the event the abolition, [or at least] the first step to correct a vice, which has spread through the continent of North America, contrary to the laws of God and man, and to the fundamental principles of the British constitution. That vice is slavery.”

Hartley, like Mansfield, saw slavery as repugnant to English law, but he also recognized that it would be “infinitely absurd to send over...an act to abolish slavery at one word” – the positive law of the colonies, created and upheld by the representative assemblies that pro-American Whigs like Hartley so admired, protected the institution and required “the greatest discretion to root it out.” The solution to this jurisdictional issue was colony-by-colony gradual emancipation. Once the British Parliament had “led the way by the act for [trial by] jury,” each colony could work within their own “peculiar circumstances” by finding some “practicable way...by which slavery be in a certain term of years

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62 Proceedings and Debates, VI:332.
abolished.” Extending trial by jury, the most basic right of British imperial subjecthood, to enslaved Afro-Britons would be the first step in the process of gradual abolition. 63

Furthermore, by uniting all imperial Britons behind the worthy cause of human freedom, antislavery policies would quiet the conflict between metropole and colonies. Extending jury trials to the enslaved would:

“lay the first stone of universal liberty to mankind, [something that] no American could hesitate an instant to comply with...and thereby to re-establish peace and harmony with the parent state. Let us all be reunited in this, as a foundation to extirpate slavery from the face of the earth. Let those who seek justice and liberty for themselves, give justice and liberty to their fellow-creatures. ... Let the only contention henceforward between Great Britain and America be, which shall exceed the other in zeal for establishing the fundamental rights of liberty to all mankind.”

Here, then, was the reformulated British imperial agenda flatly stated. Abolition would redeem the British Empire and “re-unite its common interests and exertions into one common cause” – universal freedom. 64 The following year, as the American colonies began to abolish the slave trade, Hartley again rose in the Commons to propose a resolution describing English participation in the trans-Atlantic slave trade as “contrary to the laws of God, and the rights of men.” 65 Though this motion was also voted down, Hartley’s open opposition to slavery

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63 Proceedings and Debates, VI:336.
64 Ibid., 336-338.
65 Quoted in Thomas Clarkson, The History of the Rise, Progress, and Accomplishment of the Abolition of the African Slave-Trade by the British Parliament (London: L. Taylor & Co., 1808), I: 84-85. Sir George Savile seconded both of Hartley’s motions – for trial by jury for American slaves and for an official denunciation of the slave trade – on the floor of Parliament. Savile’s support also illustrates how exposed divisions between pro- and antislavery Whigs became during the imperial crisis. On seconding the motion for trial by jury, he noted that “if I should touch on the topic of lightening the chains of slavery in America...a learned gentleman will perhaps tell me that I am not a Whig; for the Whigs were ever fond of despotism.” Proceedings and Debates, VI:338.
and the slave trade illustrates how debates over military emancipation spilled over into broader critiques of imperial bondage.\footnote{Brown, *Moral Capital*.

This broadening debate, in conjunction with the actions of enslaved Afro-Britons in the rebellious colonies, redounded back on imperial war policy and pushed the boundaries of wartime emancipation. Indeed, by 1779 metropolitan planners were actively expanding the scope of their emancipatory military strategy. On June 30\textsuperscript{th}, General Henry Clinton, commander of British forces in America, issued his Philipsburg Proclamation, which extended emancipation to all slaves of rebellious masters who would desert to British lines. Though any “Negroes taken in arms” would be “purchased for the public service” and employed as military laborers, Clinton “strictly forbid” any person to “sell, or claim right over” any Patriot slaves who “take refuge with any part of this army.” Clinton’s proclamation also promised “full security” to Patriot slaves, who would be allowed to “follow...any occupation which he may think proper.”\footnote{Henry Clinton, Philipsburg Proclamation, http://clements.umich.edu/exhibits/online/proclaiming_emancipation/02_Timeline%20of%20Emancipation/clinton_62_28a.jpg (accessed 10 October 2015).}

Unlike Dunmore’s 1775 proclamation, which had been limited to Virginia and applied only to able-bodied male slaves willing to take up arms, Clinton’s proclamation applied equally to men and women, young and old, able-bodied or infirm, and implied that freed people would be maintained in their liberty.

This was certainly a move made in desperation – the tide of war had turned against the British following Washington’s victory at Monmouth the previous summer, and Clinton hoped that his emancipation proclamation would draw American forces away

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\footnote{Brown, *Moral Capital*.

\footnote{Henry Clinton, Philipsburg Proclamation, http://clements.umich.edu/exhibits/online/proclaiming_emancipation/02_Timeline%20of%20Emancipation/clinton_62_28a.jpg (accessed 10 October 2015).}
from the field of battle to guard against slave rebellion. While the law of war generally recognized the legitimacy of arming slaves during a conflict, emancipating non-combatant slaves was an unprecedented step. Furthermore, the Philipsburg Proclamation also hinted at a longer-term commitment to the freedom of emancipated slaves on the part of the British Empire. Freed people were allowed to follow the occupation of their choice, hinging that they were conceived of as subjects free to enter into employment arrangements through their own consent. And if enslavement through captivity in war was illegitimate, as so many Britons were coming to believe, then the Empire had a responsibility to maintain these subjects in their freedom. The congruence between Clinton’s wartime emancipation policy and broader British debates about the legitimacy of property-in-man and the rights of subjects is striking. Drawing on the novel tool of military emancipation, Clinton, whether he intended it or not, had achieved the old English antislavery goal of bringing enslaved persons into the community of subjects.

Many Britons, however, still harbored doubts about military emancipation. As they had four years earlier when debating Lord Dunmore’s arming of Virginia slaves, some policymakers worried that Clinton’s Philipsburg Proclamation would incite a race war, leaving slaveholders at the mercy of their slaves. Edmund Burke, a stalwart if deeply conservative opponent of the American war, argued that freeing and arming colonial slaves was “contrary to the common and statute law of this country, as well as the general law of nations,” painting a lurid picture of what would ensue “from constituting 100,000 fierce barbarian slaves, to be both judges and executioners of their

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The Duke of Richmond echoed Burke’s disapproval in the House of Lords, flatly stating that “to arm negro slaves against their masters...is not...a fair war against fellow subjects.” Temple Luttrell, another vocal opponent of the American war and booster for the Africa trade, specifically targeted Lord Mansfield, who had nothing to do with military emancipation policy, for “set[ting] the negro servants to butcher their masters.” He, at least, saw a connection between Mansfield’s Lewis and Somerset rulings and the emancipatory power of the war – unlike David Hartley, however, Luttrell was concerned not with the liberty of Afro-Britons but with the security (and profitability) of Anglo-American planters. Particularly for these opponents of the British war effort, arming colonial slaves was yet another marker of the arbitrary and unjust nature of the war against the American colonists.

Whatever their qualms, however, British policymakers stood behind their commanders’ military emancipation programs. Burke, Luttrell, and other critics may have blanched at the prospect of servile war, but the British were committed to the policy of wartime emancipation, and as the Revolutionary War came to a close in 1782, ministries dominated by Rockingham and Chathamite Whigs sought to guarantee the continued freedom of enslaved people emancipated during the war. The summer of 1782 saw slow progress on a preliminary peace treaty, but questions of compensation for property confiscated during the war were a major point of contention. The British delegates, led by Richard Oswald, a prominent merchant and co-owner of the Bance Island slaving factory with close ties to a number of prominent American planters,

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69 Cobbett, Parliamentary History, IXX:697-698.
70 Ibid., 403.
71 Cobbett, Parliamentary History, XX:1149.
demanded the “restitution of all estates, rights, and properties” confiscated from Loyalists
during the war.\textsuperscript{72} The American negotiators – Benjamin Franklin, John Adams, and John
Jay – responded that if British claims to confiscated property must be honored, then
“carrying off Goods from Boston, Philadelphia, and the Carolinas, Georgia, Virginia, &c.
and the burning of the Towns” in America should be considered as well. Questions of
allegiance and property ownership had stalled negotiations – as British negotiator
Alleyne Fitzherbert noted, this intractable issue threatened to put the peace process out
“to Sea again.”\textsuperscript{73}

It was in this already charged atmosphere that the question of compensation for
slave property entered the negotiations. Henry Laurens, a prominent South Carolina
planter who had just joined the American delegation, added that “the Plunders in Carolina
of Negroes” should also be considered in tabulating the Americans’ compensation bill –
indeed, Laurens insisted that he “could never give his Voice for any Articles” without
it.\textsuperscript{74} When the commissioners assembled to sign the preliminary peace treaty on
November 30\textsuperscript{th}, Laurens again insisted on a “Stipulation that the British Troops should
carry off no Negroes or other American Property” and Oswald, a friend and factor to the
Laurens family, agreed to add an amendment to the 7\textsuperscript{th} article of the treaty.\textsuperscript{75} According
to the amended clause, British troops would be withdrawn “without causing any

\textsuperscript{72} On Oswald’s career as a cosmopolitan British merchant, see David Hancock, \textit{Citizens of the World: London Merchants and the Integration of the British Atlantic Community, 1735-1785} (New York: Cambridge University Press, 1995), \textit{passim}.
\textsuperscript{73} Entry for 29 November 1782, in John Adams diary 37, 22-30 November 1782 [electronic edition], \textit{Adams Family Papers: An Electronic Archive}, Massachusetts Historical Society (\texttt{www.masshist.org/digitaladams}), accessed 15 September 2015. [Hereinafter cited as Adams, \textit{Diary}.]
\textsuperscript{74} Ibid.
\textsuperscript{75} Entry for 30 November 1782 in Adams, \textit{Diary}. See also Benjamin Franklin to Richard Oswald (26 November 1782) for the Pennsylvania legislature’s demand that American owners be compensated for confiscated slave property – The Papers of Benjamin Franklin Online (\texttt{www.franklinpapers.org}), accessed 15 September 2015. [Hereinafter cited as \textit{Franklin Papers Online}.]
To Laurens and Oswald, this clause must have seemed perfectly clear – while property taken during the war would be a subject of future negotiation, now that hostilities were over no further confiscations could take place, so all persons claimed as slaves must remain in America. Wartime emancipations did not empower the British to remove property from the now-independent United States.

The clause that Laurens and Oswald had thought so transparent turned out to be open to competing and mutually exclusive interpretations, however. In a well-known series of encounters with George Washington, Guy Carleton, the British officer in charge of the evacuation of New York, spelled out the logic behind the dominant British interpretation of the treaty. Though Carleton claimed to have cooperated with observers sent to ensure that the British did not carry off American property during their evacuation, there was some “difference of opinion...in the case of the negroes who had been declared free.” The British general denied any intention to set down a definitive interpretation, but argued that the language of “Property” in the treaty only encompassed “Property at the Time, the Negroes were sent off.” While other articles of property were to be “restored” to American claimants, “Negroes...were only not to be destroyed or carried away.” Carleton’s position was that there were no slaves to return within British lines – there were only black British subjects, and these could not be held as property.

“Delivering up the Negroes to their former Masters,” Carleton told Washington, “would be a dishonorable violation of the public Faith, pledged to the Negroes” by the British government.76 To Carleton and a growing number of antislavery Britons, the

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foundational premises of the long English antislavery argument – persons could not be
made into property, and all subjects came under the protection of the law – followed the
British flag.

It is likely that Carleton’s interpretation of the Treaty of Paris was a fair
approximation of the British government’s broader stance on restitution for slave
property taken during the war. When American and British negotiators met to finalize
and sign the Treaty of Paris in the summer of 1783, for example, the British delegation
was led by none other than David Hartley, the MP who had so fervently argued for the
inalienable claims of black Britons to the rights of subjecthood back in 1775. Though the
American commissioners dutifully presented Hartley with Congress’ objections against
Britain’s carrying off “a considerable Number of Negroes belonging to the Citizens of the
United States,” they must have known that their claims would fall on deaf ears. Though
Hartley, like Carleton, left the door open to potential compensation in the future,
restitution of slave property was impossible – this would be tantamount to re-
enslavement of a free British subject and was clearly repugnant to English law after
_Somerset._ Compensation for slave property remained a sticking point in Anglo-American
relations for decades but, to their credit, the British never budged on their interpretation
of the Treaty of Paris. Not a single cent in compensation was ever paid to an American
slaveholder by the British government.

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77 American Commissioners to Hartley (17 July 1783), in _Franklin Papers Online_. Franklin and Hartley
had a longstanding epistolary friendship by the summer of 1783, and Franklin was surely aware of the
British commissioner’s position on slavery. See Hartley to Franklin (14 November 1775), in _Franklin
Papers Online_, where Hartley informs Franklin of his proposal to extend jury trial to all slaves in the
empire.

