Time and Property in the American Republican Legal Culture

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Modern historians including J.G.A. Pocock and Gordon Wood have demonstrated the degree to which revolutionary American political discourse incorporated "civic republican" notions of virtue, property, and citizenship that promoted stable land ownership and active political participation. These historians also have argued that the republican view soon gave way to the now-dominant liberal view that champions the alienability of property and private over public life. Professor Alexander argues that this history is too neat. In fact, American republicanism contained unreconciled "dialectical" tensions—between individual rights and societal goals, stability of ownership and wealth redistribution, historical continuity and change—that, though now expressed in a different vocabulary, continue to plague American political thought. Focusing on the concept of property as it appeared in the thoughts of Jefferson, Adams, Madison, Hamilton, and Webster, Professor Alexander details the ways in which these otherwise diverse thinkers attempted to confront and reconcile a common set of dialectical concerns.

INTRODUCTION

From the nation’s beginning until the present, American legal discourse about property has been dialectical. That is, at any given moment, the concept of property has contained elements that conflict with, if not contradict, one another. To understand different periods’ concepts of property as dialectical is to treat them as conceptual responses to historical predicaments that members of particular cultures define for their own culture. At the deepest level, these predicaments consist of antinomies—for example, between society and individual, stability and change—with which political discourse wrestles. Accordingly, the con-
cepts that members of a culture develop to understand and cope with these predicaments contain antinomic elements. Thus, in American history, proponents of particular views about political issues (for example, how property ought to be distributed) are forced to attempt to reconcile these fundamental tensions. Moreover, different dialectics have organized American legal writing about property during different periods of American history. The result is an American legal discourse that has created multiple legal meanings of property rather than one fixed meaning.¹

This Article interprets the legal meanings of property that were created during one of these periods, from roughly 1765 to 1800. Historians have described this period as the high point of the American recrudescence of the classical republican tradition of political thought. That tradition emphasized (as distinguished from classical liberal thought) the ideal of a citizenry devoted less to private-gain than to political participation in pursuit of the public good. Property, on this view, was valued insofar as its distribution aided the citizenry in the free pursuit of that good. This Article's analysis treats American legal discourse about property during this period as a rich and complex political, philosophical, and legal conversation in which the participants attempted to work out, within a shared conceptual vocabulary, the dialectical elements of their understanding of property.

To begin to understand the complexity of this historical terrain requires a departure from the two interpretive frameworks that have dominated much intellectual and legal historiography, that is, the

¹ These legal understandings of property, of course, were not the only public meanings of property that existed in American society during the republican period. Indeed, they were not the only political-legal meanings. Isaac Kramnick has identified, for example, the existence of four distinguishable political languages during the constitutional period: republicanism, Lockean liberalism, work-ethic Protestantism, and state-centered theories of power and sovereignty. See I. Kramnick, Republicanism and Bourgeois Liberalism: Political Ideology in Late Eighteenth-Century England and America 260-88 (1990). Although Kramnick does not do so, a distinct understanding of property can be identified in each of these languages. Moreover, apart from the meanings of property emerging from legal or mandarin political discourses, different social groups historically engage in their own dialogues that create alternative public meanings of ownership and property. See, e.g., L. Ford, Origins of Southern Radicalism 49-56 (1988) (discussing "country-republican" ideology of upland South Carolinians during ante-bellum period); S. Lebsock, The Free Women of Petersburg: Status and Culture in a Southern Town, 1784-1860, at 112-45 (1984) (describing differences between men's and single women's understandings of property in one Virginia community).

The meanings created by the legal writers whose texts are examined in this Article were elite in the sense that the participants in this dialogue represented an elite, powerful segment of American society. Precisely because they were powerful, however, their dialogue played an important role in the construction of social knowledge that dominated the last part of the eighteenth century.
"evolutionary" and "transformational" frameworks. In recent years, American intellectual historians have favored the transformational framework and have used it to characterize some particular historical moment, such as 1787, or the early Federal period, or even the War of 1812, as the moment at which American political and legal thought repudiated civic ideology in favor of liberalism. This tendency to see the early history of the republic in terms of a dramatic shift from one neat and coherent world-view to another reached its extreme in the works of those historians who interpreted Federalist ideology as monolithic and antirepublican, thereby reducing "Federalist" to "Liberal" and "Anti-Federalist" to "Republican." The problem with this interpretive frame-
work is that it "romanticizes" republicanism, by which I mean to suggest two related sins. First, the transformational view, by compartmentalizing liberalism versus republicanism, implicitly portrays each camp as a regimented and ordered whole. In the case of republicanism, this distorts the complex meaning of crucial concepts in the late eighteenth-century American political-legal dialogue, including concepts of property. It overlooks the similarities between supposed opposites and the discontinuities between supposed lines of descent. It also misses the great degree of ambiguity in prevailing ideologies and their vocabularies. Finally, this view ignores the interdependency between "republican" and "liberal" lines of argument. We will better understand the changes that occurred between the eve of the Revolution and the close of the eighteenth century if we self-consciously emphasize both disjunction and continuity—dissent and descent—from the Jeffersonian culture and its concepts. A framework that seeks to identify historical dialectics permits us to do just that.

The dialectical framework recognizes that eighteenth-century civic-republican American lawyers saw themselves as confronting a predicament involving the effect of time and history, time's social aspect, on property. Virtually all of their writings connected property with different conceptions of time and history. This convergence between temporal-historical ideas and ideas about property in turn generated a dialectic between themes of stability and dynamism. This dialectic touched on a wide variety of questions, including the proper distribution of wealth, the alienability of land, and the desirability of different forms of property.

Rediscovering the dialectical complexities of republicanism will help save it from the second aspect of its romanticization, namely, its perceived obsolescence in the face of the "triumph" of liberalism and the market-economy view of property solely as a commodity for exchange. Of course, modernist and postmodernist legal writers might find it odd that anyone would identify time as a central puzzle of property. From their perspective, the core predicament is the relationship between the self and others. This is because both modernist and postmodernist writ-
ers have defined the fundamental predicament of property in terms of a dialectic of sociality, an oscillation between visions of the self as separated from and in union with others. They have pointed out that while the liberal vision underlying individual property rights depicts the self as separated from politics, it is politics that defines the personal sphere—individual property rights depend on state power. Moreover, property is inescapably relational. When the state recognizes and enforces one person's property right, it simultaneously denies property rights in others. Thus the owner's security as to particular assets comes at the expense of others being vulnerable to the owner's control over those assets. Ownership is power over persons, not merely things.

Yet, although seemingly unrelated, the republican and the modernist predicaments are in fact related. Examining the former will inform our understanding of the latter. The eighteenth-century dialectic of temporality articulated the premodern legal and political cultures' anxiety about the role of property in a very different culture—one that I will call modern. The modern culture, characterized by an instrumental and self-aggrandizing conception of rationality, by an understanding of the market mode of economic organization, and by a legal conception of property ownership that secures the autonomy of individually defined goods, did not emerge fully until the second half of the nineteenth century, but its seeds were sown much earlier. More specifically, the dialectic of temporality was the premodern cultural formulation of a dilemma that moderns have articulated as the dialectic between individuality and sociality. Stability represented adherence to shared traditions and a sense of one's place in the social order. Dynamism represented individual capacity to break free of stifling social conventions and entrenched hierarchies. Stability and dynamism, tradition and fluidity, embeddedness and uniqueness: though differently articulated, these sets of antinomies reflect cultural anxiety that we can now see as linked together.

The two dialectics overlap in another sense as well. They arise from the same historical phenomenon, namely, the transformation of property occupied with the question of whether individuals were capable of acting in a public-regarding fashion.


11 See M. Horwitz, supra note 2, at 33-34, 101-08 (discussing how common law of property changed in mid-18th century to an instrumental vision of economic development).
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from a nonfungible, necessary good into a readily exchangeable commodity. Many modern liberal theorists favor this development. They argue that freely transferable property promotes both individual freedom and wealth-creation. Their critics, though, point out the double-edged nature of the legal term "alienation": that property relations in which market actors treat each other instrumentally for personal gain are detached and distorted. Late eighteenth-century American legal writers similarly were ambivalent about the commodification of property, but they expressed their ambivalence through the dialectic of stable and dynamic property. Examining this earlier dialogue as an alternative set of metaphors for the social predicament of property provides a deeper understanding of why the meaning of property remains so controversial today.

Neither the use of dialectic as a methodology nor the emphasis on time constitutes a novel approach to interpreting republican thought. J.G.A. Pocock, to whom any scholar of republicanism owes a large debt, repeatedly stresses the dialectical character of what he calls the republican tradition throughout that tradition's several incarnations, in Renaissance Florence, seventeenth- and eighteenth-century England, and revolutionary America. Pocock's work also focuses on the crucial problem that time has created for the republican ideology. Nevertheless, this Article departs from Pocock's work in two important respects: one

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13 See, e.g., Radin, Market-Inalienability, 100 Harv. L. Rev. 1849, 1852-55, 1870-97 (1987) (arguing that market-inalienabilities should be evaluated on concept of human flourishing other than universal commodification); see text accompanying notes 74-79 infra.

14 Time was not uniquely problematic for republican writers. It was problematic for American common lawyers generally. American acceptance of the English common law of property in the face of a political and ideological revolution against England, as is discussed later, see text accompanying notes 113-55 infra, posed the question of the static or dynamic character of common law property. This was a problem generally with the role of the common law in postrevolutionary American law. As G. Edward White points out, "Their [federal judges'] problems were basically those of all early-nineteenth-century Americans who perceived a need to preserve the special character of American culture in light of an increased distance between the Revolutionary experience and the present. Their concern... was the same concern exhibited by other interpreters of their time: how to invest the past with meaning for the present and future, and thereby preserve the exceptional version of American republicanism against decay, while modifying it to accommodate social and economic change."

3-4 G. White, History of the Supreme Court of the United States: The Marshall Court and Cultural Change, 1815-35, at 8 (1988). This Article departs from Professor White's interpretation in two respects: first, it dates the emergence of this temporal predicament within the revolutionary era itself; second, its understanding of culture is not limited to social and economic circumstances but stresses ideology as well.
methodological, the other substantive. First, unlike Pocock, this Article does not claim that the dialectical framework constitutes a neutral recovery of the actual thoughts or objective reconstruction of the speech practices of individuals from the past. The dialectic framework seems useful to me because it facilitates the resituation of the discourse of American legal writers from the past into the present legal culture, in which the predicament of marketable property is understood dialectically. Rather than stepping outside the present context to reconstruct the thoughts of the dead within their own, what intellectual historians can hope to accomplish is “anachronistically to impose enough of our problems and vocabulary on the dead to make them conversational partners.”

Second, Pocock sees no connection between the premodern dialectic of temporality and the modern dialectic of sociality. He ignores the dilemma that property, especially commodified property, continues to pose for the conception of the self, as separated from and simultaneously connected with others. By contrast, my study interprets the eighteenth-century temporality dialectic as a metaphor for the modern sociality dilemma.

15 Pocock’s approach to intellectual history aims at recovering and explaining authorial intention. His answer to the problem of the hermeneutic circle is to finesse it: he states that the historian “is characteristically interested in the performance of agents other than himself and does not desire to be the author of his own past so much as to uncover the doings of other authors in and of it.” J.G.A. Pocock, Virtue, Commerce, and History 9 (1985). The end result of this focus on subjective intentions of autonomous individuals, Pocock claims, is that the historian’s politics are inherently liberal. Id.


This is not the place for an extended discussion of my methodological differences with Pocock. Recognizing, however, that my statement regarding the aim of intellectual history—to see how the discourse of the past can speak to the predicament of the present—makes me guilty of the mortal sin of “presentism,” I will summarily state two defenses here.

First, the historiographical claims of “radical contextualist” intellectual historians like Pocock and Quentin Skinner are themselves highly vulnerable to a number of basic epistemological objections. For example, critics have called into question not only the recoverability of authorial intentions but the theory of language (language as representational) and the relationship among author, text, and reader (text as passive facilitator of communion between author and reader) that the contextualists assume. My own views are closest to Gadamer’s hermeneutics. See H. Gadamer, Truth and Method 267-74 (1985).

My second defense is political rather than epistemological. In practicing “presentist” history, I am affirming the Jeffersonian idea, discussed in Part II infra, that each generation, or in my terms, each culture, is primarily responsible to itself rather than to the past. To impose our vocabulary and our dilemmas on past discourses is to act upon that responsibility. It is also an act of self-expression and self-creation. In that sense this Article itself constitutes a republican act. For a clear discussion of the historiographical controversy between contextualists and their critics, see Harlan, Intellectual History and the Return of Literature, 94 Am. Hist. Rev. 581 (1989). For a useful overview of contextualism, focusing on perhaps its most important figure, see Tully, The Pen Is a Mighty Sword: Quentin Skinner’s Analysis of Politics, in Meaning & Context: Quentin Skinner and His Critics 7 (J. Tully ed. 1988).
This Article's argument proceeds in five parts. Part I describes the broader intellectual background of civic republicanism. Part II provides a glimpse of the republican dialectic of time and property, using Jefferson's discussion of the idea that the earth belongs to the living as an exemplar, while Part III focuses on the various complexities of the republican idea of property. Part IV is the core of the Article. It examines in depth the interrelated historical dialectics through which Jefferson and other American republican legal writers tried to create coherent meanings of property for the new nation. Part V is a prolonged coda, describing the redefinitions of the civic understanding of property in the constitutional and postconstitutional period.

I

THE INTELLECTUAL UNIVERSE OF CIVIC REPUBLICANISM

"Republicanism," as Gordon Wood explained, "meant more for Americans [of the revolutionary generation] than simply the elimination of a king and the institution of an elective system." The core of American republican thought during the eighteenth century was the idea that private "interests" both could and should be subordinated to the common welfare of the polity. This idea, which originated in classical Greek political writing, particularly that of Aristotle, and underwent periodic revivals and modifications in Renaissance Florence and in seventeenth-century England, animated nearly all political and legal writing throughout the period of the Revolution and even after. As Wood further explained, "[b]y 1776 the Revolution came to represent a final attempt . . . by many Americans to realize the traditional Commonwealth ideal of a corporate society, in which the common good would be the only objective of government."

What made the notion of the public good as the central objective of political life intelligible was a conception of society as a homogenous body whose members were organically linked together. The common good, then, was not merely what the consensus of society's individual members wished, but a substantive conception of the moral good that transcended individual interests. Such a holistic understanding of society did not exclude the concept of individual liberty, but it did at least require a public conception of liberty. A central dilemma of American politics was not thought to be protecting individual freedoms against collective encroachment, but protecting the political rights of ordinary citi-

17 G. Wood, supra note 3, at 47.
19 G. Wood, supra note 3, at 54.
20 See id. at 65-70.
zens against aristocratic privileges and power. Protecting the political liberty of the people would serve to protect their individual liberties.

According to American republicanism, the realization of this ideal required a particular moral character among the citizenry. Citizens had to practice “virtue,” or a willingness to subordinate their individual wants for the well-being of the entire polity. American republicans were well aware of how extraordinary this demand on individuals was and how fragile the requirement of virtue made the republic. Virtue was understood as constantly threatened by “corruption.” Indeed, eighteenth-century American republican discourse was preoccupied with a dialectic between “virtue” and “corruption.” Political writing was preoccupied with both the sources of corruption and the social, economic, and political conditions necessary to overcome it. In short, the civic-republican ideology posited that virtue, public and private, required the existence of certain social conditions. Jefferson, as the leading exponent of republicanism, articulated this “sociology of virtue” by means of an opposition between the “aristocracy of wealth” and the “aristocracy of virtue and talent.” That dichotomy was a trope that was in turn part of a cluster of oppositions that characterized the political problems and solutions identified in civic-republican discourse. The most important of these tropic oppositions included:

- virtue vs. corruption;
- equality vs. privilege;
- leisure vs. luxury;
- independence vs. servility;
- liberty vs. wealth.

Property occupied a central place in this typology. Its role, however, was neither straightforward nor strictly instrumental. Rather, it was dialectical and symbolic.

II

THE REPUBLICAN DILEMMA STATED: JEFFERSON’S DOCTRINE OF POLITICAL RELATIVISM

In September of 1789, Thomas Jefferson, then serving as ambassador to France, drafted a letter to James Madison setting forth a political and legal doctrine remarkable for its boldness and for its simplicity.

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21 See id.
22 See id. at 91-93.
23 J.G.A. Pocock, supra note 4, at 545-46.
"The question," Jefferson began, "[w]hether one generation of men has a right to bind another, seems never to have been stated either on this or our side of the water. Yet it is a question of such consequences as not only to merit decision, but place also, among the fundamental principles of every government."

Turning directly to the answer to this "fundamental" question, Jefferson continued, "I set out on this ground, which I suppose to be self evident, 'that the earth belongs in usufruct to the living': that the dead have neither powers nor rights over it."

This is the famous doctrine of "political relativism." At one level the doctrine is an answer, albeit a remarkable answer, to an aspect of a larger question of intergenerational justice familiar to modern political theorists and lawyers: what rights and duties, if any, do generations owe to each other? Jefferson's rather unique answer asserted a dynamic principle of political economy: that each generation is free to create its own social order and is under no constraints from actions taken by past generations. This was a severe restriction on, indeed a denial of, the possibility of transmitting ideas between generations. Jefferson went so far as to suggest that every constitution and every law naturally expires and must be either reenacted or revised at the end of nineteen years, which was, by his calculation, the life expectancy of any single generation.

At a deeper level, Jefferson's letter was an attempt to define for the republican legal and political culture the relationship between property and society. He unambiguously asserted that, while the general principle that the earth belongs to the living is grounded in the laws of nature and therefore is by definition presocial and prepolitical, specific property rights are strictly social creations. So, upon the death of the owner of land, "the child, the legatee, or the creditor takes it, not by any natural right, but by the law of a society of which they are members, and to which they are subject."

This assertion, that society creates property rights and ought continuously to control them, separated Jefferson's doctrine from the tradition of thought regarding the origin and character of property rights that is commonly called Lockean. The very idea of property rights being usu-

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26 Id.
27 Id.
29 Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), reprinted in 15 Jefferson Papers, supra note 25, at 392.
30 Locke's own theory placed the origins of contemporary property rights in both nature and social convention. In this sense, as Richard Schlatter observed, Locke himself was not always Lockean. See R. Schlatter, Private Property: The History of an Idea 152, 157-61 (1973).
fructuary, a term borrowed from Roman law, placed a considerable distance between the Jeffersonian and the Lockean conceptions of property.Usufructuary interests, conferring only a lifetime right to use, confer none of the individual sovereignty over resources that fee simple ownership is thought to do in the Lockean tradition. Such a notion of ownership presupposes that individual rights are social rather than pre-social or “natural.”

The conception of property embedded in Jefferson’s doctrine not only asserts the social character of property rights but their political character as well. For property was valued not as an end in itself but as a foundation for republican government. Each generation had to be free to redefine property because the specific configuration of property rights depended upon the political demands of the republic and the maintenance of virtue.

The doctrine that the earth belongs to the living, then, represented an attempt to create a public meaning for property in the new nation in terms of time. It depicted, figuratively through the use of naturalistic metaphor, American property, or more precisely, civic-republican American property, as freed from the past; dynamic, rather than static.

But defining the meaning of republican American property in those terms prompts a series of questions about our relationship to the past that Jefferson did not answer. If people were, as the doctrine suggests,

33 See note 6 supra (discussing civic republicanism).
34 My interpretation of Jefferson and the Jeffersonian meaning of property differs from that developed by Professor Joyce Appleby. See Appleby, supra note 6, at 287. She interprets Jefferson's generational egalitarianism as repudiating the civic-republican tradition. Because Appleby so strongly associates the civic tradition with political elitism, represented by figures like Montesquieu and John Adams, she interprets any element of egalitarianism as a rejection of the republican ideology. In contrast, I view Jefferson's writing as consistently preoccupied with the same basic dialectic, a dialectic of stability and dynamism. Professor Appleby's commitment to a linear interpretive framework in which there was a decisive break from republicanism to liberalism prevents her from seeing that Jefferson's view contained dialectical components. Her claim that the 1790s were the crucial decade in which Jeffersonians led a decisive break from the civic paradigm to create “the first truly American political movement,” J. Appleby, Capitalism and a New Social Order: The Republican Vision of the 1790s, at 4 (1984), suffers from the same urge to identify a time of linear transformation. Part V argues that the same dialectic of stability versus dynamism continued to organize American political-legal discourse throughout the 1790s. See text accompanying notes 259-312 infra.
35 One gap in Jefferson's conception of dynamic property—land in usufruct for the living—is that it could be used to justify actions by the present generation that undermine the ability of future generations to enjoy any property. The doctrine of political relativism can provide a paradoxical justification for the living—through exploitation of resources—to sell out the future, not just to cast off the shackles of the past. Willard Hurst's famous study of the Wisconsin lumber industry in the nineteenth century vividly chronicles exactly how Jefferson's relativism can adopt this malignant form. See W. Hurst, Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915 (1964). According to Hurst,
to be liberated from the past, from exactly what experiences were they free? Did their rejection of the past commit them to embracing an unlimited future and, with it, change at the expense of stability, as Jefferson's linkage between social time and natural time suggested?

