

# Britain and the American South

FROM COLONIALISM TO ROCK AND ROLL

*Essays by*

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*We are sailing to London. . . . We are a whisper of wind seeking for London, a clean rag from the wash on a straight-up pole, pushing on to London. We are these new people who sail for pleasure. But the wind and the whisper and the rag are part of what I know, and the me in the other we, I am, fears. We are a sailed people. We sailed to America. We taste the path of our abduction in our tears.*

*. . . I miss the safe inland cities. Nashville, Atlanta. These cities with their front porches on the ocean, Washington, Savannah, Charleston, scare me, like a door left open on a dark night with robbers about.*

*But I am hungry for the city on the Thames.*

—ALICE RANDALL, *The Wind Done Gone*

## Power and Authority in the Colonial South

### *The English Legacy and Its Contradictions*

HOLLY BREWER

When historians consider the influence of English ideas about power and authority on colonial America, they have often focused on what colonists referred to at the time of the Revolution as “English liberties,” which meant some combination of representation, trial by jury, and freedom of the press, at least for free-born adult men. Of course, the influence of English ideas about authority is a complex question—and many other scholars have addressed the ways that English culture and values influenced the colonies. But to some degree our questions have been ignoring the depth of the changes and struggles that England and Britain burned through during this period. Indeed, any scholar who looks closely at—to take only one example—the role of the jury must admit that it transformed between the mid sixteenth and early nineteenth centuries from a more elite, neighborhood body that was supposed to judge on the character of the accused, to a body that was less elite and supposed to analyze only the evidence presented in the courtroom. Likewise this period was convulsed by sharp confrontations over who could vote (and when and over what) and over freedom of the press.<sup>1</sup> The seventeenth century in England, in particular, was a time of incredible struggle—of two revolutions—fought over principles of power and authority, questions that ranged from high ideology to base laws, with arguments about perpetual status at their center.

Those two revolutions in England profoundly affected the colonies, both practically, by disrupting the political organizations of many colonies, and ideologically, by shaping the debates over laws and principles in the colonies. While the New England colonies, especially

during the first revolution, the English Civil War/Interregnum of 1642–1660, felt freer to pursue their own courses, the southern and Caribbean colonies most certainly did not: their Royalist Governors and Burgesses were forcibly evicted by Cromwell's troops in 1651–1652. During the Glorious Revolution of 1688–1689, many colonies held mini-revolutions of their own, and the issues of authority underlying it had echoes in debates in the colonies.

I propose to focus on the seventeenth century and the way that these debates influenced the development of the colonies in the colonial South. In particular, I want to trace the opposite side of the “whiggish” history that is normally told, which begins with the founding of the House of Burgesses in Virginia in 1619 and relates the steady growth of freedom and English liberties. Instead, I want to outline the impact of the opposing ideas about authority and power: absolute monarchy, neo-feudalism, and perpetual status. These principles were those supported by the Royalist side during the English Civil War and had some basis in the laws and practice of England. To what extent did southern colonies adopt these precedents and ideology? How receptive were Virginia and Barbados, in particular, to the different sides in the titanic struggles gripping England, particularly the English Civil War? These alternative precedents, which focus on the principle of perpetual status, help to explain both slavery and many other aspects of the legal organization of the southern colonies. Particularly, this study will sketch those elements of English culture and institutions which supported perpetual status, whether in religious and political ideology, land law, or personal law (of which both slavery and monarchy are parts).

These elements interacted with each other: political debates both drew on the law and sought to reshape it. One set of laws (about perpetual land ownership) influenced another (those about personal status). Religion was the arena where much of the debate took place, partly because church and state were one in Tudor and Stuart England: the monarch was the head of the Church. During the seventeenth century, in short, England's struggles over power ranged across religious and political and legal boundaries.

Should authority be based on inherited right or on the consent of the governed? While there were of course legal precedents for both—kings and members of the House of Lords generally inherited their positions, members of the House of Commons were elected (e.g. on the consent of some 5–10 percent of adult males in the population)—what those precedents even meant was sharply disputed. Sir Robert Filmer's Royalist pamphlets of the 1640s, for example, while admitting freely that the House of Commons was elected, argued that its role was only to advise the king, that it was called only at his pleasure, and dissolved at his pleasure as well, and then only infrequently. The king had his authority by divine right (as his father's next heir), and his will was the law of the land.<sup>2</sup> Filmer's principles came from his king, and were preached in pulpits, from sermons to catechisms. Charles I was steeped in his father's ideology of divine and absolute monarchy. James I had laid out the basis of this ideology in his *Trew Law of Free Monarchies* (1598). “The duty and allegiance which the people swears to their prince is not only bound to themselves, but to their . . . lawful heirs and posterity [to] the lineal succession of crowns. No objection may free the people from their oath giving to the King and his succession. As he is their heritable overlord, and so by birth comes to his crown.”<sup>3</sup>

The arguments underlying absolute monarchy were largely about perpetual status and the divine basis of birthright. The next king was heir by birthright: he was chosen by God for that status, the same as his father. If primogeniture did not hold, as Thomas Paine so cleverly mocked with statements like “virtue is not hereditary” in 1776, then the very basis of monarchy—hereditary authority—disappeared.<sup>4</sup> Without perpetual status, there is no monarchy.

Perpetual status did not apply simply to the monarchy, however. It applied, potentially, to everyone. Were you born to privileges and/or obligations or were you born with some measure of choice about your fate, whether religious or political? Religion and politics, it must be remembered, were inextricably combined in sixteenth- and seventeenth-century England: the monarch was not only the head of the country; he (or she) was head of the Church. Hierarchies in both ran parallel. Perpetual status was an issue that English lawyers of the sixteenth and

seventeenth centuries spent a great deal of time arguing about, whether inside or outside the courts of law.