78 The issue arose most pointedly in negotiations over the Jay Treaty in 1794, and again in the wake of the
War of 1812. See John Fabian Witt, _Lincoln’s Code: The Laws of War in American History_ (New York:
Free Press, 2012), 13-29 and 66-78; James Oakes, _The Scorpion’s Sting: Antislavery and the Coming of
The imperial crisis and the American Revolution, then, fundamentally altered British discourses surrounding slavery and freedom. With property-in-man delegitimized at home and the British state committed to maintaining the freedom of thousands of emancipated slaves in America, legal antislavery and military emancipation laid the foundation for an emerging abolitionist movement. The Society of Friends, committed to ending the slave trade and rapidly disentangling itself from slaveholding, drew on long-held English antislavery beliefs in framing abolitionist petitions to the House of Commons in 1783.\textsuperscript{79} Linked through epistolary networks to cadres of like-minded Britons and Americans of all denominations, these early abolitionists turned first to the slave trade and the amelioration of the conditions of slavery.\textsuperscript{80} These were halting measures to be sure, and did not directly attack property-in-man – indeed the British would not tackle the issue of slavery head on for another fifty years. Still, the rising dominance of antislavery principles had important effects. Moral and economic critiques of slavery honed over generations fueled the drive for slave trade abolition in the 1790s. The ability of Afro-Britons to gain and protect their own freedom made people of color central to this abolitionist drive – Equiano and Cugoano humanized the experience of enslaved people for mass audiences as never before, adding urgency to the abolitionist movement.

Even this lukewarm antislavery looks far more radical in the context of the longer English antislavery argument. Enslaved people would certainly still be classed as property, ameliorationists argued, but slaveholders would not have unlimited arbitrary

\textsuperscript{80} On the processes of slave trade abolition and ameliorationism in the British Empire, see Brown, \textit{Moral Capital}.
power over their bodies – in a sense, enslaved people would cease to be rightless. When emancipation finally came in 1833, then, there were centuries of antislavery arguments for British activists to draw on. Well before the last West Indian slave was freed in 1838, the basic English antislavery premise laid down in *Cartwright’s Case* nearly three centuries earlier – that the air of England was too pure for slavery – had already been vindicated. There was much work yet to be done to ensure that this basic proposition applied to all subjects around the globe, but generations of antislavery Britons, black and white, had provided English abolitionists with fit tools for the destruction of human bondage.  

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American national mythology accords Virginia a prominent place at the center of the narrative of the American Revolution, and with good reason. Virginians, driven to expand into the Ohio River valley by the monopolization of prime lands by the colony’s planter elite, sparked the imperial crisis when a small contingent of British regulars and Virginia militiamen, under the command of an obscure planter-officer, George Washington, skirmished with French and Native American troops. When economic depression and exacting metropolitan taxation programs drove American colonists into revolution, it was a Virginian – Patrick Henry – who gave the rebellious provincials their rallying cry: “give me Liberty or give me Death!” One Virginia delegate to the Second Continental Congress, Richard Henry Lee, took the fateful step of proposing American independence, while another, Thomas Jefferson, drafted the document declaring it as fact.

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A tall, taciturn Virginian led American forces to victory in a long and bloody war, and rose to lead the new national government that emerged from it – the great George Washington, father of the nation.

This American founding mythos, however, is also deeply connected to the cornerstone of the Old Dominion – human slavery. Recent generations of scholars have illustrated beyond any doubt that slavery and racism played central roles in shaping the ideals and course of the American Revolution in Virginia. Far from being the liberatory moment of popular historical memory, Virginia’s revolution saw planter elites pulled reluctantly into rebellion by the concerted action of rebellious slaves, restive Native Americans, and tumultuous poor whites, all aided to a greater or lesser degree by royal officials. The few halting moves against slavery that did take place were a function not of any meaningful commitment to universal natural rights but rather self-interested attempts to gain independence and maintain the Old Dominion’s slave society.

Abandoning the slave trade was a minor concession – Virginia’s enslaved population was already growing by natural increase well before the Revolution – and the few scattered voices calling for gradual emancipation were fatally compromised by racist insistence on the removal of emancipated blacks from the state.82 Sameul Johnson’s famous query about how such loud yelps for liberty could come from American slaveholders is now

easily answered – Virginia Patriots were bald-faced hypocrites, unwilling or unable to see the incongruity of their claims to natural rights and their continuing enslavement of tens of thousands of people.

Neither of these founding myths is quite right, though both have basis in historical reality. When Virginia revolutionaries drew on the tradition of English republican thought in framing their new state, they imported a set of political ideals that had been historically hostile to property-in-man – when they sought to remake the social basis of their new republic, they favored policies that many theorists hoped would cut into the profitability of large-scale plantation agriculture. Tidewater planters and republican farmers repeatedly debated gradual emancipation and the nature of a free multiracial society. The exigencies of war and British emancipation policies had provoked widespread resistance from the enslaved, however, and in the end Virginians, anxious to maintain the stability of their society, closed ranks and doubled down on the civic exclusion of people of color and the definition of slaves as a species of property. Despite widespread moral, political, and economic criticism of slavery, then, when push came to shove most Virginia slaveholders could not imagine their immediate future without their human property.

This fact should not blind us to the very real debates over slavery that took place in revolutionary Virginia. The tension between antislavery ideals and the reality of plantation slavery in the Old Dominion shaped the legal development of the institution during the American Revolution, resulting in attempts to “ameliorate” the condition of enslaved people, and even a few gradual emancipation proposals. Whatever their qualms about slavery, however, most Virginians simply could not think their way out of the
institution. To some, like Thomas Jefferson, belief in black inferiority, reinforced by generations of laws stripping enslaved Afro-Virginians of basic rights and limiting the economic and political inclusion of free blacks, precluded immediate action against slavery. Others, however deeply they may have opposed slavery’s deleterious effect on their economy over the long term, could not imagine any short term economic solutions that did not rely on the continuation of slavery. As Patrick Henry told a correspondent in 1773, “I am drawn along by the general inconvenience of living without [slaves]. I will not – I cannot justify it, however culpable my conduct.”

As had been the case in the mid-18th century, Virginains’ main critique of slavery was that it stifled their economy. In a sermon celebrating British victory over France in 1763, for example, Jonathan Boucher, an English-born tutor to a number of prominent planters’ children and Anglican minister, argued that Virginia and Maryland lagged behind other colonies in their economic development “because they are cultivated by slaves.” Indeed, Boucher claimed, if it were not for “the immediate interest which every man has in the property of his own slaves, it would be for every man’s interest” that the institution be abolished. The “free labour of a free man, who is regularly hired and paid for what he does,” would be far more productive than the “extorted eye-service of a slave.”

Despite this economic criticism and his moral “abhorrence of slavery,” Boucher did not challenge the existence of the institution. Instead he argued that its “lawfulness has again and again been clearly proved” and that flatly denied charges that Virginia

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slaveholders were cruel to their human property – indeed, Boucher claimed that “in no part of the world were slaves ever better treated.” His recommendation was simply that slaves be better instructed in Christianity to “emancipate them from the bondage of sin.” Actual emancipation was unthinkable. “To set all free,” Boucher argued, would be “no gain to them.” The sticking point was an emerging scientistic conceptualization of race – “even when made free” a person of African descent could never be “on terms of equality with a free white man. Nature has placed insuperable barriers in his way.” Slavery was not objectionable because of its “tendency to debase and injure slaves,” but because it was “injurious to society at large.” Hamstrung by white supremacy, Boucher, like many Virginians, could simultaneously believe that “an essential part of the improvement [of Virginia] must be the abolition of slavery” and that slavery was a legal, benevolent, Christian institution perfectly suited for Africans.85

George Mason also saw slavery as an impediment to Virginia’s future development. In 1765, Mason bemoaned the fact that a “Policy of encouraging the Importation of free People & discouraging that of Slaves” had “never been duly considered” by Virginians. The effect of Virginia’s reliance on slavery was that “Half of our best Lands…remain unsettled” while the rest was “cultivated with Slaves.” From this basic problem flowed a variety of economic ills – the “fluctuating State of our Trade, the Uncertainty of our Markets & the Scarcity of Money” among them. Illustrating the congruence of his thought with elements of the long English antislavery tradition, Mason also argued that slavery was not merely an economic problem. Reliance on the institution had an “ill Effect” on the “Morals & Manners of our People.” These social

85 Ibid.
and economic symptoms were the “first Signs of the Decay” of the Old Dominion and, if not quickly remedied, would be the “primary Cause of the Destruction” of a free government. Mason’s solution was simple and straightforward, and bore a striking resemblance to John Locke’s reform plan from the 1690s. Virginia should encourage the immigration of free settlers who could lease undeveloped lands from the great planters. While in the short term this might seem to decrease the profits of the Virginia gentry, in the long term such a scheme would be “more useful to the Public.” That tenant labor was more productive than slavery was, Mason argued, “a Maxim that will hardly be denied in any free Country. Despite his clear economic animus toward slavery, Mason knew he was on dangerous ground – he would not push the slavery question too hard for fear that it would “expose our Weakness by examining this Subject too freely.” Whatever the economic virtues of free labor, it was politically difficult to openly challenge slavery in revolutionary Virginia. 86

Like Mason, many Virginians drew on elements of the long English antislavery argument in their criticisms of imperial economic policy. Few, however, shared his faith that freedom and education might gradually prepare former slaves for participation in Virginia society. To most Virginians, race presented an insuperable barrier to emancipation. This distinct admixture of economic, and often philosophical, opposition to slavery with reliance on racially based systems of social control determined the outer limit of revolutionary antislavery in the Old Dominion. Arthur Lee, youngest son of the Lee dynasty and a British trained doctor and lawyer, provides a case in point. Lee took up his pen in 1764 to refute Adam Smith’s claim in *Theory of Moral Sentiments* (1759)

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that American slaveholders, “whose levity, brutality, and baseness, so justly expose them to...contempt,” were in many ways inferior to their African slaves, who Smith described as “nations of heroes.” The honor of his family and his country wounded, Lee responded that Smith’s assertions were “more worthy an African savage than an European philosopher.” Virginia planters were refined, generous, and hospitable – African slaves were “a race the most detestable and vile that the earth ever produced.” Even Aristotle, Lee proclaimed, could not have imagined a more naturally slavish race than Africans, who he described as “generally shallow, and their hearts cruel, vindictive, stubborn, base, and wicked.”

Far from a simple racist diatribe against outside criticism, however, Lee’s *Essay in Vindication of the Continental Colonies* went on to consider the role slavery played in the Old Dominion, and whether it ought to continue in the future.

Despite, or perhaps because of, his intense hatred of Africans, Lee argued that the colonies should gradually disentangle themselves from human bondage. Unlike Granville Sharp, however, he did not start from the premise that slavery was in and of itself illegitimate. Indeed, Lee claimed, “the origin of slavery seems just and legal.” Illustrating how slaveholders grappled with evolving ideals about the legitimacy of their increasingly peculiar institution, Lee agreed with Hutcheson, Smith, and Blackstone that war captivity was no longer “sufficient authority for enslaving” since “it is founded on a right which is itself unjust..., the power of inflicting death on a prisoner.” Nor could a person consent to be enslaved – under this circumstance, a slave “yields all his duty and obedience to his master; [and] is no longer entitled to any privileges or protection from society. A slave...would be constantly an outlaw.” Even Virginians recognized that the

law must, in some circumstances, recognize the humanity of enslaved persons, at least as far as their liability to punishment was concerned. What, then, could be the basis for legitimate enslavement? To Lee, the only acceptable foundation for slavery was “the legislative power in each society” – anticipating Lord Mansfield, Lee saw the root of slavery in local positive legislation.89

If slavery was a legitimate institution based on local law, and Africans were so degraded as to deserve their enslavement, what was Lee concerned about? The problem with slavery, Lee argued, was that it retarded local economic development. Here the Virginian placed the blame squarely on British merchants. They were the malign force behind the slave trade, a commerce “shocking to justice and humanity, ... [a] barbarous tyranny, and...abominable craft.” Worse yet, the merchants’ allies in Westminster and Whitehall had pursued a “confined and puny” mercantilist policy “employed to depress [the colonies], and prevent their growth.” Unable to control their own economic destiny, Virginians found themselves with “their manufacturing hands tied up; their commerce confined; and their staple commodity oppressed. They are treated, not as the fellow-subjects, but as the servants of Britain.” By channeling slaves into Virginia, British merchants had rendered the colonial economy “unfavourable to trade and manufactures,” which would be more likely to flourish in “free states.” To Lee, the solution was clear – “if slavery be...an enemy to arts and sciences, good policy would surely direct us to suppress it.”90

Though Lee stopped short of recommending any specific policies to this end, the basic outlines of his antislavery agenda are clear enough. Virginians must be freed from

89 Ibid., 31-35.
90 Ibid., 37, 20, 39.
the servitude of imperial mercantilism and allowed to direct their own internal economic
development. Though slavery, legitimated by “the legislative power” of the Virginia
Assembly, would continue for a time, the slave trade should be abandoned – “how long
shall we continue a practice,” Lee asked, “which policy rejects, justice condemns, and
piety dissuades?” Besides, closing the slave trade had the added benefit to racists like
Lee of keeping more “barbarous Africans” and “inhuman...savages” out of Virginia.
Once the benefits of a free labor economy began to be felt in the Old Dominion, slavery
itself might even be abandoned, since it “tends to suppress all improvements in arts and
sciences..., deprave[s] the minds of the freemen..., [and] endangers the community by the
destructive ends of civil commotion.” 91 Here was the distinctive antislavery of
revolutionary Virginia on full display – it is hard to discern which Lee found more
distasteful: slavery or enslaved people.