At the root of the concern with time was an anxiety about the type of polity that Americans were creating and the relationship between the individual and that polity. A mainstay of the republican ideology held that a stable polity, and with it a stable institution of property, was the central device for creating a political and social order in which individuals could and would pursue the public good. The function of property was to anchor individual independence so that virtuous citizens were free to pursue the common good. Within the republican vision, property served to maintain the appropriate social and political order, rather than to create individual wealth for its own sake. Yet, if generational political and social transformation, as a result of the exercise of self-governance, also was integral to the American polity, what hope was there for creating and maintaining the new nation as a stable and therefore virtuous republic committed to the public good and not to personal interest? In short, the doctrine that each generation was free to recreate its polity and redefine its property rights from the ground up seemed to contradict the requirements of republican politics—proper order, social stability, subordination of self-interest—even while it affirmed them. Jefferson's doctrine affirmatively embraced each generation's exercise of its power to transgress settled practices and to recreate political institutions.36 That power is compatible with republicanism to the extent that republicanism puts great emphasis on individuals' active and meaningful political participation. But insofar as republicanism includes a political vision of maintaining traditions and institutions that help fix the social order, it undermines republican tenets to celebrate the power to "destabilize" existing social practices, institutions, and traditions.37

The political relativism doctrine potentially poses an even deeper dilemma. Implicit in the idea that each generation retains the power to


37 See note 6 supra.
define its political and social order is the idea that that power resides in each individual citizen of a given generation. At bottom, Jefferson's republicanism favors active and full political participation by individual citizens. This power seems to affirm the power of each individual to call into question the legitimacy of existing institutions and practices. Arguably, such participation is not possible unless each citizen is empowered to participate equally. And as a practical matter, empowerment to participate requires a minimal level of material endowment. To be without property is to be exposed to the raw power of those who have property.

This notion does not sit well with another aspect of republican thought—community. Republicans envisioned the well-ordered society as one whose members share at a very deep level certain values, ideas, and aspirations. The idea that each individual has the power to dissent from prevailing community sentiment perhaps can be made consistent with the ideal of community if the individual's dissent is depicted as an act of participation affirming that person's union with the polity. But such an interpretation misreads the dissenter's message. It is the very condition of being embedded in widely shared practices and institutions that the dissenter fears. In promoting the individual power to dissent, the Jeffersonian doctrine threatens to undermine republican social union. In this respect Jeffersonian republicanism created a social dilemma far more basic than the dilemma concerning the stability and change of property rights over time.

The remainder of this Article describes in greater depth American republican anxieties about commodified property, the sort evidenced in Jefferson's writings, as a central aspect of modernity. Studying these anxieties is not an exercise in nostalgia for some "world we have lost." Nor does it imply a wholesale denunciation of commodified property as a social or economic system, or modernity as a form of cultural life. As even those in Eastern and Central Europe who are currently experiencing the pain that accompanies shifting to marketized property likely will attest, few would deliberately swap our current situation for the conditions of the eighteenth-century premodern world. At the same time, however, there is little basis for unqualified enthusiasm about the conditions of social life in the modernist world with its marketized relationships. Rather, there is good reason for the anxiety about our marketized culture and society that seems evident not only in intellectual discourse, but in ordinary daily life.

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39 P. Laslett, The World We Have Lost (1965).
III
THE DIALECTICS OF PROPERTY IN CIVIC-REPUBLICAN THOUGHT

It is illuminating to begin an examination of the role of property in republican thought by contrasting it with the more familiar understanding of the function of property supplied by the political theory that C.B. Macpherson called “possessive individualism.” Property plays as prominent a role in civic-republican theory as it does in that tradition, but the two ideologies attach strikingly different functions to property. From the perspective of possessive individualism, property is the basis for the categorical separation of private life from the public sphere. It is the central mechanism by which autonomous individuals shield themselves from the potential of collective tyranny. The private realm, in possessive individualist thought, inevitably reduces to property and consolidated ownership.

Civic republicanism, both in revolutionary American thought and in its earlier Harringtonian version, did not separate public and private life categorically. Lacking a categorical opposition between polity and individual, it did not assign a negative role to property. Protection against collective action was not the exclusive, nor even the primary, role of property in American civic republicanism. Instead, republicans conceived of property as necessary to facilitate a publicly active, self-governing citizenry. They believed that ownership of property provides the necessary foundation for virtue, enabling citizens to pursue the common welfare. J.G.A. Pocock has stated succinctly the republican function of property: “The citizen possessed property in order to be autonomous and autonomy was necessary for him to develop virtue or goodness as an actor within the political, social and natural realm or order. He did not possess it in order to engage in trade, exchange or profit; indeed, these activities were hardly compatible with the activity of citizenship.”

Property was valued “as a means of anchoring the individual in the structure of power and virtue and liberating him to practice these activities.”

41 See id. at 3 (“The human essence is freedom from dependence on the wills of others, and freedom is a function of possession.”).
42 For a recent statement of this position, see R. Epstein, Takings: Private Property and the Power of Eminent Domain 3-6 (1985).
45 J. Appleby, supra note 34, at 9.
On this view, individuals who did not own property were forced to devote their attention to providing for their own personal welfare, exposing them to corrupting influences and distracting them from the public good. John Adams expressed this concern when he asked rhetorically, "[i]s it not . . . true that men in general, in every society, who are wholly destitute of property, are . . . too dependent on other men to have a will of their own? . . . Such is the frailty of the human heart, that very few men who have no property, have any judgment of their own."\textsuperscript{46}

American civic republicans, then, understood property within the framework of a conflict between "autonomy" and "dependency." Autonomy was considered a necessary condition for virtue, while dependency seemed to undermine it. Jefferson expressed the civic-republican meaning of dependency in his \textit{Notes on the State of Virginia}, stating, "[d]ependence begets subservience and venality, suffocates the germ of virtue, and prepares fit tools for the designs of ambition."\textsuperscript{47}

\textbf{A. Static vs. Dynamic Property}

As will be shown, Jefferson's use of a metaphor of manufacturing in this passage is especially significant because it gives a particular, if not contradictory, content to the abstract republican notion of property as the foundation of the political, social, and moral order. American republicanism failed to specify what type of property—land or commodity ownership, for example—was required for property to perform this function, or whether any one type of property was required.\textsuperscript{48} Arguing, as republicans did, that property has an important social function, begs the question as to what specifically the institution of property in a republic should amount. Could a republic survive if forms of property ownership were dynamic, continually free to change as social and economic conditions changed, or did these forms have to be static, maintaining a certain type? Related to this question was an ambiguity concerning the character of property as mobile or immobile. In practice, for property to change form would seem to require a high degree of alienability, while for a particular form of property to remain in place, its mobility (or exchangeability) seemingly would be restricted. These two meanings of republican property were not simply different; they were, at least, potentially contradictory—a fact the abstract notion of republican property obscured. The static meaning implied a greater degree of control

\textsuperscript{46} Letter from John Adams to James Sullivan (May 26, 1776), reprinted in \textit{9 The Works of John Adams} 376 (C. Adams ed. 1854) [hereinafter Adams Works].


\textsuperscript{48} There certainly was no ambiguity about Harrington's view on this question. He thought it was crucial to republican virtue that citizens not only be settled on land but own land in inheritable fee simple estates. See J.G.A. Pocock, supra note 4, at 387-91.
over property to maintain its preferred form. On its surface, the dynamic meaning required little or no social control of property, only collective restrictions to maintain its alienability being necessary.

It is crucial to emphasize that both these meanings of property were "republican" in the sense that they involved different readings of the commitments to the republic, civic virtue, and the common good. This point is lost on those who have read Jefferson's writings on the benefits of cultivated land owned in fee simple and worked by citizen-owners, the republic as constituted by the "fee simple empire," as representing the paradigm of republican property. This latter interpretation sees Jefferson's thought as built around a defense of landed as against commercial forms of property. In fact, the concept of "commerce" did play, as this interpretation suggests, a crucial role in Jefferson's republican discourse, just as it did in the discourse of English republicans. The opposition, rather, was between the cultivation of agricultural property, which he assumed to have a commercial dimension, and industrial property, that is, manufacturing. While he considered that "[t]he small landowners are the most precious part of a state," Jefferson viewed "the class of artisans" as "the panders of vice and the instruments by which the liberties of a country are generally overturned."

To Jefferson, expressing a vision that he inherited from seventeenth-century republican thought and that he bequeathed to nineteenth-century agrarian economic reformers, an economy dominated by "artifi-

49 The phrase is taken from H. Smith, Virgin Land: The American West as Symbol and Myth 133 (1950).


51 Letter from Thomas Jefferson to James Madison (Oct. 28, 1785), reprinted in 8 Jefferson Papers, supra note 25, at 681-82. Several years earlier, Jefferson expressed the same theme in Notes on the State of Virginia: "Those who labour in the earth are the chosen people of God, if ever he had a chosen people." T. Jefferson, supra note 47, at 157.

52 Letter from Thomas Jefferson to John Jay (Aug. 23, 1785), reprinted in 8 Jefferson Papers, supra note 25, at 426. Jefferson later revised his general hostility toward manufacturing, applying his earlier critique that those who labor in manufacturing become dependent on manufacturing only to the "great cities in the old countries." The American republic, on this later view, was immune to this critique because of the abundance of Western land. See T. Jefferson, supra note 47, at 157. This was an early example of the idea Henry Nash Smith has called "the West as safety valve." See H. Smith, supra note 49, at 201-10.

In this passage Jefferson also was contributing to an extremely important eighteenth- and nineteenth-century American social myth—the myth of the garden. See generally L. Marx, The Machine in the Garden: Technology and the Pastoral Ideal in America (1964). Land's symbolic role within this mythology was to mask "poverty and industrial strife with the pleasing suggestion that a beneficent nature stronger than any human agency, the ancient resource of Americans, the power that had made the country rich and great, would solve the new problems of industrialism." H. Smith, supra note 49, at 206.

53 See generally L. Goodwyn, Democratic Promise: The Populist Moment in America
subverted republican liberty by creating a two-class society in which class defined one's dependence or independence. Manufacturers would acquire a monopoly of sovereignty, political and economic. Laborers would lack the necessary conditions for meaningful participation in public life. Property could not take predominately the form of manufacturing processes and manufactured goods if American society were to be viable as a republic. Reinforcing this view, Jefferson stated in his Notes on the State of Virginia:

[general speaking, the proportion which the aggregate of the other classes of citizens bears in any state to that of its husbandmen, is the proportion of its unsound to its healthy parts, and is a good-enough barometer whereby to measure its degree of corruption. While we have land to labour then, let us never wish to see our citizens occupied at a work-bench, or twirling a distaff.]

Yet Jefferson hardly was prepared to banish commerce. He accepted commerce not merely as economically expedient or inevitable for any nation's survival, but as freedom-enhancing in certain passages. Thus, he continued:

Our interest will be to throw open the doors of commerce, and to knock off all its shackles, giving perfect freedom to all persons for the vent of whatever they may chuse to bring into our ports, and asking the same in theirs... [I]t might be better for us to abandon the ocean altogether, that being the element whereon we shall be principally exposed to jostle with other nations; to leave to others to bring what we shall want, and to carry what we can spare. This would make us invulnerable to Europe, by offering none of our property to their prize, and would turn all our citizens to the cultivation of the earth...

What is operating in these passages is less an opposition between agrarian—the proper form of property—and commerce than the dialectic between static and dynamic property that generally characterized the eighteenth-century American republican understanding of the relationship between property and republican democracy. On the one hand, the republic may be threatened fatally if property is transformed readily from an agricultural into an industrial and completely commodified form. On the other hand, throwing open our doors to foreign commerce represented the embracing of a form of economic dynamism. To be sure, Jefferson seems to have advocated an international division of labor that was itself static. This division of labor, though, made American open-


55 Id. at 164-65.
ness to foreign commerce crucial to the preservation of an agrarian economy. Paradoxically, economic stability required economic dynamism.\textsuperscript{56} It complemented that doctrine to the extent that it preserved each generation's independence, so that each generation remained able to practice self-governance. Yet there is a catch-22 in this theory. It is not clear how the doctrine of political relativism could be reconciled with the need to maintain property in an agricultural mode, whose very stasis implies intergenerational control. Under the doctrine of political relativism, would not each generation be free to cast off the previous generation's commitment to any particular form of property—indeed, any form of government—and decide for itself what type of property and form of government best suited its own needs? To see how Jefferson evaded this dilemma, one must examine how the dialectic of stasis and dynamism informed Jeffersonian discourse about the mobility and distribution of property.

**B. Mobility and Distribution**

The ambiguity over the meaning of republican property concerning stasis or change also affected the related questions of the proper mobility and distribution of property. Jefferson and others viewed the unequal distribution of property, specifically land, as incompatible with republicanism. Writing from Fountainbleau in 1785, Jefferson observed that the high degree of concentration of French land in the hands of the aristocracy caused high unemployment, as French landowners left their lands uncultivated for hunting. He then reiterated a view that he propounded throughout his career:

> I am conscious that an equal degree of property is impracticable. But the consequences of this enormous inequality producing so much misery to the bulk of mankind, legislators cannot invent too many devices for subdividing property, only taking care to let their subdivisions go hand in hand with the natural affections of the human mind.\textsuperscript{57}

The dilemma was how to prevent unequal distribution of land from undermining republican virtue while pragmatically acknowledging the "natural affections of the human mind" to truck, barter, and trade that were embodied in the concept of individual ownership.\textsuperscript{58} John Adams,\textsuperscript{56}

\textsuperscript{56} It also bears mention that Jefferson's suggestion, which his fear of dependence on manufacturing prompted, did not succeed in removing that threat altogether. Rather, it substituted external dependence on other nations for internal dependence so that America could remain republican agrarian.

\textsuperscript{57} Letter from Thomas Jefferson to James Madison (Oct. 28, 1785), reprinted in 8 Jefferson Papers, supra note 25, at 682.

\textsuperscript{58} Letter from John Adams to James Sullivan (Apr. 26, 1776), reprinted in 9 Adams Works, supra note 46, at 376.
citing Harrington’s assertion that power always follows property, had expressed the recurrent anxiety about the consequences for republican virtue in terms of a need to maintain a balance of property in order to maintain a balance of power:

The only possible way . . . of preserving the balance of power on the side of equal liberty and public virtue is to make the acquisition of land easy to every member of society; to make a division of land into small quantities, so that the multitude may be possessed of landed estates.

Jefferson’s solution was similar but more complete. He proposed that the state distribute equally to all takers unowned land and that inherited property be divided equally among heirs, while also protecting existing property rights against governmental redistribution.  It was this accommodationist strategy that underlay, for example, his well-known reforms of Virginia inheritance law, including the abolition of primogeniture in favor of partible inheritance and the abolition of entail.

The strategy was for the state to take advantage of the abundance of uncultivated land in the American West and assure each able-bodied citizen a relatively small parcel which, through cultivation, would make that citizen self-sustaining and protect the personal autonomy secured through ownership.

But that strategy was incomplete. It failed to indicate whether there existed any assurance that autonomous owners would not exercise their right to transfer land and thereby upset the proper egalitarian distribution scheme. For his part, Jefferson never seemed to question the power of citizens to transfer ownership—that is, to commodify land—an idea well established in the existing common law. Again, the static aspect of republican property clashed with the dynamic by asserting the dependence of the republic upon an ideal type of property, that is, land, and an ideal form of property holding, that is, fee-simple ownership, so as to prevent land from degenerating into a mere commodity.

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59 See id.
60 Id.
61 See Katz, Thomas Jefferson and the Right to Property in Revolutionary America, 19 J. Law & Econ. 467 (1976).
63 Indicative of this strategy was Jefferson’s bill to the Virginia legislature in 1778 proposing that every freeborn Virginian who married and resided in that state for one year receive “seventy five Acres of waste or unappropriated Land.” Bill for Establishing a Land Office (Jan. 8, 1778), reprinted in 2 Jefferson Papers, supra note 25, at 139-40. The proposal, however, never was enacted. 2 Jefferson Papers, supra note 25, at 147 n.12.
64 See text accompanying notes 57-61 supra.
65 See J. Baker, An Introduction to English Legal History 223-25 (2d ed. 1979) (alienability was accepted attribute of possession of real property since before 1290).
66 On the theme of stability in the American civic-republican vision, see J. Appleby, supra.
It was not the rise of commerce per se, but the potential for commerce to transform the sociology of property that aroused the Jeffersonian anxiety. Acts of free exchange always could precipitate a social transformation that would change the meaning of freehold land from a stable social foundation to a fluid item of commerce. Were this to happen, property would no longer constitute an aspect of virtuous personality but rather would represent a mere artifact of private life. So transformed, property might become a solvent that dissolves the political bonds of the community.

Interpreted into modern terms, the anxiety was that property, reduced to a mere commodity, would come to dominate social relations. Individuals would relate to each other as interchangeable buyers or sellers in the marketplace rather than as land-holding neighbors and human beings. In this respect, the civic-republican critique of commodified property anticipated the modern theme that connects highly mobile forms of property with the phenomenon of alienation in social relations. Although the concept of alienation did not flower until the next century, its seed was planted well before then. It exists in all theories that define the role of property in terms of self-development and self-governance realized through union with others.

The real world phenomenon that prompted the Jeffersonian anxiety was the rapid development of intangible forms of property, especially credit. These interests, which seemed to be based on nothing more real than a guess about the future, appeared indistinguishable from the “expectancies” that the common law long had held not to be property. A recurrent theme of eighteenth-century writers who opposed the rise of a credit-based economy was the fear that permitting ephemeral interests to operate as property would destabilize the proper social order. More fundamentally, it would destroy the autonomy that land ownership pro-

Note 34, at 37-38. On the theme of stability in earlier versions of the republican tradition, see generally J.G.A. Pocock, supra note 4.

67 This concern about dynamic, marketized property undermining communal ties is not unique to the civic-republican tradition. Hegel had expressed the same view in pointing out the benefits of stable property, especially land used for agriculture. See G. Hegel, The Philosophy of Right §§ 203, 305-307 (T. Knox trans. 1952) (n.p. 1821).

68 See generally A. Ryan, Property and Political Theory (1984) (arguing that western philosophies of private property can be organized according to whether they are instrumental or self-developmental).

69 For discussions of the rise of credit at this time, see F. McDonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution 138-42 (1985); J.G.A. Pocock, supra note 4, at 423-61.

70 See L. Simes & A. Smith, The Law of Future Interests 2 (2d ed. 1956); see, e.g., In re Baker, 13 F.2d 707 (6th Cir.) (expectancy not property and cannot become property even by valid conveyance between heirs), cert. denied, 273 U.S. 733 (1926).

71 See, e.g., C. Secondat [Baron de Montesquieu], De l’Esprit des Lois, Oeuvres Complètes bk. 22, ch. xix (Paris 1748) (discussing conversion of “crédit” to “confiance”).
vided and, with it, the moral personality upon which the republic
depended.

We must recall, though, that stability was only one-half of the dia-
lectic understanding of property in American civic republicanism. The
other half of that understanding was the fluidity of property that republi-
cans sought to promote even while they feared it. Jefferson's proposal to
"throw open the doors of commerce" suggests that what he rejected
was not commerce itself but an empire of commerce in which fluid and
intangible property replaced stable cultivated land. What was called for
was a "dynamism of virtue" to counterbalance the "dynamism of com-
merce." Making virtue dynamic required not that land be commodi-
fied, but that the state take steps to ensure its "natural" circulation was
not impeded. Jefferson's efforts to amend the law of inheritance followed
from this vision of transforming land ownership from the static condition
that characterized English land law—in which strict settlements, entails,
and primogeniture allowed the heads of a few privileged families to retain
large portions of land for successive generations—into a dynamic
phenomenon.

As modern debates in property theory evidence, the dynamic ele-
ment of Jeffersonian thought does not sit well with the antinomic con-
cern for stability. For example, recent law-and-economics scholarship
has argued that government must protect the free transferability of re-
sources if the market is to remain the central device for allocating eco-
nomic resources. This meaning of alienability trades on a meaning of
property as market commodity. Yet modern critics of the economic par-
adigm regard that meaning as incompatible, at least in some circum-
stances, with the ideal of human flourishing. Echoing Marx, they
worry that market alienability is alienating. While neither of these inter-
pretations was unambiguously part of the legal consciousness of civic
republicans, elements of both can be found in the late eighteenth-century
legal debate. American republican writers simultaneously depicted the
free transferability of property as liberating and threatening. It liber-
ates individuals from one form of dependency, feudal hierarchy, but

72 See text accompanying notes 55-56 supra.
73 See J.G.A. Pocock, supra note 4, at 535 (discussing the notion of a dynamism in virtue
as it appears in the works of other American republican writers of the early 1800s).
74 See, e.g., Demsetz, Toward a Theory of Property Rights, 57 Am. Econ. Rev. 347 (1967).
75 See, e.g., Radin, supra note 13, at 1852-55, 1870-77.
76 For a discussion of this, see Banning, Jeffersonian Ideology Revisited, 43 Wm. & Mary
Q. 32 (1986).
77 The clearest example in eighteenth-century American republican discourse of the associ-
ation of social hierarchy with feudalism is Adams, A Dissertation on the Canon and the Feu-
dal Law, Boston Gazette, Aug. 12, 1765, reprinted in 1 The Papers of John Adams 111 (R.
Taylor; M. Kline & G. Lint eds. 1977) [hereinafter Adams Papers].
exposes them to another dependency, markets and manufacturing. By debasing the moral personality of individuals and the polity, the free transferability policy would create a new form of dependency. Individuals would be subjects of the market, and the common welfare would be subordinated to the limitless pursuit of self-interest.

