Divesting the Vestries

Courts, Legislatures, and the Many Definitions of Religious Establishment in the Early Republic

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Abstract

Historically, the debates on the Virginia Statute for Religious Freedom have informed jurists as they traced the contours of the First Amendment's prohibition on established religion. However, these struggles over the role of religion in Virginia did not end with James Madison's Memorial and Remonstrance against Religious Assessments. The debates over what constituted a religious establishment in the Commonwealth continued throughout the period of the Early Republic as members of the revolutionary generation and their children grappled with the inherited establishment of the Anglican Church. These debates culminated with an 1802 Act of the General Assembly which enabled the largest confiscation of church lands in the Anglo-American world since the Henrician dissolution of the monasteries in 1536. Despite the scale of this dispossession, this later period of the Virginia debates is often overlooked in the history of the American religious liberty. In investigating how the confiscatory 1802 Act survived decades of legal challenges, this paper explores the multiple definitions of religious establishment that critics and supporters of the legislation marshalled to their respective causes. These legal challenges demonstrate that intense disagreement over what constitutes an established religion have always inflected the debate over the role played by religion in American public life.

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INTRODUCTION

Following the Declaration of Independence from the British Empire, the Commonwealth of Virginia was faced with the uncomfortable question of what ought to be done regarding the Anglican Church within the Commonwealth. The Church of England presented a dichotomy between the fledgling state and Britain since it represented a large and influential religious hierarchy within the former colony's borders while at the same time being inextricably linked to the legitimacy of the English Monarchy. In 1784, the Anglican Church in Virginia was reincorporated in Virginia as the Protestant Episcopal Church, and some members began to hope for a future in which the Episcopal Church would be restored as the established religion of the Commonwealth[1] However, the growing number of religious dissenters feared the resurgence of a repressive religious establishment and thus sought to counteract any attempt by the Episcopalians to reclaim their former position of prominence.[2]

The conflict between these two camps prompted a sustained legislative contest as the Episcopalians and dissenters clashed over every aspect of Church and State relations and embarked upon dramatic attempts to recodify their respective policy preferences on the issue of religion. Over time, the power and influence of the Episcopalian church began to wane as the group failed to keep pace with the rapidly growing Baptist, Methodist, and Presbyterian denominations. From mid-1780s onward increasing influence of the Baptist and Evangelical dissenters within the western part of the state gave these groups significant leverage within the state legislature. As a result of these demographic shifts, its soon became clear that any hopes for legislative Episcopalian establishment were doomed to disappointment.

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[1] *See* THOMAS E. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776–1787, at 85–89 (1977).
[2] RHYS ISSAC, THE TRANSFORMATION OF VIRGINIA, 1740–1790, at 280 (1999).

Cognizant of their increased political power, the dissenters engaged in a concerted lobbying effort designed to promote legislation that would eliminate what they saw as the vestiges of a distant and oppressive Episcopalian establishment. This legislative putsch culminated with the passage of the Glebe Act of 1802, a statute that systematically dispossessed the Episcopalian Churches in Virginia of any lands that they retained by royal grant or that had been donated by parishioners over the years. A "glebe" is a term from ecclesiastical law denoting an area of land that is maintained and rented out by the Church as a form of endowment to supplement the income of a priest or minister at a specific parish.[3] Glebes served as powerful financial incentives to attract ministers to specific parishes while also relieving those parishioners of the burden of continual collections or subscriptions that would otherwise be necessary to pay the churchman's salary. Such monetary inducements were often necessary to convince Episcopalian ministers to relocate to Virginian parishes because at this point most Episcopalian preachers were trained and ordained in England.[4] Since the glebes represented real property held by the Episcopal parishes that provided rents which could be used to supplement the income of the parson, the seizure of the these lands deprived parishes not only of valuable pieces of property, but also of the tools necessary to attract new ministers and remain a viable religious society.[5]

This paper will focus on the dueling conceptions of the issue of religious establishment in the early American republic focusing on both federal and state litigation regarding the constitutionality of the Virginia Glebe Act of 1802. In particular, the analysis focuses on

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[3] *See* Glebe, Black's Law Dictionary (4th ed. 1968); *see generally* 2 FREDRICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF THE ENGLISH LAW BEFORE THE TIME OF EDWARD I 501 (2d ed. 1909) (discussing the history of church lands in English law).

[4] *See* GEORGE MACLAREN BRYDON, VIRGINIA'S MOTHER CHURCH AND THE POLITICAL CONDITIONS UNDER WHICH IT GREW 415 (1947).

[5] G. McLaren Brydon, *The Antiecclesiastical Laws of Virginia*, 64 VA. MAG. OF HIST. & BIOGRAPHY 259, 275 (1956).

contrasting the cases of *Turpin v. Lockett*, a Virginia Supreme Court of Appeals case upholding the act under the Virginia Constitution, and *Terrett v. Taylor*, a United States Supreme Court case holding that the Act was an impermissible impairment of vested rights.[6] However, this discussion is influenced by the subsequent Virginia Supreme Court of Appeals case of *Selden v. Overseers of the Poor of Loudoun*, which affirmed the constitutionality of the 1802 act as a valid exercise of the state's legislative power in spite of Justice Story's opinion in *Terrett*.[7] A close reading of the different jurisprudential approaches to religious establishment adopted by Judge St. George Tucker and Justice Joseph Story in their respective opinions demonstrates how these doctrinal differences represented fundamentally different approaches to the role of state legislatures.

In pursuance of this inquiry into religious establishment, Section I of the paper describes the history of Anglican Disestablishment in Virginia following the American Revolution and the political conflicts that emerged over the proper relationship between the state government and the formerly established religion. As part of this discussion, the paper will review the complex statutory history that contributed to the Episcopalian Church's claims of vested rights in the lands formerly held by the Anglican establishment. Section II explores the initial challenge to the Glebe Act of 1802 in the Virginia state court system and how political pressures influenced the Virginia Supreme Court of Appeal's ultimate disposition that the act was a constitutional exercise of legislative power. Despite this focus on the impact of external political considerations on the decision, this section will also examine Judge St. George Tucker's determination that the vested rights doctrine applied only to private individuals and thus did not adhere to any property rights of an artificial person such as the Episcopalian Church. In contrast, Section III investigates how a

[6] Turpin v. Locket, 6 Call 166 (1804); Terrett v. Taylor, 9 Cranch 43 (1815).
[7] Selden v. Overseers of the Poor of Loudoun, 11 Leigh 127 (1840).

later and separately arising challenge to the Virginia Glebe Act provided Associate Justice Story a vehicle to expand the doctrine of private rights as a curb on the excesses of state legislatures. The fourth and final Section examines how the Virginia Court refused to implement the vested rights rationale put forward by Justice Story and continued to view the Glebe Law of 1802 as a valid exercise of legislative power.

This analysis will illustrate how the doctrine of vested rights was used to imply substantive, non-textual constitutional protections as a method of curbing the perceived excesses of popularly elected legislatures. A close reading of these cases will also demonstrate how jurisdictional concerns and institutional intransigence limited the federal judiciary's ability to enforce doctrinal cohesion from the top down. The vast majority of the historical scholarship on the Virginia glebe cases has cast the issue in stark terms of an unjustified and vindictive land grab, with Sarah Barringer Gordon arguing that Judge "Tucker's reasons for sustaining the forfeiture were never recorded, but history has judged the court's decision as indefensible."[8] This section will evaluate this claim by examining the circumstances surrounding Judge Tucker's appointment and reviewing the primary source record of the materials that he prepared during oral arguments and while drafting his opinion in *Turpin*.

Additionally, this paper will seek to use the issue of church land confiscation in Virginia to illuminate the growing mistrust between the Virginia Supreme Court of Appeals and the Supreme Court of the United States as the conflict over the glebe cases moved from the period of the Early Republic into the ante-bellum social and political environment. In this exploration of the social and political shifts exemplified by these early cases on religious establishment, this paper will be

[8] Sarah Barringer Gordon, *The Landscape of Faith: Religious Property and Confiscation in the Early Republic*, *in* MAKING LEGAL HISTORY: ESSAYS IN HONOR OF WILLIAM E. NELSON 13, 26 (Daniel J. Hulsebosch & R. B. Bernstein eds., 2013).

building on Michael McConnell's analysis of the external forces that influenced the Marshall Court by placing those federal precedents in conversation with the debates that were occurring at the level of the Virginia state courts.[9]

This paper will also seek to develop a clear understanding of the legal reasoning behind Justice Story's decision in *Terrett v. Taylor*. While Alyssa Penick has provided a compelling account of how Justice Story's opinion in *Terrett* used the Contracts Clause in order to counteract Judge Tucker's decision in a way that had dramatic ramifications for some of the Marshall Court's seminal corporate law cases, this seems to conflict with James W. Ely's argument that *Terrett* doesn't implicate the Contracts Clause at all.[10] This paper will chart a middle path between these two positions by demonstrating that Justice Story's conception of vested rights incorporated considerations of natural law and abstract moral reasoning. This discussion will also explore the extent to which the distinction that Justice Story drew between public and private corporations in the context of church lands impacted the Court's later decision in *Dartmouth College v. Woodward*.

I. Revolution and Jeffersonian Disestablishment

The outbreak of the American War for Independence forced a critical reassessment of the role that the Anglican Church played within Virginia government. Despite retaining the "legal supremacy" that it had enjoyed since the founding of the colony, at the time of independence adherents to the Church of England represented "at best a bare majority of the white population"

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[9] Michael McConnell, *The Supreme Court's Earliest Church-State Cases: Windows on Religious-Cultural-Political Conflict in the Early Republic*, 37 Tulsa L. Rev. 1, 13 (2001).

[10] *Compare* Alyssa Penick, *From Disestablishment to Dartmouth College v. Woodward: How Virginia's Fight Over Religious Freedom Shaped the History of American Corporations*, 39 Law & Hist. Rev. 479, 483 (2021) (illustrating a doctrinal through line from the Virginia glebe cases to the doctrinal developments of *Dartmouth College v. Woodward*) *with* James W. Ely, Jr., The Contract Clause: A Constitutional History 57 (2016) (noting that Justice Story's opinion in Terrett is based in the conceptions of natural law untethered from the text of the Contracts Clause).

within the state.[11] The effect of the decreasing membership and religious apathy of most nominal adherents on the Anglican Church in Virginia was compounded by the rise of motivated and politically active religious dissenters, especially in the western counties where the Anglican Church's hold had always been weakest.[12] Reacting to decades of governmental repression that they had suffered at the hands of the established church, the religious dissenters harbored an abiding antipathy for the Anglican establishment.[13] Against this backdrop, the religious dissenters and their allies understood the revolutionary moment as a chance to free Virginia from the yoke both the Crown and Church of England.

1. Eroding Establishment in the Revolutionary Moment

This conflict came to a head during the Virginia Convention of 1776 where the conservative supporters of Anglican establishment clashed with a coalition of liberals and religious dissenters over the proper role of the Anglican church in an independent Virginia. While James Madison's attempt to enshrine religious disestablishment in the Virginia Declaration of Rights was unsuccessful, Madison did manage to modify George Mason's provision requiring religious toleration into an individual right of "free exercise of religion."[14] While relatively uncontested, the insertion of the principle of free exercise into one of Virginia's constitutional documents would exert enormous influence over the post-revolution debates on religious establishment. The novel term "free exercise" lent itself to expansive interpretation and opened the possibility that dissenters

[11] BUCKLEY, *supra* note 1, at 8–9.
[12] JOHN A. RAGOSTA, WELLSPRING OF LIBERTY 20–21 (2010).
[13] The Anglican Church in Virginia sought to limit the spread of religious dissent by having the colonial government impose licensing requirements which effectively prevented un-affiliated ministers from being able to lawfully preach to their congregations. These regulations were supported by fines and the threat of imprisonment. *See* Debra R. Neill, *The Disestablishment of Religion in Virginia*, 127 VA. MAG. HIST. & BIOGRAPHY 2, 6 (2019).
[14] *See* Carl H. Esbeck, *Disestablishment in Virginia, 1776–1802*, *in* DISESTABLISHMENT AND RELIGIOUS DISSENT 139, 140–43 (Carl H. Esbeck & Jonathan J. Den Hartog eds., 2019). For a detailed account of Convention debates regarding Madison's amendments to the Virginia Declaration of Rights see IRVING BRANT, JAMES MADISON, THE VIRGINIA REVOLUTIONIST 241–50 (1941).

would not merely be able to achieve "toleration" by the established church but would be able to eliminate establishment entirely.