It was in this context of growing unease with the economic role of slavery that
Virginia legislators took up the question of slave importation duties in the mid-1760s. As
we have seen, the House of Burgesses had resuscitated their slave trade tax in the decades
preceding the imperial crisis, placating imperial planners by levying the duty on slave
purchasers rather than importers, and this trend continued when the slave trade picked up
again with peace in 1763. 92 In that year, the colony’s 1752 slave importation duty – five
percent of the purchase price – was renewed without metropolitan opposition. Three

91 Ibid., 42-43, 45.
92 The importation of African slaves into Virginia reached its pre-revolution nadir during the French and
Indian War – just over two thousand slaves were imported between the outbreak of war in 1754 and the
cessation of hostilities in the Chesapeake in 1760, and none at all in 1756 or ’57. Imports had rebounded
by 1762, with 2,357 slaves imported in that year alone. By 1765, however, with the colonial non-
importation strategy gaining momentum, slave imports plummeted once again – aside from a spike in
1772, when nearly 2,000 new slaves were imported, slave importations to Virginia were few and far
years later, the tax was renewed once again, and new amendments extended the duty to slaves imported overland or through the coastwise trade as well. These slave importation duties skirted the fine line between revenue measures and prohibitive tariffs, and many Virginians held out hope that regulating slave importation would both foster economic diversification and raise the market price of tobacco. Few, however, saw taxation of slave imports as a step toward the ultimate abolition of slavery itself – controlling the influx of new slaves was meant to make Virginia’s slave economy more dynamic and diversified.

The tension between these lukewarm antislavery ideals and the continued commitment to racial slavery in practice also informed revisions in the slave law of the Old Dominion. When the Burgesses made the first major revisions to their slave codes in nearly two decades in 1765, for example, new laws seemed to hint at a growing ameliorationist ethos in the Virginia legislature informed by English antislavery legal principles. Refining an older law that bound mixed-race children born of free white mothers to servitude for thirty-one years, one new statute sought to prevent colonists from “selling...mulattoes and others as slaves, who by the law of this colony are subject to a service...after which they become free.” Violation of this statute would result in a £50 fine, and for a second offense the master would “forfeit the residue of the time of service” to the state – if unable to pay their fines, offending masters could even be bound out “to serve...[for] the full time of service that would have been due.” Furthermore, the Burgesses recognized that thirty-one years of bondage was “an unreasonable severity” and shortened the term of bondage for freeborn mixed-race children to twenty-one years
for boys and eighteen years for girls.\textsuperscript{93} Born free, these children could not be considered as property in the way that enslaved people were. They were certainly forced into a servile status, but treating a free person as a slave, even a mixed-race servant, could not be condoned. All free people were subjects with basic rights.

If the colonial state intervened to regulate masters’ property rights and protect mixed-race servants, however, it increasingly abrogated its responsibility for the capture and rendition of fugitive slaves. Indeed, the state delegated fugitive renditions almost entirely to private Virginians. Unlike earlier laws that required sheriffs or other magistrates to retain runaways until their masters retrieved them, a 1765 revision now required that “the taker up” or his agent “immediately carry such runaway to his or her owner.” As a reward, slave catchers received five shillings plus four pence for each mile of their journey – in 1769 the rate was raised to ten shillings plus six pence per mile, further incentivizing slave-catching. The only case in which the old system of holding fugitives would remain was if a captured runaway refused to identify his or her owner – enslaved Afro-Virginians captured in escape attempts must have been particularly reticent after this statute passed.\textsuperscript{94} This same tendency to delegate authority over slavery is evident in another 1765 act regulating trials for enslaved people accused of capital crimes. Unlike earlier laws which required that the governor issue separate commissions of oyer and terminer for each trial, the new statute called for blanket commissions to be issued to all county justices, who would “try, condemn, and execute, or otherwise punish

\textsuperscript{93} William Waller Hening, \textit{The Statutes at Large: Being a Collection of all the Laws of Virginia...} (New York: Bartow, 1823), VIII: 133-135. [Hereinafter cited as Hening, \textit{SAL}.] The statute also reduced terms of service for any children born to a female mixed-race servant during her term of servitude to the same ages discussed above.

\textsuperscript{94} Ibid., VIII: 135-6, 358-361. The 1769 revision allowed for Virginians who preferred not to deliver slaves in person to deposit fugitives in the county jail. Sheriffs would then take custody and be responsible for returning the fugitive to his or her owner and receive the reward.
or acquit” at their discretion “without the solemnity of a jury.” Even as the colonial state intervened to protect the liberty of freeborn mixed-race children, then, it also delegated ever-greater discretionary power over the bodies of enslaved people to private citizens and local magistrates.

As Patriot rhetoric of liberty reached a fever pitch in the late 1760s, however, there were signs that ameliorationist tendencies were making inroads in Virginia’s slave police law as well. Earlier laws empowering county justices to order the mutilation or castration of “outlying slaves” were deemed “disproportioned to the offence, and contrary to the principles of humanity.” In 1769 castration was outlawed as a punishment except in cases of “an attempt to ravish a white woman.” Three years later, a series of statutes gave a semblance of judicial form to slave trials and further limited punishments inflicted on enslaved people accused of crimes. Slaves accused of breaking and entering without theft, for example, were allowed to invoke benefit of clergy, while private citizens were no longer empowered to kill outlying slaves with impunity. Limits were also placed on the capital punishment of slaves, requiring at least four county justices to “concur in their opinion of...guilt” before sentence could be passed. These were clearly not policies meant to touch property-in-man, but they circumscribed the near-absolute physical power previous generations had given to slaveholders and hinted at the kind of ameliorationist policies British abolitionists would later employ.

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95 Ibid., VIII: 137-139. Slaves accused of manslaughter in the death of another slave, however, would be allowed benefit of clergy.
96 Hening, SAL, VIII: 358. See also the 1778 petition of Edmund Voss who asked for £300 in compensation for his “negro man slave” who died as a result of his castration. Both the House of Delegates and the Senate agreed to pay Voss the requested sum. Journal of the Senate of the Commonwealth of Virginia...1778-1779 (Richmond, VA: Thomas W. White, 1828), 9. [Hereinafter cited as VASJ.]
97 Ibid., 522-523.
As the imperial crisis deepened, Virginia Patriots began to directly link their concerns about the long-term future of slavery in the colony to their resistance to metropolitan authority. In his *Summary View of the Rights of British America* (1774), Thomas Jefferson asserted that “The abolition of domestic slavery is the great object of desire” in the colonies. Though the institution had been “unhappily introduced” to the colonies “in their infant state,” slavery was now opposed to the “lasting interests of the American states.” The “immediate advantages of a few African corsairs,” however, weighed heavier than “the rights of human nature” in the scales of imperial policy, tying the hands of colonists who hoped to see slavery end. Virginians, Jefferson claimed, had made “repeated attempts” to “exclude all further importations from Africa...by imposing duties which might amount to a prohibition,” but these attempts had been “defeated by his majesty’s negative.” Here, Jefferson was at least partially correct – the prohibitive import duties enacted by the House of Burgesses in the early-18th century *had* been disallowed by the Privy Council, though his linkage of earlier slave trade taxes to a broader program of emancipation strains credulity. Drawing on these earlier slave trade duties, however, Jefferson now argued that regulation and eventual abolition of the slave trade would prepare the ground for “the enfranchisement of the slaves we have.”

The most potent challenge to slavery in Virginia came not from internal critics of the institution, however, but from imperial officials working to crush colonial resistance to metropolitan policy and enslaved people themselves who used the chaos of revolution to claim their freedom. As we have seen, Lord Dunmore’s 1775 military emancipation proclamation and the expansion of this policy to all slaves held by American Patriots

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during the Chesapeake campaigns of 1779-1781 had freed thousands of enslaved Virginians who ran for British lines. In an attempt to prevent their valuable slave property from running to British lines, Virginians expanded their already brutal police law. Shortly after Dunmore issued his proclamation in November, for example, the Assembly declared that any enslaved people “taken in arms against this colony, or in the possession of the enemy, through their own choice” would be transported to the West Indies and sold, the proceeds from their sale going to purchase weapons and ammunition for Virginia Patriot units. If for some reason sale out of the colony was inconvenient, slaves could also be returned to their owners or punished under existing law for punishing enslaved people for capital crimes.99 Particularly given the close attention Virginians gave to the traditional practice of prisoner exchanges and paroles when dealing with British redcoats, this application of police law is striking. To British commanders and imperial planners, once enslaved Virginians were freed and enrolled in military service, they were understood to be subjects in arms, protected by the norms of European international law. To Virginia planters, however, Lord Dunmore’s Ethiopia Regiment was nothing more than a band of rebellious slaves, subject to the brutal police law of their revolutionary state.100

Virginia slaveholders also sought to protect their slave property by moving enslaved people away from the theater of war, making escape to British lines far more difficult. The revolutionary state also sought to prevent enslaved people from running to

99 Hening, SAL, IX:106.
100 See Writings of Washington, XXII: 19 for Virginians’ insistence on regular prisoner exchanges and assurances that British captives were treated humanely in accordance with the laws of war. See also Betsy Knight, “Prisoner Exchange and Parole in the American Revolution,” The William and Mary Quarterly, vol. 48, no. 2 (April, 1991): 201-222.
British forces and to exploit their labor power in service of the Patriot cause by sending runaways westward to toil in the lead mines of western Virginia. When Bristol, an enslaved man owned by William Montague, was captured by Patriot forces while attempting to reach Lord Dunmore’s forces at Gwin’s Island in the early summer of 1776, for example, he was sent west and “employed in the public service at the lead mines” – Montague was paid nearly £100 in compensation for Bristol’s labor, and the unfortunate slave was returned to his owner in June of 1779.\textsuperscript{101} Despite these efforts, however, enslaved Afro-Virginians continued to exploit the chaos of revolution to claim their freedom.\textsuperscript{102}

When war returned to the Chesapeake in 1779, the steady stream of enslaved people who had been running for British lines since Lord Dunmore’s proclamation now became a torrent. During Cornwallis’ 1781 campaign alone, at least 4,500 enslaved people ran for British lines. Many prominent Patriots, including Washington, Jefferson, and Madison, lost slaves to the British during this campaign. Though tabulating the total number of enslaved people who escaped during the Revolutionary War is a notoriously difficult task, it is certain that at least 6,000 slaves deserted Virginia plantations for British lines. With Cornwallis’ defeat at Yorktown, however, the future of these escaped slaves was thrown into uncertainty – around 2,000 were evacuated with British forces and carried to Canada, while the vast majority were left behind to fend for themselves. Most were returned to slavery. Throughout the War of Independence, then, enslaved Afro-Virginians consistently took advantage of British wartime emancipation policies and protection from re-enslavement to seize their own liberty, but with Patriot victory the

\textsuperscript{101} VASJ, 1778-1779: 30, 38.
\textsuperscript{102} Taylor, Internal Enemy, 21-32; Gilbert, Black Patriots and Loyalists, 30-37.
institution of slavery was shielded from further erosion. Indeed, the enslaved population of Virginia had actually grown over the course of the war, to over quarter-million men, women, and children.\(^{103}\)

British policy may have shaken slavery, but Virginia slaveholders were not willing to see their property claims extinguished without a fight. In addition to local police laws meant to terrorize Afro-Virginians and prevent them from making it to British lines, Patriots in the Old Dominion pursued legal and diplomatic strategies to reclaim or at least gain compensation for lost slave property. For slaves still in Virginia, or who had died during the war, the solution was relatively simple – earlier statutes allowed slaveholders to petition the legislature for compensation, and existing law already regulated the rendition of fugitives within Virginia. Private citizens regularly petitioned the new House of Delegates for compensation for slaves lost during the war. In May 1777, for example, the executors of John Bowdoin’s estate petitioned the General Assembly for the return of Ned, an enslaved man captured in an escape attempt and sent to the lead mines, along with compensation for the slave’s “hire” by the state.\(^{104}\) Masters of slaves taken in arms and condemned by the state during the war also sought compensation. Lewis, an enslaved man who had escaped to Dunmore’s lines and was taken captive by Patriot troops at the battle of Great Bridge in December 1775, died in jail while awaiting transportation out of the colony – Hansford Rowe, his former master, sought “such satisfaction as shall be thought just” from the General Assembly for the loss


\(^{104}\) *Journal of the House of Delegates of the Commonwealth of Virginia, 1777-1780* (Richmond, VA: Thomas W. White, 1827): 8. [Hereinafter cited as *VAHJ*.] The legislative records of revolutionary Virginia are replete with similar requests during and after the war. See, for example, *VADJ* and *VASJ*, passim.
of his property. The Virginia legislature approved the vast majority of these claims for compensation.