C. Balance and the Problem of Hierarchy Based on Property

To conflate dynamic property with commodity ownership—the market as a device for regulating scarcity—would pervert the civic-republican ideal that Jefferson articulated. The ideal was republican in that it carried forward from James Harrington a fundamental concern for the inequality of land distribution, the social hierarchy that such distribution caused, and the corruption of character that resulted from both of these inequities. John Adams, for example, repeating Harrington’s doctrine of balance, asserted that “power always follows property. . . . [T]he balance of power in a society, accompanies the balance of property in land.” But the meanings that the eighteenth-century American republicans imputed to Harrington’s doctrine of balance modified that doctrine in crucial respects.

For Harrington, popular government depended on the enactment of agrarian law. The objective of agrarian law was to assure that “the property in lands be so diffused through the whole people that neither one landlord nor a few landlords over-balance them.” Agrarian law represented a direct exercise of government power to maintain an equal distribution of land, which could not thereafter be upset by the market.

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78 The republican anxiety about freely transferable property also anticipated two further modern dilemmas. The first is the problem in liberal political theory that the free-transferability policy depends upon the exercise of the very source of dependency that the policy is intended to avoid, namely, state power. The second is the social dilemma that commodifying all assets in the name of freedom of the market creates the risk of social exploitation within market relations. Eighteenth-century republicans evaded these dilemmas, however, by defining time as the central question about property and property law in the new nation. This is not to suggest that eighteenth-century writers were aware of either dilemma. Their discourse of commerce and property must be understood within the context of a culture that was preoccupied with moral personality and that linked the creation of that personality with the ready availability of land, not within a structure of meaning constructed from the concepts of profit and market commodity. My point is that their discourse gives meaning to us within the context of our dilemmas of free alienation of property.

79 On Harrington, see J.G.A. Pocock, supra note 4, at 386-88.

80 Letter from John Adams to James Sullivan (May 26, 1776), reprinted in 9 Adams Works, supra note 46, at 376.


82 See id. (“so an agrarian [law] is a law fixing the balance of a government, in such manner that it cannot alter”), reprinted in Harrington Works, supra note 81, at 459.
Freedom could be anchored only in an equal distribution of land; inherited, not acquired through speculation; and owned in fee simple.

Adams seemed to adopt this doctrine of balance when he argued that "[t]he only possible way, then, of preserving the balance of power on the side of equal liberty and public virtue, is to make the acquisition of land easy to every member of society; to make a division of the land into small quantities, so that the multitude may be possessed of landed estates." Note, however, that by this formulation Adams, like Jefferson, added a dynamic element to Harrington's view of property. Harrington viewed dynamic property as a direct threat to balance; he was solely concerned with stability. Thus he considered partible inheritance, rather than grant, to be the preferred method for acquiring land. Once acquired, land was to be used for possession, not exchange. He disfavored trade in land because of its propensity to undermine balance and recreate inequality and dependency. In Adams's hands, dynamic property became an antidote to inequality and hierarchy. On his understanding, Harrington's preoccupation with stability caused him to miss the important connection between stability and antidemocratic aristocracy based on "privilege" and "luxury." On Adams's view, property had to be dynamic precisely because it then could destroy the basis for an aristocracy of privilege and luxury. Hence the true goal of property law was to liberate land by removing entanglements on fee-simple ownership that prevented every ordinary citizen from obtaining a parcel of land. Liberating land, Adams and Jefferson thought, meant liberating the individual.

We can see this dynamic view of property at work in the American civic-republican critique of primogeniture and entailments. Inheritance was the aspect of the common law of property about which eighteenth-century American republican lawyers expressed the greatest concern. Within the law of inheritance, no topics had greater importance to these writers than primogeniture and entailment of land. It may seem odd that even eighteenth-century American lawyers would have been so preoccupied with these common-law doctrines. After all, several colonial legislatures already had abolished either or both primogeniture and entailments of land. Recent scholarship further indicates that even where these devices were legally recognized, they were not widely used.
the significance of these devices—and of the legal writing attacking them—lies in their symbolic role rather than their functional effect.

The doctrine of primogeniture provided that when a man died without a legally effective will his lands descended to his eldest son, although his personal property was distributed in equal shares to his sons and daughters, with a portion reserved for his surviving spouse. A wealthy landowner easily could block the doctrine's operation, of course, merely by devising his land by will. At the same time, however, this option did not guarantee that the land would be divided equally among the children. Eighteenth-century American landowners enjoyed a high degree of freedom of testation and could exercise that freedom to produce the same pattern of distribution as primogeniture did. Moreover, from the perspective of consolidating land ownership within the family for the purpose of maintaining dynastic family power, devises were far less effective and less used as means of supporting family dynasties among American estate holders than among English landowners of the seventeenth and eighteenth centuries.

Along with primogeniture, the device that American republican lawyers who despised English landed aristocracy associated most closely with the landed English family dynasty was the entailment of land. Reduced to its bare essentials, the entail's purpose was to maintain land within the family by restricting the power of the persons to whom the testator devised land to transfer the land. This was an entail's purpose, but not its invariable effect, as numerous means existed for breaking entailments. However, it appears that in England the more commonly used device to keep land within the family was the so-called strict settlement, an elaborate arrangement for transferring land and restraining its future alienability. The strict settlement, whose enforcement was the work of the English equity courts, was little used in America, owing in part to an absence in most colonies of a separate equity system. With the strict settlement generally unavailable to American testators in the seventeenth

America: From Colonial Times to the Present 30-51 (1987); Keim, Primogeniture and Entail in Colonial Virginia, 25 Wm. & Mary Q. 545, 545-48 (1968). Keim's paper reveals that although primogeniture and entail existed in Virginia until 1785, neither was a prevailing custom in colonial Virginia, which had just the aristocratic, agrarian class that one would expect to engage in these inheritance practices. Id.

See Keim, supra note 88, at 557.


See J. Baker, supra note 65, at 234 (dynastic instinct as major motivation for fee tail).


and early eighteenth centuries, the entail was virtually the only testamentary device for maintaining family control of land.

As was mentioned above, the institutions of primogeniture and the entailment never really took root in American law. As a result, historians usually have been content to explain their disappearance by means of a functionalist argument. Economic conditions, in particular the abundance of land in the colonies, the argument runs, vitiated the need of wealthy American testators for legal devices designed to assure the family's foundation on large concentrations of land.95 But this interpretation tells only part of the story. In particular, it ignores the continued symbolic importance of these institutions in republican political discourse on both sides of the Atlantic. English and Continental lawyers had debated the benefits of primogeniture heatedly since the sixteenth century.96 That debate yielded no consensus, and its enduring effect was to cripple the stature of primogeniture within English legal culture even prior to its rejection in America.97 Similarly, but less intensely, early modern English lawyers had attacked entailments of land, arguing that the indestructibility of entails "would put a stop to commerce and prevent the circulation of the riches of the kingdom" and that such devices conflicted with the common law's supposedly fundamental commitment to freedom of alienation.98 Later still, lawyers, philosophers, historians, and political economists of the Scottish Enlightenment (with whom American legal writers in the late eighteenth century were familiar)99 relentlessly attacked primogeniture and especially entailss as antiquated and socially harmful.100 Most important for eighteenth-century American lawyers,

96 On the European debate concerning primogeniture, see Thirsk, The European Debate on Customs of Inheritance 1500-1700, in Family and Inheritance 177 (J. Goody, J. Thirsk & E. Thompson eds. 1976).
97 See id. at 189-91.
98 See Cooper, Patterns of Inheritance and Settlement by Great Landowners from the Fifteenth to the Eighteenth Centuries, in Family and Inheritance 192, 193 (J. Goody, J. Thirsk & E. Thompson eds. 1976). On the other hand, writers like Sir Matthew Hale developed functional arguments in favor of entailss, contending that favoring the eldest son forced younger sons, who otherwise remained idle, to seek socially useful occupations. See M. Hale, The History of the Common Law of England 142 (171).
100 See note 104 infra.
republican political theory since Harrington regarded both devices as incompatible with republican principles. Republican regimes required partible inheritance as an aspect of the Harringtonian principle of balance.101 Reinforcing the republican antipathy to these devices were the customary inheritances practices of various groups in the colonies102 and American lawyers' conception of the historic common law.103 Yet American legal writers' republican concern for corruption prompted their hatred of primogeniture and especially of entailments of land, which appeared to be the most glaring vestiges of a corrupt past. They associated that past with the English social hierarchy of land. Moreover, they associated that social order, indeed, social hierarchy in general, with "feudal" encrustations on the common law of property.104 To both Ad-

101 See text accompanying notes 79-84 supra. Preambles to late eighteenth-century American statutes repealing primogeniture and entail drew on the balance of property principle explicitly. The preamble to the 1794 Delaware statute, for example, stated: "[I]t is the duty and policy of every republican government to preserve equality amongst its citizens, by maintaining the balance of property as far as is consistent with the rights of individuals." 2 Laws of the State of Delaware ch. 53 (S. Adams & J. Adams eds. 1797).

102 In recent years, American historiographers have interpreted colonial life as characterized by a plurality of customary practices and beliefs among small communities. See Henretta, Families and Farms: Mentalité in Pre-Industrial America, 35 Wm. & Mary Q. 3 (1978); Roeber, In German Ways? Problems and Potentials of Eighteenth-Century German Social and Emigration History, 44 Wm. & Mary Q. 750 (1987); Warden, Law Reform in England and New England, 1620-1660, 35 Wm. & Mary Q. 668 (1978); Waters, Family, Inheritance, and Migration in Colonial New England: The Evidence from Guilford, Connecticut, 39 Wm. & Mary Q. 64 (1982). To some extent these differences were the result of particular customs that colonists brought with them from their European communities. With respect to inheritance practices, the persistence of local customary practices did not always cut against primogeniture. Professor Waters, for example, argues that colonial New Englanders generally believed in and practiced unequal treatment among heirs. See id. For a critical assessment of the emphasis on discontinuities among local customary practices, see Ruttman, Assessing the Little Communities in Early America, 43 Wm. & Mary Q. 163 (1986).

103 Thus, I am not suggesting that the American critique of primogeniture and entailments was motivated solely by a republican ideology. In interpreting the eighteenth-century elite American legal writers' attacks on primogeniture and entail, one must take into account John Reid's thesis that the American revolution was a controversy about law and that the revolutionaries' driving force was largely a constitutional vision framed by the common law. See J. Reid, Constitutional History of the American Revolution: The Authority of Rights (1986); see also J. Greene, Peripheries and Center: Constitutional Development in the Extended Polities of the British Empire and the United States, 1607-1788 (1986) (showing continuity and importance of constitutional organization in the colonial period). This Article argues that the line between republican ideology and the common-law mentalité of the American revolutionaries was not categorical. Republican politics was not distinct from law. Indeed, a central challenge (perhaps the central challenge) to the American revolutionaries, both during and after the Revolution, was to reconcile retention of much of the common law of property with the very act of revolution. It was the republican ideology, re-created by American revolutionaries (most of whose leaders were lawyers, trained in the English common law), that was the path they took to effect this reconciliation.

104 Linking entailments to feudal law was not a critique unique to American republicans.
REPUBLICAN DIALECTICS

It was crucial to both republican ideology and the American common-law mentalité, then, to repudiate primogeniture and entail, despite the fact that they were not used with great frequency. Primogeniture and entailment symbolized the undesirable consequences of stability of property that required a dynamic of property to counteract. The release of land from these feudal constraints meant a release of individuals from dependency and inequality. 

Scottish Enlightenment writers, particularly Lord Kames, pursued the same strategy. Entails followed, Kames argued, from the very nature of feudalism, which he labelled a "violent system, repugnant to natural principles." Home, Lord Kames, History of Property, in 1 Historical Law Tracts 197 (n.p. 1776). From the perspective of the Scottish writers, what made entails objectionable was that they removed large amounts of land from circulation, thereby frustrating the needs of a commercial society. Paralleling arguments developed by Adam Smith, see 1 A. Smith, Lectures on Jurisprudence 69-71 (R. Meek, D. Raphael & P. Stein eds. 1978), Kames contended that "no circumstance tends more to the advancement of commerce than a free circulation of the goods of fortune from hand to hand." H. Home, Lord Kames, The Principles of Equity 259 (Edinburgh 1760). This, of course, is quite a different basis from which to attack entails than that provided by traditional republicanism. The Scottish critique of entails, which was well known to American republican elite lawyers like Jefferson, see A. Hook, Scotland and America: A Study of Cultural Relations, 1750-1835 (1975), thus was an important instance in which republican ideology and commercial ideology complemented each other. Such instances of overlap were sources of ambiguity and paradox that facilitated the subsequent transformation of civic-republican legal thought under the influence of commercial ideology. See text accompanying note 219 infra. On Kames's role in the Scottish Enlightenment critique of entails, see Lieberman, The Legal Needs of a Commercial Society: The Jurisprudence of Lord Kames, in Wealth & Virtue: The Shaping of Political Economy in the Scottish Enlightenment 203 (I. Hont & M. Ignatieff eds. 1983).

See Adams, supra note 77, No. 1, reprinted in 1 Adams Papers, supra note 77, at 112-15; for Jefferson's views, see his correspondence with Edmund Pendleton concerning Jefferson's proposal to abolish all feudal tenures, reprinted in 1 Jefferson Papers, supra note 25, at 484-508.

I am suggesting here that in the republican dialogue about property we will find antecedents of the theme of "the release of energy" that Willard Hurst has described as characterizing nineteenth-century legal thought and practice. See W. Hurst, Law and the Conditions of Freedom in the Nineteenth Century United States 3-32 (1956). I also am arguing that the origins of a dynamic conception of property in American legal discourse are to be found earlier than Morton Horwitz claims. See M. Horwitz, supra note 2, at 31-62. The republican (Jeffersonian) understanding of dynamic property differs, however, from the form of dynamism that Hurst and Horwitz have in mind. Republican dynamism seeks to release land from social hierarchy, created by legal restraints, so that land will be used as the basis for responsible self-governance. Land, in other words, first must be made dynamic to serve its proper public role. Market dynamism seeks to liberate land (and all other forms of payments) from restraints so that it is available to satisfy individual wants. Hurst and Horwitz are correct in that the legal developments that best exemplified the market conception of dynamic property occurred in the nineteenth century. Even in the nineteenth century, however, there were traces of republican dynamism at work. Examples include the Homestead Act of 1862, ch. 75, 12 Stat. 392, which contemplated (but only incompletely achieved) an initial distribution of clear title in relatively small parcels of government-owned land to individuals conditioned merely on their working the land themselves, and the prior-appropriation system of allocating water rights. The purpose of these legal rules was not to enable homesteaders to trade the land for other forms of
The civic-republican dynamic of property, then, stood in a dialectical relation to components of stability that also were vital to American civic republicanism. Property—land—needed to be unencumbered to avoid privilege and inequality, but it also had to be stable—that is, non-transferable—to avoid being reduced to a mere commodity, the object of acquisitive pursuit that would destroy republican virtue. This dialectic posed a dilemma: how would the necessary stability of property be secured without undermining the possibility of dynamic property and egalitarianism? Stability meant not only that the dominant form of property in society had to remain constant, specifically that it had to be tangible agricultural property rather than industrial and intangible property, but also that its public meaning as the anchor of a virtuous civic life had to resist any metamorphosis reducing the meaning of property to that of commodity, the mere object of an acquisitive spirit. These two aspects of stability affected each other because, as republicans like Jefferson understood the logic of commerce, if property came to be understood as a commodity, then its dominant social form would shift from stable fee-simple ownership to a series of speculative sales and purchases. Conversely, if intangibles came to displace cultivated land as the socially dominant form of wealth, then the public meaning of property would shift to the framework of the self-interested, nonpolitical speculator. This change in the public meaning of property would represent a change in the relational aspect of property. Civic property, property as the basis for sociality and participation, would be replaced by self property, property as the basis for personal gain. The danger was in allowing the forces of dynamism to undermine completely stability and sociality.

How, then, could stability and dynamism both be given their due? The Harringtonian “solution”\textsuperscript{107} simply repeated the problem. The legal system had to impose restraints on the transferability of land both to prevent persons to whom the government had distributed land from using their land as a commodity for speculation and to prevent the formation of family dynasties. Jefferson made slightly further headway. His inheritance-law reforms paradoxically imposed collective restraints on freedom of alienability to encourage the transfer of property so as to prevent landed dynasties. Yet this idea and his doctrine of political relativism also implicitly denied that ownership was or could be thoroughly

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\textsuperscript{107} See text accompanying notes 80-82 supra.
privatized. The latter doctrine, in particular, embraced each generation's power to re-create the configuration of property rights, allowing the republican polity to limit the alienation of land to whatever extent was needed to create the necessary conditions for republican politics.

In short, Jefferson never adequately explained how the law of property could accommodate stability and dynamism. Part of the reason for this is that he sometimes assumed away the problem by arguing that collective restraints aimed at limiting the dynamic component of property (land speculation) were unnecessary. Individuals would, he argued, choose cultivation over manufacturing or speculation if given the choice. So long as land, owned in fee simple for cultivation, was available to them, Americans would of their own accord preserve the dialectic of stability and dynamism. Individuals pursued nonvirtuous modes of property and ownership in the past, he thought, only because they lacked any choice. "In Europe the lands are either cultivated, or locked up against the cultivator. Manufacture must therefore be resorted to of necessity not of choice, to support the surplus of the people. But we have an immensity of land courting the industry of the husbandman." The seemingly unlimited supply of land available for cultivation placed Americans in a historically unique situation of being able to escape from the constraints that had dictated the corruption of property in Europe.

One might speculate about an even deeper concern underlying Jefferson's dilemma. His unwillingness to abandon entirely the principle of freedom of alienation stems from the link between individual freedom of alienation with republican personal independence. The republican meaning of independence is that individual citizens are politically autonomous. While republicans traditionally argued that individuals experienced political autonomy through participation, autonomy, understood as freedom from corruption, also required that individuals be free to choose among alternative political locales. In the modern idiom, as a political option, "exit" might be preferable to "voice" under some circumstances. Moreover, as public-choice theory recognizes, political voice is more effective if local governments know that the threat of exit is

108 Staughton Lynd has pointed out that the principle that the earth belongs to the living "approached most nearly the socialist conception that living labor has claims superior to any property rights." S. Lynd, Intellectual Origins of American Radicalism 77 (1968).

109 Indeed, unless restricted to changes that were consistent with republican principles, the doctrine permitted the destruction of republican politics itself. Jefferson never addressed whether the doctrine was so restricted, but even if such a restriction is implied, there remains the task of explaining how such a denial of self-governance can be reconciled with the republican ideal.


maximized. Maintaining individual freedom to transfer one's property, or at least those assets that anchor individuals to one locale, preserves personal mobility. Broad legal restrictions on the individual power to dispose of land, then, might threaten the citizen-farmers' political independence by effectively tying them to one locale and thereby weakening their political voice. Yet the problem remained that unless such restrictions were imposed individuals might exercise their freedom privately rather than publicly, that is, by using their land as an exchange commodity rather than as a means of preserving their political autonomy.

By assuming away the distributional or egalitarian problem that dynamic property was meant to solve, Jefferson was able to avoid directly confronting the dilemma. The two meanings of property, stable and dynamic, hierarchical and egalitarian, coexist in his writings. To understand why he and other eighteenth-century American republicans could not help but avoid this problem, it is necessary to place the American civic-republican meaning of property in the context of that culture's focus on time and history.

IV
TIME, HISTORY, AND PROPERTY
IN THE REPUBLICAN VISION

Time and history were central in the consciousness of American lawyers during the revolutionary and early national periods. More specifically, property gained meaning to American republican lawyers from a concern with time and an historical vision that reacted to that concern.

