

**CREATING AN AMERICAN PROPERTY LAW:  
ALIENABILITY AND ITS LIMITS IN AMERICAN HISTORY**  
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This Article analyzes an issue central to the economic and political development of the early United States: laws protecting real property from the claims of creditors. Traditional English law, protecting inheritance, shielded a debtor's land from the reach of creditors. Under English law, an individual's freehold land was exempted entirely from the claims of unsecured creditors. In addition, even where land had been explicitly pledged as collateral in mortgage agreements, Chancery court procedures imposed substantial costs on creditors making it difficult for them to seize the land. American property law, however, emerged in the context of colonialism and the dynamics of the Atlantic economy. Although the English property laws exempting land from debts were administered in many colonies, they were voluntarily rejected by several colonies that sought to improve the terms upon which credit would be extended. In 1732, to advance the economic interests of English merchants, Parliament enacted a sweeping statute, *The Act for the More Easy Recovery of Debts in America*, which required that real property, houses, and slaves be treated as legally equivalent to chattel property for the purpose of satisfying debts in all of the British colonies in America and the West Indies. This statute, and those of the colonies that voluntarily reformed their laws prior to the *Act*, substantially dismantled the legal framework of the English inheritance system by giving unsecured creditors priority to land over heirs. The *Act* also provided Parliamentary authority for the legal treatment of slaves as chattel, rather than as a form of real property attached to the land and, in most colonies, required that the courts hold auctions to sell both slaves and real property to satisfy debts. More broadly, this legal transformation led to greater commodification of real property, the expansion of slavery, and enhanced the availability of capital for economic development.

The *Act for the More Easy Recovery of Debts* was reenacted by most, but not all, state legislatures in the Founding Era. Through the 1840s, most states exempted only minimal amounts of property from creditors' claims. These policies—a legacy of the colonial era—subjected American landholders to greater financial risk than would have been the case in the absence of the Parliamentary Act. During times of recession, landowners unable to pay their debts faced the threat of losing land and possible disenfranchisement. Tensions relating to creditors' remedies, both between the states and the federal government, and between states with differing policies had important consequences for American federalism. The history of creditors' claims to real property in the colonial and founding periods is important to understanding the emergence of an American property law, the economic development of the colonies and states, the growth and operation of the slave system of labor, and American federalism.

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Joseph Story, writing about American legal development in his *Commentaries on the Constitution* of 1833, described a transformation in colonial property law, the effect of which was to:

“make land, in some degree, a substitute for money, by giving it all the facilities of transfer, and all the prompt applicability of personal property.”<sup>1</sup>

Story’s description of the legal treatment of land as a substitute for money—the most fungible of all assets—had important economic and political implications in the context of the Anglo-American property tradition. It suggests that, in America, land was treated as a commodity without special status. The description of land as having the “facilities of transfer” and “prompt applicability” of chattel property suggests that, in America, few legal and procedural hurdles impeded the use of land in market exchanges, and therefore that the commercial and economic potential of land was fully realized.

Story’s comment also implies that America had departed from the traditional English law of real property that was dominated by concerns relating to the protection of landed inheritance. English law reflected a society in which political and social authority was vested in a landed class that perpetuated itself through the long-term ownership of real property. Real property was viewed as the source of wealth of families that, like an endowment, would persist through the generations. In contrast to the modern emphasis in property law on increasing the productivity of real property, Blackstone’s

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<sup>1</sup> JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, Book 1, §182, p. 168 (Boston: 1833). It is well known that Story’s writings often emphasized commercial expansion as a principal causal force for American legal change. The description of land as operating like a “substitute for money” is so strongly worded, however, that it suggests a dramatic legal change, even if it is acknowledged that Story’s historical writings were intended to advocate a view. See R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 181-94, 305 (1985) (describing the positions Story advanced in the *Commentaries* and Story’s emphasis on commerce).