The war had destabilized slavery in Virginia, however, and property claims were not always clear. One statute sought to address the problem of slaves “wandering about” by empowering local justices to imprison any suspected slaves for up to three months. Justices were required to advertise these captured slaves in the *Virginia Gazette* so that slaveholders could claim them, and if no owner materialized they were to hire out unclaimed slaves to recoup their costs. Private Virginians were also required to assist in the rendition of slaves who had escaped during the war. The General Assembly took up the question enslaved people who had escaped from one master and wound up in the hands of “wicked and evil disposed persons” who refused to return them to their rightful owners in 1782. They attempted to solve this problem by ordering the return of all such slaves to their owners by October 1st – Virginians who refused to comply would be subject to a £50 fine, laggards who stalled in returning slaves would be fined £5 per month, and all would be “liable to the action of the party grieved at the common law.”

The legislature also recognized the limited geographic reach of this law, however. Any slaves “taken by the enemy” and removed from the state, along with any “retaken in action” in “any of the United States,” were beyond the reach of Virginia slaveholders unless “by capitulation or agreement [they were] to be returned to their owners.”

Enslaved people who had made it out of Virginia’s jurisdiction, then, were beyond the reach of local law, requiring local legislators to address questions of the reach of slave property law. In 1781, for example, John Turberville, a drover, protested that

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105 *VADJ*, 1777-1780, 29.
one of his wagons and its “negro driver” were impressed by the Continental Army back in 1778 to accompany a group of draftees to Pennsylvania. Arriving at Lancaster, the enslaved man was “detained in the continental service” and never returned to Virginia. With the slave beyond their jurisdictional reach, and Turberville unable to produce a certificate from the Continental Army, the General Assembly denied the claim. They did recommend that the Old Dominion’s representatives to the national Congress press for compensation from the emerging federal state, but Virginia legislators would not be held liable for slave property taken by an external authority.  

Slaves who successfully made their escape to the British and were carried off at the cessation of hostilities were even further beyond the reach of Virginia law. The best Virginians could hope for was that their claims for restitution and compensation would be vigorously pressed by the American delegates negotiating the Treaty of Paris, and this, as we have seen, was a losing battle – the British never budged on the question of compensation for slaves emancipated under wartime policy.  

External pressures on Virginia slavery certainly played a crucial role in destabilizing the institution during the Revolution, but internal political and economic changes also hinted at the possibility of an antislavery Old Dominion. Upon declaring their independence in May 1776, Virginians set to work creating a new republican political order and transforming the political basis of their state. Central to this new republican vision was the abolition of primogeniture and the entail, the central pillars of

107 VADJ, 1781-1786: 15, 18-19.
108 Perhaps not coincidentally, it was a Virginian, Edmund Randolph, who, as Attorney General and then Secretary of State, pressed the issue of compensation for slave property taken by Great Britain during the Revolutionary War in negotiations over the Anglo-American Treaty of 1794. See Henry P. Johnston, ed., The Correspondence and Public Papers of John Jay... (New York: G. P. Putnam, 1893), IV: 60-64, 137.
the Virginia gentry. Echoing Adam Smith’s description of entails as “unnatural,”
Thomas Jefferson later famously argued that “the earth belongs in usufruct to the living;
that the dead have neither powers nor rights over it.”

The bill Jefferson drafted to
abolish entails described “the perpetuation of property in certain families” as “contrary to
good policy” because it discouraged owners from “taking care [of] and improving” their
property. When the bill was enacted in October 1776, all entailed estates were converted
to fee simple tenure, allowing owners to divide and sell off their landed property. Any
enslaved people entailed to an estate were also converted to fee simple property,
increasing the salability of slaves. Intestate accounts still descended via the old law of
primogeniture until a 1785 statute guaranteed an equal division of estates among heirs.
The laws of property that protected the political and economic power of Virginia’s
planter gentry were destroyed in the crucible of revolution.

As we have seen, these political economic policies were heavily influenced by
earlier Patriot Whig ideals that, if paired with policies regulating slave trading and the
conditions of slave labor, could have real antislavery potential. To some Virginians, the
best way to guarantee their economic development was to gradually abolish the
institution of slavery outright. Jefferson, for example, included an abolition proposal in a
draft of the Virginia state constitution in June 1776, stating flatly “No person hereafter
coming into this country shall be held...in slavery under any pretext whatever.”

109 Smith, Lectures on Jurisprudence, 468; Thomas Jefferson to James Madison (6 September 1789) in
1950 - ), XV:392. [Hereinafter cited as TJ Papers.]
110 Hening, SAL, IX: 226.
111 Ibid., XII: 138-140.
113 TJ Papers, I:353.
Though some Virginians clearly believed gradual abolition was in the best interest of their newly independent state, a majority disagreed and Jefferson ultimately omitted his own proposal from the final draft presented to the state convention in 1777. After consulting with fellow Virginia framers Edmund Pendleton and George Wythe, Jefferson decided it would be better to leave out “any intimation of a plan for a future & general emancipation” from the document since “the public mind would not yet bear the proposition,” though he hoped to raise the issue “by way of amendment” at some future date. While Virginia’s founding fathers chose to leave gradual abolition out of the state’s constitution, there was broad agreement about what such a policy would look like: guarantee “the freedom of all born after a certain day” to prevent tampering with vested property rights, and ensure the “deportation at a proper age” of all emancipated slaves – Jefferson’s ideal republic was lily-white. Though Jefferson saw gradual emancipation as the “foundation...for a government truly republican,” he, like Arthur Lee a decade earlier, could only imagine abolition if directly linked to the expulsion of all Afro-Virginians.114

Abolition, then, was a political impossibility in revolutionary Virginia, and even those who promoted it tied emancipation to racially exclusionary policies. Ending the slave trade, however, was politically feasible. As had been the case for decades, many Virginia elites saw the slave trade as a drain on their local economy that made independent gentleman planters reliant on metropolitan creditors and merchants. Economic catastrophe and the rising imperial crisis of the 1760s only exacerbated these

114 As Jefferson later noted in his Autobiography, “Nothing is more certainly written in the book of fate than that these people are to be free. Nor is it less certain that the two races, equally free, cannot live in the same government. Nature, habit, opinion has drawn indelible lines of distinction between them.” Though written decades after the drafting of the Virginia Constitution, and perhaps more indicative of Jefferson’s later views on race, the quote illustrates how difficult Virginians found it to imagine a multiracial republic. Paul Leicester Ford, The Works of Thomas Jefferson (New York: G. P. Putnam’s Sons, 1904-1905), I: 76-77. [Hereinafter cited as TJ Works.]
issues. Once they declared their independence, then, abolition of the slave trade was high on Virginia Patriots’ list of priorities. Support for a full slave trade ban was widespread enough that a bill authored by Thomas Jefferson quickly passed into law in October 1778, stating “no slave or slaves shall hereafter be imported into this commonwealth by sea or land, nor shall any slaves so imported be sold or bought by any person whatsoever.” Fines for violation of this law were substantial – illegal importers would be fined £1000, and purchasers £500. To encourage private citizens to assist in preventing further slave importations, half of all fines would be paid out to informers. Any enslaved people imported in violation of the act would be “upon such importation become free.”\textsuperscript{115}

As had been the case throughout Virginia’s colonial history, local regulation of slave importation had no direct impact on the legitimacy of property-in-man within the newly independent state. Indeed, as numerous scholars have pointed out, the enslaved population of the Old Dominion was already growing by natural increase by the time of the revolution, and shutting down the slave trade increased the value of slaves on a burgeoning resale market.\textsuperscript{116} Abolishing the slave trade, however, was no mean feat. The state’s interest in preventing new slave imports overrode the individual private property claims of slave traders and potential buyers. Imperial centralization had blunted earlier attempts at regulation but now, freed from metropolitan control, Virginians finally and definitively ended their official participation in the trans-Atlantic slave trade.

The question of slaves brought into the colony by slaveholders from other American states, however, raised tricky questions about comity and forced Virginia

\textsuperscript{115} Hening, \textit{SAL}, IX:471-472.

\textsuperscript{116} For a recent argument stressing the demographic health of Virginia’s enslaved population, see Richard S. Dunn, \textit{A Tale of Two Plantations: Slave Life and Labor in Jamaica and Virginia} (Cambridge, MA: Harvard University Press, 2014), 23-73.
legislators to carve out a number of exemptions to the importation ban. Slaveholders who moved into Virginia and became citizens were allowed to bring slaves with them as long as they took an oath not to import any new slaves from beyond American jurisdictions, those “making a transient stay” could bring slaves with them “for necessary attendance” during their sojourn, and Virginians who inherited slaves held in another state exempted as well.117 Two years later, with the British army on the offensive in South Carolina and Georgia, the General Assembly gave slaveholders from those beleaguered states right of sojourn with their slave property for up to one year after the “expulsion of the enemy...or the restoration of civil government” – slaves held beyond this term would be freed.118 Virginians might be able to prevent slave importations from beyond the United States, but the doctrine of comity required that they respect the property rights of their fellow republican citizens.

Still, these statutes represent an unprecedented regulatory intrusion into the property rights of slaveholders. All exemptions to the 1778 slave importation ban required slaveholders to register their slaves with the state, and violations of the statutes would void masters’ property rights and emancipate enslaved people. Indeed, revolutionary Virginia saw the state emancipation of scores of enslaved people. In June, 1779, for example, an enslaved man named Kitt was freed for “meritorious service to the commonwealth” in uncovering a counterfeiting ring. Kitt may have been freed, but his former owner, Hinchia Mabry, had to be compensated for his property – Mabry was awarded £1000 by the legislature. Aberdeen, an enslaved man who had “laboured a

117 Hening, SAL, IX:472.
118 Ibid., X:307-308.
number of years in the public service at the lead mines,” was declared “free in as full and ample a manner as if he had been born free” in October 1783.\textsuperscript{119}

Though Virginia never officially enlisted enslaved people in its armed forces, slaveholders sometimes freed individual slaves to enroll them as substitutes, and free black Virginians were accepted into the military as early as 1775. Some enslaved people attempted to pass as free and enroll in the militia, leading the legislature to require evidence of freedom for black soldiers after 1777. As the need for manpower became more pressing during the Chesapeake campaigns of 1779-1780, however, some Patriots, James Madison prominent among them, called on the Old Dominion to free and arm some of its slaves. One correspondent informed Madison that his plan was doomed to failure – most Virginians considered “sacrificing the property of a part of the community” to be “unjust.”\textsuperscript{120} With military victory achieved by 1782, some slaveholders attempted to re-enslave men they had freed to serve as substitutes and “force them to return to a state of servitude, contrary to the principles of justice.” To prevent this, the legislature decreed that all enslaved people who had faithfully served out their term of enlistment were “fully and compleatly emancipated, and shall be held and deemed free.” The state Attorney General was empowered to initiate suits \textit{in forma pauperis} to guarantee the freedom of those improperly detained and assess damages against slaveholders.\textsuperscript{121}

Private manumissions also became more common during and after the revolution. As had been the case since the 1690s, all manumissions had to be approved by the state,

\textsuperscript{119} Ibid., X:115.
\textsuperscript{120} Quarles, \textit{Negro in the American Revolution}, 57-58.
\textsuperscript{121} Hening, \textit{SAL}, XI:308-309.
but with the governor and council in exile, responsibility for approving private
emancipations fell to the legislature. The case of John Barr and his slaves, illustrates the
difficulties this situation created. Barr was in ill health, and wanted to make sure that
Rachel, an enslaved woman, and her daughter, also named Rachel, were freed. But with
the old law restricting manumissions still in force and the governor “withdrawing from
his government,” he had no legal way to do so. Barr simply added a codicil to his will
abrogating all “right, title, or interest” to Rachel and her daughter, and set aside twenty-
five acres of his estate for their support. When a dispute arose over the validity of this
emancipation clause, the matter ended up before the legislature in May 1777. The
General Assembly approved the will, granting both Rachels their freedom, but were also
anxious to limit the scope of their ruling. Approval of Barr’s codicil was not an
invitation to flood the legislature with manumission requests – the case was not to be
“drawn into precedent, except in cases where the circumstances may be precisely similar”
– but Virginia slaveholders continued to petition the assembly for emancipation of their
slaves.122