Like the concept of property embedded in them, American legal writers' conceptions of time and the nation's place in history were deeply ambivalent. On the one hand, an important part of the meaning of the institutions they were creating was breaking away from the constraint of the past. Tocqueville only was reflecting a widely shared American view when he observed that in the United States "the wool of time is broken and the track of past generations is broken." On the other hand, many of the "new" legal institutions Americans had created were largely transplants from England, including that most unrevolutionary of institutions, the common law. Specifically with respect to the law of property, American legal thought had to develop a vision of property

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113 See 3-4 G. White, supra note 14, at 6-10.
that reconciled the fact of revolution with both the substantial continuity between American property law and the English common law of property and the affirmation of individual property rights created by the American revolution. Crucial questions thus emerged. How had the American revolutionary experience altered the meaning of property so as to distinguish American property law from its English antecedents? Given that by the late eighteenth century the meaning of property in English law already was linked closely with the ideology of individual freedom, as Blackstone's *Commentaries* abundantly demonstrated, what new meaning of individual autonomy did American property law create?

The initial answers provided by American republican lawyers, including not only Jefferson but the many who wrote on the subject of property, were framed largely in the form of negations. American property law promoted a new form of autonomy because it had repudiated "feudal tyranny." "Tyranny" served as the central metaphor for domination and hierarchy. The meanings of individual autonomy and property and their relationship to each other were articulated in terms of the negation of tyranny. Yet this negative articulation again allowed republicans to avoid the critical dilemmas of individualized property rights. If history, especially the feudal past, was a trope by which property and human liberation were signified, the symbol was effective largely because it was amorphous. To comprehend how reliance on history could be a move by which republican lawyers avoided confronting the dilemmas of property and autonomy, however, one must first sketch the understanding of history that was embedded deeply in civic-republican legal consciousness.

**A. History in Eighteenth-Century American Legal Consciousness**

American legal writers turned to history as a, if not the, principal source from which to create meaning for their revolution and for the new nation. As practitioners of the eighteenth-century *mentalité* of reason, they believed that "the actions and affairs of men are subject to as regular and uniform laws, as other events." The sources of these laws were reason and history. History itself was a repository of reason, a fund from which to discern the timeless principles of law and politics. Such principles, the revolutionaries thought, were the constituent elements of

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115 See 2 W. Blackstone, Commentaries *2.*5.
117 G. Wood, supra note 3, at 5 (quoting S. Williams, The Natural and Civil History of Vermont xi (1794)).
what John Adams called "the divine science of politics." They would guide Americans in their efforts to resist tyranny and protect their fundamental rights. Grounded in "reason" and discovered through history, these principles legitimated both the rejection of English political and legal institutions and the American institutions that replaced them.

1. The Ancient Constitution and the Common Law

Among the many paradoxes of American republican culture was the Americans' reliance on English political and legal history as the main source of meaning and legitimacy for their own "revolutionary" institutions. Eighteenth-century American Whigs saw no contradiction in this, however, for that history was, as they interpreted it, a story of continual struggle by a people to protect their liberties against depravations by rulers. They considered their actions as constituting another chapter in the same story, an extension of the same struggle for fundamental liberties carried on by their ancestors. But they regarded the chapter that they were writing to be unlike those written by the English political actors of 1215, 1628, and 1688. It was the chapter that completed the entire story, the eschatological moment of the historical process of discovering and realizing the ancient and fundamental liberties. It was the millennial chapter to which nothing would be added later.

The notion of the "ancient constitution" was crucial in supporting this eschatology and in avoiding contradiction and paradox in the American affirmation of the English common law. The core of that conception was the belief that the ancient English constitution—or, as it was sometimes called to emphasize the supposed Germanic source of Saxon liberties, the "Gothic" constitution—transcended not only time but also place. Its integrity was not confined to any particular nation or culture.

On the unique view of American republicans, the common law had come to embody the promise of this ancient constitution. The American historical narrative thus chronicled the origin of the ancient constitution as linked to the common law early in Saxon times. The Saxons, they believed, had developed the common law to protect certain principles of

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120 As Gordon Wood points out, however, a few Americans of the revolutionary generation, James Otis in particular, were less Panglossian about the English past, seeing it as at least occasionally in conflict with reason and the law of nature. See G. Wood, supra note 3, at 9-10.
121 See id. at 7.
122 See 4 W. Blackstone, Commentaries *134.
liberty, and the English had asserted these principles continuously from that time through the seventeenth century.\textsuperscript{124} From time to time the artifice and corruption of hierarchical tyranny had undermined the Saxon liberties of the ancient constitution, but these lapses into corrupt forms of authority always had proved to be unstable. Eventually the English had purified the common law, purging it of its alien elements. Most importantly among the foreign elements that had contaminated the ancient common law, the Norman conquest was depicted as an aberration, not producing any change in the essential character of the common law.\textsuperscript{125} Robert Ferguson has summarized the role of this historical understanding of the common law and its role in the Whig ideology:

The Whig vision of history . . . assumed an ancient constitution, which, through immemorial common law, guaranteed the rights of Englishmen in perpetuity. The virtues of that ancient constitution had been undermined by the incursions and usurpations of William the Conqueror and his kingly heirs, transforming all of English history into one long struggle for the recovery of lost liberties. In this view the Glorious Revolution of 1688 had been “the triumph of the Common law and lawyers over the king.”\textsuperscript{126}

To Americans of the eighteenth-century republican culture, then, the common law signified a tradition of political practice of resistance against foreign “tyranny” to protect “liberties” that were both ancient and natural. Their efforts, by cleansing the common law of the corruptions that the English Crown and inherited aristocracy had introduced into it, represented the culmination of this historical teleology.

The historical stories that inhabit cultures, if they are successful, achieve the level of myth. The narrative of the common law and its connection to the ancient constitution had acquired that character well before its telling by the American Whigs, dating back, in different versions, to the histories of Coke and Hale.\textsuperscript{127} But it was not a myth lacking


\textsuperscript{125} As Pocock points out, Norman storytelling itself aided efforts to get over the stumbling block of the Conquest. Throughout the twelfth and thirteenth centuries, Normans had responded to complaints by dissident barons by assuring them that William the Conqueror had confirmed “the good old law of Edward the Confessor.” By the time Coke wrote his narrative history of the common law, the legend of the Norman adoption of Saxon laws as their own was thoroughly established. On this view, William, by codifying the indigenous law rather than replacing it with his own, was no conqueror after all, thus eliminating the problem of the Conquest being a breach of the common-law tradition. See J.G.A. Pocock, supra note 119, at 42-45.


\textsuperscript{127} See M. Hale, Consideration Touching the Amendment or Alteration of Lawes (Dublin 1787), reprinted in A Collection of Tracts Relative to the Law of England 249 (F. Hargrave ed. 1787).
paradox. As Coke told the story, the law that judges declare is unwritten and immemorial, embodying the wisdom of generations gained through experience—what Coke called “artificial reason.” The customary nature of that law allowed it to adapt to new situations constantly. Therein lies the source of the paradox. Adaptation suggests a historicist conception of the common law, meaning that it comprehends that law as historically contingent, not fundamental. But it was just Coke’s mission to affirm the timeless character of the common law to ground firmly and finally its (and its judge-expositors’) legitimate and superior authority against the contending power of the Crown. Legitimating the political claims of the common-law courts of his time by depicting them as continuous with the politics of the past would, within the belief-structure that Coke inhabited, work only if that past itself was depicted as temporally transcendental. The past as an adaptation to a particular set of circumstances is an interpretation that undermines the strategic interpretation of timelessness. Coke successfully side-stepped these paradoxes and offered a compelling account of the common law by relying on the crucial notion of common law as custom. “Custom” reconciles itself with the future through adaptation, while simultaneously embracing the past as having no identifiable source point. As custom, then, the common law transcended the limits on legitimacy set by time by looking both toward past and future, making it, in Selden’s famous allusion, the English Janus.

2. The English Transformation of the Myth of the Ancient Constitution

American revolutionaries hardly could be expected simply to transplant the mythology of English lawyers and adopt it as their own. Nevertheless, continuity does exist between the stories of English and American lawyers—the American telling was a variation rather than an entirely original or indigenous myth. To some extent the change reflected in the American version itself reflected changes that had occurred in the English telling of the story between the sixteenth and eighteenth centuries. But the eighteenth-century version differed from its predecessor by replacing “custom” with “reason” as the source of both the coherence and legitimacy of the ancient constitution, the former having lost intelligibility under the rise of modern ideas of sovereignty. English liberties were indeed ancient, but now they were grounded in reason.

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130 See J.G.A. Pocock, supra note 119, at 36 (discussing Selden’s works).
The role of history was one of confirmation, not derivation.

The other notable difference between the sixteenth- and eighteenth-century versions of the story was the acknowledgment of feudalism and the accommodation of the Norman conquest within the common law's linear development. Seventeenth-century historians, in particular Sir Henry Spelman, had made it impossible to deny that there had been a conquest and that feudalism existed as a foreign element in the English past. But while eighteenth-century lawyers could no longer depict the history of the common law as entirely smooth or continuous, they could—and did—minimize the discontinuity that feudalism represented. Of the eighteenth-century English historians who accommodated the feudal past with the common law's historical preservation of "Saxon liberty," Blackstone was especially successful in reducing the ideological significance of the feudal past by portraying it as "a mere interruption of the true course of the national life." 133

More so than any other single historical work of its time, Blackstone's Commentaries on the Laws of England was responsible for articulating the entire spectrum of symbolic vocabulary through which both English and American lawyers interpreted the relationship between the common law and time. He combined, without any sense of incompatibility, Coke's notion of the common law as ancient and immemorial with Hale's theory of adaptive evolution. That is, he simultaneously acknowledged and denied the historicist character of the common law. Moreover, his historical vision oscillated between two incompatible theories of historical development, one cyclical, the other linear. Like Hale but unlike Coke, he acknowledged the reality of the common law's feudal past but resolved the problem it created for common-law mythology in contradictory ways. Describing the common law's "successive mutations at different periods of time," he portrayed the common law as having come full circle to reattain its original state of purity with the final stage constituting "the complete restitution of English liberty, for the first time, since its total abolition at the conquest." At the same time, chapter thirty-three of the Commentaries, entitled "Of the Rise, Progress, and Gradual Improvements, of the Laws of England," chronicles the story of the linear progress of the common law from its relatively despotic origins, with each successive stage representing improvement in

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132 See J.G.A. Pocock, supra note 119, at 91-123.
133 Id. at 244.
134 See L. Friedman, supra note 90, at 112.
135 See, e.g., 1 W. Blackstone, Commentaries *5, *17; 4 id. at *413.
136 1 id. at *5.
137 4 id. at *400.
138 Id. at *431.
the condition of English liberty. The linear metaphor also stressed that modern England exemplified the commercial stage in social, legal, and political development, a stage whose superiority over all prior history is indicated by its simplicity and refinement.

What was consistent in these two versions was the figurative use of feudalism. The Commentaries developed feudalism into a symbol for the idea that departures from English liberty were only aberrational corruptions. That theme was signified forcefully by Blackstone’s repeated opposition between “servility” and “liberty.” One of the ironies of the historical rendering of the common law during the late eighteenth century is that the Blackstonian symbology closely paralleled the tropes of American political and legal discourse, in particular the opposition between “feudalism” and “liberty,” even while the English and American symbol-systems signified conflicting political objectives. No single American text of that time illustrates this irony more emphatically than John Adams’s famous essay, *A Dissertation on the Canon and the Feudal Law.* Written at about the same time as the Commentaries, the Dissertation chronicled essentially the same historical tale as did Blackstone’s work. Yet, while Blackstone’s message was a confirmation of the rationality and justice of the extant English regime, Adams’s was precisely the opposite.

3. *The Historical Symbology of Tyranny in the American Legal Imagination: Adams’s Dissertation*

To the modern reader, Adams’s *Dissertation* appears odd in several respects. Why would an American republican lawyer, writing political tracts for newspapers to argue the case for revolution, be interested in the canon law of the Roman Catholic Church or the English feudal law of centuries past? For that matter, why would anyone in the late eighteenth century bother to juxtapose canon law with feudal law? The sense of

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139 See id. at *407-*43.
140 Blackstone’s contradictory eclecticism, strategically deployed in the interest of rationalizing the existing social and legal order, also is indicated by the fact that while he borrowed the idea of linear social and legal evolution, ending with the commercial order, from Scottish social historians like Hume, Lord Kames, and John Robertson, he perpetuated myths of traditional English legal historiography that the Scottish historians had completely discredited. See Lieberman, *The Legal Needs of a Commercial Society: The Jurisprudence of Lord Kames, in Wealth & Virtue: The Shaping of Political Economy in the Scottish Enlightenment* 203, 207 (I. Hont & M. Ignatieff eds. 1983). For detailed discussion of the Scottish theory of linear social development, see text accompanying notes 196-227 infra.
141 See, e.g., 2 W. Blackstone, Commentaries *74-*100, *287-*90; 4 id. at *420.
142 Blackstone himself became an object of the paradoxical character of the civic-republican legal culture: while a symbol of all that was despised about England, he was the source of legal education for that entire generation of American lawyers.
143 See Adams, supra note 77, reprinted in 1 Adams Papers, supra note 77, at 103.
oddness disappears, however, if one recognizes Adams's use of the topics as figurative rather than literal. Feudal law and canon law were symbols for different civil and ecclesiastical forms of tyranny that were ripe for overthrow in the American republic. They were symbols of a past that was to be transcended.

“Since the promulgation of Christianity,” Adams began, “the two greatest systems of tyranny... are the cannon and the feudal law.”\footnote{Id. (emphasis in original), reprinted in 1 Adams Papers, supra note 77, at 112.} The former was “framed by the Romish clergy for the aggrandisement of their own order,” while the latter was “originally, a code of laws, for a vast army, in a perpetual encampment.”\footnote{Id. (emphasis in original), reprinted in 1 Adams Papers, supra note 77, at 112-13.} Adams continued that the “grandees” of the two systems were in “confederacy” and that “as long as this confederacy lasted, and the people were held in ignorance, Liberty, and with her, Knowledge, and Virtue too, seem to have deserted the earth. . . . [T]he struggle between the people and the confederacy” began with the Reformation.\footnote{Id., reprinted in 1 Adams Papers, supra note 77, at 113.} Adams defined that struggle in terms of the opposition of liberty, knowledge, and virtue against tyranny, ignorance, and corruption. That opposition was the basis for nothing less than the meaning of America itself. “It was this great struggle, that peopled America. It was not religion alone, as is commonly supposed; but it was a love of universal Liberty, and an hatred, a dread, an horror of the infernal confederacy... that projected, conducted, and accomplished the settlement of America.”\footnote{Id. (emphasis in original), reprinted in 1 Adams Papers, supra note 77, at 113-14.}

Adams is defining here the teleology of America, a teleology that is eschatological. For the American experience is seen as a singular moment in history, the point in time toward which all other moments have aimed but never reached. It is not a matter of returning to some ancient constitution that temporarily had been corrupted. Rather the vision is linear and progressive. The very reason for America's existence as a nation was to establish liberty as the victor over tyranny finally and conclusively. Because it had been created without a feudal past and without an ecclesiastical government, it had succeeded where no other nation had.\footnote{As Pocock has noted, there is a sense in which Adams's eighteenth-century whiggism, depicting America as a nation destined to be liberal, anticipated the twentieth-century whig historiography of Louis Hartz. Both were asserting what Pocock has called “the premise of inescapable liberalism.” See Pocock, Between Gog and Magog: The Republican Thesis and the Ideologia Americana, 48 J. Hist. Ideas 325, 338 (1987).} Adams's America was the epiphany of liberty, and what made that experience possible was America's escape from the past, its victory over time. From this transcendental perspective, then, it was possible to see the English common law as foreign—indeed hostile—to American law, not
as its "parent," with all of the sense of authority and greater wisdom that that image would imply.

But while the American political and legal regime might be unique in history, its success—the ultimate success of liberty over tyranny—was not guaranteed. Liberty was not self-executing. The feudal and canon law remained a threat to the American system's status as the culmination of the historical struggle:

There seems to be a direct and formal design on foot, to enslave all America. This however must be done by degrees. The first step that is intended seems to be an entire subversion of the whole system of our Fathers, by an introduction of the cannon and feudal law, into America. The cannon and feudal systems tho' greatly mutilated in England, are not yet destroy'd. Like the temples and palaces, in which the great contrivers of them, once worship'd and inhabited, they exist in ruins; and much of the domineering spirit of them still remains.¹⁴⁹

It was necessary, therefore, for Americans to undertake positive steps to assure that the canon and feudal laws acquired no foothold here.

The law of property was clearly a part of this project. Although the Dissertation is not explicit on this point, it does recognize property's role in resisting feudal intrusions by emphasizing a distinction basic to the figurative vocabulary of English and American eighteenth-century common-law historiography. That distinction was between "feudal" and "alodial" land, that is, land "held" by one who occupied a subordinated position in a hierarchy of ownership versus land autonomously "owned" by a person free of hierarchical entanglements.¹⁵⁰ The distinction marked the translation of the Whig distinction between "servility" and "liberty"¹⁵¹ into the context of land ownership. The association between the feudal regime, in particular feudal property, and personal dependence was so strong in American republican legal discourse that merely to characterize something as "feudal" itself was sufficient to indicate condemnation.¹⁵²

Adams did not assert that land ownership in America had always been allodial. Given the colonies' origins in royal charters, he could hardly do so. Yet he still denied that feudal property had ever existed here. He explained this historically unique tertium quid:

To have holden their lands, alodialy, or for every man to have been the sovereign lord and proprietor of the ground he occupied, would

¹⁴⁹ Adams, supra note 77, reprinted in 1 Adams Papers, supra note 77, at 127.
¹⁵⁰ See 2 W. Blackstone, Commentaries *57-*100, *287-*90, *463; 4 id. at *420.
¹⁵¹ See 2 id. at *57-*100, *287-*90, *463; 4 id. at *420.
¹⁵² That the term "feudal" connoted tyranny was neither unique to American thought nor uniquely republican. It had the same meaning in Scottish Enlightenment writing and in English Whig texts as well, as Kames and Blackstone clearly illustrate. On the former, see Lieberman, supra note 140, at 216; on the latter, see 4 W. Blackstone, Commentaries *419-*20.
have constituted a government, too nearly like a commonwealth. They [the Puritans] were contented therefore to hold their lands of their King, as their sovereign Lord, and to him they were willing to render homage: but to no mesne and subordinate Lords. . . . In all this, they were so strenuous, that they have even transmitted to their posterity, a very general contempt and detestation of holdings by quit rents: As they have also an hereditary ardor for liberty . . . .

Here again, Adams metaphorically communicated the correlative messages of America's escape from time and its destiny with liberty. In a view that prefigured Louis Hartz's now-rejected view that America was born liberal, Adams maintained the myth that, from the very outset of their experience, Americans had escaped the past, which was associated with "feudal" tyranny and corruption. The original regime of property in America had illustrated this unique achievement.

To American republican lawyers like Adams, then, feudalism and feudal property were the dominant symbols for the past that was rejected or, rather, transcended. But what was the alternative that American republicans were affirming? The symbolic opposite of feudal property was "allodial" land. Why was this seemingly technical and obsolete concept from the English common law meaningful to American republican lawyers? What did it signify to them? We gain an appreciation for the import of the concept of allodial land and some idea of its symbolic function from Jefferson's widely circulated pamphlet, *A Summary View of the Rights of British America*.

### 4. The Dialectic of Allodial vs. Feudal Land

Intended to justify colonial complaints against English tyrannical practices, *A Summary View* also set out Jefferson's historical understanding of the development of the common law regarding property. That understanding by and large followed the American variation on the English myth that Blackstone and others had popularized but with one important change. Unlike Adams, Jefferson did not deny that feudal property had ever been introduced into the American colonies. Instead, he argued that its introduction "at a very early period of our settlement" had been "an error in the nature of our landholdings." The histori-

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153 Adams, supra note 77, reprinted in 1 Adams Papers, supra note 77, at 118. Quit rent was a rent paid in lieu of a required feudal service. On the use of quit rent in the American land system, see generally B. Bond, The Quit-Rent System in the American Colonies (1919).


155 T. Jefferson, A Summary View of the Rights of British America (1774), reprinted in 1 Jefferson Papers, supra note 25, at 121.

156 See text accompanying notes 130-55 supra.

cally accurate account, Jefferson contended, was that the general rule of
the common law even after the conquest was the Saxon regime of "allo-
dial" land, held "in absolute dominion, disencumbered with any supe-
rior." Feudal tenures were "but exceptions out of the Saxon laws of
possession," and the latter "still form the basis or groundwork of the
Common law, to prevail wheresoever the exceptions have not taken
place." But why had not those exceptions correctly become part of
colonial law, and why were feudal tenures nevertheless in fact introduced
here? In a truly ingenious move, Jefferson simultaneously resolved both
paradoxes and laid the historical foundation for colonial claims against
the crown:

America was not conquered by William the Norman, nor it's [sic]
lands surrendered to him or any of his successors. Possessions there
are undoubtedy of the Allodial nature. Our ancestors however, who
migrated hither, were laborers, not lawyers. The fictitious principle
that all lands belong originally to the king, they were early persuaded
to believe real, and accordingly took grants of their own lands from the
crown. And while the crown continued to grant for small sums and on
reasonable rents, there was no inducement to arrest the error and lay it
open to public view. But his majesty has lately taken on him to ad-
vance the terms of purchase and of holding to the double of what they
were, by which means the acquisition of lands being rendered difficult,
the population of our country is likely to be checked. It is time there-
fore for us . . . to declare that he has no right to grant lands of
himself.