Perpetual status had many dimensions, but basically the principle was that you were born a subject of a kingdom, or you were born to inherit it. You were born to inherit a freehold or a copyhold or a leasehold, born to inherit a seat in the House of Lords. Just so, you could be born to obligations that fit your status: by the Elizabethan statute of Artificers, you and your children could be forced to labor for someone else if your belongings were not worth a total value of "ten poundes" and you were not heir to someone. Indeed, children from such families could be forced to labor in "apprenticeships" to husbandry (e.g. without pay) if a person who owned at least sixty acres of land needed their help: "That if any person shallbee requyred by any Householder having and using half a ploughelande [about sixty acres] at the least in Tillage, to bee an Apprentice and to serve in Husbandrye or in any other kind of Arte, Mysterye, or Science before expressed, and shall refuse so to doo; that then upon the Complaint of suche Housekeeper to one Justice of Peace of the Countye . . . [he] shall have powre and auctoritee by virtue herof, yf the said person refuse to bee bounde as an Apprentice, to commit him unto Warde [prison], *there to remayne untill he be contented and will bee bounden to serve as an Apprentice* should serve. . . ." The statute of Artificers built upon elements of feudalism, such as they had existed, by which the children of villeins had their parents' status.<sup>5</sup>

Likewise, you were born a subject of both church and state. You were born a member of the Anglican Church (it was assumed) and were supposed to be baptized within three weeks of your birth, which reaffirmed that membership. If not, your parents could be prosecuted. You were born owing allegiance to the king—and to all magistrates and lesser officials justly put in authority over you, as literally millions of catechisms, published across the land, emphasized. "What dost thou learn from these commandments? . . . My duty [is] . . . to honour and obey the kyng and his ministers. To submit myself to all my governours, teachers, spiritual pastors and maisters. To ordre myselfe lowly and reverently to all my betters."<sup>6</sup> The mainstream catechism, in short,

inculcated principles of perpetual status: you were born a subject, with obligations, just as the king was born your overlord.

The political support of birthright and birth status influenced religious positions and vice versa: the religious debate over birthright connected ideologically to other questions of birth status; just so were people born subjects or born slaves. As Stephen Marshall expressed it so beautifully in 1644, while arguing for the Anglican position that children are born members of the same church as their parents, with consonant privileges and obligations: birthright is everything. "As it is in other kingdomes, corporations and families; the children of all subjects born in a kingdom, are born that prince's subjects; where the father is a free-man, the childe is not born a slave: where any are bought to be servants, their children born in their master's house are born his servants. Thus it is by the Lawes of almost all nations, and thus hath the lord Ordained it shall be in his kingdome [i.e., in the church]." For Marshall as for the Church of England, a child inherits the status of the parent as a Church member just as a child inherits the status of the father as a subject, free-man, slave, or servant. Marshall pointedly did not distinguish himself from the "Orthodox Church [the Anglican]": his point was to argue for infant baptism as a possibility (except for "Indians" and "Turks,") although he did focus on the easiest case, the children of professed believers.<sup>7</sup>

Perpetual status was also enshrined in land ownership, by means of the legal institutions of primogeniture and entail (which also governed the transmission of titles). The statute "De Donis Conditionalibus" (1285) that formed the core of "feudalism" in England (such as it existed) dictated that the natural way for land to descend after a person's death was according to the rules of primogeniture. (In England this meant all land would go to the eldest son, or if no son, to the daughters). Those who owned land could not freely designate the person who would next inherit it. After some reforms (especially a law of 1540 passed under Henry VIII, and also Henry VIII's liquidation of the monasteries) it became easier for testators to choose who would inherit their land, but only for a while. Due to that thirteenth-century statute, "De Donis" land once again began falling into a kind of locked inheritance, despite Henry VIII's reforms. If a testator once designated

that the land should descend via primogeniture, it was supposed to do so "for ever." This permanent inheritance by primogeniture was called an entail.

Entails in their ideal form were impossible to break. The land could not be sold or mortgaged. It could be leased only under certain conditions. In practice, English lawyers developed some strategies for breaking entails (fines and common recoveries), so that the land could be sold to pay off a debt, for example. But even these were difficult to invoke. Several of Jane Austen's novels, for example, revolve around entails—which the families are unable to break, and lead to the women, in particular, being put in difficult positions. In *Pride and Prejudice*, Mr. Bennet had inherited his estate in a male tail (a type of entail that barred females from inheriting). The rules required that the consent of the "next heir" be gained before such an entail could be broken; in order to revoke an entail, the person who was supposed to inherit thus had to agree that he would not receive the land. The problem is obvious: The distant cousin who was to inherit, Mr. Collins, would never have agreed to breaking the entail; he was not even asked.<sup>8</sup>

Likewise, lesser forms of land ownership could be hereditary. A person could lease a farm for "three lives," meaning his own life and that of his next two heirs by primogeniture—although these usually also specified a maximum of twenty-one years. Copyholds—the remnants of feudalism—also descended by primogeniture.

These three interrelated types of perpetual status—political and religious and economic identity—were key parts of the laws of England in the late sixteenth and early seventeenth centuries and were approved of by many, particularly those in authority. This was the way the world should be.