Despite its influence on the post revolution debates regarding religious establishment, the Religion Clause of the Virginia Declaration of Rights did not effect a separation between the vestigial Anglican church and the newly formed state. Over the course of the Revolution, "Anglican clergymen were still regarded, in a sense, as officers of the state" and the Anglican vestries "managed the poor relief system and assessed taxes for it."[15] In spite of this continuation of Anglican officials in governmental roles, the dissenters were able to extract a valuable concession from pro-establishment forces in the creation of a new statute that permanently exempted dissenters from Anglican religious assessments while also temporarily freeing the Anglican laity from the tax burden of supporting their church though mandatory tithes.[16] This change injured the core of the Anglican Church in Virginia in a manner that far exceeded the loss in assessment revenue during the war years. As historian H.J. Eckenrode has observed, this concession of the right to collect taxes "in effect, destroyed the establishment" since any attempt to reinstitute the taxes among Anglican parishes would only swell the ranks of the dissenters with tax-averse, erstwhile Anglicans.[17] Thus, while the Anglican establishment retained their governmental function related to poor relief, the seeds of the establishment's destruction had already been sown.

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[15] H. J. ECKENRODE, SEPARATION OF CHURCH AND STATE IN VIRGINIA: A STUDY IN THE DEVELOPMENT OF THE REVOLUTION 46 (Leonard W. Levy ed., Da Capo Press 1971) (1910).

[16] While this statute had the effect of exempting both dissenters and Anglicans from religious assessments, it did not repeal those statutes related to collections for poor relief. As such Anglican vestries were prohibited from collecting taxes for the support of their minister or maintenance of church lands but still retained the power and obligation to collect poor relief contributions from individuals residing within the territorial bounds of their parish. Carl H. Esbeck, *Protestant Dissent and the Virginia Disestablishment, 1776–1786*, 7 GEO. J.L. & PUB. POL'Y 51, 71–72 (2009).

[17] ECKENRODE, *supra* note 15, at 53.

2. Incorporation and the Statute for Religious Liberty

Despite the erosion of the traditional trappings of establishment, the post-revolutionary period was not an inexorable march towards strict separation between church and state. Dismayed at the perceived push towards civil secularism, the conservatives of the General Assembly banded together to pass an act that reincorporated the former Church of England as the Protestant Episcopal Church.[18] Unsurprisingly, this legislative action produced a vehement backlash from the religious dissenters who had yet to receive the privilege of a corporate form for their own religious societies and who feared additional legislation favorable to the Episcopalian Church.[19] Thus, the victory on incorporation contained the seeds of its own destruction as it increased anxiety amongst the dissenters that a reinvigorated Episcopalian church might leverage its political power in the General Assembly to reassert its preeminent position as an established state religion in all but name. Indeed, James Madison, an opponent of state religious incorporation, relished the "mutual hatred" the debates engendered between Presbyterians and Episcopalians since "a coalition between them could alone endanger our religious rights"[20]

The formal incorporation of the Protestant Episcopal Church in 1784 was remarkable primarily for its evanescence. Indeed, less than two years after the enactment of the act of incorporation, the conservative consensus that had prompted this legislative victory had fragmented. Against this growing backdrop of religious dissent, Patrick Henry spearheaded the conservatives' effort to enact a general assessment that would support the teachers of the Christian

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[18] 11 WILLIAM WALLER HENING, *The Statutes at Large: Being a Collection of All the Laws of Virginia, from the First Session of the Legislature in the Year 1619*, at 532 (1823).
[19] *See* Rhys Isaac, T*he Act for Establishing the Freedom of Religion Remembered: The Dissenters' Virginia Heritage*, 95 VA. MAG. HIST & BIOGRAPHY 25, 31–31 (1987).
[20] Thomas E. Buckley, *Church-State Settlement in Virginia: The Presbyterian Contribution*, 54 J. PRESBYTERIAN HIST. 105, 115 (1976).

religion throughout the state. Despite its popularity with the Episcopalian establishment in the Piedmont and Tidewater regions, the measure faced stiff resistance from the Western counties where some of the most vocal Baptist critics of religious establishment held sway. While the proposed bill maintained that the assessment could exist "without counteracting the liberal principle … abolishing all distinctions of pre-eminence amongst the different societies or communities of Christians," some members of the religious dissenters perceived the bill as an attempt to restore the *status quo ante bellum* and recreate an established church.[21] Sensing the weakness of Henry's flagging coalition, Madison presented to the General Assembly his famous "Memorial and Remonstrance Against Religious Assessments," which sounded the death knell of assessment and left an indelible mark on the rhetoric surrounding religious freedom.[22]

With the collapse of the conservative consensus, opponents of religious incorporation within the General Assembly formulated a legislative strategy to rescind the Episcopalian Church's legislative victories. While serving as ambassador to France, Thomas Jefferson reworked his 1779 draft of a bill for religious liberty into a legislative proposal designed to provide statutory reinforcement for the freedom of conscience delineated in the Virginia Declaration of Rights.[23] Continuing the collaboration which had successfully defeated Patrick Henry's attempt to enact a general assessment for teachers of the Christian religion, James Madison shepherded the refurbished Bill for Establishing Religious Freedom through the General Assembly towards

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[21] *See* RAGOSTA, supra note 12, at 116–20.
[22] *See* Rhys Issac, *"The Rage of Malice of the Old Serpent Devil": The Dissenters and the Making and Remaking of the Virginia Statute for Religious Freedom*, *in* THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM 139, 155 (Merrill D. Peterson & Robert C. Vaughan, eds., 1988); s*ee also* Esbeck, *supra* note 16, at 60, 81-82 (2009) (noting the impact of Madison's *Memorial and Remonstrance* on the Court's construction of the federal Establishment Clause in Everson v. Board of Education of the Township of Ewing)
[23] BRYDON, *supra* note 4, at 183–87.

successful enactment in 1786.[24] With the enactment of Jefferson's Bill, the tides turned against the supporters of the Episcopalian church. The 1784 incorporation of the Episcopalian Church was quickly repealed in the wake of the Statute Establishing Religious Freedom and by 1799 every law relating to the privileged status of the Episcopalian Church had been repealed by the General Assembly.[25] In less than a decade, the 1784 incorporation of the Episcopalian Church had been overturned and all legislative remnants of the favored position of the Church had been stripped away by the legislature.

3. A Rising Tide of Confiscations

The turn of the century saw the Episcopalian Church in Virginia in a dramatically weakened political position. In the decades since the revolution, the traditional bases of Episcopalian electoral power, namely the older settled areas of the Tidewater and Piedmont, experienced dramatic population declines as soil exhaustion and the promise of cheap land drew successive generations of Virginians further to the West.[26] These demographic shifts hurt the Church by decreasing the relative political power of the Episcopalian strongholds in comparison to the western counties where dissenting sects predominated.[27] Additionally, the population drain

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[24] Following the death of the assessment bill in committee, James Madison experienced a meteoric rise in stature within the Virginia General Assembly which in turn led to the successfulness of the counterattack against religious incorporation. *See* IRVING BRANT, JAMES MADISON: THE NATIONALIST, 1780–1787, at 354–55 (1941); ECKENRODE, *supra* note 15, at 111.

[25] Brydon, *supra* note 5, at 275–76.

[26] DAVID HACKETT FISCHER & JAMES C. KELLY, BOUND AWAY: VIRGINIA AND THE WESTWARD MOVEMENT 202 (2000). This decrease in population increased the relative political power of religious dissenters within the eastern counties as several dissenter groups, such as the Baptists, were growing in number in spite of the general trend toward depopulation. Thus, Tidewater and Piedmont counties, which had traditionally been bastions of the Episcopalian Church providing secure seats in the legislature, began to align with the dissenters on the issue of church land confiscation. *See* Thomas E. Buckley, *Evangelicals Triumphant: The Baptists' Assault on the Virginia Glebes, 1786–1801*, 45 WM. & MARY Q. 33, 45 n.45 (1988) (noting how the rising number of Baptists in the Tidewater eroded this "bulwark against encroachments on the Episcopal Church's property").

[27] *See generally* J.R. Pole, *Representation and Authority in Virginia from the Revolution to Reform*, 24 J. SOUTHERN HIST. 16 (1958) (cataloguing the demographic shifts and struggles over reapportionment of the legislature in post-revolutionary Virginia).

and poverty severely enervated the Church at a local level as the remaining parishioners were forced to shoulder an increasing amount of the burden for supporting the Church through donation. These demographic and economic changes in turn caused an increasing number of parishes to consolidate with one another or else shutter entirely in the face of fiscal impracticability. With each passing year, the political and financial position of the Church deteriorated while its critics grew in power and influence among the ranks of the General Assembly.

These circumstances gave rise to the Virginia program of church land confiscations as vacant or enervated parishes represented easier targets for legislative confiscation. Using this logic, the increasingly powerful electorate of religious dissenters lobbied for blanket confiscation of those church lands that they viewed as a relic of the tyrannical colonial establishment. The Baptists, who had grown to be the Episcopalian Church's most outspoken critics, lodged repeated confiscation petitions with the General Assembly in 1787, 1789, 1790, 1791, 1794, and each year between 1795 and 1802.[28] The persistence of these petitions bore fruit when in 1799 the General Assembly passed "an Act to repeal certain acts, and to declare the construction of the Bill of Rights and Constitution concerning religion" that emphasized that Virginia, as a result of the Revolution, had assumed the sovereignty of the English Crown and retained the ability to dispose of ecclesiastical lands.[29] Over the next two years, the General Assembly authorized the

[28] Carl H. Esbeck, *Disestablishment in Virginia, 1776–1802*, *in* DISESTABLISHMENT AND RELIGIOUS DISSENT, *supra* note 14, at 139, 169–70.

[29] The original draft of the bill included a provision that would allow the members of parishes without incumbent ministers to elect a commissioner charged with selling excess glebe lands to support "the education of poor children" or ensure "the general benefit" within the parish. After lengthy debate on the issue, the House opted to remove the provision providing a process for the sale of glebes. 2 SAMUEL SHEPHERD, THE STATUTES AT LARGE OF VIRGINIA: FROM OCTOBER SESSION 1792 TO DECEMBER SESSION 1806, 149 (1835); *see* THOMAS E. BUCKLEY, ESTABLISHING RELIGIOUS FREEDOM: JEFFERSON'S STATUTE IN VIRGINIA 99 (2013).

confiscation of glebe lands in three specifically enumerated counties based on applications made "by sundry inhabitants of [those] counties."[30]

However, this piecemeal approach to confiscation rapidly grew unmanageable for the legislature. After receiving six simultaneous petitions from Counties requesting dissolution of their respective glebes, the General Assembly passed the Glebe Act of 1802 which established a uniform procedure by which the Board of Overseers for a county could sell glebe lands and apply the proceeds to the operation of the secular poor law of that county.[31] The Act based the legitimacy of the legislative confiscation in both the Free Exercise Clause of the Virginia Bill of Rights and the language of the Statute for Religious Freedom, stating that the continued emoluments and privileges of the past establishment were inconsistent with the state constitution and statutory law. [32] To avoid the accusation that the legislature was throwing elderly ministers out of their homes, the legislature declared that glebes could only be confiscated upon the death of the incumbent minister.[33] Thus, the legislation did not immediately deprive Episcopalian ministers of their homes and rental income, as some of the strident voices among the dissenters had advocated.[34] Yet the Glebe Act still represented a severe constraint on the Episcopalian Church by preventing it from selling its vacant lands to cover church expenses and making any vacancy in occupancy grounds for forfeiture.