Jefferson further developed the idea of alodial land in an exchange
of correspondence with Edmund Pendleton two years after the publica-
tion of A Summary View. His discussion here reveals the central sym-
bolic function of the concept of alodial property. That function was to
signify the role of property in realizing the republican vision of individual
autonomy.

In a letter to Pendleton, Jefferson made two proposals regarding
the disposition of Virginia land. He urged first that all Virginia land,
including land already held by individuals who owed tenurial obligations
to the state, should be allodial in character. The immediate and obvi-

158 Id.
159 Id., reprinted in 1 Jefferson Papers, supra note 25, at 133.
160 Id.
161 Id. The act doubling the quit rent, to which Jefferson referred, was the Land Ordinance
551, 552 (1948).
162 See Letter from Edmund Pendleton to Thomas Jefferson (Aug. 3, 1776), reprinted in 1
Jefferson Papers, supra note 25, at 484.
163 See id.
ous effect of purging land of this vestige of feudal land law would have been to wipe out the remaining tenurial obligations that landholders owed to the state. A less obvious, but to Jefferson equally important, effect would have been to replace symbolically hierarchical landholding with autonomous landownership.

His second proposal was that the government should sell all unsettled lands, which it owned, in fee simple. By the end of the eighteenth century, the general view behind this proposal became the land policy of the federal government and some municipalities as well. The Northwest Ordinance of 1787, for example, can be understood as implementing the Jeffersonian land policy. Similarly, New York City embarked on a program disposing of its public land in Manhattan through unrestricted grants in fee-simple absolute.

Responding to these two proposals, Pendleton was frank: "I have [been] beating my brain about your old Opinion that our Land tenure should be merely Allodial, and a New Opinion frequently mentioned during the last convention, that the unappropriated Lands should all be sold for the benefit of the commonwealth." Pendleton raised two objections to both proposals. First, by changing the terms of the original Virginia charter (which had entitled every newly arrived settler to fifty acres of land to be held in so-called "socage" tenure in exchange for the annual payment of a modest fee, known as quit rent), both proposals unfairly would put new settlers in a comparatively better position than existing settlers. Second, Jefferson's plan would disadvantage the poor, "who would not be able to bid against the others [that is, the "men of property"] for the unappropriated land.

In response to these criticisms, Jefferson reiterated his historical theory that the English common law which had been transplanted to the

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164 See id.
168 Socage, the only tenure encountered in early modern English and American land law that had any real importance, was the residual category of tenure. A socage tenant held land under an obligation either to perform certain services for the lord or to pay to the lord a fixed sum of money. See A. Simpson, A History of the Land Law 11-13 (2d ed. 1986). By Jefferson's time, the tenant in socage was treated the same as a freeholder. Yet, while the socage-farmer was owner in all but name, the fact remained that it was tenure under which the land was held. For republicans, this had enormous symbolic value.
170 Id.
colonies, when correctly understood, provided for allodial ownership. Whether any American land may have been converted into feudal land by legislation or by the terms of grants was a matter of speculation, but even if any land had been so changed "we have it in our power to make it what it ought to be for the public good."171 Jefferson left little doubt which regime of ownership he considered as comporting with the public good:

[W]as not the separation of the property from the perpetual use of lands a mere fiction? Is not it's [sic] history well known, and the purpose for which it was introduced, to wit, the establishment of a military system of defence? Was it not afterwards made an engine of immense oppression? Is it wanting with us for the purpose of military defence? May not it's [sic] other legal effects . . . be performed in other more simple ways? Has it not been the practice of all other nations to hold their lands as their personal estate in absolute dominion? Are we not the better for what we have hitherto abolished of the feudal system? Has not every restitution of the antient [sic] Saxon laws had happy effects? Is it not better now that we return at once into that happy system of our ancestors, the wisest and most perfect ever yet devised by the wit of man, as it stood before the 8th century?172

The effect of Jefferson's historical chronicle was much the same as Adams's. Both strongly affirmed the themes of America as breaking with the past and the historical priority of "allodial" over "feudal" property in America. Feudal property signified "tyranny" and the corruption of "virtue," which in turn was understood in terms of the question of hierarchical social relationships. Allodial land signified "liberty" and "virtue." Each chronicle was structured by a dialectic in which "feudal" and "allodial" land were symbols for opposing political, social, and legal ideals:

feudal property vs. allodial property;
corruption vs. virtue;
wealth vs. liberty;
privilege (hierarchy) vs. equality;
personal dependency vs. personal autonomy.

But this dialectic obscured important ambiguities. The positive meaning of "allodial" property was less clear than its negative meaning: the rejection of formal social hierarchies and personal dependency. If allodial property signified personal autonomy and equality, or at least a nonhierarchical society, did that imply anything like a commitment to radical egalitarianism in the distribution of land or even abandonment of

172 Id., reprinted in 1 Jefferson Papers, supra note 25, at 492.
the common-law conception of privatized ownership? Adams did not address these matters in his *Dissertation* itself, but his "Fragmentary Notes" for it offer a partial response. He wrote: "Property monopolized or in the Possession of a few is a Curse to Mankind. We should preserve not an Absolute Equality—this is unnecessary, but preserve all from extreme Poverty, and all others from extravagant Riches." While Adams's views later would become clearer, they were initially vague and ill-defined. Jefferson's views on the distribution of land and on the configuration of property rights were similarly fraught with ambiguity. In his correspondence with Pendleton, at least, Jefferson made clear that he contemplated distribution of small parcels of land to all settlers, not by selling unappropriated land but merely by allowing settlers to do what they were bound to do anyway, that is, appropriate the western lands.

More important for present purposes was the remaining uncertainty about the character of property. Did allodial property imply an embrace of dynamic property as a means of eliminating the material basis for a possible American re-creation of formal hierarchies? American republicans, including the most conspicuously "agrarian" among them, i.e., Jefferson, were deeply ambivalent about the character that property ought to take, producing a dialectic in eighteenth-century American legal discourse between dynamic and stable property.

Yet the source of that anxiety was not a concern for feudal property nor the hierarchies its tenures and entails generated. Rather the concern was over commercial, or more accurately, commodified property. The republican culture associated commodified property with a modern form of personal dependency that created social as well as economic hierarchies to replace the old "feudal" hierarchies. What is striking about the discourse of property in terms of a dichotomy between "feudal" and "allodial" property then is that it coexisted with, yet was completely isolated from, discourse about the dangers of commodified property.

There are in fact, then, three, not two, forms of property in the symbolism of American civic republicanism—"feudal," "allodial," and "commercial"—and two dichotomies, not one—"feudal vs. allodial"
and "feudal vs. commercial." Each form signified a particular mode of social life. These modes of social life, moreover, were understood historically. That is, each occupied a position within a temporal line, a stage of social development.

To say that American civic-republican lawyers arranged these modes of social life historically does not indicate, however, what their historical arrangement was. Two different arrangements of history were available in eighteenth-century Anglo-American historiography, cyclical and linear, and the two could be confused, leading in some instances to an inconclusive oscillation between the two. For American republicans, this inconclusiveness was not simply the result of sloppiness or inattention. Rather it signalled a deep anxiety about commerce, specifically its attendant changes on the form of property, and an ambivalence about social change in the new republic.

B. Historicizing Property: Predicament and Responses

1. The Predicament of Time and Republican Property

One might say that republican time added a historical dimension to the dialectic of stability and change in property. The same dialectic between stability and change, which posed a seemingly intractable question of political theory—how to regulate land ownership to avoid both hierarchy and commercialization—also emerged as a problem of history; of how to leave the past while avoiding a particular version of the future. In relation to the past, time posed one problem: the existence of feudal property in the common law, which represented personal dependency. That threat to the republican vision led to the related calls for a break with the past and a dynamic of property that would prevent the re-creation of feudal hierarchies. It is from this point of view that American property lawyers could regard, as crucially important, legislative reforms that effected little practical change, especially the abolition of entailments and primogeniture.\(^{179}\)

In relation to the future, however, time posed another problem: the loss of stability, without which virtue could not be maintained, brought about by the rise of commodified property. J.G.A. Pocock has established the important role of public credit, whose growth was part of the so-called Financial Revolution of the first half of the eighteenth century,\(^ {180}\) in the emergence of intangible and highly mobile forms of wealth

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\(^{179}\) See text accompanying notes 86-106 supra.

as property. The "new property" of the eighteenth century—marketable shares of public debt—was unlike the paradigmatic form of property not only in its intangibility but in the popular perception that its character as property depended upon its exchangibility. Land, of course, had long been subject to exchange, but enough of its mystique as anchoring social (and political) relations remained in eighteenth-century English understandings to have prevented it from being treated as a commodity. Marketable interests in public debt were altogether a different matter. Their fluidity helped to create an understanding in popular thought of other forms of property, including land, as dynamic, and that understanding, in turn, affected the legal idea of property, pushing it toward the status of commodity. Courts in both England and, later, the United States gradually came to regard property interests as protectible because of their value as determined by exchange.

Faced with corruption when it looked to the past and uncertain about a future in which the corrupting forces of manufacturing and commodification might be victorious, American civic republicans hardly could avoid experiencing a sense of anxiety. "Here," as Pocock has reminded us, "are the origins of American historical pessimism."

2. Responses to Historicism

One way to circumvent the temporal aspect of the predicament of republican property would have been simply to deny the identification of time with change and contingency. This was precisely the thrust of the old common-law mentalité articulated through the understanding of the common law either as the ancient, or "Gothic," constitution or as em-

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182 On the rise of "imaginary" forms of property in the eighteenth century, see text accompanying notes 247-58 infra.
183 One indication of the commodification of land in popular American consciousness by the mid-nineteenth century is the failure of the Homestead Act to have its desired effect of using land to anchor populations in the American West. As several supporters of the Act had predicted, the failure to impose restrictions upon the land's alienability meant that a large number of "homesteaders" used the land to engage in speculation. See H. Smith, supra note 49, at 189-94.
185 Pocock, Civic Humanism and Its Role in Anglo-American Thought, in Politics, Language and Time 80, 100 (J.G.A. Pocock ed. 1973). For Jeffersonians, anxiety about the future stemmed from their recognition that the "safety valve" of Western land—the crucial feature differentiating America from those European countries whose limited space tied their citizens to lives of manufacturing—might close eventually. In this sense, the myth of the garden provided the seeds for its own demise. Signalling the West's demise as a symbol, of course, was the achievement of Frederick Jackson Turner. See H. Smith, supra note 49, at 206.
bodying the principles of an immanent natural and timeless order.\textsuperscript{186} The central claim of this view was that the common law and all of its associated institutions, property being the most important among them, was not contingent but essentially had remained constant through time.\textsuperscript{187} In the American context, such a view would have allowed republicans to claim, rather abstractly, that American property relations would balance conflicting interests because they would reflect the natural order of things.

However, increasingly sophisticated critiques of historicist chroniclers of the common law's feudal past eroded the static conception of the common law, indeed, of all social institutions. By the second half of the eighteenth century, that conception largely had disappeared in English and colonial American legal writing.\textsuperscript{188} This disappearance helps explain why denial was not an available response to the predicament of time for republican lawyers. While many legal writers did continue to discuss the ancient constitution, that reference was no more than a "fragmented survival,"\textsuperscript{189} that is, a rhetoric whose original meaning had lost virtually all of its original coherence.

Denial of contingency as a consequence of time, then, was not readily available to well-read American legal writers in the late eighteenth century. The public meaning of time had changed from continuity to contingency. Indeed, American lawyers had inherited from English civic-humanist sources extending back to Harrington\textsuperscript{190} a public meaning of time that unambiguously acknowledged the inevitability of change in all societies. That meaning was expressed in a theory of social development that portrayed societies as organic and developmental, rather than mechanistic and static.\textsuperscript{191} To articulate the pattern of social development civic republicans turned again to metaphor, interpreting society in terms of what they believed they best understood, themselves. As humans developed, they reasoned, so did societies. The pattern of human and social change was one of birth, growth, decay, and death. Individual societies, like individual humans, did not develop continuously in a linear direction. They flourished for a time but eventually

\textsuperscript{186} See J.G.A. Pocock, supra note 119, at 255-80.
\textsuperscript{188} See text accompanying notes 185-87 supra.
\textsuperscript{189} Both the term "fragmented survival" and the meaning to which I am assigning it appear in A. MacIntyre, After Virtue 110-13, 257 (2d ed. 1984).
\textsuperscript{190} On the English civic-humanist theory of history, see J.G.A. Pocock, supra note 4.
\textsuperscript{191} See G. Wood, supra note 3, at 29.
deteriorated.\footnote{On this cyclical theory of social change, see id. at 28-30; Persons, The Cyclical Theory of History in Eighteenth Century America, 6 Am. Q. 147 (1954).}

The consequence of this cyclical theory for republicans was deeply troubling. It implied that even the virtuous polity gradually decayed as society passed through a cyclical series of changes. The actual histories of past republics, of which eighteenth-century American republicans were well aware, reinforced this message. The republics of Sparta and Rome, as well as those of Renaissance Italy, not only had failed to elude change but had passed through the cycle of decay precisely as the theory posited.

Moving from the macro to the micro level, from entire societies to particular institutions, the message was equally worrisome. Property, as the foundation of society and personality, was at the center of this cycle of change. In all known societies, property had changed form over time, originating in a natural state in which ownership anchored personal autonomy but thereafter transforming into increasingly corrupt forms that replaced autonomy with dependence and hierarchy.

It is just this matrix of historical change that explains both the prominence and the ambiguous meanings of the dichotomy between allodial and feudal land. For the cyclical theory of social change, as well as the sociology of property, was simultaneously the source of optimism and pessimism. Indeed, what emerges perhaps most clearly from the discussions of the allodial/feudal dichotomy is a dialectic of optimism and pessimism which is built into the very image of the cycle. While that image encouraged the notion of the restoration of “Saxon liberty” associated with allodial land by abolishing all vestiges of feudal property (again, the movement to eliminate the entail and primogeniture looms large here), the logic of the cycle dictated that forms of property and society that are marked by a high degree of personal autonomy eventually must succumb to decay and dependence. With the experience of European nations, whose economies already had been transformed by manufacturing, credit, and the rise of mobile and intangible forms of property, serving as examples of how the seemingly inexorable logic of social change produced dependence and corruption, Americans could well wonder whether they could escape the same fate.

One response to this predicament that republican American lawyers made was to assert, with more hope than conviction, an escape from history. In other words, if neither Jefferson nor Adams denied change wrought by time as did Coke, it equally is true that neither confronted it directly.\footnote{Adams's response to time differed from Jefferson's in yet another respect. Adams was drawing on the Christian millennialist tradition to define a relationship between the new}
American republicans, indeed all Americans at that time, a deep-seated belief in the historical uniqueness of the new society and its institutions. For Adams, the historical novelty was that America and all of its social institutions were created free from the taint of the old world, the world of the feudal and the canon laws, from the very outset. American law was unique in never having been part of the ancien régime. Jefferson's response, articulated repeatedly from A Summary View through Notes on the State of Virginia and later correspondences, expressed the hope that America's generous frontier would allow it to escape history. To Jefferson, the unique conditions of the American experience seemed to make it possible to redefine the pattern of historical development and to break the cycle in which decay, corruption, and dependence ultimately prevailed. Societies, Jefferson claimed, resorted to manufacturing only by reason of necessity. The vast expanse of land in America held out the promise, for the first time in known history, of breaking the historical authority of necessity.

But this was no more than a hope. Jefferson was well aware that the uniqueness of the American experience might only be temporary, reducing it to a "Rousseauean moment." The land eventually would all be settled, and the safety valve closed. At that moment—the "Machiavellian moment" when time, secularly understood, confronts virtue and personal autonomy—the cycle must resume and "feudal" property must give way to "feudal" property, autonomy to dependency and hierarchy.


Although Jefferson and Adams did not avail themselves of it, there was another response to the predicament that history posed for society in general and property in particular. This response was developed by eighteenth-century Scottish social theorists, including David Hume,
Adam Smith, John Millar, Adam Ferguson, William Robertson, and, most significantly for lawyers, Lord Kames. The central achievement of these Scottish Enlightenment social theorists was to develop an interpretation of commerce and its effect on society that was an alternative to the civic-humanist interpretation found, for example, in Harrington, that saw commerce as marking a cyclical descent toward decay. If the ultimate message of the latter interpretation was pessimism about time and commerce, Scottish social theory had a quite different trajectory, one that encouraged optimism about the future and effects of social change, particularly about the rise of commercial society.

1. From Politics to Society

The two interpretations differ most importantly over what they emphasized as the fundamental object of historical study. While civic humanism focused on the benefits and vices of various kinds of political institutions—monarchical, aristocratic, democratic, etc.—the Scottish interpretation shifted attention to forms of society—agricultural, feudal, commercial. This shift from the political to the social is reflected most obviously in the difference between the categories of their historical typologies. Civic-republican thought tended to chart historical change as a movement through monarchy, aristocracy, democracy, and republic. In contrast, the Scottish Enlightenment thinkers were concerned cen-

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196 On Kames's contribution to the legal aspects of Scottish historical theory, see I. Ross, Lord Kames and the Scotland of His Day 8-43 (1972); Lieberman, supra note 104, at 203; Lehmann, The Historical Approach in the Juridical Writings of Lord Kames, 9 Jurid. Rev. (n.s.) 17 (1964); Stein, The General Notions of Contract and Property in Eighteenth-Century Scottish Thought, 8 Jurid. Rev. (n.s.) 1 (1963). As Henry May has noted, it was Kames who had the greatest influence on the legal writers in the American civic-republican tradition. See H. May, The Enlightenment in America 337-58 (1976). Even those historians who have cautioned (correctly) against reading too much Scottish influence into late eighteenth-century American political thought have conceded Kames's influence on American writers, particularly those who were trained as lawyers. See Hamowy, Jefferson and the Scottish Enlightenment: A Critique of Garry Wills' Inventing America: Jefferson's Declaration of Independence, 36 Win. & Mary Q. 503, 521 (1979).

197 See G. Bryson, Man and Society: The Scottish Inquiry of the Eighteenth Century 148-73 (1945); R. Meek, Social Science and the Ignoble Savage 99-131 (1976); Pocock, Cambridge Paradigms and Scotch Philosophers: A Study of the Relations between the Civic Humanist and Civil Jurisprudential Interpretation of Eighteenth-Century Social Thought, in Wealth & Virtue: The Shaping of Political Economy in the Scottish Enlightenment 235, 240 (J. Hont & M. Ignatieff eds. 1983). The project of developing a science of society comparable to Baconian natural science was the work not only of those contributors to the Scottish Enlightenment whose approach to the study of society was historical and comparative (Ferguson, Millar, Smith, and Kames) but also of the part of the Scottish circle known as the "Common Sense" school, led by Thomas Reid, whose central concern was to repudiate Humean skepticism. See generally S. Conrad, Citizenship and Common Sense: The Problem of Authority in the Social Background and Social Philosophy of the Wise Club of Aberdeen (1987).

trally with comparing feudal and commercial society. Moreover, this analysis took place within an historical time-line whose categories—hunting, pastoral, agriculture, and commercial—are all categories whose public meaning was social and economic rather than political.

Focusing on this shift from the political to the social risks distorted the extent to which the civic republican and Scottish Enlightenment interpretations of time differed. The two understandings, in fact, were locked together in various and complicated ways. For one thing, the Scottish writers did not understand their work as constituting a rhetoric that competed with the rhetoric of civic humanism. If Scottish historical social theory was a theory of civil, as distinguished from civic, humanism, it nevertheless was consistent with civic republicanism to the extent that it was, above all, a theory of humanism. Both interpretations shared an overriding concern with the human personality. Civic republicans and Scottish social theorists differed over which aspect of that personality should be emphasized, political or social, or, more accurately, over the meaning of the human personality, not over the paramount importance of the nature of human personality. Moreover, Hume, Smith, Ferguson, Robertson, and Kames all shared with civic republicans the understanding of time as change. Insisting that the study of history and society must be scientific and adhering to the historiographical advances made in the preceding century by Spelman and Hale, the Scottish historical writers were hardly more likely than Harringtonian civic republicans to reject the insights gained in the preceding century by the critics of the ancient constitution myth.

What separated the two paradigms was each one's response to the understanding of historical change over time. This difference was inextricably related to the two schools' difference over the nature of personality. The effect of, if not the incentive for, shifting attention from the political to the social was to make it possible to welcome social change in general and commercial culture and commercial values in particular. To see why this is so, the theory of social development to which virtually every writer associated with the social-historical-comparative branch of the Scottish Enlightenment subscribed, the so-called “four-stages” theory, must be considered.