They were not, however, completely traditional. Indeed, the first "historians" to discover and define medieval feudalism were doing so in the context of the ideological debates over perpetual status in the early seventeenth century. In defining medieval feudalism, they were searching for legal precedents and principles to justify their ideals of absolutism. They were trying to create a model of a past that should influence the present. Others, by labeling "feudalism" as a product of

the Norman conquest, sought to idealize different precedents and ideals, in pre-Norman, Anglo-Saxon laws and norms.

This historical debate over feudalism had wide political impact and implications. More than a century later, for example, Thomas Jefferson would glorify Anglo-Saxon freedoms and repudiate Norman feudalism.<sup>9</sup> Feudalism in seventeenth-century England, then, was hardly dead. Pure feudalism, with its double-sided obligations and services and oaths of loyalty, undoubtedly was, if it had ever existed.<sup>10</sup> But important elements of what these seventeenth-century historians labeled feudalism were embedded in the law and, in the context of these debates, were being idealized and glorified. These included the entails, discussed above, and some types of personal status (e.g. the statute of Artificers drew on principles related to villenage).

Elements of feudalism and hereditary status also included the layers of land ownership. Often king, lord, and commoner all had some claim, layered claims, if you will, to the same piece of land. The king gave the land to his "tenant in knight service"—a lord—and in exchange the lord owed some obligations (and the land still really belonged to the king and could revert to him). The tenant in knight service in turn leased the land under, for example, a copyhold, to the commoner. And that copyhold could itself contain certain rights, including access to common land. These claims were often hereditary.

Indeed, the enclosure movement in England between the sixteenth and the early nineteenth centuries, which historians have usually seen as capitalist, was in other ways neo-feudalistic, albeit invoked to limit the traditional rights of the poorer and middling sort. By enclosing common lands and using them for their own purposes (and preventing common people from growing crops or grazing cattle or sheep on them) the lords increased their own hereditary authority. While this did lead to a concentration of capital, it also grew out of a glorification of, if you will, absolute lordship. Even the terms under which the new enclosures were created invoked older feudal norms: they wanted to make it seem as if these reforms had some basis. Modifications of the term villein, for example, were used to describe those who would be tenants in new cottages built to replace the old.

These legal norms about feudalism and perpetual status were fiercely debated and even fought over in the English Civil War and the Glorious Revolution. The debates and wars made the connections between laws and systems of power explicit; they illuminated the connections between monarchy, aristocracy, and inherited status generally.

The key group to lead the opposition to inherited status, whose effort to limit the authority of Charles I led first to civil war and finally to beheading him, were those we now call Puritans or, after the Civil War, Dissenters (meaning they "dissented" from the Church of England and refused to worship there). Many Puritans (not all) moved from arguments about consent to church membership to arguments about consent to government. John Milton, for example, wrote political pamphlets in the 1640s that celebrated the legitimacy and rightful authority of the commons—true government should be based on the consent of the governed. Whether one looks at the Putney debates (wherein Cromwell's soldiers debated the legitimate boundaries of consent) or the laws passed by the House of Commons, which required oaths of allegiance from all men—consent of some kind, as opposed to hereditary obligation, was clearly critical to those who fought with Cromwell on the side of Parliament. As Colonel Rainsborough stated during the Putney debates of 1647: "every man that is to live under a government ought first by his own consent to put himself under that government." Indeed, the question of consent was arguably the most important issue during the trial of Charles I.<sup>11</sup>

The religious argument—that they were born to be members of the Church, just as they were subjects of the kingdom—honed their objections to their political status. Indeed, one of the critical questions of the seventeenth century was "infant baptism," about which literally hundreds if not thousands of tracts were written. John Tombe, a self-described "antipaedobaptist," took the lead in arguing against the Anglican position about Church membership. "Christianity is no mans birth right" but comes only by "free election of grace, and according to Gods appointment." Baptism should be a matter of election and choice, not inheritance: "In the confession of baptism, every ones free choice is shewed. . . . None were to be baptized, but such as shewed their own free choice by confession."<sup>12</sup>

Under Cromwell (a Puritan) they not only executed King Charles I in 1649, ending his lineage and kingship itself, but also abolished the House of Lords. They thus destroyed the twin bastions of hereditary authority in the English system. While Cromwell anointed himself Lord Protector and did not hold viable elections for Parliament (partly because of a fear that those elected might literally condemn those who had participated in the execution of the king), the Interregnum rump parliamentary sessions are marked by constant discussion on the topic of consent and new elections.

At the restoration of Charles II in 1660, not only the king was restored (and his progeny by primogeniture) but also the hereditary House of Lords. At the same time, one of the critical questions asked of ministers (many of whom had received their positions during the almost twenty years of Puritan control) was whether they held to the Anglican position on hereditary Church membership. If they did not, they would be dismissed. More than two thousand were thus removed by 1662.

Literally all of the authors writing in seventeenth-century England whom the American Revolutionaries cited and quoted as the basis for their Republican ideology were Dissenters. Whether writing in the context of the English Civil War, or of the Glorious Revolution in 1688–1689 and the decade of crisis that preceded it, they extended the religious arguments against inherited status and for consent to political theories. While John Locke developed these most clearly (and was undoubtedly the most influential), others, from James Harrington to Algernon Sidney, were inspired by the religious controversies to shape new theories of government based on the consent of the governed.<sup>13</sup>

The Glorious Revolution was undoubtedly only a partial revolution, in that it did not fully adopt the new theories. Parliament got rid of one king but chose other monarchs (a queen and her husband). They exerted some control over the dominance of inherited right and limited the absolute power of kings, but did not dispense with the principles. Still, many of the books written during the decades before and after had more radical positions about inherited right. Indeed the clear implication of

popular books such as Gordon and Trenchard's *Cato's Letters* (published first in serial form in the 1720s and reprinted four times in the colonies) was that inheritance was the worst way to choose a king. A prince always grows up spoiled and without self restraint, by definition.<sup>14</sup> While they did not propose doing away with the position of monarch altogether (and indeed, one could not do so openly without threat of prosecution for treason, and had to fight to evade the official censors), their implication was that rulers should be chosen.