The choice to have the Overseers of the Poor administer the system demonstrates that additional pragmatic concerns underlay the confiscation program. In 1784 the General Assembly

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[30] The January 23, 1799, Act provided for the sale of glebe lands in Nottoway and Shenandoah Counties while the January 4, 1800, Act related only to Hardy County. 2 SHEPHERD, *supra* note 29, at 161, 206.
[31] 2 SHEPHERD, *supra* note 29, at 314–16; BUCKLEY, *supra* note 29, at 101.
[32] 2 SHEPHERD, *supra* note 29, at 314.
[33] *Id.*
[34] *See, e.g.*, Buckley, *supra* note 26, at 44 (noting conflict within the General Committee of Virginia Baptists regarding the incumbency prohibition on glebe confiscation).

completely removed the Episcopalian Church from the operation of its poor law and "released [the church] from those restraints which are yet imposed on her by the laws of this commonwealth" as part of this larger program of religious disestablishment.[35] While this action furthered the separation of church and state, it also meant that after more than a century and a half of church subsidization and control, the government of Virginia needed to find an alternative method of administering its poor law. To replace the lost administrative capacity of the parochial system, the Virginia legislature expanded upon the 1780 and 1782 enactments by creating a board of Overseers of the Poor for each county in the State and granting these administrative boards the power to levy taxes.[36] These secular poor levies were extremely unpopular and the elected Boards of Overseers where heavily incentivized to find alternative sources of funding to keep these taxes at acceptable levels. In such an environment, it is easy to understand how both Overseers of the Poor and the members of the General Assembly might have seen some internal symmetry in using vacant church property to fill the budgetary gap precipitated by the Church's withdrawal from administration of the poor law.

II. THE CASE OF THE GLEBES

Regardless of the fiscal incentives underlying the legislation, the passage of the Glebe Act of 1802 represented the final blow to the flagging fortunes of the Episcopalian Church in Virginia. In contrast to the relative stability that had been accomplished, however briefly, by the incorporation of the vestries in 1784, the possibility of the confiscation of some of the Church's

[35] 11 HENING, *supra* note 18, at 536; *see also* 2 BRYDON, *supra* note 4, at 412 (noting that this change was not entirely unwelcome within the Church hierarchy as it significantly reduced the administrative burden on parish personnel).
[36] *See* 12 HENING, *supra* note 18, at 27; *see also* 10 HENING, *supra* note 18, at 288 (establishing a Board of Overseers of the Poor in Rockbridge, Botetourt, Montgomery, Washington, Greenbrier, Augusta, and Fredrick); 11 HENING, *supra* note 18, at 62 (establishing a Board of Overseers of the Poor in Shanandoah, Henry, Monogalia, Ohio, and Berkley).

most valuable properties posed a severe threat to its future viability as a religious institution. In addition to their conviction that the state legislature was illegitimately robbing the Church of its vested property rights, the individual parishes had a financial incentive to prevent the law from going into effect. Without either the income provided by rents from the glebes or the benefit of religious taxation, the individual parishes would be entirely reliant upon subscriptions from the parishioners for the expense of supporting the parson.

In a period of declining membership, the Episcopalian Church and its individual parishes perceived the seizure act as a direct legislative attack on the future viability of their institutions. Even though the act purported to apply to only vacant glebe lands without an incumbent parson, the loss of these church lands severely handicapped Episcopalian parishes in their attempts to attract new parsons.[37] With this threat of seizure hanging over their heads, individual parishes turned to the Virginia Courts of Equity in hopes of forestalling the application of the glebe law. However, the opponents of Episcopalian establishment began their own maneuverings to prevent a Federalist judiciary from undoing what the dissenters had accomplished in the legislature.

1. Before the High Court of Chancery

The first and most substantial judicial challenge to the glebe law occurred mere miles away from where the Virginia legislature decided the issue. Following the passage of the Glebe Act, Manchester Parish near Richmond became vacant. Upon determining that the Manchester glebe fell within the scope of the statute, Edmund Lockett and Richard Haskins, the Overseers of the Poor for Chesterfield County began proceedings to authorize the sale of the church lands. The

[37] Prior to the passage of the Glebe Act, parsons actively sought out parishes that had the most profitable glebe properties designated for the support of the minister. Due to this economic incentive, the possession of a significant glebe was a powerful tool for inducing clergymen to remove themselves to more remote parishes. *See* BUCKLEY, *supra* note 29, at 117.

members of the Manchester Vestry, headed by Philip Turpin, brought suit in the Virginia Superior Court of Chancery seeking an injunction to prevent the sale of the glebe. In the bill of complaint submitted to the court, the vestrymen asserted that the property rights of the glebe were held by the vestry of the parish and since the Virginia legislature had recognized and secured these rights after the revolution, any legislative act that purported to remove such property was void.[38] Chancellor George Wythe rejected the arguments that the legislature had negatively impacted any privately held property rights that would give rise to an equitable remedy against the Chesterfield Overseers of the Poor.[39] However, the Chancellor did allow the plaintiff vestrymen to amend the bill of complaints and join the Attorney General of Virginia to the case so that the issue could reach the Supreme Court of Appeals of Virginia on demurrer.[40]

The complainant vestry members complied and joined Attorney General Philip Norborne Nicholas to the suit. The vestrymen then entered a demurrer that assigned three causes, namely: that the vestry could not show title to the glebe either in the church or in the members of the vestry themselves, that a valid statute directed the Overseers of the Poor in a county to sell the vacant Manchester glebe, and that if the church or vestry did have title they would have "complete redress at common law," thus depriving the court of chancery of jurisdiction.[41] Once Nicholas was joined,

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[38] Thomas Ritchie, who had recently acquired the Jeffersonian-Republican newspaper the *Examiner* and rechristened it the *Enquirer*, reprinted the complete bill of complaints as part of the Enquirer's coverage of the case as it was appealed to the Virginia Supreme Court of Appeals. Thomas Ritchie, *Glebe Lands*, ENQUIRER, May 23, 1804, at 4.
[39] There is no record of a formal written opinion being rendered in this case. While Chancellor Wythe did publish a report containing several of his opinions from the High Court of Chancery, these opinions seem to have been retroactive justifications for those decisions where Wythe was overruled by Judge Edmund Pendleton of the Supreme Court of Appeals. *See* GEORGE WYTHE, DECISIONS OF CASES IN VIRGINIA, BY THE HIGH COURT OF CHANCERY, WITH REMARKS UPON DECREES BY THE COURT OF APPEALS, REVERSING SOME OF THOSE DECISIONS (1795); *see also* IMOGENE E. BROWN, AMERICAN ARISTIDES: A BIOGRAPHY OF GEORGE WYTHE 261–64 (1981); ROBERT B. KIRTLAND, GEORGE WYTHE 159–60 (1986). However, evidence of the contents of Chancellor Wythe's opinion as delivered in court remain in the form of contemporaneous newspaper reporting on the case. An Observer, *Law Intelligence*, VA. ARGUS, Sept. 25, 1802, at 5.
[40] An Observer, *Law Intelligence*, VA. ARGUS, Sept. 25, 1802, at 5.
[41] Turpin v. Lockett, 6 Call 113, 114–16 (1804).

Chancellor Wythe dismissed the case for lack of equitable jurisdiction leading to an almost immediate appeal to the Supreme Court of Appeals on the basis of the demurrer.[42] Wythe's dismissal of the case was in keeping with his more restrained view of the role of the courts of equity.[43]

Despite Wythe's broad endorsement of the legislative power to authorize the confiscation of church lands, the complainant's appeal dramatically increased the chances that his decision below would be overturned. During his tenure as the Chancellor of the High Court of Chancery, Wythe had suffered the professional indignity of being repeatedly overruled by Chief Judge Edmund Pendleton, a man who had once served with Wythe as one of the Chancellors of the Court.[44] By the time that *Turpin v. Lockett* appeared before Wythe, the continual threat of overrule had aggravated a long-standing rivalry between the two men.[45] Since Pendleton's intense loyalty to the Episcopalian Church and disapproval of the seizure of the glebes were on display during the legislative debates over the issue, Wythe must have been aware that his court's opinion would be unlikely to survive an appeal before the Chief Judge.[46] Nevertheless, the Chancellor acted to ensure that Philip Turpin and the other vestrymen would have the ability to argue their case before a court dominated by Pendleton, a conservative jurist who Wythe viewed as erasing his own impact on Virginia law.

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[42] Turpin v. Lockett, 6 Call 113, 116 (1804).
[43] *See* KIRTLAND, *supra* note 39, at 270–75 (1986).
[44] BROWN, *supra* note 39, at 261–64.
[45] *See generally* DAVID JOHN MAYS, EDMUND PENDLETON 290–302 (1984) (describing the intense animosity that characterized Wythe and Pendleton's relationship following the latter's elevation to the Virginia's highest court in 1789).
[46] *See* Edmund Pendleton, *Petition of the Minister and Vestrymen of the Protestant Episcopal Church in the Parish of St. Asaph to the General Assembly of Virginia* (1787), *reprinted in* THE LETTERS AND PAPERS OF EDMUND PENDLETON 1734–1803, at 643–46 (David John Mays ed., 1967).

2. First Hearing before The Supreme Court of Appeals

Having appealed their case to Virginia's highest court, the vestrymen of Manchester could reasonably have believed that the fortunes of the Protestant Episcopal Church were on the mend. Chief Judge Pendleton, despite his failing health, seemed well positioned to form a solid majority for overturning Chancellor Wythe's decree. Judges Peter Lyons, Paul Carrington, and William Fleming would likely vote with the Chief in support of preserving the glebe lands due to the opinions they expressed at conference.[47] Only Judge Spencer Roane, the youngest and most avowedly Republican member of the court, seemed inclined to vote for the constitutionality of the 1802 Glebe Act.[48] In light of the seeming security of the Chief Judge's majority position, Judge Fleming recused himself from the case on the basis that he was a resident of Chesterfield County.[49] Judge Fleming's recusal constituted a pivotal moment of the case since it effectively eliminated a nearly certain vote for Pendleton's majority position while also introducing the possibility of a split court on the five-judge tribunal. Though this decision would ultimately have a dramatic impact on the resolution of the case, at the time of recusal it might have appeared to be the decision between a four-to-one majority and a three-to-one majority.

The Judges sitting for the case heard four days of oral arguments during the April of 1803; however, due to the delicacy of the underlying political issue and the persistent split of opinion on the court, the judges were unable to issue opinions before the end of that term.[50] This delay proved to be critical for the vestrymen of Manchester as Chief Judge Pendleton's health, already in decline at the start of the Spring term, began precipitously to worsen. When the Fall term began later that

[47] MAYS, *supra* note 45, at 341.
[48] MARGARET E. HORSNELL, SPENCER ROANE: JUDICIAL ADVOCATE OF JEFFERSONIAN PRINCIPLES 70–71 (1986).
[49] MAYS, *supra* note 45, at 341.
[50] *Id.* at 341–44.

year, Chief Judge Pendleton was notably absent for the first two weeks and arrived on the 25th of October, one day before the judges were scheduled to deliver their opinions in *Turpin*. However, in a dramatic reversal of fortune, Pendleton was found dead the next day with a manuscript copy of his opinion holding the Glebe Law of 1802 unconstitutional found on his among his effects.[51] Since the Chief Judge never had the chance to deliver this opinion, the court determined that the case would be reargued once the legislature had selected his successor.[52] The fact that a decision in this case, which was already being referred to as one of the most important to come before the Virginia appellate court, should be dependent upon such unlikely circumstances led one nineteenth century historian to diagnose the situation as "a marked intervention of Providence."[53] In the span of a single day, the unconstitutionality of the Glebe Act went from being a *fait accompli* to being entirely dependent upon which jurist was chosen to fill the vacancy left by the former Chief Judge.

3. The Politics of Appointment

Mindful of how narrowly the Glebe Act escaped judicial invalidation, the Virginia legislature began the search for a legal mind capable of replacing Pendleton on the court. Supporters of the policies of disestablishment underlying the revocation of the glebes were particularly concerned with finding a jurist who would be amenable to the legislature's understanding of the state constitution. Governor John Page supported his close confidant St. George Tucker, then a judge on the Virginia General Court, as the presumptive nominee for any vacancies that might occur during the administration.[54] Upon hearing news of Pendleton's death,

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[51] The text of Pendleton's opinion was not included in the final reported version of the case. Nevertheless, Daniel Call, who served as both an attorney for the vestrymen and as the reporter of the case before the Supreme Court of Appeals, noted in his memorandum that he had viewed the original opinion drafted by the Chief Judge. Turpin v. Lockett, 6 Call 113, 187 (1804); *see* MAYS, *supra* note 45, at 345.
[52] BUCKLEY, *supra* note 29, at:119.
[53] 2 ROBERT R. HOWISON, A HISTORY OF VIRGINIA 400 (1848).
[54] CHARLES T. CULLEN, ST. GEORGE TUCKER AND LAW IN VIRGINIA 1772–1804, at 164–65 (1987).