In October 1779, Susanna Riddle, Thomas Walker, and Lewis Dunn all petitioned
the Assembly for the manumission of their slaves – John Hope, known as Barber Caesar,
William Beck, a mixed-race slave, and Pegg were “declared to be free, and [to] enjoy all
such rights, privileges, and immunities, as free negroes or mulattoes by the laws of this
country do enjoy.” The following year, Henry Delony and Benjamin Bilberry
manumitted their slaves Ned and Kate.123 By 1784, the General Assembly construed
private manumission requests so broadly that Anne Rose and her daughter Margaret were

122 Ibid., IX: 320-321.
123 Ibid., X:211, 372.
freed by a clause in Walter Robertson’s will granting them “possession of all his real and personal estate” for their “long and faithful service.” Though the document said nothing about manumission, the legislature interpreted the will as “manifesting [Robertson’s] intention that they should be no longer subject to bondage” – both mother and daughter were freed and immediately inherited their former owner’s estate.\textsuperscript{124}

By 1782, the General Assembly decided to do away with the costly and cumbersome process of granting legislative approval for individual manumissions. Private emancipations could now be conducted by any written instrument attested by two witnesses or by declaration in open court. Any enslaved people freed in this manner would “enjoy as full freedom” as if they had been emancipated by legislative decree. To prevent slaveholders from abusing manumissions to rid themselves of the aged, the infirm, or minors, the legislature required that former owners continue to support those “not...of sound mind and body” and any freed people over forty-five or under the age of consent. Manumission documents would be issued to the freed people and copies lodged with the county clerk – slaveholders who neglected to provide their former slaves with freedom papers would be fined £10, £5 of which went to the freed person. There were, to be sure, limits to manumission. Any freed person traveling beyond their home county without freedom papers could be jailed until their freedom could be confirmed, and those unable to pay taxes could be bound out to repay their bill. Still, this made access to manumission easier for those slaveholders who wished to divest themselves of their human property.\textsuperscript{125} Nor did it, as some Virginians had hoped, require former slaves to leave the state. Freed Afro-Virginians certainly faced a difficult life, hemmed in by racist

\textsuperscript{124} Ibid., XI:362-363.
\textsuperscript{125} Ibid., XI:39-40.
legislation limiting their political and civic rights and relegated to the most menial
employments in an already-depressed economy, but they were recognized as legal
persons, not articles of property.

Revolutionary Virginia was, like its central figure, Thomas Jefferson, deeply
ambivalent toward human slavery. Some Virginians had been uneasy with the central
role of slavery in their local economy for decades, and the revolutionary infusion of
natural rights ideology and the chaos of war opened up new space for debate over the
future of the institution. The new state under construction in the Old Dominion eschewed
many of the old bases of great planter power – primogeniture, the entail, and the slave
trade – pointing toward a possible new future. Yet many of the same tendencies that
shaped this emerging debate over slavery limited the emancipatory potential of the
revolution in Virginia. Revolutionaries like Jefferson and Mason may have hoped to see
their new republic peopled by free yeoman farmers, and implemented many policies to
promote this outcome, but theirs was to be a white man’s republic. Their revolutionary
vision limited by generations of racial violence and the repression of free black
Virginians, they simply could not imagine enslaved people as citizens.

* * *

New Englanders, Edmund Burke noted in March of 1775, were particularly fond
of liberty. The great orator described “a love of freedom” as the “predominating feature”
of all the American colonies, but the New England colonies were “not only favourable to
liberty, but built upon it.” This was due, of course, partly to the peculiar religious culture
of early colonial New England. Puritanism was “the Protestantism of the Protestant
religion” – though all “dissenting interests” were rooted in “direct opposition to the
ordinary powers of the world,” New Englanders grounded their local political and legal cultures in “a strong claim to natural liberty.” The real source of New England’s love of freedom, then, was not “so much to be sought in their religious tenets, as in their history.” Unlike the Southern colonies, where “a vast multitude of slaves” made slaveholders “proud and jealous of their freedom,” Massachusetts and her neighbors were “not only devoted to liberty, but to liberty according to English ideas, and on English principles.” Religion may have given a peculiar inflection to New England politics, but when Bostonians rose in rebellion against what they perceived as unjust taxation and punitive enslavement by the metropole, they drew on a long history of English resistance to tyranny.126

White Bay colonists were not the only people to express this tendency toward freedom, however, and enslaved and free blacks quickly seized the moment to press for freedom and greater inclusion in revolutionary Massachusetts. As in Virginia, some enslaved people saw the British as natural allies. In 1768, for example, Boston was seized with panic when word of a planned rebellion, instigated by offers of freedom from a British officer, swept the city.127 Rumors of slave revolts resurfaced again in 1772 and 1774, keeping revolutionary Bay Colonists on edge and wary of potential enemies within. In the wake of the 1774 rebellion scare, Abigail Adams reported to her husband that slaves had been in communication with Thomas Gage, the embattled royal governor and military commander, expressing their willingness to “fight for him provided he would arm them and engage to liberate them.” Unlike the Virginians, who doubled down on

126 Cobbett, Parliamentary History, XVIII:491-495.
their coercive police law to prevent slaves from joining British forces, Adams seized the moment to argue against the continuation of slavery. “I wish sincerely there was not a Slave in the Province,” she argued. To Abigail Adams and many others in revolutionary Massachusetts, slavery was an “iniquitous Scheme” – how could American Patriots honestly claim to be on the side of liberty when they were “daily robbing and plundering from those who have as good a right to freedom as we have.”

In such a context, with talk of liberty and slavery thick in the air and the economic future of the Bay Colony on the line, questions about the desirability of human slavery in Massachusetts were unavoidable, and a number of prominent Patriots addressed them head on. As Burke had noted, Puritanism played a critical role in shaping Massachusetts’ distinctive ideals of liberty, and religion continued to inform denunciations of slavery in the Bay Colony. Nathaniel Niles, minister of North Church in Newburyport, linked antislavery directly to Christian precepts. Drawing on a long tradition of dissenting Protestant thought, Niles argued that true liberty consisted not in absolute individual freedom or licentiousness, but in “such a system of laws, as effectually tends to the greatest felicity of a state,” and, just as God was no respecter of persons, “there must be no distinctions, made by the law, between persons of different characters and stations.” “The omniscient God himself,” Niles argued, “esteems liberty a great blessing,” but sinful man had perverted God’s plan by enslaving his fellow human beings. Americans were faced with a clear choice: “either cease to enslave our fellow-men, or else let us cease to complain of those that would enslave us. Let us either wash our hands from

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blood, or never hope to escape the avenger.” Linking the dominant political discourse of civil liberty to religious ideals of human equality, Niles’ sermon illustrates how antislavery became linked to revolutionary republican ideology in Massachusetts.

Criticism of slavery also emerged from the political rhetoric of natural rights so prevalent among Massachusetts Patriots. James Otis argued in a 1764 pamphlet, The Rights of the British Colonies Asserted and Proved, that the natural rights of all mankind precluded slavery. British taxation, he asserted, was illegitimate because Americans were “by the law of nature free born, as indeed all men are, white or black.” Enslaved people were “born with the same right to freedom, and the sweet enjoyments of liberty and life, as their unrelenting task-masters.” It was a “manifest” truth that all colonists, “black and white, ...are free born British subjects, and entitled to all the essential civil rights of such.” Otis insisted that skin color was not a valid basis for exclusion from the community of subjects. “Does it follow that it is right to enslave a man because he is black? Will short curled hair, like wool, instead of Christian hair, as it is called by those whose hearts are as hard as the nether millstone, help the argument? Can any logical inference in favour of slavery, be drawn from a flat nose, a long or a short face?” To Otis, racial difference could never outweigh the fundamental equality of all humans. The belief in natural liberty that led the Massachusetts Patriot to decry taxation without representation also informed his belief that “good, loyal and useful subjects, white and black” anywhere in the empire should be accounted the equals of any other Briton.

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129 Nathaniel Niles, Two Discourses on Liberty: Delivered at the North Church in Newbury-Port... (Newburyport, MA: I. Thomas & H. W. Tinges, 1764), 8, 21, 37-38.
130 James Otis, The Rights of the British Colonies Asserted and Proved (Boston, 1764), 43-45, 56-57. Otis explicitly linked this concept of equal subjecthood to the revolution principles of 1688 and its aftermath.
Political and economic critiques of slavery informed by Massachusetts’ godly republican heritage were honed even further as the imperial crisis deepened. In 1767, for example, Congregational minister Nathaniel Appleton argued that slavery and the slave trade were “contrary to humanity, christianity, the interest of the province, and of private families.” Though Appleton made no specific proposals in his letters, he did call for “an act of government to prevent the further importation of slaves.” The logic of his argument pushed even farther, however, toward general emancipation. Reminding readers that they were descended from “ancient Britons” who had “resolved from time to time, that no inhabitant of their island shall be a slave,” Appleton called on the Assembly to take the question of slavery “into their most serious consideration” and work toward the “noble and christian...design” of abolition. Americans had the opportunity to be “true sons of Liberty” by extending freedom “to all mankind that come among us.” Other colonies might hesitate, but Massachusetts must act – the Bay Colony had been a city upon a hill before. “Let us not wait for the example of any other of our sister colonies,” Appleton argued. “It is praise-worthy to follow good examples: but much more so to set them.” Other prominent Patriot leaders like John Adams and his cousin Samuel also opposed slavery. John saw slavery as a source of potential social unrest and a drain on the state economy. Samuel Adams once refused to accept a female slave offered to him as a gift into his service unless she were freed. Leading figures in revolutionary

131 Nathaniel Appleton, Considerations on Slavery, In a Letter to a Friend (Boston: Edes and Gill, 1767), 19-20.
132 See John Adams’ letter to Jeremy Belknap in Collections of the Massachusetts Historical Society, 5th ser. (Boston: Massachusetts Historical Society, 1877), III: 401-402. [Herinafter cited as MHS Coll.]
Massachusetts, then, opposed slavery on a variety of grounds – the question was how they could best go about eliminating it.

As in Virginia, revolutionary Bay Staters recognized that closing the slave trade was critical to the safety and health of their commonwealth, and would be a first step toward the ultimate abolition of the institution. In June 1767, for example, the Assembly took two linked bills into consideration – one to revive the prohibitive import duty on slaves, and another to “prevent Fraud in the Sale of Negroes.” Both bills passed the House but Lieutenant Governor Hutchinson refused to sign them into law. In 1771, the Assembly went even further, framing a law that would prevent future slave importations from Africa – again, the bill passed in the legislature but was disallowed by the governor. Subsequent attempts to formally abolish the slave trade also failed, and the Bay State would not officially bar its citizens’ participation in the trade until 1788, but these attempts at ending Massachusetts slaving illustrate that the necessary political will already existed.

Whatever the letter of the law, Massachusetts residents largely stopped buying newly imported slaves during the revolution. In the entire period under consideration, Bay State citizens imported just over six hundred enslaved people, all of whom were purchased between 1758 and 1763 – after this date there are no recorded slave imports to Massachusetts. Bay state vessels and sailors, however, continued to be active in the trans-Atlantic slave trade, making seventy-eight slaving voyages during the imperial

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135 *MAHJ*, XLVII: 117.
crisis and revolution, and though slave trading voyages ceased between 1774 and 1782 as a result of the Boston Port Act and the privations of war, they rebounded again in the 1780s and ‘90s. Massachusetts would not officially ban the slave trade until 1788, when a number of free black residents were kidnapped and sold into slavery in Martinique. Outraged by this violation of the rights of citizens, governor John Hancock secured the return of these six black Bay Staters, and ushered a final slave trade participation ban through the legislature. Once again, the rights of black citizens to basic legal protections led the way toward state policies favoring freedom.