*Commentaries* of the late eighteenth century describes “the principal object of the laws of real property in England” as the law of inheritance.<sup>2</sup> Americans from the Founding Era forward, however, viewed the greater circulation of land in America as the basis of a new political ideal—republicanism—that offered greater opportunity for political participation than in European society. As stated by Noah Webster in 1787, for example, “an equality of property, with a necessity of alienation constantly operating to destroy combinations of powerful families, is the very *soul of a republic*.”<sup>3</sup>

This Article examines a body of English laws and procedures that stabilized the English aristocracy and its inheritance system by protecting real property from the claims of creditors. It examines in detail the legal transformation referred to in Story’s *Commentaries*, that is, the repeal of English law with respect to creditors’ claims to land. What were the English protections to real property from creditors’ claims? First, the law incorporated a default rule that protected property owners’ title to land from the claims of all unsecured creditors: claims to collect debts where land had not been explicitly offered as security. Debtors’ freehold interests could not be taken to satisfy unsecured debts.<sup>4</sup> The law also extended this rule so that, at the death of a debtor, the debtor’s real property holdings descended to the heirs and devisees free of all legal claims of the deceased debtor’s unsecured creditors. As described by Sir Samuel Romilly, an

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<sup>2</sup> 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 201 (facsimile ed. 1979) (1765-69). See also A.W.B. Simpson, *Land Ownership and Economic Freedom*, in THE STATE AND FREEDOM OF CONTRACT 13, 19 (Harry N. Scheiber, ed. 1998) (“The aim was to pass the complete estate as a unit down the family line, ideally to a succession of males. . . . Thus the family land was employed as a patrimony for the whole family, in which individuals performed distinct roles.”); P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 88 (1979) (“The eighteenth century was the age of the strict settlement, that intricate piece of conveyancing designed to tie up property, provide for widows, younger sons, and daughters, and, above all, maintain the property intact—or preferably augmented—in the family.”).

<sup>3</sup> Noah Webster, *An Examination into the Leading Principles of the Federal Constitution* (Philadelphia, 1787).

<sup>4</sup> See discussion of English remedies *infra* text accompanying notes 36-48.

English landowner was “allowed to live in splendour on his property, while his honest creditors remain unpaid, struggling perhaps with all the vicissitudes of trade, or reduced to bankruptcy and ruin.”<sup>5</sup>

Under English law, alienation of a freehold interest in land was permissible when the formalities of a secured credit agreement, such as a mortgage or bond, or a deed, or a will—formalities not undertaken for unsecured debt—were satisfied. Even landowners who explicitly pledged their land, however, were protected by procedural hurdles to creditors recognized in the Chancery court. The Chancery court made it costly for creditors to seize land to satisfy secured debts by recognizing rights in mortgagors to redeem property after a judgment against them in a court of law, and by giving landed inheritance preferential treatment in inheritance proceedings.

The legal restrictions on creditors’ ability to seize land in satisfaction of debts helped to stabilize the landed class by protecting real property holdings from the risk associated with accumulated unsecured debt. This legal structure, however, on the margin, reduced capital available for productive investment. When lending on an unsecured basis, creditors would have discounted the underlying value of debtors’ real property wealth because the remedial scheme prevented them from seizing a debtor’s freehold interest in property. More broadly, creditors lending without security to anyone in England (landowner or not) assumed the risk that debtors might convert their chattel assets and purchase land that creditors could not seize. Similarly, unsecured creditors faced the risk that landowning debtors might die unexpectedly, in which case their only legal recourse would be to the debtors’ chattel property. Each of these risks would have

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<sup>5</sup> Sir Samuel Romilly, in 2 THE SPEECHES OF SIR SAMUEL ROMILLY IN THE HOUSE OF COMMONS 74, 75 (London: 1820).

worsened the terms on which creditors would lend to debtors on an unsecured basis. The extension of credit with security—the promise of the borrower to allow a levy against land—was likely to have been limited on the margin by the costs imposed on creditors in the form of arduous foreclosure procedures in the Chancery court. This structure of property rules reflects that, in England, stability in real property ownership was valued more highly than more extensive credit and investment in economic growth that would have resulted from less restrictive land credit policies and the reform of Chancery.