Tucker's son, Henry St. George Tucker, implied that he and his father had previously spoken about the possibility that he might replace Pendleton, noting his "anxiety to hear the steps that are taken" and hoping that his father would write him about the process when "[t]here is little danger . . . of trusting your thoughts to paper."[55] However, Tucker's candidacy was impeded by two factors: a general resistance by legislators from the Western counties to appoint another Eastern jurist to the court, and a series of salacious accusations of judicial misconduct from an aggrieved criminal defendant named Robert Bailey.[56] These twin considerations threatened to jeopardize Tucker's candidacy for the highly contested appointment.

Realizing the potential for defeat, Tucker went to extreme lengths to preempt any impact that Bailey's accusations might have on his candidacy. He petitioned the General Assembly to conduct a complete investigation into the credibility of Bailey's assertions in an effort to dispose of the matter before the body voted on Pendleton's successor.[57] Tucker relied heavily on his cousin, George Tucker to press his case to the members of the General Assembly and act as his proxy during the legislative proceedings in Richmond.[58] However, despite the threat to his candidacy of the bribery accusation, Tucker took pains to ensure that members of the legislature knew where he

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[55] Letter from Henry St. George Tucker to St. George Tucker (Nov. 5, 1803) (on file with William & Mary Special Collections).

[56] The charges sprung from the case of Commonwealth v. Bailey decided by Judge Tucker in September of 1803. Bailey was accused of running a game of Faro in violation of Virginian anti-gambling statutes. Bailey alleged that Tucker had solicited a bribe of two-hundred guineas in return for more lenient treatment even though Tucker was considered an exceptionally strict judge regarding gambling offenses. Some supporters of Tucker's candidacy suspected that Bailey, who was from Staunton, might have been encouraged to make his accusations by supporters of the Western judicial candidates who wanted to remove Tucker from consideration. For a thorough account of the how the Bailey affair impacted St. George Tucker's candidacy see CULLEN, *supra* note 54, at 165–68.

[57] *See* Letter from St. George Tucker to William Newsom (Nov. 26, 1803) (on file with William & Mary Special Collections); St. George Tucker, The Representation & Petition of St. George Tucker One of the Judges of the General Court 1–43 (Nov. 26, 1803) (unpublished manuscript); see also CHARLES F. HOBSON, ST. GEORGE TUCKER'S LAW REPORTS AND SELECTED PAPERS 1782 – 1825, at 59 (2013) (detailing the process by which the General Assembly evaluated the petitions).

[58] *See, e.g.*, Letter from St. George Tucker to George Tucker (Nov. 28, 1803) (on file with William & Mary Special Collections) (directing his cousin, George to oversee the printing and distribution of petition to the General Assembly in Richmond); Letter from George Tucker to St. George Tucker (Dec. 11, 1803) (on file with William & Mary Special Collections) (describing the introduction and discussion of Tucker's petition).

stood on the issue of glebes, something that was more politically fraught than the baseless accusations of a habitual gambler. Writing under the guise of appraising Tucker of the progress of his petition, Representative James Semple included an unassuming postscript that noted that "more than one member has enquired" regarding Tucker's "opinion on the constitutionality of the law directing the sale of the glebe lands… with a view to the appointment of a successor to Mr. Pendleton."[59] Semple continued with the observation that this issue was top-most in the minds of many of the individuals voting on Tucker's appointment as they knew that an opposing candidate, "[Francis] Brooke voted for the law" during his time in the legislature.[60] It is easy to read between the lines to see the implicit warning carried by the second aspect of the postscript. Mere neutrality would not be sufficient in the face of Francis Brooke's challenge. If Tucker were to refuse to take a stance endorsing the constitutionality of the Glebe Act, it could easily cost him votes pivotal to securing a position on Virginia's highest court.

In a response that skirted the edges of judicial propriety, Tucker obliquely assured Semple and the concerned legislators of his belief that the legislative confiscation of the glebes was constitutional. Despite noting that no "considerations whatsoever induce me at this time to say or do aught that could possibly be construed as a pledge of any particular opinion," the judge directed Semple to a note on the glebe issue that Tucker had appended to his recently published edition of Blackstone's Commentaries.[61] In the cited portion of the appendix, Tucker discussed the rationale

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[59] Letter from James Semple to St. George Tucker (Dec. 13, 1803) (on file with William & Mary Special Collections).
[60] *Id.*
[61] Copy of Letter from St. George Tucker to James Semple (Dec. 14, 1803) (on file with William & Mary Special Collections). Judge Tucker's edition of Blackstone's Commentaries grew out of a heavily edited version of the text that Tucker used while serving as George Wythe's successor to the Chair of Law and Police at the College of William and Mary. Tucker's edition of the Commentaries was intended to update the text to account for the changes brought on by the Revolution and the subsequent ratification of the Federal Constitution. *See* Nathaniel Jackson Jiranek, The American Blackstone: The Inception, Creation, and Dissemination of a Legal Treatise in the Early Republic (April 10, 2019) (A.B. thesis, Princeton University) (on file with the Princeton University Library system).

behind Chancellor Wythe's dismissal of the case at the High Court of Chancery before observing that it would be "equally presumptuous, and indecorous" for him to express any opinion "as it might relate either to the merits of the question, or the constitutionality of the several laws."[62] However, Tucker continued to lay out a scheme for a general assessment for the support of religious teachers prefacing his discussion that he did so "with greater diffidence since he has reason to believe that the subject was once discussed in the legislature, with consummate ability, both by advocates and opposers of the measure."[63] This plan indicated Tucker's support for the principle behind the Glebe Act in three ways: first, the plan demonstrated deference to legislative enactments at the intersection of religion and property rights; second, it expressed a non-preference principle that provided much of the impetus behind the legislation regulating glebes; and third, by proposing an alternative system to the traditional glebe emoluments, Tucker indicated his willingness to abandon that form of religious support.

Despite adopting a politically contentious view on the issue of a general assessment for religious and moral instruction, Tucker's proposal was couched in deference to the legislature's understanding of the strictures placed on its enactments by the Bill of Rights and Constitution of the Commonwealth. His appendix referred to the ability to make law on issues touching property and religious rights as "the most important duty of legislators" without any reference to any boundary-keeping role that the state judiciary might play.[64] Thus, his note functioned as a tentative legislative proposal rather than a framework upon which to base judicial review of the balance of private rights and legislative prerogative. As the historian Charles Cullen noted, Tucker likely knew that his reference to this proposal would be interpreted as ratifying the state's prerogative to

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[62] ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 115 (1803).
[63] *Id.*
[64] *Id.*

use legislative power on matters of religion and thus tacitly confirming his understanding of the Glebe Laws as falling within the bounds of the state constitution.[65] The reference to this part of his plan for the establishment of a method of general assessment for religious education could be read favorably by supporters of the Glebe Law even if they would be opposed to the assessment as a matter of public policy.

Similarly, the avowed non-preference principle that appears in the proposal was aimed at assuaging fears of foisting the support of a religious establishment upon citizens who do not support that religious sect. Within the debate on the glebe issue, the Baptists and other dissenters noted that the Episcopal Church's retention of those glebes dating from before the Revolution had been acquired using funds from all citizens located within the territorial boundaries of the parish regardless of those individuals' religious preferences.[66] This argument was essential to belief that since parishes rested upon geographical boundaries rather than membership in a parish, the true possessors of title to the glebes at the revolutionary disestablishment were the sovereign people of that parish, regardless of religious denomination.[67] Tucker's statement that his plan for the support of ministers acted "without regard to sects, or denominations, and without preference to any" in order to allow individuals to choose what denomination their assessed tax should be directed to was consistent with the larger justification behind the state confiscation of Episcopalian glebes.[68] Therefore, the logic underpinning Tucker's proposed general assessment was consistent with the major justification for the eventual passage of the Glebe Act.

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[65] CULLEN, *supra* note 54, at 177.
[66] *See* BUCKLEY, *supra* note 29, at 96.
[67] ECKENRODE, *supra* note 15, at 131.
[68] *See* ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 115, 117 (1803).

Finally, his endorsement of the idea of a general assessment could be interpreted as advocating for replacement of the antiquated and outmoded form of ecclesiastical support represented by the glebes. Though the dissenters were hardly a monolith on the issue, many the supporters of the Glebe Act were not categorically opposed to state support of religion. As the historian Thomas E. Buckley argues, by maintaining glebes that were remnants of Virginia's history of Anglican establishment, "the Episcopalians occupied a gold mine, and erstwhile dissenters, particularly the Baptists, deeply resented it."[69] Thus, the glebes became a focal point for the disparate groups of dissenters not because of a belief that government should not provide support for ministers, but rather out of a jealous fear that the political and social elites of the Tidewater and Piedmont regions would seek to subsidize "the old establishment" at the expense of the other sects.[70] Tucker's proposal for what could amount to an alternative method of providing for the salaries of religious ministers and teachers did not contradict the reasoning behind the government seizure of the glebes. Rather, it provided a viable alternative to ameliorate the divestment without prejudicing one sectarian group over another.

While there is no record of Semple responding directly to Tucker's letter, the historical evidence demonstrates that Tucker's reference to his legal opinions on the Glebe Law impacted the search for Chief Judge Pendleton's replacement on the court. In the weeks following the letter to Semple, Tucker's opinion on the Glebe Law overtook the discussion of Bailey's accusations as the focus of debate within the General Assembly. Opponents of Tucker criticized the Judge for

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[69] BUCKLEY, *supra* note 29, at 93–94.

[70] The collapse of the Baptist General Committee illustrates the factiousness of the dissenters outside of the narrow issue of disestablishment of the episcopalian glebes. While the shared suspicion of the episcopalian church had prompted some early successes, the arrival of more fractious issues such as the Committee's stance on slavery in 1790 served to shatter the narrow consensus that had allowed central organization and concerted political action in earlier years. Thus, the glebe issue remained "the only matter that [the General Committee] had negotiated successfully after 1792." Buckley, *supra* note 26, at 61–63.

being "an advocate for general assessment" who claimed "the right … of making as well as expounding laws."[71] George Tucker also noted that "it had been industriously whispered that" Semple was opposed to Tucker's candidacy, but that Semple himself had denied adopting these rumors.[72] Indeed, discussion of Tucker's understanding of Glebe Law even was reported in the *Examiner*, causing George Tucker to feel obligated to clarify some aspect of the Judge's position to the editor of the paper in the subsequent printing.[73] Likely due to the oblique nature of his note on the Glebe Law, the discussion surrounding Tucker became so confused that John Minor, one of Tucker's confidants, reported hearing that one of the objections against Tucker's candidacy was that he was "of the opinion that the law for the sale of the Glebe & Churches is not Constitutional."[74] Even though Tucker's citation of his note on the Glebe Law provoked some negative reactions, on balance the refocusing of the conversation on the glebe issue aided Tucker's pursuit of his appointment.

The disapproval expressed by some against Judge Tucker's proposal did not represent the majority view on the Glebe Act. While describing the criticism heaped upon Tucker regarding his opinion on the glebes, George Tucker emphasized that the current mood in the legislature led him to believe that his cousin would receive a "triumphant & most honorable suffrage."[75] Another important development was that Francis Brooke, the other candidate who supported the Glebe Act, withdrew his name from consideration for the post.[76] As a result of Brooke's departure, Tucker

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[71] Letter from George Tucker to Saint George Tucker (Dec. 18, 1803) (on file with William & Mary Special Collections).
[72] *Id.*
[73] Unfortunately, the editions of the *Examiner* referenced in George Tucker's letter do not appear in the Library of Virginia's collection of surviving editions of that newspaper. Letter from George Tucker to Saint George Tucker (Dec. 18, 1803) (on file with William & Mary Special Collections).
[74] Letter from John Minor to St. George Tucker (Jan. 6, 1804) (on file with William & Mary Special Collections).
[75] Letter from George Tucker to Saint George Tucker (Dec. 18, 1803) (on file with William & Mary Special Collections).
[76] CULLEN, *supra* note 54, at 179.

remained as the one candidate who had expressed the most solicitude for the legislature's power to divest the Episcopalian parishes of their glebes.