With the future of slavery in revolutionary Massachusetts uncertain, the value of slave property began to plummet. In the mid-18th century, rewards offered for fugitive slaves were typically between £5 and £20, but by the 1770s slaveholders offered very little reward for the return of fugitives. In 1774, for example, one Bostonian offered only four dollars for the return of an enslaved man, and in 1777 John Cobbett offered only four pence for his enslaved man Felix. Though advertisements for slave sales continued to appear on Massachusetts newspapers, slave prices on the open market also dropped precipitously during the revolution. Revolutionary leader Joseph Warren, for example, sold an enslaved boy for £30 in 1770 – five years later Bostonian Henry Carver was lucky to get ten shillings for an enslaved teenager. Indeed, during the revolution itself Massachusetts slaveholders, perhaps hoping to avoid the cost of raising enslaved children, were simply giving slaves away. Boston newspapers carried advertisements for

138 Emily Blanck, Tyrannicide: Forging an American Law of Slavery in Revolutionary South Carolina and Massachusetts (Athens, GA: University of Georgia Press, 2014), 142.
140 Ibid., 45.
“a fine Negro child of a good healthy breed to be given away,” and one slaveholder even offered to pay anyone who would take “A Negro child soon expected of a good breed” off his hands.141 Like slave sales throughout the history of the institution, these clearly ripped enslaved families apart, tearing even newborn infants from their mothers. They are also, however, an indication of how uncertain slave property had become in the Bay State—slaveholders were unwilling to make an investment in the upkeep of enslaved children when there was little guarantee that they could reap a profit from their future labor.

The importation of new slaves may have ended, and the value of slaver property may have declined, but enslaved persons already within Massachusetts continued to be classed as personal property. Tax codes passed each year between 1754 and 1776 rated “Indian, negro, and mulatto servants proportionably as other personal estate.”142 This definition, consistent with local taxation of slave property in practice since the 1690s, suggests that Massachusetts slavery went without serious political challenge during the imperial crisis. Yet, as we have seen, ideological and political factors led many Bay staters to question the legitimacy of property-in-man, and local legislation began to chip away at the security of slave property. A number of bills proposed during the imperial crisis would have severely curtailed rights to slave property in Massachusetts. One act, proposed in March 1767, would have outlawed slavery entirely, ending the “unwarrantable and unusual Practice of Custom of inslaving Mankind” and shutting down the slave trade. After three days of debate, the emancipation clauses of the bill

141 Ibid., 212-213.
were laid aside, while the slave trade ban passed the legislature only to be vetoed by Lieutenant Governor Hutchinson.\textsuperscript{143} Later that same year, another proposed bill sought to “prevent frauds in sales of negroes” – apparently free black Bay Colonists were being kidnapped and sold into slavery, and the legislature now attempted to end this corrupt practice.\textsuperscript{144} Revolutionary legislation may not have attacked slavery head on, but it did chip away at its security.

The actions of enslaved and free black Bay Staters during the Revolutionary War also made continued enslavement difficult to justify. Unlike in the Southern states, where enslaved people deserted to the British \textit{en masse}, in Massachusetts free and enslaved blacks sided overwhelmingly with the American Patriots. Though the Bay State barred all blacks from military service for a short period in the mid-18\textsuperscript{th} century, people of color were always fixtures in Massachusetts units. There were black minutemen present at Lexington in 1775, black sailors from Marblehead helped shuttle cornered Continental troops across the East River after the disastrous Battle of Brooklyn in 1776, and a black Bay Stater manned the stroke oar as Washington crossed the Delaware in the surprise attack on Trenton. Indeed, despite the Bay State’s ban on black enrollment, enslaved and free people of color appeared in Massachusetts regiments throughout the war. With a long history of basic civic inclusion behind them, and the struggle for personal liberty advancing back home, black Bay Staters were willing to fight for the political liberty of the American colonies.\textsuperscript{145}

\textsuperscript{143} MAHI, XLIII: 387, 390, 393.
\textsuperscript{144} Greene, \textit{Negro in Colonial New England}, 49.
Massachusetts’ enrollment of black troops in her own forces may also have influenced treatment of black British soldiers. Unlike in Virginia, where black men taken in arms were treated as rebellious slaves, black British troops taken by Bay State forces were treated as prisoners of war and given treatment similar to any other redcoats. In September 1775, for example, “two Negro men” were taken captive on board the *Hannibal*, a British sloop, and carried back to Massachusetts, where they were advertised for sale at Salem. The Assembly intervened, however, and forbid their sale, ruling that “any Negroes...taken on the High Seas, and brought as prisoners into this State...shall not be allowed to be sold, nor treated otherways than as prisoners are ordered to be treated.”\(^{146}\) Not only had the Assembly voided the sale of these two specific captives, they laid down a rule for the equal treatment of black British soldiers as prisoners of war.

Slave property, then, was under assault in revolutionary Massachusetts, and the long local tradition of granting limited rights to enslaved people only intensified. Informed by their long history of godly republicanism and rough egalitarianism, many Massachusites of all political stripes believed that no person could own another as property, and that the authority of masters must be bracketed by the rule of law. Though they had precious little else in common, Patriots like Samuel Adams and James Otis would likely have agreed with royal governor Thomas Hutchinson that slaveholders did not have the power of life and death over enslaved people. “Slavery by the Provincial laws gives no right to the life of the servant;” Hutchinson reported to metropolitan planners in 1771, “and a slave here is considered as a servant would be who had bound himself for a period of years exceeding the ordinary term of human life.”\(^{147}\) Under this

\(^{146}\) *MA A&R*, XIX: 568.

\(^{147}\) Quoted in Greene, *Negro in Colonial New England*, 177.
definition, enslaved people would have access to a number of traditional English rights, including protections for their persons, limitations on the physical authority of masters, and recognition of legal personhood in courts of law. With the political climate tilting in favor of liberty, and sympathetic allies in both the British and American camps, Massachusetts slaves began to press ever more firmly for freedom by petitioning the legislature and bringing freedom suits in the law courts.

Illustrating how a long history of relatively open access to the rights of subjects, enslaved Bay Colonists regularly petitioned the colonial, and later state, assembly for a general emancipation of all Massachusetts slaves. In January 1773, a number of enslaved Bostonians asked the Governor Hutchinson and the Council, the last vestiges of civil government in the revolutionary colony, to “take their unhappy state and condition under...just consideration.” Displaying their clear grasp of contemporary debates over slavery “on both sides of the water,” they argued that “multitudes” of Britons, many of them “of great note and influence,” had begun to turn on the institution, and they mobilized a number of their arguments in the petition. The basic problem, as enslaved Bay colonists saw it, was that, as slaves, they were classed among “the beasts” – as property – and deprived of all rights. A slave could not “possess and enjoy any thing – no, not even life itself.” Defined as property, the enslaved Bostonians argued, “We have no property! we have no wives! we have no children! we have no city! no country!” If this was tragic for enslaved people, it was also a loss to the state. Freeing Massachusetts slaves would add hundreds of loyal citizens “of good parts,...discreet, sober, honest and industrious” to the commonwealth, all of whom would be more than willing “to bear a part in the public charges” as free people. Abolition, then, could never be “productive of
the least wrong or injury” to slaveholders, while to enslaved people it would be “as life from the dead.” The fact that they could petition the Assembly at all must have given enslaved Bay colonists hope – the petitioners were “very happy, that [they could] address the great and general court of the province,” a right no Virginia slave could have dreamed of.  

The following year, another group of enslaved settlers petitioned the royal government once again, arguing that they had “in common with all other men a naturel right to our freedoms without being depriv’d of them by our fellow men as we are a freeborn Pepel and have never forfeited this Blessing by aney compact or agreement whatever.” Drawing on one of the central tenets of the Anglophone antislavery argument, they pointed out that their bondage was incompatible with membership in corporate bodies of church and state. Their “deplorable situation” made them “incapable of shewing [their] obedience to Almighty God” and prevented them from “perform[ing] the duties of a husband to a wife or parent to his child.” Slavery also prevented enslaved people from “reap[ing] an equal benefet from the laws of the Land.” All of this was incompatible with the principles of a “free and christian Country” because it prevented enslaved people from “fulfill[ing] our parte of duty” to church and state. Indeed, the petitioners argued that Massachusetts law “doth not justifi but condemns Slavery.” Again illustrating a clear understanding of contemporary debates over the institution, they argued that even if the enslavement of persons carried into the colony was sanctioned by law, “ther never was aney [law] to inslave our children for life when Born in a free Countrey.” The petitioners called on the revolutionary legislature to pass an act “that we

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may obtain our Natural right our freedoms and our children be set at liberty at the year of
Twenty one.”149 As in 1773, however, no immediate action was taken.

In 1777, with an independent state government coming into existence and debates
over a new constitution for the Bay State at the forefront of local politics, enslaved and
free people of color sought to put universal emancipation on the political agenda. A
petition to the General Court signed by eight prominent free black Bostonians, including
Prince Hall, founder of the first black Masonic lodge in America, drew on revolutionary
natural rights ideology in condemning the existence of “a State of Slavery in the Bowels
of a free & christian Country.” Like earlier petitioners, Hall and his co-petitioners argued
that enslaved people “have in Common with all other men a Natural and Unalienable
Right to that freedom which the Great Parent of the Universe hath Bestowed equally on
all menkind.” Indeed, “A Life of Slavery” deprived enslaved people of “Every social
Privilege, of Every thing Requisite to Render Life Tol[er]able” and was “worse than
Nonexistence.” Drawing parallels between their own fight for freedom and the struggle
for American liberty, the petitioners cited the “Lawdable Example” of colonial petitions
to Great Britain and lamented that “their Success hath ben but too similar” – just as King
George dismissed American grievances, American slaveholders refused to see the justice
in petitions for freedom. Indeed, the “Principle from which America has acted” during
the revolution “Pleads Stronger than A thousand arguments” for emancipation. Like the
1774 petitioners, Hall and his co-signatories hoped that Massachusetts would restore
enslaved people “to the Enjoyments of that Which is the Naturel Right of all men” and
guarantee the freedom of enslaved children at age twenty-one. Only by ending slavery

could American revolutionaries remove “the inconsistancey of acting themselves the part which thay condemn and oppose in Others.”

Again, the legislature took no direct action but, as we shall see, the principles so forcefully expressed by enslaved and free black petitioners played a critical role in shaping contemporary interpretations of Massachusetts’ revolutionary constitution.

Throughout the revolution, the most successful challenges to slavery came from the courts. Well before the institution of slavery was abolished through judicial decree in the Quock Walker cases (1779-1783), individual slaves fought for and gained their freedom by exploiting their unique access to Massachusetts courts. Numerous scholars have argued that the revolutionary-era freedom suits were relatively inconsequential, and focused primarily on the wrongful detention of individual slaves – they “did not fight to end slavery for all, just for themselves.” While technically correct in a narrow sense, these critics miss the extent to which these individual claims grew into an overwhelming precedential basis for a broader emancipatory basis. Indeed, the strategies pursued by black Bay Colonists and their antislavery allies line up almost perfectly with those later

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Blanck, the most recent historian to devote any substantial attention to these cases, argues that “these litigants did not fight to end slavery for all, just for themselves.” (35) While this interpretation may be technically accurate, it misses the extent to which Massachusetts freedom suits, taken together, contributed to a legal culture where property-in-man was deemed to be fundamentally illegitimate. Indeed, as this analysis will illustrate, even these “narrow” freedom suits relied on the proposition that the chattel principle was fundamentally illegitimate.

152 Emily Blanck, Tyrannicide, 35.
used by James Somerset and Granville Sharp – challenge the dominion of slaveholders as an opening wedge for a full-on assault on property-in-man.

When abolition came in the Bay Colony, then, it came swiftly, driven by the claims of enslaved men and women who knew precisely how to challenge their bondage in sympathetic Massachusetts courts. This process was already underway well before Thomas Lewis or James Somerset forced the issue back in England. Indeed, successful freedom suits were already being brought in the mid-1760s, just as Charles Steuart and the then-enslaved Somerset took up residence in the Bay Colony. John Adams later recalled that the courts emancipated a number of slaves during the revolution – he “never knew a Jury by verdict to determine a negro to be a slave – and they always found them free.”\footnote{MHS Coll, 5th ser., III: 402.} As we shall see, Adams was fudging the facts somewhat – he had successfully defended the rights of slaveholders in court on at least one occasion himself. Still, the general thrust of his statement rings true. The remarkably broad access of enslaved persons in Massachusetts to the basic rights of subjecthood, and their perseverance in pressing for recognition of their liberty, resulted not simply in the emancipation of individual slaves, but in the abolition of the institution of slavery.

As in England, cases concerning enslaved people hinged on questions of slaveholders’ physical dominion. With one exception, all these cases were initiated by trespass writs protesting the wrongful detention of an enslaved person and so, allegedly, raised broader questions of slavery only tangentially. \textit{Slew v. Whipple}, heard by the Essex Superior Court in 1766, began when Jenny Slew brought a writ of trespass against her master, John Whipple of Ipswich. Slew, a mixed-race woman, claimed that Whipple
had “kept her in servitude as a Slave...and restrained her of her Liberty” since 1762
“without any lawful Authority or Right so to do.” She sought confirmation of her freedom and £25 in damages. The choice of a trespass writ to initiate suit illustrates how assumptions of self-ownership transformed trespass from a form of action used by masters to gain compensation for a slaves’ lost labor into a weapon in the antislavery arsenal. Slew used this form of action to accuse Whipple of wrongfully depriving her of her rightful property in her own person, much as Granville Sharp and James Somerset would use a *habeas corpus* writ back in England six years later. Whipple responded that the entire suit was ridiculous, and moved for the abatement of Slew’s trespass writ.