2. The “Four-Stages” Theory

Inspired by the example of Montesquieu's study of legal change in

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199 The reasons for the difference between the Scottish and civic-humanist interpretations of humanity are the subject of debate. For a sketch of some possibilities, see Pocock, supra note 197, at 246-52.

200 See J.G.A. Pocock, supra note 119, at 91-123.
The Spirit of Laws, scholars in Scotland and France, whose civil law system greatly influenced Scottish social theorists, looked for what Montesquieu had not fully provided: a model of legal change, applicable to all societies, from primitive origins to full maturity. Both groups articulated the theory that societies progress through four stages, hunting, pastoral, agricultural, and commercial, apparently simultaneously. One of the most significant themes of this progressive theory was the linkage between property regimes, division of labor, and social wealth. A society’s division of labor was seen as both a consequence and a determinant of the system of property. According to the dominant version of the story, especially that told by its less sophisticated chroniclers, in the early stages of social development, labor tasks were simple because the forms of, and rights in, property were rudimentary, and the rudimentary regime of property, in turn, created no need for a greater division of labor. For a variety of reasons (which sometimes were articulated weakly, if at all) more complex forms of property and more complex property rights emerged. Private ownership of land, for example, accompanied the third, agricultural stage, at least according to Adam Smith. By the time the final stage, commercial society, was reached, a substantial division of labor existed. Significantly, that stage was marked by a profound increase in the aggregate amount of social wealth.

The Scottish writers regarded their history as scientific, or as they called it, “philosophical,” in the sense that it purported to describe an immutable pattern of social development, but they hardly were unbiased about the story they told. They depicted their social transformation as the development of “civilization.” “Civilization” was later, especially in the nineteenth century, to become “progress,” but it had much the same meaning in the late eighteenth century. All of the contributors to this story left no doubt that each stage represented a progressively higher

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201 C. Secondat [Baron de Montesquieu], supra note 71.
202 See Pocock, supra note 197, at 276.
203 See generally R. Meek, supra note 197. The principal French contributors to this theory were Anne Robert Jacques Turgot and Antoine Yves Goguet. See id. at 68-76, 91, 94-98. The principal Scottish contributors were John Dairymple, Lord Kames, and Adam Smith. See P. Stein, Legal Evolution: The Story of an Idea 23-46 (1980).
204 See P. Stein, supra note 203, at 23.
207 See id.
208 See A. Smith, supra note 205, at 22, 259.
209 The current version of this story is told, using the metaphor of allocative efficiency, by economists like Harold Demsetz. See generally Demsetz, supra note 74 (shifts from common to private ownership of resources have increased social wealth).
mode of social development. Adam Smith, for example, characterized the hunting stage as "the most rude and barbarous of any" state of society, and the modern commercial society as reflecting the "polish," taste, and manners of a refined society.\textsuperscript{210}

Here we have the theme, with which Montesquieu and David Hume usually are associated, of commerce as a moderating, socializing phenomenon—"le doux commerce," as Montesquieu called it,\textsuperscript{211} or "mildness," in Hume's language.\textsuperscript{212} Far from being the source of instability Jefferson feared, commerce was understood as having a softening effect on manners and stabilizing social behavior regardless of the form of government ruling the society.\textsuperscript{213} Far from constituting a threat to the public good, commerce promoted the common welfare by stimulating individual initiative and industry that made for a responsible and independent citizenry that itself was indispensable to the maintenance of a virtuous republic.\textsuperscript{214} And far from undermining individual autonomy, the dynamism and fluidity of commercial society prevented the re-creation of feudal hierarchies in which status determined all and ownership of property secured personal independence in fact only for one person, the king.\textsuperscript{215}

3. \textit{Toward a Rapprochement Between Commerce and Virtue}

The meaning of commerce that Scottish writers developed made available to American political and legal writers a theory, compatible with republicanism, that linked virtue with commerce.\textsuperscript{216} This linkage allowed for the possibility of overcoming the civic-humanist understanding that virtue and commerce were incompatible and that cultivated freehold land and the commercial market were rival agents of liberation from

\textsuperscript{210} A. Smith, Lectures on Jurisprudence 107, 512 (R. Meek, D. Raphael \& P. Stein eds. 1978) (n.p. n.d.).
\textsuperscript{211} On the development of the notion of "le doux commerce" in the project of legitimating commercial society, see A. Hirschman, The Passions and the Interests: Political Arguments for Capitalism Before Its Triumph 56-67 (1977).
\textsuperscript{212} Hume developed this argument most fully in two essays: "Of Commerce" and "Of Refinements in the Arts," reprinted in 3 Hume's Philosophical Works 287, 302 (T. Greene \& T. Grose eds. 1866).
\textsuperscript{213} See Hirschman, Rival Interpretations of Market Society, 20 J. Econ. Literature 1463 (1982).
\textsuperscript{214} See D. Richards, supra note 124, at 57-64.
\textsuperscript{215} See H. Maine, Ancient Law (1874). Maine went so far as to suggest that the liberating force of commerce marked not only a progressive evolution but a teleology.
America’s “feudal” past. Indeed, the reworking of what commerce promised meant a redefinition of principal republican terms, including “virtue,” “corruption,” and “luxury,” that allowed for a redefinition of American republicanism from civic to commercial republicanism.217

And, in fact, American republican thought did, to some extent, rely on the “solution” that the Scottish understanding of history provided. The classical conception of virtue, which American civic republicans, influenced by the cyclical understanding of history, commonly had articulated by invoking the name of Sparta,218 was replaced gradually by a more “modern” public meaning that associated virtue with individual productivity rather than with self-abnegation or austerity.219 This redefinition is best understood as the result of a critique that occurred within republican culture rather than as evidence of a victory won by an antagonistic external ideology.

Civic republicans like John Adams early on expressed skepticism about the plausibility of individuals practicing self-denial in the long run.220 Sharing much of the outlook on human nature that animated the critiques of classical virtue carried on in England, Scotland, and France, an outlook that asserted the primacy of private passion for personal gain as fundamental to the human personality, most American civic republi-

217 See generally D. McCoy, supra note 206, at 20-32. As Part V shows, however, while redefinitions of important terms in the republican vocabulary seemingly eliminated the dialectical tension between virtue and commerce, they could not eliminate the basic source of the tension altogether. The premodern, republican dialectic of temporality, metaphorically expressing the modern dialectic of sociality, continued to be articulated by later Federalist writers like Noah Webster. “Redefinition,” then, did not produce a “transformation.”


219 The seeds for this shift were planted by the classical-republican emphasis on activity and personal industriousness. See, e.g., B. Franklin, Information to Those Who Would Remove to America (n.p. 1782), reprinted in 8 The Writings of Benjamin Franklin 603 (A. Smyth ed. 1907); J. Witherspoon, Lectures on Moral Philosophy 114 (V. Collins ed. 1912). This theme provided a key bridge between classical theorists and Scottish Enlightenment writers like Hume and Smith.

cans, including Jefferson, realized that the rise of commerce could not be stopped altogether and that the emergence of commerce in America indicated at least some taste for private gain.

The redefinition was driven internally also in the sense that the oscillation between the cyclical and linear visions of history tended to undermine the premises of the cyclical version, namely that it was desirable to return to a classical understanding of virtue. The association of virtue with Sparta was a metaphorical articulation that was intelligible only to the extent that history was understood as cyclical. The American republic had to be seen as the restoration of a polis even older than that of the ancient Gothic constitution. But the continual reappearance of a linear vision of history, often blended with cyclical rhetoric, made such a belief tenuous and fraught with ambiguity.221 Redefining the meaning of virtue as individual productivity clarified the direction of history as continuously linear and provided grounds for overcoming anxieties about the implications of modernity. Virtue was no longer associated with the past, represented by Sparta, but with the future. This shift was the basis for reconciling virtue with time.

The Scottish Enlightenment theory of social, economic, and legal development thus signalled three claims: the inexorability of society's embeddedness in time, the inexorability of change that follows from the movement of time, and the beneficial consequences of that change. To American thinkers, the structure of the theory was attractive insofar as it created a basis for embracing time and what it brings with it, modernity. The theory always depicted social development as a movement from past to future: society is constantly moving away from, escaping as it were, the past. Since the past signified rudeness, barbarity, hierarchy, and dependency, the constant development of societies away from it signified continual social improvement.

However, the Scottish social theorists themselves were not unqualified in their optimism. Too perceptive not to understand the full implications of their theory, they appreciated that their logic provided no basis for viewing commercial society as a terminus. Their theory was not teleological, only evolutionary. Commercial society was no millennium, Christian or otherwise, to the Scottish writers. The process of change that leads from primitive to commercial society could lead easily to social degeneration. Lord Kames expressed this view in stating, "this [commercial] state is never permanent: great opulence opens a wide door to

221 If history was understood as linear, then there was no possibility of a return to a restoration of the ancient republics. The very availability of the linear theory made it difficult for late eighteenth-century intellectual republicans to be completely confident about the cyclical theory.
indolence, sensuality, corruption, prostitution, perdition." This logic, which seemed to the Scots so clearly confirmed by the experience of the Greek and Roman empires, hinted, then, at a return to the classical civic-republican understanding of history as cyclical. The fear that what lay beyond the commercial stage might be a socially and morally inferior stage did not represent a return to the cyclical theory of history, though, as much as it indicated the Scottish writers' awareness that excessive wealth can undermine the very personal characteristics that led to the accumulation of wealth. A linear theory is not necessarily continuously progressive, particularly if it is not teleological. The Scots' linear theory was based on their understanding of the human personality, as they experienced and observed it in others. As J.G.A. Pocock has pointed out, the Scottish theorists retained the sense of the delicacy of virtue as the aspect of personality that regrettably, but unavoidably, is lost with the emergence of specialization and diversification in commercial society. They foresaw the possibility of what is known today as the "atomized society" as an unintended consequence of the subordination of politics in the commercial stage, and they regarded that possibility with dread rather than with approval.

The linear theory of social development affected the American republican meaning of property in several ways. First, it replaced the simple feudal/allodial dichotomy with a more complex array of property forms associated with each stage of social development. Second, by uncoupling personality from any specific form of property, it provided grounds for optimism about historical change, though not without some doubt. Historicizing the forms of property in terms of stages of production meant that the change in the form of ownership from that of allodial land to that of newer forms of property, especially intangible and highly mobile forms, did not necessarily corrupt social or moral personality. Indeed, the theory historicized moral personality as well, showing that rather than being lost in the past, it had simply adapted to new circumstances. Third, and most importantly, it implied that time and history favored individuated ownership. The Scottish historical social theorists had claimed that ownership that is strongly public existed in only precommercial stages. Precommercial societies at first lacked any concept of ownership at all, and when a concept of ownership did

222 H. Home, Lord Kames, Sketches of the History of Man 525 (Edinburgh 1774).
223 See D. McCoy, supra note 206, at 32-40. On the theme of cyclical social change in eighteenth-century American thought, see Persons, supra note 192, at 154-63.
226 See, e.g., A. Smith, supra note 210, at 19-21, 200-03, 207-08, 459-60.
develop, it predominantly was communal. Even where individuated ownership did exist in precommercial societies, a wide variety of communal use-interests encumbered the freedom to do with one's property as one pleased. By contrast, the defining characteristic of ownership in commercial society was the drastic reduction of such communal entanglements, thereby consolidating the control of one's own assets.

The message of this progressive theory of history, then, was to historicize the Harringtonian vision of property and individual autonomy as prerequisites to the individual pursuit of an active civic life. For the upshot of their account of social development was that the classical republican interpretation of property was fated by the logic of history to disappear with the passing of precommercial society. In this respect, the Scottish progressive historical theory of property and society was an early, though somewhat softened, version of necessitarian arguments for individuated ownership that became increasingly prominent in the nineteenth century and that remain prominent in legal writing today.227 Changes in social conditions, the thesis implied (and modern scholars explicitly assert) necessitate changes in forms of ownership. More to the point, individuation of control over items of property takes precedence over more socialized (less formalized) forms of ownership not as a matter of social choice or of ideology but as a matter of historical inevitability. Republican history was giving birth to a notion of private individuality opposed to its earlier emphasis on civic participation.

4. The Multiple Meanings of Individual Liberty and Its Relation to Property

The conception of individual autonomy that operates in the Scottish conception of property is no longer that of the civic-republican notion of self-sufficiency as a precondition for virtuous politics. The Scottish historical social theorists did not define individual liberty as the condition in which the citizen is liberated from distractions so that he is able to participate actively in the affairs of the polity for the well-being of all. Rather it meant freedom from constraints on the ability, through individual initiative, to pursue one's own conception of the good. That is, it was a kind of prototype for what political philosophers today call "negative liberty."228 To be sure, like the idea of negative liberty, the Scottish conception of individual liberty shared with the civic-republican understand-

227 On the theme of functional necessity in legal historiography, see Gordon, Critical Legal Histories, 36 Stan. L. Rev. 57 (1984). The most extreme versions of the theme are those by nonhistorian scholars who resort to history as a source that verifies their instrumental claims. This is particularly true of law-and-economics scholars who have written about history, including Demsetz, supra note 74. It also is true, of course, for Marxist historiography.

ing of individual liberty a strongly social dimension. Individual autonomy still meant having the capacity to engage with others from a position of independence. But its objective of sociability had shifted from the purpose of governance that was central to the civic-republican understanding to the purpose of satisfaction of personal ends.

This redefinition of individual autonomy and its relationship to property influenced American writers, particularly during the years after the Revolution. This shift in meaning was prompted in part by the need to respond to what appeared to some American republicans in the late eighteenth century to be the inevitability of the triumph of commerce.229 It also was prompted by the political struggle over the Federal Constitution.230 The story that the Scottish historians told seemed to confirm to their American readers the political course Americans were adopting (just as it confirmed what the Scots thought they were witnessing with their own economic and political changes).231

Changes (or perceived changes) in economic and political circumstances, and psychological reactions to those changes, only partly explain the shifts in the meaning of individual liberty and property. It is dangerously easy to exaggerate the extent to which there was a redefinition and to say, using our own vocabulary, that republicanism focused on public virtue in the mid-eighteenth century and private virtue thereafter. The meanings of liberty and property throughout the eighteenth century combined elements of both the public and private.232 Liberty was highly ambiguous, and its very ambiguity facilitated interpretive shifts. The redefinition, then, was due as much to endogenous factors as to exogenous changes.

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229 See text accompanying notes 192-95 supra.
230 In a book that appeared after this Article was substantially complete, Jennifer Nedelsky argues that the basic structure of American constitutionalism—its limitation of governmental power for the purpose of protecting individual rights—developed with private property as the Framers' model for individual rights. See J. Nedelsky, Private Property and the Limits of American Constitutionalism (1990). Madison was the crucial figure in this reformulation, she argues. I entirely agree that Madison's conception of property was modern, certainly much closer to Hamilton's thoroughly commodified conception than to Jefferson's fear of commodification. See The Federalist No. 10 (J. Madison) and, especially, Madison, Property, Nat'l Gazette, Mar. 29, 1792, reprinted in 14 The Papers of James Madison 266 (R. Rutland & T. Mason eds. 1983) [hereinafter Madison Papers]. While Madison was opposed unambiguously to government redistribution of property, it is at least arguable that on this issue his views did not differ fundamentally from Jefferson's. See text accompanying notes 109-12 supra.
231 There was a kind of collective-adaptive preference, a response to avoid cognitive dissonance—the psychological frustration of attempting to change seemingly inevitable conditions—at work in both cases. The notion of adaptive preferences is developed at length in J. Elster, Sour Grapes: Studies in the Subversion of Rationality (1983).
To make this point more concrete, consider the meaning of individual liberty in relation to virtue, the concept with which liberty was inextricably connected in republican discourse. There is a tendency in recent historiography to interpret the civic-republican term “virtue” as the equivalent of altruism, that is, an abnegation of self-interest for the sake of others’ welfare.\(^{233}\) This interpretation is understandable in view of such republican rhetoric as Benjamin Rush’s: “Every man in a republic is public property. His time and talents—his youth—his manhood—his old age—nay more, life, all belong to his country.”\(^{234}\) Lance Banning has pointed out, however, that what American civic republicans contemplated was “vigorouas assertions of the self within a context of communal consciousness and a willingness to live by the community’s decisions.”\(^{235}\) Virtue meant acting on the basis of self-interest, as opposed to self-absorption. This meaning of virtue in turn affected the meaning of liberty. Virtue required that citizens live in liberty. If acting virtuously meant acting according to one’s self-interest, then liberty must mean negative freedom. Individuals must be freed from external, including political, constraints inhibiting their pursuit of individual wants.

There is obviously a strong tension, if not a contradiction, between this private aspect of virtue and liberty and the public obligation to accommodate one’s interests with the needs and decisions of the community. The Revolutionaries had sought to resolve the dialectic of self and other, separation and union, through their thesis that once hierarchy was abolished, by purging the common law of property of its feudal corruptions, for example, each individual’s permanent interests would merge with the public interest. As republicans later became increasingly skeptical about this thesis, the tension inherent in the early republican conceptions of virtue and liberty became more apparent.\(^{236}\) Realization that the original American understanding of those concepts was unworkable prompted a reworking of their meaning.

Just as it would be wrong to ignore the private aspect of virtue and liberty in early American republican discourse, it would be misleading to suppose that the thrust of the configuration of liberty and property that emerged in the late eighteenth century was strictly negative. Separation

\(^{233}\) This interpretation is explained and corrected in Banning, Some Second Thoughts on Virtue and the Course of Revolutionary Thinking, in Conceptual Change and the Constitution 194 (T. Ball & J.G.A. Pocock eds. 1988).


\(^{235}\) Banning, supra note 233, at 200.

\(^{236}\) A typical expression of this growing awareness was the observation in a 1783 pamphlet that “the interests of society and the rights of individuals s[re] distinct.” G. Wood, supra note 3, at 609 (quoting Rudiments of Law and Government, Deduced from the Law of Nature . . . (Charleston 1783)).
perhaps was being given greater weight after 1787, but the relational—indeed, the civic—theme of property had by no means disappeared. There remained a dialectic. Thus for Federalists like Madison, Wilson, and Noah Webster, the meaning of individual liberty was not confined to freedom from governmental oppression but included the expectation that one would use one’s abilities in active participation in public life. Property was crucial in this conception of individual liberty. For property, which so strongly symbolized stability to those trained in the common law, assured the conditions that were necessary for the exercise of one’s skills in the public sphere. To these Federalists, moreover, the public sphere was not confined to governance but included commerce. Extending the theme of *le doux commerce*; these writers regarded commerce as beneficial in part because of its socializing consequences. To be free to engage in commerce was to participate in public life.

Perhaps the clearest example of this attempt to connect private activity and public life through the configuration of individual liberty and property was James Madison’s famous 1792 essay on property. There, Madison explicitly contended that the term property has two meanings. It simultaneously embraces, he argued, a private, Blackstonian conception and a public, if not civic, conception. The private meaning is the familiar legal conception of property as “that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual.” What Madison emphasized was that a second, and “juster” meaning, must be added to this common-law understanding. In this second sense, property “embraces every thing to which a man may attach a value and have a right.” The first meaning includes a man’s “land,” “merchandize,” and “money.” The second sense extends the meaning of property to include a person’s opinions and “the free communication of them.” It also includes “the free use of

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238 See generally A. Hirschman, supra note 111.

239 Madison, supra note 230, reprinted in 14 Madison Papers, supra note 230, at 266.

240 See id.

241 Id. (quoting 2 W. Blackstone, Commentaries *2).

242 See id.

243 Id. Madison added a qualification to this second definition: “and which leaves to everyone else the like advantage.” Id. (emphasis in original). This, of course, echoes the Lockean proviso concerning the extent of each individual’s right to appropriate resources from the state of nature. See J. Locke, Two Treatises on Government § 27, at 304 (P. Laslett ed. 1960) (London 1698).

244 Madison, supra note 230, reprinted in 14 Madison Papers, supra note 230, at 266.
[one's] faculties and the free choice of the objects on which to employ them.\textsuperscript{245} This second meaning encompasses what we today would think of as "civil" rights. Part of Madison's strategy was to assure the greatest possible protection for such rights by elevating them to the status of "property."\textsuperscript{246} But Madison also was indicating that property, in both senses, contemplates activity. Activity, the property of exercising one's "faculties," connects property with individual liberty, but it also connects individuals with society. Madison's message was that property is not atomizing but that it is socializing. The individual liberty that is associated with property, moreover, does not mean that individuals are isolated from the larger society and polity. Rather it means that they are freed from constraints on becoming involved in the broader community through the full use of their abilities. The private and exclusive aspect of the configuration of property and liberty, therefore, complements the public aspect by enabling individual activity.

Summarizing this point, certain redefinitions in the late eighteenth century within American republicanism have been identified in which property and time are interconnected at the center. These redefinitions signalled the emergence of a cultural understanding of property that departed in several crucial respects from the meaning that civic republicans created while simultaneously retaining much of the rhetoric of civic republicanism. Individual autonomy and property remained closely linked in the emerging code, but the linkage increasingly was understood as oriented toward a private realm of activity outside the arena of governance.