On January 4th, Edmund Harrison officially nominated Tucker to fill the vacancy on the Court of Appeals with James Semple, Ellison Currie, and William Aylett seconding the nomination.[77] Tucker's nomination faced stiff resistance from some legislators who bemoaned that fact "that a judge had never yet been taken from the other side of the mountains," and protested by supporting Archibald Stuart of Augusta County.[78] On the day of the vote, an independent preacher by the name of Dawson entered the House and brandished the volume of Tucker's Blackstone containing the note on the glebes while seeking to persuade the legislators not to vote for Tucker "by reiterating those hackneyed charges."[79] Despite a closely contested vote, Tucker was appointed to the court by 115 votes to Stuart's 82 thanks in part to the continued support of James Semple.[80] On January 9th, Tucker transmitted his acceptance of the appointment to the House of Delegates and became the newest member of the Supreme Court of Appeals of Virginia.[81]

4. Re-Argument Before the Supreme Court of Appeals

During the re-argument of *Turpin v. Lockett*, the observers of the court were focused on the newly appointed Judge Tucker. From the previous slate of oral arguments during the Fall term of 1803, it was clear how Judges Carrington, Lyon, and Roane intended to vote. Since Fleming had

[77] Letter from George Tucker to Saint George Tucker (Jan. 5, 1804) (on file with William & Mary Special Collections).
[78] Letter from George Tucker to Saint George Tucker (Jan. 5, 1804) (on file with William & Mary Special Collections).
[79] Letter from George Tucker to Saint George Tucker (Jan. 7, 1804) (on file with William & Mary Special Collections).
[80] Letter form Burwell Bassett to Saint George Tucker (Jan 6, 1804) (on file with William & Mary Special Collections); Letter from George Tucker to Saint George Tucker (Jan. 7, 1804) (on file with William & Mary Special Collections).
[81] Letter from St. George Tucker to Hugh Holmes, Speaker of the House of Delegates of Virginia (Jan. 9, 1804) (on file with William & Mary Special Collections).

recused himself upon the outset of the case, there were an even number of voting members on the Supreme Court of Appeals, and a division within the court would have the effect of affirming the decision below.[82] As the deciding vote on the issue, Tucker expressed his regret that the issue had been raised in such an acrimonious way and hope that "a diligent and minute enquiry" would "acquit [him] of perspicacity in forming [his] judgement."[83] Thus began what one biographer described as "a protracted and tortuous passage through a maze of common law and Virginia statutory law" designed "to satisfy the losing party of his fairness and impartiality in a highly contentious case."[84] Given the pivotal role that the glebe debate had played in his appointment to the court, it is unsurprising that Tucker was especially conscientious in this case to avoid the appearance of quid pro quo.

The protracted litigation combined with the politically charged nature of the underlying issue to make *Turpin v. Lockett*, or the Glebe Case as it was informally known, a cause célèbre within the Commonwealth. Part of this notoriety sprang from the disproportionate media coverage that the case received. In May of 1804, a young Democratic-Republican named Thomas Ritchie, at the behest of Thomas Jefferson, acquired the *Examiner* and re-invented the failing newspaper as the *Enquirer*.[85] Capitalizing on the divisive nature of the glebe debate, Ritchie provided near continuous reporting on the case including reports on the oral arguments before the court and reprinting and editorializing on Tucker's note on the glebe law that he had directed James Semple to read.[86] Given the broad audience of the case and the intensity with which observers were

[82] Turpin v. Lockett, 6 Call 113, 186–87 (1804).
[83] *Id.* at 130.
[84] CHARLES F. HOBSON, ST. GEORGE TUCKER'S LAW REPORTS AND SELECTED PAPERS 1782 – 1825, at 68 (2013).
[85] CHARLES HENRY AMBLER, THOMAS RITCHIE: A STUDY IN VIRGINIA POLITICS 18–19 (1913).
[86] *The Glebe Case*, ENQUIRER, May 9, 1804; *The Glebe Case*, ENQUIRER, May 23, 1804; *The Glebe Case*, ENQUIRER, May 26, 1804; *The Glebe Case*, ENQUIRER, May 30, 1804; *The Glebe Case*, ENQUIRER, Jun. 2, 1804; *The Glebe Case*, ENQUIRER, Jun. 6, 1804.

scrutinizing his actions, it is not surprising that Tucker seemed intent on crafting an unassailable wall of statutory and common law justifications for his ultimate decision in the case.

The painstaking legal reasoning of Tucker's opinion presented the issue in three stages. As an initial matter, the judge sought to answer the question of whether, under the pre-revolutionary legal regime, the rights to a glebe vested in an individual such as the parson or in a corporate or collective entity such as the vestry of the parish. After an exhaustive survey of colonial statutory authority and numerous appeals to common law tradition, Tucker determined that legal title to the glebes were vested in the vestries of the Anglican Church as individual bodies politic.[87] This legal conclusion stemmed from the long history of private acts in the colonial House of Burgesses that explicitly provided for vestries being able "to take, receive and hold any land to be purchased for a glebe."[88] This logical step allowed Tucker to focus on whether the analysis of the dispossession would turn on artificial persons such as the vestry or on individuals such as the parson.

Tucker proceeded to inquire whether the legal title to the glebes remained with the vestries following the revolution and religious disestablishment. On this point Tucker concluded that the original vestries in which the title had been vested were aspects of an established church that was inseparable from the Monarchy and thus had been destroyed by the Revolution. With the destruction of these bodies politic, the common law dictated that titles to the glebe lands reverted to the donors in fee simple, which were presumptively either the parishioners or the state itself. Supporting this contention Judge Tucker pointed to the fact that in accepting the subsequent incorporation of the Protestant Episcopalian Church in 1784, the members of the church had acknowledged the permanent dissolution of the previous "ancient vestries" in whom the exclusive

[87] *Turpin*, 6 Call at 135–39.
[88] *Id.* at 139.

title was vested.[89] Based on Judge Tucker's notes of the oral arguments, this particular line of reasoning was suggested by Attorney General Nicholas who emphasized that prior to the Revolution the vestries were "not a corporation" with the ability "to transmit property."[90] To combat this reasoning, Daniel Call argued for the plaintiff vestrymen that the change from the Church of England to the Episcopalian church was "a mere substitution of one name for another" and thus did not destroy the vestries and the associated property rights.[91] Nevertheless, Judge Tucker was sufficiently convinced of the change in status to determine that moral justice required that the glebes vest in the individuals within the parish's territorial boundaries, even though he could not locate "law to support this moral principle."[92]

Finally, Tucker attempted to resolve whether the Episcopalian church retained the capacity to hold glebes following its disincorporation as a consequence of the Act of 1788. Tucker began this discussion by noting that the Henrician dissolution of the monasteries "seems never to have been questioned in [England]" and that "in Virginia, both before and since the revolution, the legislature has never scrupled . . . to exercise the right, whenever the occasion seemed to require it."[93] However, the Judge wisely decided not to rest his entire legal argument on King Henry VIII's respect for property rights and the freedom of the church. Rather, Judge Tucker pointed to the Virginia Declaration of Rights' guarantee of the right of conscience and prohibition on the grant of "exclusive or separate emoluments or privileges" except in consideration of public service.[94] The possession of glebe lands by Episcopalian parishes was characterized by George Hay, in his

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[89] *Id.* at 139–49.
[90] St. George Tucker, Notes and Papers Relating to Cases: Turpin v. Lockett (April 1804) (unpublished manuscript, on file with William & Mary Special Collections).
[91] *Id.*
[92] *Turpin*, 6 Call at 147.
[93] *Id.* at 150.
[94] *Id.* at 151; *See* THE VIRGINIA DECLARATION OF RIGHTS. art. 4, 16.

argument for the Commonwealth, as "exclusive emoluments" that existed, in violation of the Declaration of Rights, as a vestige of the established church which had persecuted the dissenters under the auspices of the English Crown.[95] Thus, the reference to the history of emoluments for the established church buttressed the argument that the glebe system impaired the right of conscience guaranteed to the dissenters in Virginia.

While this tripartite discussion comprised the majority of Judge Tucker's opinion, the Judge reserved his most consequential holding for last. Having resolved that an independent right to the glebes did not persist after the Revolution, Tucker concluded that the Episcopal Church had no right to the glebe lands other than those rights granted by the post-revolutionary statute of incorporation. Since that incorporating statute was either unconstitutional under the Virginia Declaration of Rights or repealed by subsequent legislative enactment, all property rights that might have adhered to the Church as a result of the incorporation had since been extinguished.[96] Thus, the Episcopalian Church and the vestrymen of the parish at Manchester retained no right to the lands. However, the final hurdle remained in the form of the doctrine of vested rights.

The issue of the Episcopalian Church's vested rights lay at the heart of the dispute. Tucker noted that it was a commonly held proposition "that a right of property once vested by a legislative act, cannot be divested by a legislative act."[97] At this point in the history of the Virginia state courts, the impairment of previously vested rights represented one of the key grounds upon which the judiciary would overturn legislative enactments as unconstitutional.[98] Indeed, this doctrine was so integral to the judicial understanding of property rights in the Early Republic that Edwin Corwin

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[95] *See* St. George Tucker, Notes and Papers Relating to Cases: Turpin v. Lockett (April 1804) (unpublished manuscript, on file with William & Mary Special Collections).
[96] *Turpin*, 6 Call at 151.
[97] *Id.* at 155.
[98] *See* MARGARET VIRGINIA NELSON, A STUDY OF JUDICIAL REVIEW IN VIRGINIA 1789–1928, at 35–36 (1947).

christened it "the underlying doctrine of American Constitutional Law . . . without which . . . it is inconceivable that there would have been any Constitutional Law."[99] When compared with later iterations, the understanding of vested rights at the turn of the 19th century represented a relatively weak limitation on legislative enactments; however, the doctrine did pose a potential stumbling block for the government's argument.[100] Absent an appropriate exception, the Virginia legislature's grant of the glebe lands in 1784 would have fully vested the attendant property rights in the Episcopalian Church of Virginia in a way that was insulated from subsequent legislative enactment.

On this point, the commonwealth's argument was decidedly lacking. In his record of the argument, Judge Tucker made special note of the fact that Attorney General Nicolas was unable to answer a direct question about whether the Virginia Supreme Court of Appeals had "ever decided that the Legislature had no power to interfere with vested rights."[101] Exploiting this weakness in the government's argument, both Call and Wickham drew attention to the legislature's attempt to claw back the glebe lands that had been granted to the churches in the 1784 statute. In particular, Wickham pointed to the fact that even if the government was correct and the glebes had reverted to the state government during the Revolution, the acts of 1784 and 1788 had granted that land to particular parishes of the Episcopalian Church as successors to the original vestries, causing the property interest to vest fully in these parishes.[102] By drawing judicial attention to how the clear inconsistency in the legislature's treatment of the glebe lands had prejudiced the property interests

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[99] Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247, 255 (1914).
[100] *See* Charles Grove Haines, *Judicial Review of Legislation in the United States and the Doctrines of Vested Rights and of Implied Limitations on Legislatures*, 2 TEX. L. REV. 257, 271 (1923–1924).
[101] St. George Tucker, Notes and Papers Relating to Cases: Turpin v. Lockett (April 1804) (unpublished manuscript, on file with William & Mary Special Collections).
[102] *Id.*

of the vestry, the counsel for the complainants had implicated an area of property law where courts were much more willing to second-guess legislative enactments.

Tucker's opinion addressed the issue of vested rights by narrowly cabining it within the text of the Virginia Bill of Rights. Responding to the issue of vested rights, Tucker drew a clear distinction between a private person in his or her natural capacity, who would clearly fall under the terms of Article I of the Virginia Bill of Rights, and any form of artificial person which owed its existence to the legislature.[103] Under Tucker's view, any legislative creation of an artificial person endowed with property rights must serve some public purpose that would warrant the grant of such rights and privileges.[104] Tucker saw the artificial person of the church vestry as a franchise who retained their property right only so long as the state government thought it appropriate.[105] Accordingly, the protections against legislative interference in property rights that would be afforded to an individual under the doctrine of vested rights did not apply on equal terms for those held by an artificial person.

Thus, the public purpose of this grant of right and privilege meant that the legislature was just as well qualified, if not better suited, to evaluate whether the grant was accomplishing its intended purpose. If the legislature determined that the creation of the artificial person or its endowment with certain rights was "either unconstitutional, or merely impolitic, and unadvised," that legislature would "be competent to amend, or repeal its own act."[106] Notably, Tucker stopped short of saying that the legislature was entitled to revoke privileges and dissolve corporations for

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[103] *Turpin*, 6 Call at 156.
[104] *Id.*
[105] For a discussion of the intersection of the common law concept of a franchise and the doctrine of vested rights, see Caleb Nelson, *Vested Rights, "Franchises," and the Separation of Powers*, 169 U. PA. L. REV. 1429, 1441 (2021).
[106] *Turpin*, 6 Call at 156.

arbitrary or capricious reasons. Yet, the standard articulated by the Judge still evinces a much higher deference to the legislature on the issue of rights granted to artificial persons when compared with the more stringent standard he maintains for property rights vested in natural persons.