There was “no such Person in Nature as Jenny Slew of Ipswich,” he argued – there was only Jenny Slew article of property. Whipple claimed to be prepared to “verify” Slew’s status, and offered as evidence the fact that “she had been severally Times married to slaves.” Not only was Jenny Slew a slave, she was a *married* slave, and therefore could make no legal claims in her own name under the law of coverture.154

When an inferior court jury upheld Whipple’s property right and dismissed Slew’s suit, she appealed the decision to the Superior Court, illustrating once again the legal rights enslaved people could invoke in Massachusetts courts. When the case moved to trial, Benjamin Kent, counsel for Jenny Slew, began by sidestepping the general issue of slavery’s legitimacy. Indeed, Kent conceded that “the Right of some Men to enslave others” was “in some Places...established.” Slavery in Massachusetts was different, however. Though masters might have some type of claim to their enslaved people, they

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could never have “a Right to [the] Life” of a slave, much as Lieutenant Governor Hutchinson, sitting as a justice in the case, had argued a year earlier. Slavery of such a sort might exist “in [the] West Indies to the shame of human Nature,” but Massachusetts law conferred no such right. Besides, the whole issue of property ownership was moot. Kent entered evidence that Jenny Slew was “commonly reputed to be the Child of Betty Slew a white Woman by a Negro Man.” As the daughter of a free subject, Kent argued, Slew could never be a slave. Besides, if Jenny Slew was a slave, the attorney asked, where was the proof? In other similar cases, property claims to slaves had only been admitted when a bill of sale could be produced – “Why did not they do so here?” Kent asked. With evidence of free parentage, and without any proof that she was a slave, Jenny Slew must be maintained in her liberty.¹⁵⁵

Jeremiah Gridley, counsel for John Whipple, countered that the burden of proof rest with the plaintiff – was not a plaintiff “who sues in Trespass for Goods...compelled to prove his Possession, and that it was by force taken”? Slew could never provide such proof, Gridley argued, because “She has never been in Possession of her Liberty, she has been out of Possession of it for 50 years.” Gridley and Kent began their arguments from entirely different bases – the former assumed property-in-man while the latter assumed self-ownership. The entirety of the court’s decision has not survived, but statements by Justices Peter Oliver and John Cushing illustrate how Massachusetts courts leaned in favor of freedom. Oliver identified the central issue in the case as a “Contest between Liberty and Property – both of great Consequence,” but when it came down two it

“Liberty [was] of most importance of the two.” Cushing noted that the attorney general had recently brought a trespass writ in a similar case, an action with which the justice agreed because “if a Person is free he may bring Trespass at any Time.”

The question, then, was whether Jenny Slew was free, and the fragmentary record of the case hints at how Cushing framed his decision. First he invoked the idea of slave or free status following the maternal line, “Partus sequitur ventrem” – if her mother was a free white woman, then Slew could not have been born a slave. Though there was no statutory basis for the practice in the Bay Colony, the widespread practice of *partus sequitur ventrem* in the plantation colonies likely influenced the logic of status by birth in Massachusetts as well. In this case, however, Cushing invoked the principle to argue against enslavement. The fragmentary record of the case also notes that Cushing declared that “Colour is a Presumption” in cases regarding slaves. Here, however, he seems to have presumed something quite different than Virginia jurists. Race might indeed carry a presumption of enslavement, even in Massachusetts, but it could never be proof of enslavement in and of itself. As we have seen, and as Jenny Slew’s case reinforces, there were large numbers of free people of color in the Bay Colony, and both law and custom dictated that they have access to the protection of the common law courts. The remarks of Lieutenant Governor Thomas Hutchinson, sitting as Chief Justice, and Benjamin Lynde, Jr., the effective head of the Superior Court, do not survive.

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157 One recent historian has argued Virginia’s adoption of local slave law made the issue “a moot point in New England.” See Richard A. Bailey, *Race and Redemption in Puritan New England* (New York: Oxford University Press, 2011), 63-64. Though local practice in Massachusetts may have followed that of the plantation colonies, no statute was ever passed in the colony declaring that the children of enslaved women were born slaves. The record of Slew v. Whipple hints at earlier court decisions declaring *partus sequitur ventrem* but no record of these cases exists.
but given Hutchinson’s later comments about slaves being “considered as a servant” under Massachusetts law, it is hard to imagine him breaking with Oliver and Cushing. In the end, the highest court in the colony confirmed Jenny Slew’s freedom, and she was awarded £4 in damages and nearly £10 in court costs.158

A similar case lodged two years later, however, resulted in a very different decision. Amos Newport initiated suit against his master, Joseph Billing, for “Trespass and false imprisonment,” just as had Jenny Slew, and again an inferior court ruled in favor of a master’s property rights. Newport, however, appealed the decision, and the case appeared before the Superior Court of Judicature in September 1768. Billing responded to the charge as any slaveholder would – the case should be dismissed because the “Plaintiff is [the] Defendants Property – his Negro Slave.” Unlike John Whipple, however, Billing was able to produce a bill of sale recording his Newport’s purchase, and witnesses attested to the document’s veracity. Simeon Strong, counsel for Billing, then turned to proving the legality of slavery in the colony. First, he pointed to various “Acts of Parliament that take Notice of slaves in [the] Plantations” to establish that the British Empire allowed property-in-man. Even if the empire as a whole had not approved of the chattel principle, however, the “Law of [the] Province” – like the “Tax Acts” defining slaves as personalty or the old fundamental law of the Body of Liberties – recognized that enslaved persons were a form of personal property. Covering all bases, Strong argued that even in the absence of an explicit legal sanction for slavery, “Custom” and usage

legitimated property-in-man. Slaves throughout the empire were treated as property – why should Amos Newport be an exception?159

Unwilling to lay any argument aside, Strong also sought to explain how slavery could exist in a legal regime based on the premise that “Every Man [has] a Right to freedom that no Law or Usage can take away.” The only circumstance in which a “Forfeiture of Liberty” might be legitimate was captivity in war, where captors gained “a Right to destroy them” and therefore could “enslave them to repay the Expences of defending ones self.” As we have seen, however, Strong’s position was out of step with broader Anglophone interpretations of the law of nations and was clearly open to challenge – what war could justify such terrible reparations? Strong closed his argument by returning to foundation of all just law. In cases where there was any ambiguity, the “Sense of the Nation” ought to guide the hand of justice, and the “Presumption” in Massachusetts, at least according to Strong and Billing, was that “an African black is a Slave.”160 With the weight of custom, common law, local statute, and imperial practice behind him, Billing had good reason to be confident. And if all else failed, he held the trump card – a recognized bill of sale.

Newport’s attorneys, James Putnam and Jonathan Sewall, faced the difficult task of rebutting Strong’s comprehensive proslavery argument. Both conceded that the conceptual foundation of slavery was “Conquest and Rights of War,” and that this implied the “Power of Life and Death” over an enslaved person. The question was whether this basis was applicable in Newport’s case. Echoing Richard Saltonstall’s

160 Ibid.
position in *Smith v. Keyser* over a century earlier, Putnam argued that captivity could not be the basis of Newport’s enslavement, asserting that slaves were “stolen in Affrica,” not taken as war captives. Besides, to admit the legitimacy of war captivity opened up a dangerous possibility – by this logic Africans had “The Same right...to enslave us.” Sewall added that the entire concept of slavery was “Painful [to] Humanity, common Justice, and eternal Morality.” With the foundation of slavery delegitimized, Putnam asserted that Billing’s “only Proof” of Newport’s enslavement was that he was “A Negro, black &c,” a claim the attorney refuted with references to Montesquieu’s natural rights doctrines. Billing’s entire claim, Putnam and Sewall argued, was founded on a racist presumption unsupported by natural law.\(^\text{161}\)

What of the bill of sale, though? Surely this was sufficient proof of Newport’s status. To counter this apparently implacable obstacle, Putnam and Sewall turned to arguments that had been honed by over a century of antislavery legal argument. Citing Lord Holt’s decisions in *Chamberlain v. Harvey, Smith v. Gould,* and *Smith v. Brown & Cooper,* along with Mosaic law, the antislavery attorneys argued that “Common Law [was] directly vs. this Principle” of property-in-man. The only form of bondage recognized by law was “Villenage,” and even the most degraded villein or servant retained access to the “Protection” of the law – if a master were to “Break his [slave’s] Head...Indictment will lye.” Again echoing Lord Holt, Putnam held that Billing might “have a right to [Newport’s] service, during life” but “not to [his] Life” itself. As Sewall argued, David Ingersole, Newport’s former master, may have “had a Right to sell” him, as demonstrated by the bill of sale, but this right could only be to his *labor,* not his

\(^{161}\) Ibid.
person. Since Newport had not “forfeited his Liberty, by the Laws of this Country,” he
must be accounted a free man and receive compensation for his wrongful detention in
slavery. Despite their clear mobilization of many elements of the long English
antislavery argument, Putnam and Sewall could not carry the day. With a duly
recognized bill of sale presented in court, there was little they could do to secure
Newport’s freedom. Vested property rights could not be tampered with lightly, and the
court declared that “the said Amos [Newport] was not a freeman, as he alleged, but the
proper slave of the said Joseph [Billing].”162

Another case heard in 1768 saw an enslaved woman, Margaret, initiate a suit
against her master William Muzzy, a Lexington tanner, by writ of replevin rather than
trespass. By framing her suit in this way, Margaret, emphasized her claim to self-
ownership in ways that the trespass writs lodged by Jenny Slew and Amos Newport did
not. Replevin was a form of action requiring the return of specific properties – in this
case Margaret’s person – while proceedings to determine the parties’ legal rights to such
properties were determined by the court. An inferior court jury found in Margaret’s
favor, and, despite appeals that dragged on for nearly two years, the Superior Court twice
upheld their verdict.163 The writ Margaret and her attorneys chose to initiate suit with
may have been unique, but the logic behind their case fit squarely within the English
legal antislavery tradition and the long history of relatively open access to basic rights for
all persons in the Bay Colony.

162 Ibid.
163 L. Kinvin Wroth and Hiller B. Zobel, eds., The Adams Papers: Legal Papers of John Adams
As the revolution wore on the pace of judicial emancipation only quickened. In 1769, an enslaved man named James gained his freedom after bringing a trespass against his purported owner, Richard Lechmere. Caesar, an enslaved man owned by Elkanah Watson of Plymouth, won his liberty in 1771. Counsel for Caesar argued that “Province law doth not make any negroes slaves” – there was no positive law of slavery in the Bay Colony – and even if it did, slavery was against the “Laws of God and reason” and therefore “must be void.”\(^{164}\) Caesar Hendrick of Newburyport was freed by the Essex County Inferior Court in October 1773. John Lowell, Caesar’s lawyer, used nearly every antislavery argument presented over the last century and a half in framing his case. A certificate of baptism was presented as support for the argument that Caesar was “a Christian and if held in Slavery cannot perform his duties as one.” Lowell specifically cited the *Somerset* decision and argued that “There must be express law” establishing slavery, but Massachusetts law “establish[ed] Slavery only by implication if it does at all.” Liberty was an essential natural right, Lowell argued, and “No human tribunal can take away natural rights so fundamental.”\(^{165}\) Caleb Dodge gained his freedom the following year when an Essex County jury found “no law of the province [could hold] a man to service for life.”\(^{166}\) The recognition of black Massachusetts residents as legal persons enabled them to press claims for individual and collective emancipation on the revolutionary state, and made their continued definition as articles of property increasingly problematic.