As the Article will show, the status of the American colonies *as colonies* in the British Empire, distinguishable socially and politically from England, and the desire among English creditors and colonial subjects to improve credit conditions in the Empire, led to the removal throughout the colonies of traditional English protections to land from creditors. Initially, most colonial courts and legislatures administered the English body of laws exempting real property from the claims of creditors. In the late seventeenth century, however, a number of colonial legislatures in New England and the Caribbean attempted to expand the extent of credit offered within their colonies by rejecting English protections to real property from creditors. Then, in the early 1730s, English merchants and creditors became increasingly active in lobbying the English Board of Trade and Parliament to monitor and to overturn colonial legislation that they viewed as imposing costs on them. In 1731—coinciding with the expansion of credit extended to colonists for slave purchases—a group of English creditors petitioned Parliament to enact a law that would ensure that colonial subjects could not use traditional English real property exemptions to protect their land and slaves from English creditors.

In 1732, Parliament enacted a statute entitled the *Act for the More Easy Recovery of Debts in his Majesty's Plantations and Colonies in America*<sup>6</sup> (“*Debt Recovery Act*” or “5 Geo. II”). The *Debt Recovery Act* applied to all of the North American and West Indian British colonies, and required that all interests in real property and slaves be treated exactly like *personal* or *chattel* property for the purposes of satisfying debts. The *Debt Recovery Act* had both substantive and procedural implications. Substantively, the *Act* abolished the legal distinctions between real and chattel property in relation to the claims of creditors. The *Act* also provided Parliamentary authority for the legal treatment of slaves as chattel, rather than as a form of real property attached to the land. Procedurally, the *Act* required courts to extend to real property and to slave property the local processes in place for seizing and selling debtors’ chattel property in satisfaction of debts. The processes in place typically consisted of auctions and, at times, of in-kind transfers to creditors. The *Debt Recovery Act* therefore provided Parliamentary authority for the legal institutionalization of judicially-supervised real property auctions, a remedy not available to creditors under English law. Moreover, as recognized by later English abolitionists, Parliament’s *Debt Recovery Act* required that colonial courts engage in one of the most abhorrent features of slavery, the administration of slave auctions to satisfy judgments based on debts.<sup>7</sup>

Under the *Debt Recovery Act*, land and slaves could be seized and sold to satisfy any type of debt, including many widely-used forms of unsecured debt.<sup>8</sup> Unsecured creditors gained priority to real property and slaves over heirs when a debtor died. In

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<sup>6</sup> 5 Geo. II, ch. 7 (1732).

<sup>7</sup> See *infra* notes 131-133 and accompanying text.

<sup>8</sup> The most widely used forms of unsecured debt in the eighteenth century were book accounts (similar to tabs), bills of exchange, and promissory notes (similar to checks). See Claire Priest, *Currency Policies and Legal Development in Colonial New England*, 110 YALE L.J. 1303, 1328-32 (2001).

most colonies, executors appointed to distribute the assets of estates were given the authority to sell real property to pay the debts of the deceased, an authority not available under English law. Thus, in contrast to the English regime, in America after 1732, heirs to real property took the land subject to the claims of all of their ancestor's creditors.

In addition, in most colonies, debtors' equity rights to redeem real property after a mortgagee had obtained a legal judgment on a mortgage were either strongly curtailed or abolished. As mentioned, the *Debt Recovery Act* required that courts sell land, houses, and slaves to satisfy debts according to the same procedures used for chattel property. Often this was interpreted as requiring land to be sold during the process of execution at law, with the purchaser obtaining a fee simple title interest, free of familial redemption rights. In sum, these laws removed protections to real property that had increased stability in landownership and that had safeguarded inheritance, and came close to abolishing the age-old distinctions between real and chattel property. Joseph Story stated in reference to this legal transformation that "the growth of the respective colonies was in no small degree affected by this circumstance."<sup>9</sup>

This legal transformation was politically significant as well. In England, laws protecting family title interests in real property supported a society in which real property holdings were generally expected to be retained within families through the generations in perpetuity. Landed wealth—consisting of rental income from property, and linked to political and social power—enjoyed many legal protections, while all other forms of wealth were subject to commercial and financial risks.<sup>10</sup> In America, the treatment of

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<sup>9</sup> 1 STORY, *supra* note 1, at 168.