This distinction between natural and artificial persons allowed Tucker to sidestep the issue of vested rights since the parties were not suing for glebe lands that had been vested in a natural individual. Finding that the repeal of the act incorporating the Episcopal Church was a legitimate exercise of power to the extent that it didn't impede the vested rights of individuals, Tucker maintained that the High Court of Chancery had properly dismissed the bill of particulars in the case.[107] Judge Spencer Roan voted with Tucker in upholding Chancellor Wythe's dismissal and thus split the vote evenly with Judges Carrington and Lyons, who had each voted in favor of upholding the vestry's right to the glebe.[108] With the court being divided, the judgement of the court below was affirmed and the seizure of the Manchester glebe ratified by Virginia's court of last resort.

III. The Federal Response

With Tucker's decisions, the Glebe Act of 1802 was placed beyond further judicial challenge within the Virginia courts. As a Virginia statute that operated exclusively on property held by Virginia Episcopalian parishes, the Glebe Act was largely immune from federal judicial intervention. However, the jurisdictional indeterminacy that enveloped the District of Columbia provided one notable exception to this general rule of state court control. Specifically, the status of Alexandria County as a federal jurisdiction where Virginia positive law still applied provided

[107] *Id.* at 157.
[108] *Id.* at 178, 186–87.

the unique circumstance that allowed a federal challenge to the Virginia glebe land confiscation program.

The jurisdictional quandary arose from Alexandria County's status as a federal territory that incorporated Virginia state law. On December 3, 1789, the Virginia General Assembly enacted the cession of territory "where in a location ten miles square, if the wisdom of Congress shall so direct, the States of Pennsylvania, Maryland and Virginia may participate in such location."[109] Accepting this cession of territory, Congress passed the Residence Act of 1790 directing the President to select a site on the Potomac River for the new capital, which President Washington accomplished through proclamation on January 24, 1791.[110] However, the Residence Act punted the thorny issue of federal jurisdiction within the new capital by allowing Congress ten years to determine whether to assert jurisdiction over the new territory. On February 27, 1801, Congress formalized the federal assumption of control over the town of Alexandria and surrounding territory and created an entirely federal district which would house the new national capital.[111] The Act provided that Virginia law would remain in force within that ceded territory, but also established a new federal circuit court that would have exclusive jurisdiction over cases arising in the federal district.[112] The lame-duck Federalists of the Sixth Congress imposed exclusive federal jurisdiction over the District of Columbia as a way to use their party's continued power within the judiciary to curb the perceived excesses of the ascendent Democratic Republicans.[113]

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[109] 12 HENING, *supra* note 18, at 43.
[110] An Act for Establishing the Temporary and Permanent Seat of the Government of the United States, 1 Stat. 130 (1790); *see* WILHELMUS BOGART BRYAN, A HISTORY OF THE NATIONAL CAPITOL 119-20 (1914).
[111] An Act concerning the District of Columbia; 2 Stat. 103 (1801). This Act, often referred to as the District of Columbia Organic Act, represented the culmination of more than a decade of political maneuvering that sought to bring the nation's capital to the Potomac.
[112] *Id.* at 104–105.
[113] *See* William C. diGiacomantonio, *"To Make Hay while the Sun Shines" D.C. Governance as an Episode in the Revolution of 1800*, *in* ESTABLISHING CONGRESS: THE REMOVAL TO WASHINGTON D.C., AND THE ELECTION OF 1800, 39, 46 (Kenneth R. Bowling & Ronald R. Kennon, eds., 2005).

The Jefferson administration and his Democratic Republican allies in the legislature made some tweaks to the system but left the overarching balance between state and federal law intact. Most notably for the Glebe Act litigation, Congress granted the Federal Circuit Court of Alexandria County the power to hear common law and chancery cases, which empowered it to hear the actions to quiet title.[114] Under this jurisdictional framework, any suit for confiscation of a glebe that lay within the boundaries of the ceded territory would be governed under Virginia law but adjudicated in a federal forum. It was because of this amalgamation of federal and state law in the District of Columbia that the issue of glebe confiscation first arrived before the Supreme Court of the United States as an appeal from the federal circuit court in the case of *Terret v. Taylor*.[115] Under this system, Virginia law governed but federal judges decided.

1. The Virginia Glebe Act Falls within Federal Jurisdiction

The case arose when the trustees of the Episcopal Church of Alexandria initiated an action to quiet title in order to compel the wardens of the Fairfax church to sell the vacant Fairfax glebe and apply the proceeds towards the support of the Episcopal Church.[116] In response, the Overseers of the Poor for Fairfax County objected and sought to invalidate arguing that it would interfere with their right under the Glebe Act of 1802 to use the proceeds of any sale of the glebe to support the poor in the county.[117] The rather convoluted procedural history contrasts with the facts in *Turpin* because in this case the vestry was the first mover, seeking preemptively to sell the glebe

[114] An Act Additional to, and amendatory of, an Act, instituted "An Act concerning the District of Columbia", 2 Stat. 193–94.
[115] Terret v. Taylor, 9 Cranch 43 (1815).
[116] *Id.* at 44. Within the context of religious organizations in the 18th Century, Trustees were individuals elected by a parish from among their membership who were served "as the bridge between the congregation and the state" even in jurisdictions like Virginia that did not allow the formal incorporation of religious societies. *See* Sarah Barringer Gordon, *The First Disestablishment: Limits on Church Power and Property Before the Civil War*, 162 U. PA. L. REV. 307, 334–35 (2017).
[117] *Terret*, 9 Cranch at 44–45.

to prevent confiscation. Michael McConnell interpreted these facts as indicating that the vestry's original claim against the churchwardens was a "friendly suit" designed to generate a case that would lead to an adjudication of the Glebe Act on its merits before a "Federalist dominated federal bench [that] would likely be an ally in this political-cultural-religious struggle."[118] However, historian Alyssa Penick notes that the vestry had previously sought an act of incorporation from Congress which had been vetoed by James Madison and thus the federal courts were the "last resort of the Alexandria vestry" rather than a calculated appeal to a federalist judiciary.[119]

Despite Penick's observation that the vestry had first availed themselves of a legislative solution, the conduct of the litigation indicates that the litigants used the Fairfax glebe's jurisdictional anomaly as part of a coordinated attempt to counteract the negative effects of *Turpin v. Lockett*. This is demonstrated by the fact that the case was argued before the Supreme Court by Edmund Jennings Lee, the same attorney who later would argue that the precedent of *Terret v. Taylor* ought to apply to the Virginia courts in the case of *Selden v. Overseers of the Poor*.[120] As a member of the diocesan standing committee and a close confidant of the Bishop of the Diocese of Virginia, Richard Channing Moore, Lee had a clear interest in not just preserving the Fairfax glebe but also creating a federal precedent that could potentially be used to forestall further confiscations of church property.[121]

A descendent from one of the first families of Virginia and prominent member of the Supreme Court bar, Lee was well suited to the task of representing the Episcopalian church's interests and might have instigated the suit to quiet title to ensure that the Church was able to select

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[118] McConnell, *supra* note 9, at 13.
[119] Penick, *supra* note 10, at 499 n.83. For a discussion of James Madison's views on religious establishment see PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 181–84 (2002).
[120] Terret, 9 Cranch. at 45; *see* BUCKLEY, *supra* note 29, at 127.
[121] BUCKLEY, *supra* note 29, at 123.

a federal forum with a path to appellate review by the Supreme Court.[122] Regardless of the intent behind the original action to quiet title, the action proceeded before the federal circuit court without issue. Indeed, the vestry was aided in their litigation strategy by the fact that the federal court elected not to be "over-scrupulous about case and controversy requirements" of the underlying action.[123] With this procedural hurdle cleared, the Circuit Court for the District of Columbia decided in favor of the vestry, issuing an order that affirmed their right to the glebe lands. Bridling at this flaunting of the Virginia statute, Terrett and the other Fairfax Country Overseers of the Poor promptly appealed the matter to the United States Supreme Court.

At this point, the vestry members for the Fairfax parish had every right to be confident in their chances of success before the Supreme Court. Before his appointment to the Supreme Court, Justice Bushrod Washington had been one of the members of Bishop Madison's legal committee that delivered the emphatic statement that, under the common law and the Virginia Constitution, "the Protestant Episcopal Church is the exclusive owner of those glebes" in the years preceding the passage of the Glebe Act of 1802.[124] Presumably, this prior involvement with the glebe issue in Virginia was not seen as rising to the level of requiring recusal from the case.[125] Thus, the Church had an outspoken ally on the Court who had previously stated, in no uncertain terms, the illegitimacy of the Virginia legislature's attempt to divest the parishes of their glebes. Despite this, it was not Justice Washington who wrote the opinion vindicating the rights of the Fairfax parish but rather the newly appointed Justice Story.

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[122] *See* CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 369 (1911).
[123] McConnell, *supra* note 9, at 13.
[124] BRYDON, *supra* note 4, at 514–15; see MAYS, *supra* note 45, at 339–40.
[125] Penick, *supra* note 10, at 502.

2. Law, Religion, and Republicanism

Despite being appointed to the Court by President James Madison, Justice Story did not exhibit the traditional markers of a Democratic-Republican jurist. Indeed, Thomas Jefferson was immediately opposed to Justice Story's candidacy for the seat on the Court and advised President Madison against elevating him to the tribunal stating that he was "unquestionably a Tory" and too young for the position.[126] This initial animosity between Justice Story and Jefferson festered into a decades-long debate over the proper relationship between law and religion, specifically whether the English common law incorporated Christianity by its terms.[127] Jefferson rejected the assumption that the common law imported the principles of Christian scripture and maintained that such a false impression was based on the mistranslation of the law-French phrase "ancien scripture" as "holy scripture" in Sir Henry Finch's exposition on the nature of the common law.[128] Jefferson argued that this mistranslation had infected subsequent treatise writers and legal luminaries by showing the extent to which individuals such as Blackstone, Lord Mansfield, and Matthew Hale had relied upon Finch's translation.[129] As Jefferson pointed out, the earlier authorities of Bracton, Glanville, and Justice Fortescue Aland made no mention of any Christian underpinnings of the common law, a rather curious omission given the supposed antiquity and

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[126] 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY, at 407 (1922); IRVING BRANT, JAMES MADISON: THE PRESIDENT, 1809–1812, at 168 (1941)

[127] R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 182–83 (1985).

[128] Jefferson diagnosed error in the translation of Sir John Prysot's opinion within Sir Henry Finch's 1613 legal treatise *Nomotexnia Cestascavoir*, which was originally published in law French and subsequently translated into English by Finch himself in 1627. Legal scholars of the Seventeenth and Eighteenth centuries viewed this treatise, popularly referred to as Finch's Law, as a major influence with Sir. William Blackstone identifying its thematic organization of the law as a motivating force behind the structure of his own *Commentaries*. THOMAS JEFFERSON, *Christianity and the Common Law*, *in* JEFFERSON'S LEGAL COMMONPLACE BOOK 571–79 (David Thomas Konig at al. eds., 2019); *see* RICHARD BEALE DAVIS, INTELLECTUAL LIFE IN JEFFERSON'S VIRGINIA 1790–1830 at 125–28 (1972); Wilfrid Prest, *The Dialectical Origins of Finch's Law*, 36 CAMBRIDGE L.J. 326, 326–27 (1977).