John Locke, who came from a Dissenting background (his father fought with Cromwell), was one among many obsessed with questions of hereditary status, although he argued more strongly against some aspects of it than others. His *Essay on Toleration*, for example, contends that "nobody is born a member of any church; otherwise the religion of parents would descend unto children, by the same right of inheritance as their temporal estates, and every one would hold his faith by the same tenure as he does his lands, than which nothing can be imagined more absurd."<sup>15</sup> Whereas Locke expressed some tolerance for hereditary lands, he did try to modify it by critiquing primogeniture: The first treatise of his *Two Treatises of Government* is an argument against inherited power and inherited status generally. Indeed, Puritans—including John Winthrop, who was a member of Parliament in the 1620s, tried to modify the rules about inheritance of land via primogeniture: they argued that all of a father's children deserved some share. Granted, this was not as radical a position as might be taken (they were not arguing that all children in the kingdom deserved a share of land), but it was still a significant amendment to hereditary norms, in that such a policy would gradually break up estates.

Republican/democratic ideology challenged that older system of status. Should the child have the status of the father—or the mother? Can the status or the actions of the father or the mother bind the child permanently, and all their posterity? The answer for the democratic/republican political theorists of the seventeenth century was a resounding no. They gave a very different answer than the Royalists had given.

On the question of hereditary slavery, Locke, for example, was unequivocal. Even in the case where a father has made war in an

unjust manner, and agrees to serve another in exchange for his life (the only case where Locke allowed any semblance of slavery), the father can never bind the child. "I say this concerns not their children who are in their minority; for since a father hath not, in himself, a power over the life or liberty of his child, no act of his can possibly forfeit it. So that the children . . . are freemen." He continued in the same vein at length.<sup>16</sup>

Locke's *Two Treatises of Government* offers a resounding critique of slavery on the grounds that slavery cannot be inherited:

*The absolute power of the conqueror reaches no farther than the persons of the men that were subdued by him, and dies with them; and should he govern them as slaves, subjected to his absolute arbitrary power, he has no such right or dominion over their children. He can have no power over them but by their own consent, whatever he may drive them to say or do; and he has no lawful authority whilst force, and not choice, compels them to submission.*<sup>17</sup>

"He can have no power over them but by their own consent" gets at the heart of the political system that Locke was constructing. One is not born to a status. One can choose one's status, and that choosing must not be forced. This ringing indictment of slavery as it was then developing in England's empire is unequivocal. The only bound labor that Locke condones is in fact a kind of contract-bound indentured servitude, within which the servant has significant rights. Throughout his treatise, he develops ideas about what free choice means: in the case of labor contracts, as others, valid consent should be free from influence and force. The person agreeing to labor had certain rights which he cannot grant to another, which he cannot alien, including the responsibility of providing first for himself and his family. And the implication of Locke's extended meditation on political contracts is that unjust contracts, whether political contracts or for one's labor, can be broken (are voidable).<sup>18</sup>

Although Dissenters tended to cluster on one side of these arguments (to support consent) and Royalists and many mainstream Anglicans on



the other (to support hereditary authority), one should not be too simplistic about these categories. While religious arguments were affecting and shaping the political, the arguments were far from simple. The Reformation bore within it divergent claims for the basis of authority, whether in birth or consent. Ironically, both the absolutist arguments about monarchy and the most radical ideas about consent and equality were strengthened by the Reformation. The divine authority of kings and their role as “fathers” of their country—and even the emphasis on the fifth commandment—were profoundly strengthened by arguments coming out of the Reformation. On the other hand, Luther’s priesthood of all believers, who could interpret the Bible for themselves, had radical egalitarian implications. Thus in some sense both sides in the English Civil War were making arguments that were partly shaped by the legacy of the Reformation.

These English controversies helped to shape the institutional structure, legal norms, and culture in the colonies. Since the focus of this essay is on the colonial South, I can only say a few words here about the “Puritan” colonies. Suffice it to say that in reading the laws of Massachusetts side by side with those of England and Virginia, it is clear that Massachusetts was anything but traditional. The Puritan colonists fashioned a new set of inheritance laws that favored partible inheritance and they refused to enforce entail. They wrote a new set of laws and reconsidered nearly every English norm, from criminal to civil laws. Who should vote? They connected it to church membership, age, gender, and property ownership. Neither of the first two applied in England, and New England Puritans set property qualifications lower. They elected all levels of their political and religious authorities. This is not to argue that the Puritans who settled in New England were as radical as Protestants potentially could be—they were not. On questions from elections to banishments from church membership (which by the 1640s they had agreed could be quasi-hereditary), they compromised. Most were not “levellers.”

Still, in 1641, Massachusetts took a very similar position on slavery to that which would be taken by Locke forty years later. In a law entitled

“Bond-Slavery” they wrote: “There shall never be any bond-slavery, villenage or captivitie amongst us; unlesse it be lawfull captives taken in just warrs, and such strangers as willingly sell themselves.” While they did capture and sell prisoners from their Indian wars, and did eventually allow some slavery, they never developed the complex of laws that many other colonies did.<sup>19</sup> The nature of their exception is very important to understanding the debates over slavery and bond labor in the seventeenth century: they allowed it only, essentially, as punishment for what they regarded a crime (as punishment for starting, they argued, an unjust war), and/or on the basis of direct consent (so it was neither forced nor hereditary).