<sup>10</sup> The best description of the contrasting characterizations in England of merchants and the landed elite is Robert Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 39 STAN. L. REV. 3 (1986).



real property as legally equivalent to any other form of chattel in relation to creditors' claims obliterated the division between landed wealth and commercial wealth, and between merchants and landowners. In America, prior to the 1840s, all forms of wealth were subject to the commercial risks incurred by the property owner, outside of land that was entailed during the colonial period, and land covered by a widow's limited dower interest.<sup>11</sup>

Remarkably, no historian to date has thoroughly examined American colonial and state laws relating to the use of real property as security for debts or the *Debt Recovery Act*. The history of land in its role in the marketplace as security for debts is almost entirely absent in historical discussions of property in the United States. The economic historians Jacob M. Price and Russell R. Menard have attributed the rise of centralized plantation slavery in Barbados to the "Anglo-Saxon or 'creditor defense model'" of legal remedies against the land, without analyzing the impact of the laws at issue beyond slavery in the West Indies.<sup>12</sup> Aside from very brief references mentioning the potential importance of property exemption laws and the *Debt Recovery Act* to the colonial economy and to the legal history of bankruptcy, the topic has been overlooked almost entirely by American scholars.<sup>13</sup>

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<sup>11</sup> See *infra* text accompanying notes //--//.

<sup>12</sup> Jacob M. Price, *Credit in the Slave Trade and Plantation Economies*, in *SLAVERY AND THE RISE OF THE ATLANTIC SYSTEM*, 293, 296, 309-11 (Barbara L. Solow, ed. 1991); Russell R. Menard, *Law, Credit, the Supply of Labour, and the Organization of Sugar Production in the Colonial Greater Caribbean: A Comparison of Brazil and Barbados in the Seventeenth Century*, in *THE EARLY MODERN ATLANTIC ECONOMY* 154, 161 (John J. McCusker & Kenneth Morgan, eds., 2000).

<sup>13</sup> See Philip Girard, *Land Law, Liberalism, and the Agrarian Ideal: British North America, 1750-1920*, in *DESPOTIC DOMINION: PROPERTY RIGHTS IN BRITISH SETTLER SOCIETIES* 121 (John McLaren, A.R. Buck & Nancy E. Wright, eds. 2005) (briefly mentioning *Debt Recovery Act*, but emphasizing aspects of property law that continued to impede alienation in the nineteenth century—principally dower and conditional estates); David Thomas Konig, *The Virgin and the Virgin's Sister: Virginia, Massachusetts, and the Contested Legacy of Colonial Law*, in *THE HISTORY OF THE LAW IN MASSACHUSETTS: THE SUPREME JUDICIAL COURT, 1692-1992*, at 81, 97-98 (Russell K. Osgood, ed. 1992) (briefly discussing *Debt Recovery Act*); JOHN M. HEMPHILL, *VIRGINIA AND THE ENGLISH COMMERCIAL SYSTEM, 1689-1733*, at 180-89 (reprint

Of course, scholars of property law and of American history have acknowledged the transformation of American property law from its traditional English roots. Current scholarship provides two general explanations for that transformation. Each of the explanations is important but, by overlooking the legal history of the role of land in commercial transactions, has missed an essential feature of the history of American property law.