These redefinitions also responded to the predicament that time posed for the coherence of civic republicanism's conception of property. Specifically, they permitted republicans to embrace modernity rather than to fear it. This acceptance of change was important particularly

\textsuperscript{245} Id.

\textsuperscript{246} John Phillip Reid rightly stresses what he calls "the 'proprietyness' of rights" in the legal culture of eighteenth-century America. J. Reid, supra note 103, at 98-102. The bolstering effect of assimilating the language of property and the language of civil rights was reciprocal. Not only did it enhance the stature of civil rights, but, to the extent that those rights were considered natural and sacred, it protected property rights as well. Both Federalists and Anti-Federalists were anxious to protect private property to encourage prosperity. See 2 G. Haskins & H. Johnson, History of the Supreme Court of the United States: Foundations of Power: John Marshall, 1801-15, at 560 (1981). The Federalists differed from the Anti-Federalists, however, in identifying the tyranny of the masses, resulting from democratic excesses, as a threat to private property. See, e.g., The Federalist No. 10 (J. Madison). This diagnosis led them to rely on the judiciary, rather than legislatures, as the appropriate institution to set the boundaries of property rights. In the early nineteenth century, the United States Supreme Court, under the leadership of the Federalist John Marshall, eagerly assumed that responsibility, creating a legal meaning of property rights as rooted in the common law and understood as the ancient constitution. The clearest articulation of this understanding is Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810). See generally J. Nedelsky, supra note 230, at 186-276 (judicial review and competing conceptions of property).
with respect to property because it enabled American republican lawyers increasingly to accept with approval, or at least without unqualified anxiety, emerging forms of property in American society. In particular, historicizing property facilitated acceptance of emerging intangible and speculative economic interests as property.

5. The Triumph of Imaginary Property

Although Blackstone’s account of the law of property as having to do with rights as to “things” would seem to imply that English common law confined property to tangible assets, intangible interests were hardly unknown to the eighteenth-century common law of property. Property then included, among other interests, a variety of future possessory interests (remainders, reversions, and executory interests), some of which provided the interest-holder with only the slightest possibility of ever becoming entitled to take possession of the assets. In addition, legal property included a category of interests that common lawyers called “incorporeal hereditaments.” These interests were mostly what modern property lawyers call easements and profits in land but also included such remnants of feudal land law as advowsons and tithes. They were assimilated thoroughly into the common-law fabric as “things,” despite the legal awareness that, as Blackstone stated, “[t]heir existence is merely in idea and abstracted contemplation.” By the late eighteenth century, economic changes, facilitated by legal changes, had introduced new sorts of intangible and speculative interests that were more important, both quantitatively and qualitatively, than had been the old intangible interests. Changes in both commercial practices and in public finance had made transferable paper forms of property, including promissory notes, banknotes, and certificates of public debt, increasingly important forms of wealth in the last decade of the eighteenth century. Changes in the law regarding commercial paper during the second half of the eighteenth century enabled negotiable paper to succeed over the traditional legal strictures against the assignment of choses in action.

In the realm of public finance, even before the adoption in 1790 of Alexander Hamilton’s plan for strengthening public credit by funding the enormous public debt, masses of public securities, such as loan certifi-

247 2 W. Blackstone, Commentaries *16.
248 Blackstone devoted the third chapter of the second volume of his treatise to incorporeal hereditaments. See id. at *20-*43.
249 Advowson was the right to nominate the rector of a church. On the development of incorporeal hereditaments, see generally A. Simpson, An Introduction to the History of the Land Law 97-100 (1961).
250 2 W. Blackstone, Commentaries *20.
251 See F. McDonald, supra note 69, at 115-19.
252 See M. Horwitz, supra note 2, at 212-15.
icates issued by Congress, appeared on the market and were traded heavily by speculators. The Hamiltonian funding plan, which included issuing new federal securities in exchange for old public securities and creating a Bank of the United States, strengthened confidence in public credit and decisively established liquid forms of property as central to the economy.

All of these debt instruments, governmental and nongovernmental, represented property that was based on nothing more than promises, hopes, and expectations. American opponents of Hamilton's plan, echoing the arguments raised earlier in the eighteenth century by opponents of Walpole's scheme for saving public credit in England, pointed to just this fact in their efforts to stem the shift from the form of property that was, it seemed to many skeptics, literally "real property" to a form of property that rested on nothing more real than imagination. Yet even prior to the boom in public credit and paper property, common lawyers already had identified intangible interests as property. For example, future interests in landed estates were nothing more than expectations but were deemed to be property nonetheless. And while courts classified the inheritance interest in an expectant heir during the ancestor's lifetime as a "mere expectancy," English equity courts accorded to such interests many of the same characteristics as strict property interests, the most important of these being alienability. All of these legal changes reflected a gradual and general shift in legal understanding of what could be the subject of property, from assets that were tangible and stable to assets that were intangible, speculative, and highly fluid.

It is not hard to discern a basic compatibility between these emerging notions of property and historical time and the outlook of those American lawyers and political writers who unambiguously rejected republicanism of all types, in particular Alexander Hamilton, who was the clearest exponent of the antiregulation conception of property and of government. To be sure, Hamilton and other (though certainly not

254 See F. McDonald, supra note 69, at 115-17, 135-42.
255 In England, the reaction against speculative and liquid forms of property, particularly shares in the public debt, made Walpole and his "sinking fund" scheme for managing the large public debt hated symbols among those who comprised the "Opposition," mainly neo-Harringtonian agrarian republicans and "real" Tories. See I. Kramnick, Bolingbroke and His Circle: The Politics of Nostalgia in the Age of Walpole 39-56 (1968).
256 See 2 W. Blackstone, Commentaries *166.
258 As Professor Nedelsky recently observed, Hamilton most clearly articulated the Federalist plan that "offered in place of active political involvement a distant but smoothly functioning state that would ensure the conditions necessary for the effective pursuit of private gain."
all) Federalists, by advocating that government be structured around the pursuit of individual gain, did more than simply shift the meaning of virtue to something more compatible with commercialism; they explicitly rejected it as both implausible and unnecessary. In doing so, they radically altered the vocabulary of politics, law, and property from that of the Jeffersonian civic-republican culture. But in saying this, one must be careful not to overlook the degree of continuity that accompanied change. To appreciate how much continuity accompanied conceptual change, the new dialectic of property that emerged in the waning years of eighteenth-century American political and legal writing must be examined. In doing so, one finds reason to reconsider the conventional wisdom that the postconstitutional era, specifically the 1790s, marked a dramatic transformation in American political-legal discourse.

V

DESCENT AND DISSERT FROM THE CIVIC MEANING OF PROPERTY

A. American Dissent from the Civic Meaning of Property

Let us begin with the changes that did occur by focusing upon the American critique of the concept that was the keystone of the entire civic-republican structure: virtue. In that the American critique of the classical notion of virtue appears in The Federalist Papers, this critique may as well be labelled "Federalist," though schisms quickly appear within that ideology.

The critique of virtue did not originate, at least not entirely, in American writings. Gerald Stourzh has documented thoroughly the influence of Hume—a critic of republican virtue—on Hamilton, and important elements of Hamilton's and Madison's essays derived from Hobbes and Mandeville, via Hume and Sir James Stueart. The entire

J. Nedelsky, supra note 230, at 167.

It is now widely recognized that Hamilton's promotion of the Bank of the United States, his endorsement of a class of fundholding public creditors, and his vision of America as a commercial empire made him the American Walpole, whose name symbolized precisely the modern Whig corruption that consumed the attention of the English descendants of Harrington. On Hamilton's critique of republicanism, see G. Stourzh, supra note 219, at 272.


discursive structure through which the critique was conducted, more-
over, was inherited from Machiavelli, Rousseau, and, more immediately,
Montesquieu. The most important element of this structure was an elab-
orate metaphorical opposition between “virtue” and “passion.”

Eighteenth-century republican writings in general depicted “pas-
son” as threatening “virtue” and with it “the public good.”261 “Pas-
son” and “public good” were code words. “Passion” signified not
merely self-interest but self-aggrandisement as well.262 “Virtue” was a
code term that signified commitment to others, that is, “public good.”
The conflict between passion and virtue can be translated then into the
modem conflict between self-interest and community.

Montesquieu never addressed this conflict directly. Rather, he at-
tempts to mediate the opposition between virtue and passion by locat-
ing passion in the public sphere, passion for the common good.263 This
move dissolved the opposition between virtue and passion because it de-
fined virtue itself as passion for the good of the polity.

Montesquieu’s interpretation of the relationship between virtue and
passion particularly influenced John Adams.264 More than any other
American republican, Adams systematically worked through the ambigu-
ous meaning of virtue. He wrote in 1776: “There must be a positive
Passion for the public good . . . established in the Minds of the People, or
there can be no Republican Government, nor any real liberty; and this
public Passion must be superior to all private Passions.”265 By 1787,
however, Adams had lowered his sights substantially. The Montes-
queuinian conception of virtue now seemed to him to be unrealistic:

Moral and Christian and political virtue, cannot be too much beloved,
practised, or rewarded; but to place liberty on that foundation only
would not be safe; but it may be well questioned, whether love of the
body politic is precisely moral as Christian virtues, which requires jus-
tice and benevolence to enemies as well as friends, and to other nations
as well as our own. It is not true, in fact, that any people ever existed
who loved the public better than themselves, their private friends,
neighbours, and therefore this kind of virtue, this sort of love, is as
precarious a foundation for liberty as honor or fear.266

What kind of virtue, then, did Adams think plausible as a founda-

261 See J.G.A. Pocock, supra note 4, at 462-505.
262 See The Federalist No. 10 (J. Madison).
263 See, e.g., C. Secondut [Baron de Montesquieu], supra note 71, at bk. 1, ch. iii.
264 On Adams’s reading of Montesquieu, see 1 The Diary and Autobiography of John Ad-
ams 123 n.19, 142 (L. Butterfield ed. 1962).
265 Letter from John Adams to Mercy Warren (Apr. 16, 1776), reprinted in 1 Letters of
John Adams and Mercy Warren 222 (P. Ford ed. 1917).
266 J. Adams, Defence of the Constitutions of the United States (n.p. 1787), reprinted in 6
Adams Works, supra note 46, at 208.
tion for liberty?

[It] is the laws alone that really love the country, the public, the whole better than any part; and that form of government which unites all the virtues, honor, and fear of the citizens in a reverence and obedience to the laws, is the only one in which liberty can be secure, and all orders, and ranks, and parties, compelled to prefer the public good before their own . . . .

In expressing a decidedly less robust understanding of virtue—an understanding that reduces political virtue to obedience to the rule of law—Adams joined the company of other American writers whose early faith in republican virtue had weakened since the early Revolutionary years. William Vans Murray was especially direct in articulating these doubts, observing that if virtue were "of so delicate a nature, as to suffer extinction by the prevalence of those luxurious habits to which all national improvements lead—it certainly is a principle of too whimsical a nature to be relied on." Even earlier, during the debate over the Massachusetts Constitutional Convention of 1778, Theophilus Parsons had expressed skepticism about the human capacity to sustain virtue: "It may be said, the virtuous American would blast with indignation the man, who should offer him a bribe. Let it now be admitted as a fact. We ask, will that always be the case? The most virtuous states have become vicious."

Virtue and passion increasingly became opposed terms, and it was expected that passion would be the ultimate victor in the war with virtue. The critique of virtue asserted the primacy of passion over virtue on both ontological and political grounds. Ontologically, selfishness was assumed to be fundamental to human nature, virtue to be artificial, forced, or utopian. Politically, the paradox of selfish behavior producing political well-being was articulated increasingly. Hamilton forcefully asserted both grounds in a relentless attack on the civic conception of virtue. In the New York Ratifying Convention, for example, he left no room for doubt concerning his hardboiled outlook on human nature, stating: "Men will pursue their interests. It is as easy to change human nature, as to oppose the strong current of the selfish passions."

Similarly, his political theory clearly showed the influence of the critiques of Hume, Hobbes, and Mandeville. Again at the New York Ratifying Convention,
he echoed Mandeville’s notorious formula\(^{271}\) of the public benefit of private vices:

> Look through the rich and the poor of the community; the learned and the ignorant. Where does virtue predominate? The difference indeed consists, not in the quantity but kind of vices, which are incident to the various classes; and here the advantage of character belongs to the wealthy. Their vices are probably more favorable to the prosperity of the state, than those of the indigent; and partake less of moral depravity.\(^{272}\)

This redefinition, in which Hamilton was not an isolated figure,\(^{273}\) had profound consequences for the public meaning of commerce and property. The civic-republican sociology of virtue posited that virtue was possible only under Spartan conditions; what was required, Montesquieu had argued, was a “mediocrity of fortunes.”\(^{274}\) While this did not entail an “extreme equality,” civic republicanism did insist that both ends of the economic spectrum, great wealth and poverty, were incompatible with virtue. The whole purpose of property was to serve public good by establishing stable conditions for virtuous citizenship. Hamilton did nothing less than stand this analysis on its head, arguing that concern for the public good would be “a graceful appendage of wealth,” rather than the other way around.\(^{275}\) Public spiritedness was, in his view, a by-product of private gain rather than its rival. Hamilton considered the ideal of maintaining only modest disparities in wealth altogether futile. His complete repudiation of the civic-republican meaning of property in favor of a commercial meaning of property was unambiguous: “The difference of property is already among us. Commerce and industry will increase the disparity.”\(^{276}\) Even more strikingly, he noted:

> As riches increase and accumulate in few hands; as luxury prevails in society; virtue will be in a greater degree considered as only a graceful appendage to wealth, and the tendency of things will be to depart from

\(^{271}\) See B. Mandeville, supra note 260, at 41-94.

\(^{272}\) Hamilton, Address to the New York Ratifying Convention (June 21, 1788), reprinted in 5 Hamilton Papers, supra note 270, at 43.

\(^{273}\) By 1787, for example, John Adams had come to believe that there was no age in which personal “avarice” did not override love of the common good. See text accompanying notes 266-67 supra.

\(^{274}\) C. Secondat [Baron de Montesquieu], supra note 71, at bk. 1, ch. iii.

\(^{275}\) Hamilton, supra note 272, reprinted in 5 Hamilton Papers, supra note 270, at 42.

the republican standard. This is the real disposition of human nature

... .277

In short, Hamilton sought to reverse the meaning of virtually every crucial concept in classical civic republicanism. Wealth, “luxury,” and social and economic hierarchy all are embraced, while “virtue” is subordinated to “avarice”: the shining city on a hill, if it existed at all, was the capital of the empire of commerce.

Most importantly, Hamilton did more to prompt a general redefinition of the relationship between the public and the private dimensions of property than any other “Federalist.” Within the Jeffersonian scheme, property, though privatized in one sense, carried on the traditional republican function of facilitating active citizenship. Public and private thus were not entirely distinct within this code, and they certainly were not hostile to each other. Hamilton provided a figurative association that created a wedge between the public and private, with the latter emerging as the dominant domain of property. He critiqued political regimes in which the relationship between nation-states and individuals is mediated by quasi-sovereign political entities that use property to perform political functions, as “the political monster of an imperium in imperio”278—an allusion with a particularly obnoxious meaning for republicans that could not have been lost on Hamilton. He contrasted such regimes with those adhering to the principle of legislation for individuals rather than for states or sovereigns.279 While the Jeffersonian vision did not contemplate state ownership of property, it did connect directly property with political functions, both by emphasizing the political purpose of landholding by farmer-citizens and by favoring the exercise of governmental authority over land through, for example, the scheme of distributing land in accordance with republican political principles. Hamilton’s vision, by contrast, involved a more thorough privatization of property through the “depropertization” of government.280 It involved replacing the state with the individual as the source of authority over property. At the risk of stating the obvious, however, it also should be noted that the Hamiltonian scheme of “depropertizing” government did not mean reducing governmental power. The scheme was hardly one of political anarchy. Rather, it involved replacing a constitutional vision of localized government authority extending the tradition of the ancient constitution with centralized authority.281

277 Hamilton, supra note 272, reprinted in 5 Hamilton Papers, supra note 270, at 42.
279 See id.
281 Carol Rose has pointed out that while 1787 marked the rejection of localism as the
B. Continuity with the Civic Meaning

As clearly as Hamilton exemplified dissent from the Jeffersonian meanings of property and polity, other Federalist writings demonstrated an intellectual descent from Jefferson. This continuity rested not only on the continued use of civic language and the republican meanings of that language. On a deeper level, federalist writing continued to sound some of the same dialectical themes that animated civic-republican texts, though the meaning of those dialectical themes were in a certain sense displaced.

I. The Dialectic of Dynamism vs. Stability Redux

A dominant Jeffersonian dialectic was stability versus dynamism. The civic-republican texts depicted stability and dynamism as simultaneously necessary for, and in contradiction with, the value of autonomy. One aspect of individual autonomy, the dimension that saw liberty as realized through involvement in public life, required stability. The other aspect of autonomy, which connected personal liberty with social and, to some extent, economic equality, required dynamism. Connecting dynamism with virtue, civic republicans saw a dynamism of virtue as the force that would prevent the creation of aristocracy through unequal wealth. The metaphorical distinction between the alodial and the feudal was the rhetorical formulation of this dialectic most common in American legal texts throughout this period and the early nineteenth century.

In one sense, Federalist writings from 1787 throughout the 1790s approached the theme of stability and dynamism from a perspective that was in tension with that of civic republicans. For if civic-republican ideology was inclined to favor stability over dynamism, accepting dynamism grudgingly and with skepticism, federalism tilted the balance in favor of dynamism. Hamilton's empire of commerce was nothing less than a vision of dynamism. His view of property confirmed this. For Hamilton, the purpose of property was to serve private self-interest, and that purpose would be advanced by encouraging new forms of property to develop, including intangible property created both through credit transactions in general and through the credit transactions of the national government and its agencies such as the Bank of the United States.

At the same time, however, dynamism remained an ambiguous and ambivalently held notion. It mattered a great deal what sort of dyna-
mism one had in mind. The Federalists, of course, were hardly likely to favor political dynamism, at least if we associate political dynamism with radical democracy or local political variation. Nor were they likely to favor social dynamism. They never doubted the existence of a natural elite which, because of its superior intelligence, education, and practical judgment, ought to be the ruling class. The dynamism that animated Federalist writings was an economic dynamism, which in turn required a dynamic concept of property. But even that form of dynamism was a source of ambivalence. One notion of economic dynamism calls for ever-expanding commercial activity that generates greater amounts of aggregate wealth. But economic dynamism has another meaning that is in tension with its wealth-creating understanding. This is a dynamism in the distribution of social wealth. Such a meaning of dynamism very quickly becomes an ideology of egalitarianism.

Egalitarian sentiments, of course, do not coexist easily with a commitment to political rule by a natural elite, and so it hardly is surprising to find the rhetoric of stability shadowing the rhetoric of dynamism in Federalist texts. No single text by a Federalist legal writer better illustrates this continued dialectical tension of dynamism and stability than Noah Webster’s 1787 essay urging the adoption of the new Constitution, An Examination into the Leading Principles of the Federal Constitution. But equally important, this essay indicates the fundamental shift in the terms of this dialectic. The earlier sense of anxiety about the effect of a free-alienability policy on social relations was absent entirely from Webster’s essay. The commodity mentalité had eclipsed the discourse of civic personality.

2. Change and Continuity: Noah Webster and the Emerging Commercial Republican Meaning of Property

Noah Webster sounded many of the themes that characterized Federalist writings about property and politics, society and individual. Attempting to deflect Anti-Federalist arguments that the new Constitution would destroy popular power in favor of congressional power, replace democracy with aristocracy, Webster used property as the instrument for accommodating republican (and Anti-Federalist) notions

282 See text accompanying notes 79-84 supra.
285 Robert Ferguson describes Webster as “[t]he most important man of letters in [the post-Revolutionary] generation.” R. Ferguson, Law & Letters in American Culture 274 (1984). Although perhaps best known as a lexicographer, Webster was trained in the law. From 1793 to 1797, he was the editor of the influential newspaper, American Minerva, published in New York.
of individual autonomy and equality within a hierarchical society and polity. The key to realizing this accommodation of conflicting visions was the policy of unfettered circulation of property within society. Webster's defense of the Federalist scheme, premised on property, provided a clear expression of the legal policy of alienability conjoined with freedom of ownership. His essay sounded not only many of the themes that dominated late eighteenth-century American legal and political writing about property, but also anticipated themes that increasingly would dominate legal discourse in the nineteenth and twentieth centuries. In a very real sense, then, Webster's essay was Janus-like.