While historians have often seen Puritans as traditional—pointing to the ways, for example, that New England towns modeled themselves after small towns in southern England—their stands on the question of hereditary status were anything but. With respect to those towns, for example, they made one especially critical institutional difference—there was no lord who owned the town and from whom the townsfolk leased their land. Instead, each settler family was given roughly equal portions of land, which they owned free and clear. There were of course some freeholds in England in the seventeenth century, but they were the exception, not the rule.

In short, New England was not traditional—but in many ways the southern colonies were. With the exception of the slave code, Virginians made virtually no criminal laws, for example, and simply followed British ones. Indeed, it is striking the degree to which Virginia seemed to follow English laws (and not create their own). Even when one focuses on the slave code, it becomes clear that they were basing it on English norms as imprinted in their law books. Winthrop Jordan’s *White over Black* suggested some years ago that there might be a link between the “feudal laws” on the law books of England and the origins of slavery, although he was quick to point out this was only a mild influence. I see a much stronger connection. While medieval feudalism, such as it existed, was dying out in England, it was being given a new lease—and a new form in the colonies—by the ideologies underlying absolute monarchy and perpetual status.

Much of the basic structure of colonial Virginia laws favored the development of an aristocracy via laws that encouraged perpetual status. Whether one examines issues of land distribution, laws of status and inheritance, or the structure of government itself, all favored the development of a society modeled after England and (after Virginia was taken over as a Royal Colony in 1624) ideally the creation of a society that was shaped by the king. Unlike Maryland, Virginia headright policy, for example, sharply favored the master. During the 1610s, most servants who went to Virginia were promised the right to fifty acres of land as well as other freedom dues after they completed their term of service. But after about 1620 the right to patent fifty acres of land went not to the imported servant, but to the person who imported that servant (or later slave). Indeed, at certain points, the importers of multiple servants/slaves were actually given what can only be described as bulk bonuses. In the law of 1705, for example, the owner of five slaves was allowed to patent five hundred acres of land (or one hundred acres per slave). For each additional slave he owned, he could claim two hundred more acres, up to a total of four thousand.<sup>20</sup>

Even if one had a headright claim (which could be bought by a freed servant), in order to translate that into actual land one needed to have land properly surveyed and approved by the secretary of the colony (a position appointed by the governor). Depending upon the secretary, this could involve substantial difficulties, unless one were a friend (or made oneself into a friend). The ability to gain new land also depended upon its availability (it also had to be obtained from the Indians first). Tensions over these questions came to the surface during Bacon's Rebellion, but they never rested long underneath. Freed servants could become squatters, of course, but they had no legal title to the land they occupied—nor to any improvements they had made upon it.

One other important way that land distribution policy favored the formation of an aristocracy—and in some ways an explicitly feudal one—was a policy set in England by the Stuart kings: the great proprietorships. Various kings—especially Charles I and Charles II—regarded the empire on the other side of the Atlantic as so many potential gifts at their disposal. Granted (indeed, sometimes doubly granted in competing

claims) by these kings as favors and rewards (or in exchange for large sums), much of the land (sometimes including the ability to choose political authority, as well) went to great proprietors. Barbados, Bermuda, Maryland, the Northern Neck of Virginia, the Carolinas, Maine, Pennsylvania—all were granted to great proprietors. These proprietors, in turn, rarely sold the property in their colonies free and clear. They retained ownership and distributed land with attached quit-rents. The layers of ownership are part of what was then called feudalism. To give only one example of what this meant: to get rid of the Penns' claim to Pennsylvania, the revolutionaries there confiscated all of the 21 million acres.<sup>21</sup> The proprietary right descended by the rules of primogeniture, and often included official titles for the proprietors. The fact that these lands were given away on these terms by Charles I in the 1630s and Charles II immediately in the wake of his restoration, particularly to those who helped place him on the throne, should tell us something about the connections of these rights to monarchical structures and hereditary ideology.

The connections between hereditary slavery and the Restoration are even stronger, in both time and ideology. Hereditary slavery, where the child inherits the status of the mother, became the law of Virginia in 1662, in the wake of the Restoration. The laws welcoming Charles II and his lineage back to the throne were passed in close conjunction with that justifying hereditary slavery. Before 1662, those forcibly imported from Africa were treated similarly to the whites who came as servants in that they were both freed after some years. Likewise, the first laws in Barbados creating a slave code date to 1661. While keeping people of African descent as "perpetual" servants, and making their descendants into servants or slaves as well might have antedated the laws in practice (more clearly in Barbados than in Virginia), formalizing these practices and giving them a structure of enforcement was critical to creating these societies.<sup>22</sup>

Colonial historians like to imagine that the politics of the colonies and those of the mother country are somehow separate. Yet they were anything but. William Berkeley, first appointed governor of Virginia by Charles I in 1642, was a devout supporter of the monarchy for the next

thirty-five years, so much so that Charles II rewarded him in 1663 with an hereditary proprietorship of Carolina for his help in "restoring" him to his throne. Berkeley's Royalist pedigree was well formed and consistent; his ideological awareness acute. When he heard that members of Parliament had tried and beheaded Charles I, Berkeley called together the Assembly and Council of Virginia, which passed a law under his direction that made it high treason (punishable by hanging, drawing and quartering) to even speak about the trial or beheading of the king (or the legitimacy of Parliament's actions) with any favor.