The first explanation derives from the prevailing account of the decline of feudalism and the rise of alienability of the fee simple interest. According to this explanation, the Anglo-American system of private property emerged from a restrictive feudal regime where possessory interests in real property were directly tied to the

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of unpublished Ph.D. dissertation 1985) (examining legislative history of Act and its importance as a political issue in Virginia); and STORY, *supra* note 1, at §182. The only systematic examination of this Article's topic in the historical or legal literature is a brief discussion in 4 JAMES KENT, COMMENTARIES ON AMERICAN LAW 425-31 (1984 reprint) (New York: 1830), and Stefan A. Reisenfeld, *Enforcement of Money Judgments in Early American History*, 71 MICH. L. REV. 691 (1973). Reisenfeld's article is written as a treatise, and simply lists the statutory law on remedies. Historians of bankruptcy law, however, have emphasized that property exemptions were a central issue in debates over federal bankruptcy legislation in the Founding Era, without systematically examining the law in each of the states. See BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE 209-20 (2002) (examining in detail the issue of property exemptions in the debates over the first federal bankruptcy law); CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 4-8 (1935); G. Marcus Cole, *The Federalist Cost of Bankruptcy Exemption Reform*, 74 AM. BANKR. L.J. 227 (2000). See also WILLIAM E. NELSON, THE AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830, at 41-43, 147-54 (1975) (describing state of debtor-creditor law in Massachusetts prior to and after the American Revolution); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 131 (1977) (locating property law reforms in the early nineteenth century). GREGORY ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970 is a comprehensive account of the theoretical debates relating to the conceptualization of real property in American history. Alexander's work, however, focuses almost exclusively on theoretical perspectives, and does not address particular doctrines, such as those relating to the availability of real property to satisfy the claims of creditors.

Some legal historians of Canada and Australia have recognized the local impact of the *Debt Recovery Act* or similar reforms there. See, for example, DESPOTIC DOMINION: PROPERTY RIGHTS IN BRITISH SETTLER SOCIETIES (John McLaren, A.R. Buck & Nancy E. Wright, eds. 2005); John C. Weaver, *While Equity Slumbered: Creditor Advantage, a Capitalist Land Market, and Upper Canada's Missing Court*, 28 OSGOODE HALL L.J. 871 (1990) (describing lack of equity courts in Upper Canada as related to desire among elites to institute a body of remedial law against land without the redemption rights recognized in equity courts); JOHN C. WEAVER, THE GREAT LAND RUSH AND THE MAKING OF THE MODERN WORLD, 1650-1900, at 244-50 (2003) (discussing mortgage law reform in British colonies).

performance of military and other services, and alienation of land was prohibited to safeguard the performance of those services. The emergence of the modern system of private property is often described by this explanation as a steady march toward free alienability, with the fetters of feudalism removed slowly over the centuries.

There are many proponents of this view. In the late nineteenth century, Sir Henry Maine famously stated that “the movement of the progressive societies has hitherto been the movement *from Status to Contract*.”<sup>14</sup> Patrick Atiyah has added that “to a considerable degree, freedom of contract began by being freedom to deal with property by contract.”<sup>15</sup> More recently, Robert Ellickson’s survey of the historical literature in his study of the fee simple estate led him to conclude that “[m]odernity . . . fosters alienability. . . . As groups modernize, they therefore tend not only to lengthen their standard time-spans of landownership, but also to relax traditional restrictions on transfer.”<sup>16</sup> This historical account of the rise of alienation is taught in law school classrooms throughout the country. Modern property casebooks provide an account of the progressive removal of restraints on the free transfer of property and place great emphasis on the emergence of the freely-alienable fee simple estate as the paradigmatic form of land tenure by the late thirteenth century.<sup>17</sup>

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<sup>14</sup> HENRY MAINE, ANCIENT LAW 181-82 (Frederick Pollock new ed. 1930) (1<sup>st</sup> ed. London 1861).

<sup>15</sup> P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 85 (1979).

<sup>16</sup> Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1376-77 (1993).