\(^{166}\) Quoted in Higginbotham, *In the Matter of Color*, 85.
When Massachusetts Patriots set about creating a constitution for their newly independent commonwealth, then, they did so in a legal culture that was fundamentally hostile to the concept of property-in-man. The first state constitution, drafted in 1778, included no explicit mention of slavery at all, though Article V did exclude “Negroes, Indians, and Mulattoes” from the suffrage. While there were numerous reasons for the widespread opposition to the 1778 constitution, explicit condemnations of slavery are conspicuous among them. A group of free blacks from Dartmouth argued that they could not be required to pay taxes since they were barred from any “vote or influence in the election of those that tax us.” The freemen of the town of Sutton complained that Article V violated the “grand and Fundamental Maxims of Human Rights” by excluding “Negroes...even though they are free and are men of Property,” adding to the “already accumulated Load of guilt lying upon the Land in Supporting the Slave Trade.” Westminster’s freemen argued that the clause “deprives a part of the humane Race of their Natural Rights...[which] no power on Earth has a Just Right to Doe.” Partly as a result of the response to these racially exclusionary suffrage requirements, the Massachusetts state constitution of 1778 was overwhelmingly defeated.167

When John Adams penned the 1780 Massachusetts constitution, he would have known that widespread disapproval of slavery had contributed to the defeat of the first constitution two years earlier. Indeed, the very first clause of the document asserted the fundamental equality of all humanity – “All men are born free & equal, & have certain natural, essential, & unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and

167 Quoted in Higginbotham, In the Matter of Color, 89-90.
protecting property; in fine, that of seeking and obtaining their safety and happiness.”

Unlike the national Declaration of Independence, however, this ringing endorsement of natural rights was linked directly to a legal culture that had largely delegitimized property-in-man. The Massachusetts constitution of 1780 did not contain an explicit emancipation clause – indeed, it contained no direct discussion of slavery or race at all – but particularly in the wake of the Somerset decision, refusing to explicitly sanction the chattel principle, in a jurisdiction where enslaved people already had access to basic rights, ultimately had the same legal effect.\footnote{168}{Frances Newton Thorpe, \textit{The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies now or heretofore forming the United States of America} (Washington, DC: Government Printing Office, 1909), III: 1889. Massachusetts continued to tax “Negroes and Molattoes...under the government of a master or mistress” until 1793, but earlier language classing black bound laborers as personal property disappeared after passage of the 1780 state constitution.}

Massachusetts jurists, then, already interpreted their state constitution as incompatible with slavery before Quock Walker’s case began. Elizabeth Freeman was emancipated in 1781 by an emancipatory reading of the 1780 constitution by the courts.\footnote{169}{Arthur Zilversmit, “Quock Walker, Mumbet, and the Abolition of Slavery in Massachusetts,” \textit{The William and Mary Quarterly}, vol. 25, no. 4 (October, 1968): 614-624.}

\textit{Commonwealth v. Jennison}, finally decided by the Massachusetts Supreme Court of Judicature in 1783, was simply the last nail in slavery’s coffin. Parallels between the Quock Walker case and the Lewis and Somerset cases back in England are striking. Walker ran off from his master, Nathaniel Jennison, in 1781, much as James Somerset had run away from Charles Steuart. When Walker found refuge with John and Seth Caldwell, the sons of his former owner, Jennison, like Steuart, sought bring the restive slave under his dominion through brute force, beating him with the butt of a whip and dragging him back into slavery. Just as Granville Sharp had done for Thomas Lewis,
however, the Caldwells brought charges against Jennison for assault and battery, and just as in England, the court allowed the charge – despite his status, Walker was under the protection of Massachusetts courts. Jennison sought to defend himself by producing a bill of sale and arguing that Walker was his “proper slave.” When the jury handed down its verdict in June 1781, however, they disregarded the bill of sale entirely and simply ruled that “the said Quock is a Freeman and not the proper Negro slave of the Def[endan]t” – Walker was awarded £50 in damages for the assault.170 Their state constitution may not have required it, but Massachusetts jurors interpreted their fundamental law as incompatible with slavery. If Quock Walker was not a slave, he must be protected by the law of the commonwealth.

The matter was not yet settled, however, and Jennison both appealed his conviction and filed suit against the Caldwell brothers for trespass for causing Walker “to absent himself” from Jennison’s service and employing him “for 6 weeks for their own benefit.” Unlike Richard Stapylton, Charles Steuart, and countless other colonial slaveholders who framed their claims to enslaved persons as articles of property, Jennison, likely influenced by local legal mores himself, only sought compensation for Walker’s lost labor, much as Lord Holt had suggested at the turn of the 18th century. Perhaps this limited claim to Walker’s labor power and the long legal tradition of granting compensation in such cases informed the jury’s decision in Jennison v. Caldwell. Jennison won the lawsuit and was awarded £25 in damages. While the decisions in Walker v. Jennison and Jennison v. Caldwell might appear contradictory, in fact they dealt with two entirely separate issues – the first protected Quock Walker’s right

170 Proceedings of the Massachusetts Historical Society (Boston: Massachusetts Historical Society, 1875), XIII: 296. [Hereinafter cited as Proc MHS.]
to the safety and security of his own person while the second recognized Nathaniel Jennison’s right to the labor of his black servant.  

The Caldwells and their attorneys, future state and national attorney general Levi Lincoln and future governor Caleb Strong, were unwilling to let the issue lie, however, and appealed the decision in Jennison v. Caldwell to the Supreme Judicial Court. Lincoln’s brief for the appellate court illustrates how he used numerous elements of the long Anglophone antislavery argument to invalidate not only Jennison’s property claims, but also his claims to Walker’s labor. Jennison’s lawyers also trotted out long-held proslavery legal arguments, however. William Sprague, counsel for Jennison, again produced the original bill of sale for Walker’s purchase by James Caldwell back in 1754 and argued that, since the slave descended to Caldwell’s widow at his death, and then to Nathaniel Jennison after his marriage to the widow Caldwell, the chain of property ownership was both legal and uninterrupted. Besides, Sprague argued, Quock Walker had made an oral agreement to serve Jennison and was thus “a servant by his own consent.” The Caldwell brothers had knowingly enticed Walker away from his rightful master, the very situation for which trespass writs for lost labor were created. Citing biblical law and colonial statute, Sprague’s co-counsel added that “the custom and usage of the country consider slavery as right” and “a respectable affair.” The state’s constitution might say that all persons were born free and equal, but this could not retroactively invalidate a vested property right – Walker was held as a slave long before

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171 Proc MHS, XIII: 296. For a reading of these cases as contradicting one another, see Higginbotham, In the Matter of Color, 91-92.
the state constitution was ratified. To declare Walker free would cause many Bay Staters to “lose their property, and be staved.”

Lincoln countered by linking the 1780 constitution to the moral and legal constitution of the people of Massachusetts. He began, as so many antislavery thinkers did, from a presumption of fundamental human equality. All persons, Lincoln argued, were “born in the same manner, our bones clothed with the same kind of flesh, [and] live and die in the same manner.” Slavery, then, was “contrary to the law of nature” and any statutes “against the laws of nature [were] void.” Lincoln then proceeded to refute Jennison’s claims point by point. The “custom of the country” was not a sufficient defense a “custom must be general...[and] undisputed,” and the question of slavery’s legitimacy had “always been disputed in the Gen[era]l C[our]t and courts of justice – and else where.” The “several laws of the State” that seemed to allow for slavery were “In derogation of common law” and therefore must be “construed strickly.” Jennison’s bill of sale, then, was of no moment – it was in direct conflict with a strict construction of “The Constitution” of the commonwealth. Nor was Walker’s alleged consent to his servitude a valid defense. Lincoln asserted that there was “No evidence of consent,” and even if there were, since there was “no time agreed on” Walker’s servitude could be “only during will which he may put an end to when he pleases.” Without a written indenture specifying terms of service, Walker was at liberty to leave Jennison’s employ whenever he wished.

172 MHS Coll, 5th ser., III: 438-442.
173 Lincoln cited Blackston’s Commentaries as authority for this assertion.
The crux of Lincoln’s argument bore the clear imprint of Massachusetts’ long corporate humanist heritage. “Quork is our brother,” Lincoln asserted, and “When one fellow subject is restrained of his liberty, it is an attack on every subject – every one has a right” to their own freedom and the protection of the laws. Indeed, the language of equal subjecthood suffused the whole of Lincoln’s antislavery argument. Arguing that slavery was illegitimate because it broke up black families, he asked rhetorically, “Is not their child as dear to black subjects as to white”? To legitimize property-in-man would allow “a subject of this free com[mon]wealth [to] be taken from his friends, father, mother, sisters and brothers” and sold into the barbarous slavery of the West Indies. Driving his point home, Lincoln turned to the Bay State’s long history of religious opposition to slavery as well. In a ringing summation, he argued that, should they find in favor of Jennison, the jurors would be held to account “at one common bar...[by] one common judge... – by the Gospel, the perfect law of liberty.” Putting a religious spin on Somerset principles, Lincoln set the universal “law of God” against the local and limited man-made law of slavery. “If there is no law of man establishing of it,” he argued, slavery did not exist and “there is no difficulty.” Even if there were positive laws recognizing slavery, however, “the great difficulty is to determine which law you ought to obey,” and here Lincoln saw no choice – “the worst that can happen to you for disobeying [man-made law] is the destruction of the body, for [divine law], that of your own souls.” Persuaded by Lincoln’s distillation of long-held antislavery principles, the jury found for the Caldwells and invalidated Jennison’s claims to Walker’s person and labor.\textsuperscript{175}

\textsuperscript{175} Ibid.
Despite the jury’s decision, however, Jennison was unwilling to let Walker enjoy his liberty peacefully. In April 1783, the Quock Walker cases came to a climax in *Commonwealth v. Jennison*, the case that definitively invalidated the chattel principle in the Bay State. Argued and decided by some the greatest legal minds of early republican Massachusetts, including Chief Justice William Cushing, Attorney General Robert Treat Paine, and, the case involved yet another assault by Nathaniel Jennison, who attacked and beat Quock Walker with a large stick. The indictment was brought directly by the commonwealth, not, as had been the case in all subsequent cases touching on slavery, by a private citizen, indicating the commitment of early republican Massachusetts to protecting the security of all persons. Jennison again plead not guilty on the grounds that Walker was an article of property, and therefore he had every right “to bring [Walker] home when he ran away; and...only took proper measures for that purpose.” Attorney General Robert Treat Paine, presenting the state’s case, argued that natural rights, the state constitution of 1780, and, introducing a new element to Walker’s tale, a previous promise of manumission by the Caldwells together voided any property claim Jennison may have had and brought Quock within the protection of the law.¹⁷⁶

Given the dominant legal culture in revolutionary Massachusetts, the verdict was all but a foregone conclusion. Drawing on long-held English antislavery principles, Chief Justice William Cushing’s charge to the jury in *Commonwealth v. Jennison* reads like a summation of the principles underpinning the long Anglophone antislavery argument:

As to the doctrine of slavery...[it] has been heretofore countenanced by the Province Laws formerly, but nowhere is it expressly enacted or established. It has been a usage – a usage which took its origin from the practice of some of the

European nations, and the regulations of British government respecting the then Colonies... But whatever sentiments have formerly prevailed in this particular or slid in upon the example of others, a different idea has taken place with the people of America, more favorable to the natural rights of mankind, and to that natural, innate desire of Liberty, with which Heaven (without regard to color, complexion, or shape of...features) has inspired the human race. And upon this ground and Our Constitution of Government, by which the people of this Commonwealth have solemnly bound themselves, sets out with declaring that all men are born free and equal – and that every subject is entitled to liberty, and to have it guarded by the laws, as well as life and property – and in short is totally repugnant to the idea of being born slaves. This being the case...the idea of slavery is inconsistent with our own conduct and Constitution; and there can be no such thing as perpetual servitude of a rational creature, unless his liberty is forfeited by some criminal conduct or given up by personal consent or contract.\textsuperscript{177}

In language strikingly similar to that of Lord Mansfield, Cushing had explained why slavery was illegitimate in Massachusetts. Quock Walker was confirmed in his freedom, and the institution of slavery was declared incompatible with the fundamental law of the Bay State.

As we have seen, Cushing was far from the first Anglo-American to challenge the institution of slavery, nor would he be the last. Just as slavery was demolished in Massachusetts and the early national North, Southern defenders of property-in-man turned aside the very real challenges to human bondage produced by the revolution, laying the legal and political groundwork for the expansion of their increasingly peculiar institution. Indeed slaveholders largely dominated the politics of the new nation – gaining crucial concessions from the federal state and entrenching the institution behind bulwarks of local positive law. Theirs were not the only voices present at the American founding, however, and the power of antislavery arguments honed through centuries of legal struggle also left their mark on the early republic. Armed with ideals that Henry Parker, Morgan Godwyn, Lord Holt, and Samuel Sewall would have recognized, early

\textsuperscript{177} Proc MHS, XIII: 294.
national antislavery advocates prevented the expansion of slavery in the Old Northwest, kept explicit protections for property-in-man out of their national charter, gradually emancipated tens of thousands of enslaved persons throughout the North, abolished American participation in the trans-Atlantic slave trade, and worked to ensure that all persons came under the protection of the law. What Levi Lincoln had argued in *Caldwell v. Jennison* was not yet wholly true, but many Americans worked to ensure that it would be – “The air of America is too pure for a slave to breathe in.”178

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