Anyone who questioned the legitimacy of Charles II, or the authority of Berkeley himself as governor, was likewise to be punished. "Whereas divers [people] out of ignorance, others out of malice, schisme and faction . . . asserting the cleerness and legality of the said unparalleled treasons, perpetrated on the said King, doe build hopes and inferences to the high dishonour of the regall estate and in truth to the utter disinherison of his sacred Majesty that now is [Charles II], and the divesting him of those rights, which the law of nature and nations and the known lawes of the kingdom of England have adjudged inherent to his royall line, and the law of God himselfe . . . hath consecrated unto him."<sup>23</sup> The text of the law makes clear the legitimacy of monarchy, and of Charles II. The right to be king is "inherent to his royall line" as "consecrated" by God himself. The word "disinherison" is important: it refers explicitly to the legal manner in which Charles II became king (by inheritance by primogeniture) with the death of Charles I. This was a law that honored perpetual status: the "law of nature and nations" as well as those of England had lodged the right to be king "to his royall line."

In a larger ideological sense, Berkeley opposed all of those institutions which might encourage anyone to think differently about monarchy. In 1671 he wrote in a letter to the Lords of Trade and Plantations, "I thank God there is no free schools nor printing [in Virginia] and I hope wee shall not have these hundred years, for learning has brought disobediences and heresy and sects into the world and printing had divulged them, and libels against the best government. God keep us from both." Under his rule, the nascent college established in Virginia in the 1630s had dissolved by the 1640s.<sup>24</sup>

Virginians of all sorts, in other words, richer and poorer, could hardly have been unaware of the political disputes in England. The story of the public trial and beheading of Charles I, in particular, was one that traveled far and fast. When the British fleet actually sailed up the James in 1651, however, it was clear that the Royalist Virginians had no real defense. Commissioners sent by Parliament negotiated a new government with the House of Burgesses, which led to a more powerful House of Burgesses, with a governor elected by themselves (rather like a prime minister) and Puritans in some prominent positions. Only those who swore an oath of allegiance to the new ascendancy of Parliament were permitted to vote, and the commissioners supervised the election of the new House of Burgesses. Upon rumors of a possible restoration of Charles II to the throne in 1660, however, Virginians—with Berkeley newly restored as their proper head—were among the first to offer their support. Royalist supporters of Charles I fled to Virginia in the 1650s and continued to be welcomed there in the 1660s.

If one sees the English Civil War as a struggle between authority based on hereditary right versus one based on consent, then restoring the king and his lineage to the throne was parallel to making slavery hereditary. One was born to a status. That was the ideology that had just been restored to the throne of England.<sup>25</sup>

Virginia laws after 1661 drew deeply on the precedents set in Barbados. Even before Barbados set a slave code in 1661, one observer, Richard Ligon, claimed that sharp differences already demarcated the treatment of "servants" from "slaves" by 1650, in that slaves were held perpetually and their status descended to their children. At least one Barbadian planter thought he was following the "laws of England" in his treatment of servants and slaves and the distinctions between them: "by those Lawes, we could not make a Christian a slave" yet it was fine to make a heathen one. (Ligon had asked him to let one of his slaves be baptized, to which the planter replied no, because then he would have to free him, and it would set a bad precedent for other slaves.) Another visitor, Charles de Rochefort, tried to offer a justification for slavery. He maintained that the "slaves, and such as are to be perpetual servants, and are commonly employ'd in these islands, they

are originally Africans." He claimed that some entered slavery voluntarily, both for themselves and their children: "some are reduc'd to a necessity of selling themselves, and entering into a perpetual slavery, they and their children, to avoid starving." Others, he claimed, "are sold after they have been taken Prisoners in war by some petty neighbouring Prince." While Rochefort's comments were superficially similar to Locke's justification (which drew, by the way, on Hugo Grotius), they were different in several critical respects: fathers also sell their children, it is perpetual (not temporary), and de Rochefort did not care whether it was a just war or not. The latter arguments, of course, could apply to anyone, whether English and Christian or not.<sup>26</sup>

It is critical to note that Barbados was almost completely controlled, even more than Virginia, by Royalists. There, the Commonwealth takeover was brief. Barbadian politics were complicated, partly because of overlapping and disputed grants of the island by King Charles I (so that at least two different men had claims to be Lord Proprietor, with the right to choose a system of government). Royalists set the earlier policy of perpetual enslavement, even if not yet legally enshrined.<sup>27</sup>

While hereditary and perpetual slavery was different from what then existed in England, it is not as different as we would like to believe, as the practice of kidnaping makes clear. Many English subjects were forced into servitude in the New World, just as Africans were, neither signing contracts nor consenting in other ways to their transport or labor. Both English and Virginian authorities essentially agreed to allow, if not encourage, kidnaping during most of the seventeenth century, as both laws and practice reveal. Historians have long acknowledged the many court records from seventeenth-century Virginia that adjudge the age of imported servants. Servants who arrived without contracts served a length of time that was determined by their age. If imported at age eleven in the 1680s, for example, as some were, one would have to serve thirteen years (until age twenty-four). If imported at fifteen, then nine years. If imported at twenty-one (or any age above nineteen) then five years.