<sup>17</sup> See, for example, JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 197-220 (5<sup>th</sup> ed. 2002). Dukeminier and Krier emphasize that “By the end of the thirteenth century . . . the fee was freely alienable.” *Id.* at 210.

This explanation can be extended to suggest the impact on property of market development and industrialization. With the emergence of banking and a stock market in the early nineteenth century, individuals began to hold wealth in forms other than real property, such as stocks, bonds, and bank accounts. As markets developed and labor became more specialized, labor contracts became the principal substitute for land tenancy. For works discussing the relation between land and industrialization, see ATIYAH, *supra* note 15, passim; WILLIAM CUNNINGHAM, THE GROWTH OF ENGLISH INDUSTRY AND COMMERCE 462-66 (5<sup>th</sup> ed. 1910); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977); WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956). For more recent accounts of changes in the law of property and contract over the

This explanation, which might be referred to as the “decline of feudalism” or “status to contract” theory is not totally satisfying, however, because of its exclusive focus on the ability of individuals to sell fee simple land interests in land markets. A separate form of alienation—or potential alienation—occurs when property owners offer their property as security for loans. In many agriculturally-based societies—a characterization applying to colonial America—families often intend to remain on the same parcels of property for generations. Using real property as security for debts is a way in which landholders can access resources, such as tools, livestock, and building materials in agricultural societies, or money, in more advanced markets, that will enable them to increase the productivity of their property or to invest in other productivity-enhancing activities not related to the land, especially in the absence of other accumulated wealth. Land is an ideal form of collateral because it cannot be moved or hidden from creditors. In terms of its role in economic development, the ability to secure debts with real property may be even more significant than the ability to voluntarily sell property in the market.<sup>18</sup>

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eighteenth through early twentieth centuries, see John V. Orth, *Contract and the Common Law* and Charles W. McCurdy, *The “Liberty of Contract” Regime in American Law*, in *THE STATE AND FREEDOM OF CONTRACT* (Harry N. Scheiber, ed. 1998); Rowland Berthoff, *Independence and Attachment, Virtue and Interest: From Republican Citizen to Free Enterpriser, 1787-1837*, in *UPROOTED AMERICANS: ESSAYS TO HONOR OSCAR HANDLIN* 97 (1979). See also CHARLES W. MCCURDY, *THE ANTI-RENT ERA IN NEW YORK LAW AND POLITICS, 1839-1865* (2001) (describing persistence of feudal landholding practices in New York).

<sup>18</sup> One recent study of relatively primitive economies estimates that barriers to secured transactions have led to economic losses in Argentina and Bolivia amounting to between ten to fifteen percent of their respective gross domestic products. Heywood Fleisig, *Secured Transactions: The Power of Collateral*, 33 *FIN. & DEV.* 44 (1996); Heywood Fleisig & Nuria de la Pena, *Design of Collateral Law and Institutions: Their Impact on Credit Allocation and Growth in Developing Economies*, World Bank Background Paper; BUILDING INSTITUTIONS FOR MARKETS: WORLD DEVELOPMENT REPORT 93 (2002); GERSHON FEDER ET AL., LAND POLICIES AND FARM PRODUCTIVITY IN THAILAND 109-32, 137-47 (legally-titled farmers had better access to credit, improved their lands more, and produced more than squatters); OMAR MUNIF RAZZAZ, LAW URBAN LAND TENURE, AND PROPERTY DISPUTES IN CONTESTED SETTLEMENTS: THE CASE OF JORDAN 62-75 (1991).

As this Article shows, the transformation in English property law in the American colonies was a legacy of imperialism that does not fit into a simple account of legal change tied to “modernity.” English creditors’ concerns that the continued recognition of English property exemptions in the colonies hurt their economic interests mobilized them to lobby Parliament for legislation. The event that triggered Parliamentary action involved the impact of traditional real property exemptions in slave colonies. The *Debt Recovery Act* reflects the unique context of British colonialism and imperial rule: the *Act* applied only to the colonies, and not to England. The *Debt Recovery Act* was enacted primarily to quell the concerns of merchants lending to colonies for slave purchases, hardly a move toward “modernity.”