[129] THOMAS JEFFERSON, *Whether Christianity is a Part of the Common Law*, *in* REPORTS OF CASES DETERMINED IN THE GENERAL COURT OF VIRGINIA FROM 1730 TO 1740 AND FROM 1768 TO 1772, 137, 138 (1829).

centrality of the concept within Saxon law.[130] Thus, the supposedly ancient "sting of authorities" supporting an incorporation of Christian principles in the common law were "all hanging on the same hook" of a mistranslation of a fifteenth century jurist by a seventeenth century treatise writer.[131]

Such an understanding of legal development comported with Jefferson's jurisprudential preconceptions that the Anglo-Saxons "had originally lived under a code of unwritten custom and natural law" which was perverted into a "tortured system of judicial metaphysics" at the hands of "Norman lawyers, pious judges, and grasping clerics."[132] Jefferson cleaved to an idealized version of the Saxon past that painted the Germanic-English ancestors as proto-democrats, a view heavily influenced by the Whig historical conception of Saxon liberty and Norman oppression.[133] As Jefferson himself noted that he had always believed "that the difference between the Whig and the Tory of England is, that the Whig deduces his rights from the Anglo-Saxon source, and the Tory from the Norman" and "how some of the A[nglo]-Saxon priest interpolated the text of Alfred's laws" belied the Tory proposition that Christianity inhered in the common law.[134] In asserting that the connection between Christianity and the common law the result of mistranslation and Tory judicial forgery, Jefferson accused the other side of acting in bad faith. This fact was not lost on his interlocutors, especially Justice Story, and colored the character of the debate going forward.

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[130] *Id.* at 140.
[131] *Id.* at 138.
[132] L. K. Caldwell, *The Jurisprudence of Thomas Jefferson*, 18 IND. L.J. 193, 195 (1943).
[133] H. Trevor Colbourn, *Thomas Jefferson's Use of the Past*, 15 WM. & MARY Q. 56, 59 (1958).
[134] This private letter provides an early version of the argument regarding Fitch's alleged mistranslation and provided the basis of the later published versions of the Jeffersonian position regarding Christianity and the common law. The letter preserves some rhetorical flourishes that were removed from later versions, such as referring to the supporters of the link between Christianity as members of "a conspiracy . . . between Church and State" and "rouges all." Thomas Jefferson to John Cartwright (June 5, 1824) (on file with the Library of Congress); *see also* Caldwell, *supra* note 132, at 195 (parsing the letter and Jefferson's correspondence with Cartwright regarding the Anglo-Saxon origins of the English Constitution).

Justice Story publicly rejected Jefferson's view as ahistorical at best and disingenuous at worst. In a targeted response to Jefferson's exegesis on Finch's alleged mistranslation, Justice Story maintained that the common law incorporated Christian faith in order to exemplify "the duties found in natural law" and moral reasoning.[135] Furthermore, Justice Story would later indicate in his seminal treatise on American law that the Christian faith ought to be promoted by the state as "the especial duty of the government to foster and encourage it among all the citizens and subjects."[136] Under this view of the proper relationship between church and society, Christianity represented an integral aspect of American civic republicanism. Jefferson's support of stringent supranationalism led Justice Story to muse amongst his friends and confidants that Jefferson's continued attacks on the Christian underpinnings of the common law threatened to dissolve the Union from the inside.[137] Thus, *Terrett* can be seen as part of Justice Story's opening salvo in a complicated intellectual debate over the soul of American common law.[138]

3. Churches and the Corporate Form

Despite the religious concerns implicated by the issue of glebe confiscation, Justice Story's opinion in *Terrett* does not deal explicitly with the proper role of religion in American society. Rather, the case is typically viewed as being an early exposition of the Contract Clause.[139] As legal historian G. Edward White has noted, this categorization of *Terrett* as a Contracts Clause case is somewhat counterintuitive because it is difficult to determine from the text of the opinion exactly

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[135] ANDREW FORSYTH, COMMON LAW AND NATURAL LAW IN AMERICA 87–88 (2019).
[136] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1871 (2d ed. 1851); *see* JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 118–28 (1971).
[137] *See* David Reiss, *Jefferson and Madison as Icons in Judicial History: A Study of Religion Clause Jurisprudence*, 61 MD. L. REV. 94, 104 (2002).
[138] NEWMYER, *supra* note 127, at 183; MCCLELLAN, *supra* note 136, at 129.
[139] Some commentators have viewed *Terrett* and its companion case *Town of Pawlet v. Clark* as continuing Justice Story's "rigorous exposition of the contracts clause." This interpretation likely stems from the pivotal role that the Terrett precedent played in Daniel Websters' oral argument in *Dartmouth College v. Woodward*. *See, e.g.*, GERALD T. DUNNE, JOSEPH STORY AND THE RISE OF THE SUPREME COURT 126–27 (1971).

what contract the Virginia legislature had impaired in passing the Glebe Act of 1802.[140] Rather than anything stated in Justice Story's opinion, *Terrett* owes its identity as a canonical Contracts Clause case due to its subsequent usage by Daniel Webster in the oral argument for the landmark case of *Dartmouth College v. Woodward*.[141] Rather than attempting to force *Terrett* to conform to Contract Clause doctrine, the majority opinion is better understood as a case where Justice Story, failing to find an applicable textual provision to ground his constitutional analysis, "turned to natural law principles to restrain legislative authority."[142]

This understanding of *Terrett* is supported by the fact that Justice Story does not cite any specific constitutional provisions in determining that the Virginia Glebe Act violated the United States Constitution. Rather, the core of Justice Story's opinion lies in his determination that the Fairfax parish represented a private corporation that had been created by the Virginia legislature during the incorporation act of 1784.[143] From this baseline status he determined that the post-revolutionary incorporation of the Episcopal Church in Virginia had "vested an indefeasible and irrevocable title" in those lands formerly held by the Anglican Church, which precluded any legislative attempt to claw back these lucrative properties.[144] Justice Story stated that the Court was unaware "of any authority or principle which could support the doctrine that a legislative grant is revocable in its own nature, and held only *durante bene placito*" since the existence of such a doctrine would upend the "great and fundamental principle of a republican government" that citizens have a right to property once granted free from the interference of legislative fiat.[145] Thus, the central focus of Justice Story's argument was that the Act of the Virginia legislature was not

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[140] G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835 at 608 (1991).
[141] *See* Penick, *supra* note 10, at 480–81.
[142] JAMES W. ELY, JR., THE CONTRACT CLAUSE: A CONSTITUTIONAL HISTORY 57 (2016).
[143] *Terrett*, 9 Cranch at 47.
[144] *Id.* at 50.
[145] *Id.* at 50–51.

unconstitutional because it impaired the obligation of any preexisting contracts but rather it was void because it represented a legislative encroachment on rights that had vested in private citizens.

In invoking the doctrine of vested rights, Justice Story embraced a much more circumscribed view of the ability of state legislatures to influence the legal rights and relations of its citizens. In his *Commentaries*, Story noted that while the United States Constitution itself did not forbid state governments from divesting legally vested rights absent the impairment of a contract, such legislative divestment could be voided "upon principles derived from the general nature of free governments, and the necessary limitations created thereby."[146] This doctrine, as enunciated by Justice Story, draws strength from the natural law conception of the right of property as one of the key rights retained by individuals when they entered into a civil society. Since no reasonable group of citizens would grant a legislature the power to violate these rights arbitrarily, such power to revoke previously granted lands lay outside of the capacity of government.[147] Thus, any attempt by a legislature to violate these rights was void on its face as an illegitimate assumption of power to which that branch was not entitled.

Under this view, vested rights doctrine provided a method to curb the perceived excesses of Democratic-Republican legislatures by emphasizing that the determination of the scope and content of private rights held by individuals and private corporations were the domain of the more measured judicial branch.[148] As Corwin notes in his analysis of the vested rights doctrine, this jurisprudential shift meant that "natural rights, expelled from the front door of the constitution are

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[146] 3 STORY, *supra* note 136, § 1398 at 251.
[147] Corwin, *supra* note 99, at 253–55.
[148] *See* Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 VA. L. REV. 1421, 1437-38 (1999); *see also* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1444 (1990).

readmitted through the doctrine of separation of powers."[149] Thus, Justice Story's choice to base his opinion upon "the common sense of mankind and the maxims of eternal justice" represents an importation of natural law principles into the Constitution through the mechanism of declaring the separation of powers among the different branches of government.[150] As such, the lack of any specific textual provision upon which to base this vested rights argument did not detract from its force.

Having established that the Glebe Act of 1802 was an impermissible attempt to exercise power which the Virginia legislature did not possess under the United States Constitution, Justice Story then turned to refuting Judge Tucker's argument that the Episcopalian parishes were not private corporations but rather corporations created for a public purpose. While the opinion does not explicitly reference Judge Tucker's opinion in *Turpin*, the choice to distinguish ecclesiastical corporations from public corporations or corporations holding a franchise is directly responsive to Tucker's earlier treatment of the issue under Virginia law.[151] While Justice Story acknowledged that this represented a closer issue, ultimately he distinguished the Fairfax parish's possession of the glebe from property held by a public corporation as a franchise to aid its public purpose.[152]

Despite the majority's emphatic rejection of the public purpose conception of parishes, the opinion intentionally leaves the exact legal basis for this determination ambiguous. Justice Story's opinion noted only that the Court's determination that the classification of the Fairfax parish as a purely private corporation rested "upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the constitution of the United States, and

[149] Corwin, *supra* note 99, at 252.
[150] *Terrett*, 9 Cranch at 50.
[151] Turpin v. Lockett, 6 Call 113, 156 (1804).
[152] *Terrett*, 9 Cranch at 51–52.

upon the decisions of most reputable judicial tribunals, in resisting" Judge Tucker's proposed doctrinal classification of parish organizations as public purpose corporations.[153] Despite this averment to the overwhelming weight of these authorities, Justice Story's opinion does not cite any sources that mandate the treatment of parishes as purely private corporations in spite of their historical use as public, quasi-governmental entities.

The refusal to consider the potential that parishes might hold lands for public purposes was almost certainly based in the majority's disinclination to view religious or eleemosynary organizations as anything other than a purely private corporation. These organizations were viewed as being particularly vulnerable to the caprices of an overzealous and unchecked popular legislature and thus the Justices in the majority likely sought to offer them the complete protections of private vested rights doctrine.[154] Under the nineteenth century conception of vested rights doctrine, corporations that were determined to be mixed public and private purposes, such as municipalities, were not viewed as possessing vested rights in the powers or property that had been granted to them by the state sovereignty and thus the legislature could interfere with these rights at their discretion.[155] Accordingly, any concession that the parishes might be mixed corporations rather than purely private ones would be fatal to the argument that these entities enjoyed vested property rights in the lands held by the Anglican Church prior to the Revolution. Indeed, it was this determination that eleemosynary corporations were private corporations that was so essential to Justice Story's later concurrence in *Dartmouth College*, another case where Story sought to

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[153] *Id.* at 52.
[154] *See* R. Kent Newmyer, *Justice Joseph Story's Doctrine of "Public and Private Corporations" and the Rise of the American Business Corporation*, 25 DEPAUL L. REV. 825, 833 (1976); FRANCIS N. STITES, PRIVATE INTEREST & PUBLIC GAIN: THE DARTMOUTH COLLEGE CASE, 1819 at 46–48 (1972); *see also* Adam J. MacLeod, *Of Brutal Murder and Transcendental Sovereignty: The Meaning of Vested Private Rights*, 41 HARV. J. L. & PUB. POL'Y 253, 263–65 (2017).
[155] HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870 at 17 (1983).

operationalize the doctrine of vested rights to curb the perceived excesses of a Democratic-Republican state legislature.[156]

Having determined that the Fairfax parish was a private corporation that retained vested rights in the lands owned by the Anglican church prior to the Revolution, Justice Story had effectively nullified the Virginia Glebe Act of 1802 as it applied to the case. Therefore, the Court was able to dispatch the remaining issues with relative ease to hold that the Overseers of the Poor of Fairfax County lacked any right to prevent the sale of the Fairfax glebe by the Church.[157] During that same term, Justice Story provided the majority opinion the companion case of *Town of Pawlet v. Clark* which invalidated a similar attempt by a Democratic-Republican dominated legislature to reappropriate former Anglican glebes for the purposes of public education in Vermont.[158] Taken together these cases indicate the Court's hostility towards legislative attempts to deprive religious organizations of the lands previously vested in them by state governments. Indeed, Justice Story would later cite these precedents in his Commentaries as supporting the proposition that private vested rights of property were so fundamental that "no court of Justice in this country would be warranted in assuming… that such power, so repugnant to the common principles of justice and civil liberty, lurked under any general grant of legislative authority."[159] Despite this sweeping language, it was now up to the state courts of Virginia to determine how to interpret the Glebe Act of 1802 in light of an extremely hostile federal precedent.