But why were these servants arriving without contracts? To fully answer that, one must turn to the English courts and to broadsides and

legal debates, debates which finally culminated in kidnaping laws with teeth, but only by the early eighteenth century. Basically, the answer is that as long as the persons taken were poor, and especially if they were poor children (and not heirs), the English authorities—and the English laws—did not much care whether they consented to go. After 1682 (strengthened in 1717), those who left were supposed to consent in front of a magistrate and "searchers" were sent onto ships to ascertain this, and lists were supposed to be kept of those departing. Even these rules were not always enforced, however, and some of the eighteenth-century narratives of former indentured servants relate being kidnaped. That it still went on is supported by English broadsides reporting "Grand Kidnapper at last Taken" and by the continuing Virginia records of age being adjudged for those who arrived without contracts (at least through the mid-eighteenth century).<sup>28</sup>

What does the kidnaping mean? Quite simply, especially when put together with the English poor laws, it means that to a certain degree English society assumed that you were born to a particular status and that the poor would have to work—and did not mind their being forced to work. If an elite person were kidnaped, however, like a four-year-old heir, the authorities rigorously traced the child.<sup>29</sup> Once such kidnaped poor children arrived, they faced a life of similar status, if not worse, than the one they had left. While some mobility was possible for those who came as indentured servants, particularly if they arrived during the first half of the seventeenth century (and survived), the structure of that society made it difficult.<sup>30</sup>

The connections between kidnaping and slavery were clear to the Burgesses as well. The law that made slavery hereditary for the children of an enslaved "negro woman" was passed directly after one of the laws about "servants" who arrived without contracts, requiring that their ages be adjudged, if under sixteen.<sup>31</sup> The Burgesses' minds were clearly on the subject of the status of laboring children and how long they should serve. Still, while admitting that both slavery and kidnaping grew out of norms that accepted hereditary status, freedom at age twenty-four was better than never, even if one did not live for very long afterward, or begin freedom with many resources. The Burgesses

were also forming distinctions between "Christians" and heathens, between "Englishmen" and "Negroes." Instead of seeing forced, hereditary slavery as from the beginning associated with blackness (and climatic necessity), we should see it as part of English norms about status. As the treatment of whites and blacks began to be differentiated, religion played more of a role than race.

After 1705, in reforms that began in the late seventeenth century, the Virginia laws about slavery became ever more connected to a larger complex of laws about perpetual status. Virginia laws allowed people who were enslaved and their progeny "for ever" to be entailed (so that they could not easily be sold away), with both slaves and land belonging to the "head" of a family lineage "for ever," such that ownership descended by primogeniture. Both entail and slavery enshrined perpetual status. While entails were honored from the very beginning of the seventeenth century in Virginia, after the 1705 legal revision entails became much more difficult to break than they had been in England. To break an entail after 1705 required a specific act of the legislature. A revision of 1727 allowed masters to attach slaves to a parcel of entailed land (perpetually) rather than directly to a personal lineage. In principle, this meant that slaves could not be sold. However the way the law was written did allow entailed slaves (unlike entailed land) to be attached for debt, so if the owner was willing to do a legal run-around, it was possible to sell an entailed slave.<sup>32</sup>

These laws (which books like Morris's *Southern Slavery and the Law*, which focuses on the nineteenth century, do not mention) were very different from those of the nineteenth century. Slaves, while designated "real property" under these laws, were also very much people. Indeed, the comparison to medieval villenage is more than an imaginary one. Virginia legal authorities saw the similarity as explicit. St. George Tucker's edition of *Blackstone's Commentaries . . . [for] Virginia*, probably the most important single legal text published in Virginia in the early nineteenth century, claimed that before the Revolution in Virginia all slaves had the status of villeins. As late as 1848, Henry Augustine Washington blamed entail, which he saw as feudal land law, for slavery (which he saw as feudal personal law). Despite the

Revolutionary dispersing of entailed estates, slavery was left, "a fragment of the feudal system floating about here on the bosom of the nineteenth century."<sup>33</sup>

For the 1705 revisions, in particular, we have some information about who wrote them and supported them, unlike for earlier Virginia slave laws. William Fitzhugh seems to have been the primary author of the 1705 reforms—even though he died in 1701. He had been working on revisions for some time, and seemed to have based his legal knowledge on an extensive reading of the various volumes of Sir Edward Coke's *Institutes of the Laws of England* and the *Statutes of the Realm* of England, for it was these he cited most frequently in his legal notations. He also carefully collected all previous Virginia laws. The most important of the *Institutes* was Coke's volume one, which was often called by contemporaries *Coke upon Littleton*. Realizing this is critical, because Littleton, on whose treatise Coke commented in this volume, is the classic feudal treatise on land and personal status (but especially the former), written in the late fifteenth century. One does not necessarily have to embrace feudalism after reading *Coke upon Littleton* (indeed, Coke offered subtle critiques), but Fitzhugh was certainly well familiar with this part of English legal tradition. If he wanted to provide "precedents" for Virginia slave law, he had them laid out before him. Fitzhugh entailed the whole of his estate (some fifty-one thousand acres) on his five sons. Fitzhugh left few overt statements of his political opinions, but the few clues indicate he was high Tory. Indeed, he was prosecuted in 1693 for asserting that James II's son was a rightful heir to the throne and criticizing those who questioned the legitimacy of James II's lineage: "[Fitzhugh] wondered what they would have to say now about the legitimacy of that prince."<sup>34</sup>

Robert "King" Carter, who pushed through the later revisions, was also well-versed in English feudal law. Although he claimed to be "no Tory" (the term was tainted after 1715 and the accession of the house of Hanover, during which "Tory" Royalists tried to restore the line of James II to the throne), he clearly supported hereditary and proprietary interests (he was agent for the proprietor of the Northern Neck, during which he acquired much of his fortune). He owned more slaves and

land than any other Virginian at his death in 1733, and left all—slaves and land—in perpetual entail, with the slaves and their progeny attached to the land.<sup>35</sup>