Webster began his argument by affirming the link between democracy and property:

[The power of the people has increased in an exact proportion to their acquisition of property. Wherever the right of primogeniture is established, property must accumulate and remain in families. Thus the landed property in England will never be sufficiently distributed, to give the powers of government wholly into the hands of the people. But to assist the struggle for liberty, commerce has interposed, and in conjunction with manufacturers, thrown a vast weight of property into the democratic scale. Wherever we cast our eyes, we see this truth, that property is the basis of power; and this, being established as a cardinal point, directs us to the means of preserving our freedom. Make laws . . . destroying and barring entailments; leave real estates to revolve from hand to hand, as time and accident may direct; and no family influence can be acquired and established for a series of generations—no man can obtain dominion over a large territory—the laborious and saving, who are generally the best citizens, will possess each his share of property and power, and thus the balance of wealth and power will continue where it is, in the body of the people.]

This passage expresses an astonishingly wide variety of themes, extending from those of Jefferson and Harrington to those of Hamilton and the Scottish Enlightenment writers. Webster's basic premise, that power follows property, was a recurrent theme in the civic-republican tradition. Harrington had developed fully the connection between polity and property, and his theme was picked up by American civic republicans like John Adams. Webster developed this premise along figurative lines that echoed Adams's *Dissertation on the Canon and the Feudal Law*. Like

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286 N. Webster, supra note 237.
287 See T. Pangle, supra note 237, at 95 ("Perhaps no one captured the moral transformation that was afoot better than Noah Webster, in the remarkable essay he contributed to the ratification debates . . . .").
289 J. Adams, supra note 77.
Adams, Webster used history to affirm the meaning of the new nation and its regime of property. For Webster, as for Adams and others, feudal property was the mirror image of what we were to become. Webster's use of entailments and primogeniture was entirely symbolic, for by this time those devices had been eliminated virtually everywhere. What is notable is the seriousness with which Webster discussed the need to abolish entail and primogeniture, suggesting that they continued to act as powerful symbols long after any threat that the English society of landed aristocracy would be recreated in America had dissipated. Webster, doubtless fully aware of this, appreciated that their very irrelevance made them all the more useful as symbols by which to discuss the form of aristocracy that was taken seriously at this time. This was the form of aristocracy that many Americans believed the Federalists were seeking to create through the Constitution. Webster's basic objective in writing his essay was to defend the Federalist social order, an order based on unrestrained commerce. His strategy was to develop a variation on the familiar theme of history as progressive, a variation that situated the Federalist order at the opposite end of the spectrum from aristocracy.

Webster pointed out that there are two systems in which property ownership and political power are distributed: hierarchical or democratic. Representing these two paths were on the one hand primogeniture and entailments, which signified aristocracy, and on the other hand commerce, which represented freedom and democracy. By associating freedom with commerce, Webster crucially shifted from the framework of Harrington, Jefferson, and Adams to one whose roots lay in the Scottish Enlightenment tradition and whose development was the project of Federalist writers.

Webster, on behalf of the Federalists, was claiming that commerce and manufacturing had thrown the weight of property in favor of democracy and away from aristocracy. The understanding of liberty and freedom that operates barely beneath the surface here is not described solely by its negative antiaristocracy, anti-English meaning but also includes an association of liberty and freedom with private activity. Commerce instrumentally promotes freedom rather than jeopardizes it, as civic republicans thought, because the meaning of freedom shifted from the Harringtonian notion of agricultural activity within and for the public realm to commercial activity within and for one's own sphere. Individuals are free when they "revolve" land "from hand to hand, as time and accident may direct." Webster here unmistakably affirms the dynamic understanding of property. But the dynamic activity he depicted was that of autonomous economic actors rather than civically connected citizens. Even less compatible with his social vision are the ideas of people as socially interdependent and of market forces acting to alienate citizens.
from one another. Whereas earlier republican writing anticipated aspects of these modern ideas, they are absent entirely from Webster's text.

The privatization of freedom and property constituted a repudiation of the civic-republican ideology in one sense, but again it is important to stress that the meaning of property that Webster was creating did carry forward cultural beliefs that were fundamental to Jeffersonians. The repudiation of family dynasties based on property tied up through entailments and primogeniture, the endorsement of individual ownership of limited amounts of land, even the depiction of "the laborious and the saving" as the best citizens—a characterization that was congenial to nonrepublicans like Hamilton—all were familiar Jeffersonian themes. More importantly, Webster's objective was to create a meaning of property that integrated a vestige (but only as a "fragmented survival") of the old republican understanding of property as political and social with the newer understanding of property as private. Property, rendered dynamic for private gain, was the path to realizing the vision of a democratic society.

That this integrated public/private meaning of property animated Webster's essay becomes even clearer when we examine the rest of his argument. He continued:

A general and tolerably equal distribution of landed property is the whole basis of national freedom: the system of the great Montesquieu will ever be erroneous, till the words property or lands in fee simple are substituted for virtue, throughout his Spirit of [the] Laws.

Virtue, patriotism, or love of country, never was and never will be, till men's natures are changed, a fixed, permanent principle and support of government. But in an agricultural country, a general possession of land in fee simple, may be rendered perpetual, and the inequalities introduced by commerce, are too fluctuating to endanger government. An equality of property, with a necessity of alienation, constantly operating to destroy combinations of powerful families, is the very soul of a republic—While this continues, the people will inevitably possess both power and freedom; when this is lost, power departs, liberty expires, and a commonwealth will inevitably assume some other form.

Gordon Wood has interpreted Webster's writing during the mid-to-late-1780s as indicating a complete loss of faith in virtue as the foundation of the republic. This loss of faith, Wood argues, contributed to

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290 See text accompanying notes 48-68 supra.
291 The phrase is borrowed from A. MacIntyre, supra note 189, at 257.
293 See G. Wood, supra note 3, at 610.
the demise of civil republicanism in American thought and signalled the ascendance of liberalism.\textsuperscript{294} J.G.A. Pocock rightly has responded that Webster in the passage just quoted was in fact adopting the Harringtonian—and Jeffersonian—position that "a material foundation was necessary to ensure virtue and equality" and that land owned in fee simple was such a foundation.\textsuperscript{295} Webster here was resuming quite deliberately the Harringtonian tradition of identifying property of a particular type and employing an overtly common-law vocabulary to prescribe ownership of a particular kind as foundational for both equality and freedom.

Appropriating the Jeffersonian critique of landed aristocracy was strategically well-suited to Webster’s purpose: to respond to the charge that Federalist politics was hierarchical and would reinforce an American aristocracy that already had begun to take the place of the hated English aristocracy. This is not to say that his endorsement of a relatively wide distribution of fee-simple ownership of land was disingenuous. Rather it is to insist that change accompanied continuity in the Jeffersonian rhetoric of property among different practitioners of that rhetoric. Jefferson and Webster wrote with different needs in mind: Jefferson, to find a path to maintaining a vestige of the civic-republican vision in a society moving toward commercialization and modernity; Webster, to find some way to connect a political regime designed for modernity with the nation’s premodern revolutionary culture.

One of the most noteworthy aspects of Webster’s essay is his use of the symbolic language of stability and dynamism that pervaded virtually all of the civic-republican discourse about property. He continually moves back and forth between stability and dynamism, in one sense continuing a dialectic with which civic republicans would have been familiar, but in a more profound sense shifting the meaning of the figurative language of stasis and flux from that understood within the civic-republican system of signification. This process illustrates again how the ambiguity of that vocabulary permitted, indeed encouraged, innovation that led to transformation.

Notice, first of all, how Webster juxtaposed stability and instability in the following passage to minimize the threat that commerce posed to republican government and republican ideals: “[I]n an agricultural country, a general possession of land in fee simple, may be rendered perpetual, and the inequalities introduced by commerce, are too fluctuating to endanger government.”\textsuperscript{296} Here, he is anxious to insist that stability

\textsuperscript{294} See id. at 606-15.

\textsuperscript{295} J.G.A. Pocock, supra note 4, at 534.

\textsuperscript{296} N. Webster, supra note 237, reprinted in Pamphlets on the Constitution of the United States 59 (P. Ford ed. 1888).
not assume the public meaning of inequality. Stability can coexist with equality through ownership of land in fee simple. But the crucial step linking land ownership with stable equality, for Webster, was a dynamic regime of ownership. Land, because of its obvious physical immobility, is associated easily with stability, but, Webster subtly reminded his American readers, the meaning of stability by itself is ambiguous. After all, English social and political hierarchy rested on, to borrow the rhetoric of stability, a foundation of stable ownership of land. Linking stability of land ownership with equality requires the mutually reinforcing measures of limiting, as much as possible, the estate in which land ownership exists to the fee simple and protecting the free and full alienability of land. Together these two measures create a dynamic of land ownership. Webster here drew attention to a central paradox: dynamism is necessary to achieve stability. Equality and freedom can be secured only through a regime of land ownership based on a dynamic of alienation of unencumbered property interests. It is the legal policy of alienability, then, that Webster saw as the crucial mechanism by which property would be the foundation for individual freedom and equality rather than hierarchy and aristocracy.

Webster's emphasis on the importance of alienability of property indicates a shift toward a more privatized meaning of freedom and a more formalized meaning of equality than those terms had within civic-republican discourse. Alienability of property expressed a vision of marketized social relations, not a vision of property as the foundation for citizens to participate in the creation of public life. It certainly did not express a vision of equality in fact. The purpose of property was to enable people to create their own lives and pursue their own conceptions of the good. Freely transferable property was a metaphor for opportunity, not for entitlement. Removing restraints on the alienability of land gives people access to property, through market transactions, but it does not assure that all social distinctions will be eliminated. It secures individual

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297 See id.
298 John Adams unambiguously expressed this understanding of the relationship between property and equality in a letter to his son, written a few years after Webster's essay, that criticized Chancellor James Kent's contention that English law in particular was “utterly subversive of Equality of rights.” Adams's response to the assertion is one with which Kent would have found little to disagree:

I contend that the laws from our own Country, and every other Country where the hereditary Descent of real estates is established, is as utterly subversive of Equality as the Descent of the Whole of real estate to the first born, or of a Lordship in Parliament, or of the Crown itself. All laws which establish Property are inconsistent with Equality in one sense. The very idea of Property is inconsistent with Equality . . . .

It is the establishment of Property . . . which introduce[s] the great Inequalities in fact, but no Inequalities of right.

Letter from John Adams to Charles Francis Adams (Feb. 15, 1795), reprinted in Memoirs and
freedom in the sense that status and property formally are uncoupled.

The choice between feudal property and alienable property that Webster posed indicates his understanding of individual freedom as formal and negative. Feudal property, which he described in terms of the use of entailments and primogeniture to lock up land, locked individuals within a formal hierarchy. Webster continually defined the freedom that property would secure in the new order as the mirror image of the regime of formal hierarchy based on privileged holdings of land. Stable freedom and stable equality would exist by liberating land from all of the feudal entanglements, leaving the "pure" form of ownership, the freely alienable fee simple, as the dominant estate in land. It is the juxtaposition of feudal and alienable property as the only available alternatives that made it intelligible for him to assert: "The power of entailing estates is more dangerous to liberty and republican government, than all the constitutions that can be written on paper, or even than a standing army."299

Webster's dichotomy between feudal and alienable land obviously resembled the older and more familiar feudal-allodial dichotomy.300 The surface resemblance should not obscure, though, an important change. Webster's feudal-alienable dichotomy transformed the feudal-allodial distinction because the term "allodial" had never emphasized alienability expressly. Transferability, of course, was implicit in the idea of allodial land, but it was not its defining characteristic. Allodial land had signified a natural order which was perverted by an unnatural political regime that made land the basis for domination of the many by the few. It also had represented an indigenous order that had been suppressed by a foreign influence.

Alienability was not central to these civic messages. But it was central to the Federalist message. Federalists regarded the idea of the human personality as civic to be dangerously wrong-headed. A strong policy of alienability of property encouraged individual freedom by advancing a wedge between public and private life. There was no attempt in Webster's discussion to connect the alienability policy with political independence or self-governance. His understanding of individual liberty was liberal and negative rather than positive and civic. He associated the policy of alienability with the principle of freedom to alienate, and he equated collective, or regulatory, restraints with the old feudal restraints. Both forms of restraints were objectionable because they limited the transferability of property. He never considered that this policy might require sacrificing the principle of individual freedom to alienate.

Letters of James Kent 70-71 (W. Kent ed. 1898).

299 N. Webster, supra note 237, reprinted in Pamphlets on the Constitution of the United States 60 (P. Ford ed. 1888).

300 See text accompanying notes 156-78 supra.
Rather, he saw them as mutually reinforcing. In one sense it seems that Webster dissolved the dialectic of stability and dynamism by discounting the demands of stability. This interpretation, however, misses a crucial shift in the meaning of stability in Webster's essay. To see this shift, one needs to distinguish between two conceptions of stability of property operating in political and legal discourse during the eighteenth century. The first is republican stability, and it can be traced to Harrington. According to this conception, stability of property means that land not be used as an exchange commodity but remain in the possession of the freeholder. The only mode of transfer that was expected was inheritance. Stability performed a civil function—anchoring citizens so that they were free to be public-regarding rather than self-interested.

The second conception is utilitarian, developed by Hume and later refined by Bentham. Like Harrington, Hume associated stability with possession, but to a quite different end. Hume emphasized stability of one's possessions as "the most necessary to the establishment of human society." Stability of possessions (which Hume did not confine to land) served a social rather than civic function—maintaining society by avoiding constant disorder and violence. Unlike Harrington, Hume assumed that individuals had limited capacity to act in the public interest and that individual selfishness made justice and property necessary. Moreover, unlike Harrington, who contemplated stability of possession after the government had redistributed land to maintain a "balance" of property, Hume assigned no redistributive role to the government. The government's function was only to secure one's rights as an owner, but not to participate in a plan of distributing those possessions. The injunction of stability, Hume considered, was to "leave every one in the peaceable enjoyment of what he may acquire by his fortune and industry."

Finally, Hume departed from the Harringtonian conception in maintaining that a crucial aspect of security of ownership is that individual owners be free to transfer their property as they wish. For Hume, then, stability of property includes the idea that possessions can be used as exchange commodities.

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302 See id. at 494-97.
303 Id. at 489. Bentham later expressed the same conception of stability of property in terms of "security," which he said was "the most important object" of legislation. Bentham, The Theory of Legislation, in Principles of the Civil Code 98 (C. Ogden ed. 1931). "As regards property," Bentham wrote, "security consists in receiving no check, no shock, no derangement to the expectation founded on the laws, of enjoying such and such a portion of good." Id. at 113.
304 See D. Hume, supra note 301, at 514-16; Bentham, supra note 303, at 112.
Webster's discussion of property did not abandon the stability part of the republican dialectic so much as it took advantage of the ambiguous meaning of stability. It combined elements of the utilitarian and republican conceptions, abandoning the republican understanding to the extent that property would not be stable in the sense that it would be immobile or that it would embed citizens in the ground of politics, preventing them from being transplanted into the arid and shifting sands of commerce. However, it continued the republican understanding to the extent that it recognized that property has a political, democratizing role. This is evident in Webster's use of the Harringtonian formula that power follows property, leading him, like Harrington, to emphasize the need for "a general and tolerably equal distribution of landed property." For Webster, as for Harrington, it is the stability of property that is ultimately important. Harrington sought a stability of property because he considered that such a property regime was necessary to achieve a stable and equal distribution of political power among the citizenry. Webster continued the republican emphasis on the distribution of political power.

What Webster changed was the strategy for securing stability and equality of power. In effect, he turned the Harringtonian critique of mobile property on its head. First, he adopted the utilitarian theme of security of individual ownership interests. Then, rather than achieving equality of political power through government controls that initially distribute land in fee simple equally among all citizens and thereafter maintain equality against the forces of commerce, Webster relied on commerce as the very force that would create and maintain an equality of property and power. Eliminating the old aristocratic restraints on alienation and making property freely transferable, Webster argued, itself would create equality, as each citizen would have access to property. Stability of property, according to Webster, means that wealth would

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305 The Harringtonian conception of stable property was aided by a common misunderstanding of what it means for property, especially land, to be immobile. The natural fact that land itself cannot be moved and personal property, including intangibles evidenced by legal paper can be, made the idea of immobile property, where property is equated with land, easy to understand. But this confuses the ownership interest in some object of property with the object itself. Land cannot be mobile, but ownership interests in it certainly can be. It is the mobility of ownership interests, rather than the object of those interests, that is relevant.

306 N. Webster, supra note 237, reprinted in Pamphlets on the Constitution of the United States 59 (P. Ford ed. 1888).

307 This argument departs from classical utilitarianism to the extent that it attempts to make equality and security mutually reinforcing. Bentham made no such pretense. Rather, he argued that security must be given priority over equality because without individual security equality cannot be maintained. See Bentham, supra note 303, at 119-22. He did, however, contend that security indirectly aids equality and that prosperity in time progresses toward equality. See id. at 122-23.
remain distributed among the citizenry in a rough equality, rather than becoming concentrated in the hands of a few families.

Webster's discussion continued republican aspects of the stability of property in one final sense. The path to liberation, from the past and from what he and other American writers associated with it, lay in stability of property. Webster connected America's historical uniqueness with the theme of stable property in this passage:

The English writers on law and government consider Magna Charta, trial by juries, the Habeas Corpus act, and the liberty of the press, as the bulwarks of freedom. All this is well. But in no government of consequence in Europe, is freedom established on its true and immovable foundation. The property is too much accumulated, and the accumulations too well-guarded, to admit the true principle of republics. . . . But in America, and here alone, we have gone at once to the fountain of liberty, and raised the people to their true dignity. Let the lands be possessed by the people in fee simple, let the fountains be kept pure, and the streams will be pure of course. . . . All other [free] nations have wrested property and freedom from barons and tyrants; we begin our empire with full possession of property and all its attending rights.308

The vision that Webster articulated in the passage was the liberal conception of ownership as consolidated control in individual hands. That conception, of course, was not new. Blackstone had articulated it in his widely known definition of common-law ownership as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."309

It is no coincidence that Webster would articulate this conception in a metaphorical vocabulary that Blackstone's definition lacked. Fee-simple ownership was expressed more readily as the "pure" fountain in the eighteenth-century American context of vast wilderness and, equally important, a widely shared self-image of historical uniqueness. Webster and most American lawyers understood that the Blackstonian conception of ownership was a myth in the context of English society. Indeed, they considered that ownership based on individual autonomy and equality had not in fact existed anywhere in history. The common law, in developing the concept of the fee-simple absolute, had articulated that ideal, but had not actually implemented the common-law ideal. Because the common-law conception of ownership as the fee-simple absolute had not existed anywhere previously, it had not fulfilled its promise of indi-

309 2 W. Blackstone, Commentaries *2.
vidual liberation.

A continuation of the theme of millennialism appears in Webster’s pronouncement that the true meaning of property has at last been realized. In America, for the first time in history, the ideal is made reality. In tone, if not in all substantive respects, Webster’s essay resembles John Adams’s earlier *Dissertation on the Canon and the Feudal Law* and even his later *Defence of the Constitutions of the United States of America.* Like Adams’s essays, indeed like most eighteenth-century American political writing, Webster’s writings articulated the sacred history of the New World, a teleology whose culmination is marked by the founding of the American republic. Moreover, Webster, like many other American lawyers at the time, defined that teleology within the framework of property. Webster was announcing the arrival of the fee-simple empire. But, departing from Adams’s millennialist vision, Webster not only completely secularized the millennium, dropping all biblical allusions, but also depicted it as occurring within the dynamic of individual economic activity. The fee-simple empire no longer was described as an empire of citizen-farmers; to Webster, it had become an empire of landowners who use land as the subject matter of economic transactions.

**CONCLUSION**

Webster’s essay exemplifies the paradox of ideological change occurring through continuity. He continued to define the meaning of property in figural language and extended virtually all of the important figurative devices from civic-republican discourse, including the juxtaposition of property with time, and the dichotomy of forms of property and their correspondence with two historical visions of social order, one hierarchical and oppressive, the other democratic and liberating. But in using individual ownership of property as the basis for his attempt to defend the federalist program against the charge of creating a new aristocratic social order, he shifted the meaning of the civic-republican vocabulary in crucial respects, helping to create cultural language of what has been called “commercial republicanism.” Most importantly, the thrust of

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310 Adams, supra note 77.
311 J. Adams, supra note 266. The Defence of the Constitutions of the United States of America is quite consistent with Adams’s own earlier work in its assertion that the “Promise” was realized in the American republic.

At the same time, as Gordon Wood rightly points out, the Defence of the Constitutions of the United States of America was a work riddled with contradiction. Adams’s affirmations of America’s uniqueness were juxtaposed with characterizations of American society as aristocratic. See G. Wood, supra note 3, at 580-87.

313 See, e.g., D. McCoy, supra note 206, at 101.
his argument for individual ownership of freely alienable property as the only stable foundation for individual freedom was to locate property in the realm of individual economic activity. The concomitant effect of this identification of individual liberation from domination and hierarchy with alienable property was to establish more clearly individual activity with the unrestrained market as the dominant metaphor by which American lawyers understood the central meaning of property and its relationship to the political ideal of individual freedom. The public and private dimensions of property had become more distinct from each other than they had been in civic-republican discourse. The dialectic had not ended; it had only shifted.