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[156] Penick, *supra* note 10, at 508–11; *see* Morton Horowitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1425 (1982); Charles R.T. O'Kelley, *What was the 'Dartmouth College' Case Really About?*, 74 VAND. L. REV. 1654, 1719 (2021).

[157] *Terrett*, 9 Cranch at 55. The sale was delayed by subsequent litigation instigated by members of the Fairfax parish who were dissatisfied with the plan to sell the glebe to raise funds for the support of the Alexandria Episcopalian Church. This case eventually reached the Supreme Court almost a decade later where Justice Story reaffirmed the ability of the Fairfax parish trustees to sell the glebe. Mason v. Muncaster, 22 U.S. 445 (1822).

[158] Town of Pawlet v. Clark, 13 U.S. 292 (1815); McConnell, *supra* note 9, at 18–20.

[159] 3 STORY, *supra* note 136, § 1399 at 252.

IV. The Fallibility of Federal Precedent

After the Supreme Court's decision in *Terrett*, there were no cases squarely challenging the Glebe Act before the Virginia courts for over two decades. The long tail of these cases stemmed from the statute's vacancy requirement that prevented the dispossession of any glebe in a parish until after the incumbent minister died or otherwise vacated their post, so as not to leave elderly ministers destitute and without shelter in their waning years. Thus, the next major challenge to the Glebe Act did not arise until Reverend John Dunn of the Shelburne Parish in Loudoun County died in 1827.[160] Following the minister's death, the Overseers of the Poor for the county sought possession of the now vacant glebe prompting Wilson Cary Selden and other members of the parish vestry to bring suit in the Virginia Courts of Chancery.[161] By sheer coincidence and as a function of the relatively small size of the bench and bar in Western Virginia at the time, the Chancellor assigned to this case was Henry St. George Tucker, the eldest son of the Judge Tucker who decided *Turpin* almost three decades prior.

1. Fathers, Sons, and Equitable Discretion

With a unique symmetry borne of historical accident, the last major challenge to the Glebe Act was heard before the son of the man who first preserved the law from judicial overrule. Following in the footsteps of his father, Henry St. George Tucker had enjoyed a successful career as a legal practitioner and legislator before being appointed as a chancellor for the fourth judicial district of Virginia from which he was elevated to the Virginia Supreme Court of Appeals in 1831.[162] However, unlike his father's more incremental and circumspect opinion in *Turpin*, the

[160] Brydon, *supra* note 5, at 277.
[161] Selden v. Overseers of the Poor of Loudoun, 11 Leigh 127, 127–28 (1840).
[162] David M. Cobin, Henry St. George Tucker 15 (1992).

younger Chancellor Tucker saw no need to mince words when dealing with the renewed challenge to the Glebe Act's validity. Chancellor Tucker emphasized that the glebes were public lands paid for with public money for the benefit of a public ecclesiastical institution that was overseen by the vestrymen as public officers.[163] Thus, he maintained that there could be no private right that vested in the individual minister or the parish as a whole and the continued possession of the glebe was subject to legislative modification.[164] By focusing the core of the opinion on the public aspect of the glebe lands and the attendant ecclesiastical societies, Chancellor Tucker was able to craft a narrative that did not implicate the doctrine of vested rights.

To support this narrative, Chancellor Tucker went on the offensive by emphasizing what he perceived as the manifest injustice of allowing the Episcopalian churches to retain the tainted fruits of a tyrannical establishment. In contrast with his father's opinion in Turpin, which had emphasized the republican virtues of the Anglican clergy that opted to remain in Virginia, Chancellor Tucker devoted a large swath of his opinion to recounting a quasi-historical account of the plight of religious dissenters who were forced, under pain of punishment, to contribute to the salaries and emoluments of foreign ministers in a system which was both "sinful and tyrannical."[165] From there Chancellor Tucker linked the Glebe Act of 1802 to the fulfillment of the Revolutionary promise of freedom of religion and from religious tyranny that had first been raised by the nascent Virginia Legislature in 1776.[166] Against this backdrop of Revolutionary argument, Chancellor

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[163] Though Judge Henry Tucker's opinion in the Chancery Court was not officially reported, the Judge appended a copy of the opinion to the legal treatise on the Constitution and Laws of Virginia that he published during his tenure as the Professor of Law at the Winchester Law School. 2 Henry St. George Tucker, *Appendix to Book II: The Opinion of Chancellor Tucker, in the Case of Selden and Others against the Overseers of the Poor of Loudoun and Another*, *in* COMMENTARIES ON THE LAWS OF VIRGINIA 1, 7 (1837).
[164] *Id.* at 8.
[165] In framing his historical account of the conditions giving rise to disestablishment, Chancellor Tucker would often draw language from Jefferson's Statute for Religious Freedom or the Virginia Bill of Rights to reinforce the constitutional valence these arguments for religious separation. *Id.* at 9.
[166] *Id.* at 10-11.

Tucker swiftly and succinctly dismissed *Terrett* by noting that the decision was not binding authority since the Supreme Court had issued a judgement that "relate[d] to a subject over which they have no jurisdiction" as "a pretension … to examine, by way of appeal, the decisions of the [Virginia] court of appeals."[167] Thus, the Chancellor determined that the United States Supreme Court's decision in *Terrett* did not disturb the prior decision of the Virginia Supreme Court of Appeals in *Turpin v. Lockett*.

The younger Chancellor Tucker's deliberate flaunting of federal precedent prompted a swift and vituperative rebuke from Edmund Jennings Lee, the attorney who had represented the Alexandria vestry before the United States Supreme Court in *Terrett v. Taylor*. Publishing under the pseudonym "a layman," Lee began a point-by-point rebuke of Judge Tucker's judgement in *Selden* that was nearly double the page count of the opinion it criticized.[168] While Lee devoted much of this pamphlet to technical arguments of statutory interpretation and issues of jurisdiction, the kernel of its outrage lay in the fact that a state chancery court judge "had presumed to review and reject" a decision of the United States Supreme Court.[169] With palpable indignation, Lee stated that there existed no possible rationale "to account for this departure from judicial dignity" as it fundamentally wounded the equal respect between state and national governments, imperiling the federal system as a whole.[170] Lee's pamphlet, though meticulous and well-reasoned, evinced the author's impotent rage at the chancery court's refusal to give effect to the federal interpretation of the Glebe Act. Despite the Alexandria vestry's success at the nation's highest court, ultimately the entire litigation strategy of the Episcopalian vestries turned on an expectation that state tribunals

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[167] *Id.* at 15.
[168] BUCKLEY, *supra* note 29, at 126.
[169] *Id.* at 126–27.
[170] A Layman, *Selden and Others vs. the Overseers of the Poor of Loudoun County, and Others [A Review]*, 1 (on file with Virginia Museum of History and Culture); *see also* BUCKLEY, *supra* note 29, at 126 n.33 (describing the pamphlet and linking its authorship to Edmund J. Lee).

would limit their own discretion by adhering to the logic of Justice Story's opinion. In this first challenge, this expectation had borne bitter fruit for the vestry members.

2. Return to the Supreme Court of Appeals

After the case was dismissed by Chancellor Tucker in 1830, there was a ten-year gap in the litigation before the Virginia Supreme Court of Appeals agreed to hear an appeal on the issue of the Shelburne parish glebe. By that point Henry St. George Tucker had been elevated to a position on the Supreme Court of Appeals and chose to recuse himself from the panel that heard arguments on the constitutionality of the Glebe Act.[171] Thus, it was Judge Robert Stanard who delivered an opinion for the Court adhering to stare decisis and holding that the Glebe Act remained constitutional under the precedent established in *Turpin v. Lockett*.[172] While less polemical that Judge Tucker's opinion from the Court of Chancery, the opinion conveyed the same casual disregard for the United States Supreme Court's determination of the Glebe Act's invalidity.

Despite not citing or even referring to *Terrett* by name, Judge Stanard's opinion indicated that the Virginia Supreme Court of Appeals was extremely skeptical as to whether the federal precedent should have any impact on the outcome of the case. Notably, the entire discussion of the relatively brief opinion is limited to prior decisions of the Virginia's highest court and how the intermediate courts of the Commonwealth had conformed to the legal regime laid out by the Glebe Act and affirmed by the decision in *Turpin*.[173] The Judge even goes so far as to state that none of the intervening developments in the decades following *Turpin* had introduced any doubt as to its correctness as an original matter and that "had [he] been one of the court which decided that case…

[171] Brydon, *supra* note 5, at 280.
[172] *Selden*, 11 Leigh at 135–36.
[173] *Id.* at 132–34.

[he] should have concurred in the opinions that prevailed."[174] Thus, even the more restrained opinion of the higher court issued by Judge Stanard gave little countenance to the idea that the Virginia Supreme Court of Appeals was obligated to view the decision of the highest court in the land as even persuasive authority. With no grounds for appeal to the federal courts, the judgement against the Shelbourne Parish vestry was final, notwithstanding its blatant inconsistency with a United States Supreme Court precedent on substantially the same issue. While the United States Supreme Court could operationalize the vested rights doctrine as a tool for policing perceived overreach by state legislatures, there was no guarantee that such doctrines would find purchase outside of federal forums.

3. The End of the Glebe Litigation

By the time that Judge Standard affirmed the constitutionality of the Glebe Act, the protracted pace of litigation had largely mooted the controversy. Nearly four decades and one full generation of Judges had intervened between the initial passage of the legislation and its final vindication before the Viriginia Supreme Court of Appeals. The unbroken acceptance of the Glebe Act among the Virginia state courts had allowed the confiscation and sale of all eligible glebe lands that fell within the terms of the 1802 Act.[175] While the incumbent minister provision of the statute had spaced out the seizure of a number of the glebes, each year saw more of these ministries vacated and the corresponding glebe rendered unto the Overseers of the Poor to be parceled up and auctioned off. Even if the Shelburne Parish vestry had succeeded in convincing the Virginia Courts of the injustice of the confiscations, it would have been a judgement that applied to only that Parish since no other parishes retained comparable glebe lands that would be

[174] *Id.* at 135.
[175] Brydon, *supra* note 5, at 505.

protected from seizure. As a practical matter, confiscation of the church lands and property represented a *fait accompli* in the decades before the controversy that gave rise to *Selden*.

In all that time every court except one that considered the statute had viewed it as a permissible exercise of legislative power, even if the one outlier happened to be the Supreme Court of the United States. The mutual respect between the federal and state judiciaries represented too weak a reed to convince the Virginia jurists to forgo the decision of their own highest court in favor of Justice Story's heavy-handed castigation of the General Assembly. Reading the writing on the wall, the Episcopalian Church largely abandoned any attempt to claw back the lost glebes. By this time, the Church had pivoted away from the glebe model as a method supplementing its ministers' income and was instead focusing its energies on lobbying the General Assembly to re-incorporate the Episcopal Church in Virginia.[176] Though the glebes were lost, the government sanctioned confiscation of property had been unable to destroy the Episcopal Church of Virginia.

CONCLUSION

A central virtue of these cases involving the constitutionality of the Virginia Glebe Act of 1802 is the slow pace at which the litigation progressed. While this was probably not seen as a virtue by the individual litigants, the gradual pace of these challenges means that this triarchy of Virginia glebe cases can be used to trace the judicial struggle to define the scope of legislative power from the Early Republic into the antebellum era. The Revolution saw state legislatures vested with unprecedented amounts of power just as these same legislatures were attempting to solve the complicated legacy of the final separation from the English Crown. In this environment,

[176] *See* BUCKLEY, *supra* note 29, at 130–38.

legislatures were prone to relying on sweeping enactments which disquieted the more conservative elements of American society and prompted a shift to the view of the judiciary as the guarantor of private rights.[177] With this shift, the courts became battlegrounds where the results of legislative losses could be mitigated or outright reversed by the judicious application of the correct doctrine to the appropriate set of facts.[178] Doctrines such as that of private vested rights became the weapons by which the courts and judges could encourage societal change deemed necessary to the health of the republic, though different members of the judiciary maintained conflicting views of how to apply them. Thus, these cases are best conceptualized as part of a conflict between federal and state judicial systems over who gets the power to define the scope of a doctrine within a federal system. While the controversy over the confiscation of glebe lands has all but faded into obscurity, these cases still provide valuable insight into the development of distinct federal and state legal cultures in the years following the Revolution.

[177] Wood, *supra* note 148, at 1432–34.
[178] McConnell, *supra* note 9, at 19–20.