Entail became a powerful institution in colonial Virginia, one that probably controlled three-fourths of the land in Tidewater Virginia by the time of the Revolution. Thomas Jefferson, who led the struggle to get rid of it in 1776, claimed that it was the most important single thing he did in implementing Republican ideology and “striking at the root of landed aristocracy.”<sup>36</sup>

Many other key institutional elements of English origin helped to create a society that encouraged hereditary status. Government was based only partly on the consent of the governed. Although there were no hereditary titles in the colonies (aside from the Great Proprietors), in most colonies many officials, from governor to council to judges and other officials, were appointed either directly by the king or indirectly via the governor. The Anglican Church was the established church in Virginia, as well as much of the rest of the South. It exerted a powerful influence in Virginia, especially. Its catechisms and set sermons (prepared in England and performed in a rote-response manner) often encouraged obedience to authority and the divine right of the king and his lineage to rule.

The sermons of Richard Allestree (one of Charles II’s favorite ministers), which went through dozens of editions in the late seventeenth and early eighteenth centuries (including one in Virginia in 1748), embody both of these traits. He encouraged passive obedience to all superiors. He said nothing about consenting to that authority: God places you in a condition to which you must accustom yourself. Allestree was very popular in Virginia, and was in almost every gentleman’s library in the early eighteenth century. An almost direct echo of Allestree was published in Maryland in 1750, but it was adapted especially for slaves. It instructed slaves that obeying their master was equivalent to obeying God. They were told to obey their master even if they believed he was ordering them to do something evil, on the grounds that only God (not they) could judge him. This sermon thus explicitly enshrouded a master in the king’s divine robes.<sup>37</sup>

The continuing articulation of slaves as “property” after the American Revolution was part of a neo-feudal ideology where property and status were, ideally, fixed by lineage and within which people—villeins, tenants, servants—were also property. But it was also different: in some ways, after the Revolution, those enslaved became, legally, less people, and more property, in a shift of the balance. It did so because the Revolutionary ideology explicitly rejected these norms that honored hereditary status.

In short, I am seeking to raise a significant challenge to traditional interpretations of the origins of slavery in the southern colonies based simply on arguments about climate and the ability to grow staple crops. Instead, I question how and why land and status became distributed and inherited as they were, how the laws shaped these patterns of distribution and inheritance, and why these laws were passed. Only then can we return to how patterns of distribution and inheritance shaped the desire to produce intensively for markets, the question on which most historians have focused. Ideology needs to be woven back into a much more prominent position. It is only by understanding the law of perpetuities and the pattern of the implementation of those laws that we can unravel the powerful role of ideology. Exploring how these laws were implemented and what patterns were followed can give critical insight into the way that ideology shapes laws and how those laws can in turn set patterns of development within the British Empire as a whole.<sup>38</sup>

The ideas about perpetuity, although restored in 1660 with Charles II, were not new. As the evidence from Marshall in 1644 suggests, there were deep strands in English thought and practice which emphasized birth status, whether in terms of subjects, church members, servants, or slaves. In adopting this strand in their colonies in the seventeenth century, Virginia (and Barbados, and later South Carolina and other colonies) were not creating something altogether new. They were modifying an older set of ideas to a new situation.

By emphasizing the ways they incorporated birth status, I do not mean to suggest that they repudiated the opposing strand of English

liberties. They did not. Especially during the eighteenth century, that strand grew in strength in Virginia, with the establishment of a printing press, a college, and the growth in power of the House of Burgesses by the mid-eighteenth century. With the Revolution, they repudiated inherited right in many ways—abolishing entail, creating an elected governor and senate, etc. Yet slavery remained.

For Americans today, perpetual status is a very difficult issue to get our minds around. Even for Britons today, it is difficult, but they understand it, because their newspapers still debate it. (Witness the recent loss of power among hereditary peers in the House of Lords. The newspapers in England in 1998 and 1999 repeated many of the ideological debates of the American Revolution over hereditary right. During the summer of 2001, the Scottish parliament was debating abolishing the remaining feudal rights of lords (which give them immense power over leaseholds) because some of those have recently been invoked, and too harshly. Only about two hundred people own most of the land in Scotland, and the rest live on long-term leaseholds. The recently deceased Duke of Sutherland owned about 1 million acres in England and Scotland, virtually all of it entailed. The Duke of Westminster owns a large part of London (two-thirds by some estimates), and most of the houses for sale in London are available only as long-term leases (not freeholds) as a result of an entail broken only in this century (because of inheritance taxes, the family sought to skip a generation).

Fully understanding these ideas about hereditary right and obligation will take more work. They were, for example, not only English. Spanish colonization enshrined many of these ideas before the English did, and provided a model for them. Its *encomienda* system was a variant of entail, and they also practiced, earlier, hereditary and perpetual slavery. While the Spanish colonial model clearly influenced the English in practice, it may also have done so in principle. Yet they might also have common roots in European feudalism, such as it existed and was expanded into empire.

Two sets of conflicting ideas about power and authority were pouring out of England in the seventeenth century, one of which emphasized

the consent-based authority of an elected legislature, and one of which emphasized hereditary authority and obligation. The latter was, in many ways, the more traditional, and deeply embedded in law and practice. Until we acknowledge both we will not understand colonial British society, particularly in the South. Arguably, we would still have slavery today without the ideological shift that emerged in religious debates over consent and status, and took fuller form during the American Revolution.