One hundred years after the *Debt Recovery Act*, coinciding with the expansion of the franchise, and in the aftermath of a severe recession, most state legislatures reversed their policies and enacted homestead legislation allowing debtors to exempt real property or monetary amounts from the claims of creditors. The homestead exemption movement was a legal development that reflected a desire to increase the stability of land ownership and reduce financial risk, reminiscent of the legal regime of early modern England. The connection between debtor/creditor law and modernity is therefore complex.

A second alternative explanation of the transformation of the role of property gives emphasis to the American Revolution and the belief that vestiges of feudalism—in particular primogeniture and the entail—were incompatible with a republican form of government. Gordon S. Wood’s *The Radicalism of the American Revolution* asserts that “the entire Revolution could be summed up by the radical transformation Americans

made in their understanding of property.”<sup>19</sup> Scholars such as Wood emphasize that, in the seventeenth century, Puritans and other religious dissidents established societies based on far more egalitarian and democratic principles than those prevailing in England, with some colonies abolishing primogeniture. During the Founding Era, republican principles were adopted with a much greater intensity and on a far more widespread basis. Political leaders such as Thomas Jefferson and others, advocated dismantling some remnants of aristocracy by adopting policies that would lead to the dispersion of property.<sup>20</sup> The doctrines of primogeniture and the entail were abolished in all states by 1800.<sup>21</sup> Tocqueville later identified the abolition of primogeniture and the entail and the dispersed nature of American property as central features of American democracy.<sup>22</sup>

Thus, this explanation—which I call the Republican tradition—describes the transformation of the conception of property in America as a consequence of the ideological opposition to the English aristocratic political regime.

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<sup>19</sup> See GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 269 (1991). The principal works on the significance of property and inheritance law to Founding Era political, social and economic life are Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1 (1977); Stanley N. Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J. L. & ECON. 467 (1976); David Thomas Konig, *Jurisprudence and Social Policy in the New Republic*, in *DEVisING LIBERTY: PRESERVING AND CREATING FREEDOM IN THE NEW AMERICAN REPUBLIC* 178, 188-96 (David Thomas Konig, ed. 1995); John V. Orth, *After the Revolution: “Reform” of the Law of Inheritance*, 1992 L. & HIST. REV. 33; Holly Brewer, *Entailing Aristocracy in Colonial Virginia: “Ancient Feudal Restraints” and Revolutionary Reform*, 54 W. & MARY Q. 307 (1997); ALEXANDER, *supra* note 13, at //; DREW MCCOY, *THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA* (1980); Richard Bushman, *“This New Man”: Dependence and Independence, 1776*, in *UPROOTED AMERICANS* (Bushman et al. eds. 1979).

<sup>20</sup> See, for example, THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 137 (1787; W. Peden ed.); Noah Webster, *On the Education of Youth in America*, in *A COLLECTION OF ESSAYS AND FUGITIVE WRITINGS* 24 (1790; reprint 1977).

<sup>21</sup> See sources cited *infra* note 167.

<sup>22</sup> 1 ALEXIS DE TOQUEVILLE, *DEMOCRACY IN AMERICA* 47-50 (1835) (Harvey C. Mansfield & Delba Winthrop, eds. 2000). See also, for example, James Kent, who states:

Entailments are recommended in monarchical governments, as a protection to the power and influence of the landed aristocracy; but such a policy has no application to republican establishments, where wealth does not form a permanent distinction, and under which every family has his equal rights, and is equally invited, by the genius of the institutions, to depend upon his own merit and exertions. Every family, stripped of artificial supports, is obliged, in this country, to repose upon the virtue of its descendants for the perpetuity of its fame.

4 KENT, *supra* note 13, at 20.

But the Republican tradition also suffers limitations. Again, scholarship in this tradition has emphasized the abolition of primogeniture and the entail after the Revolution. The Revolution may have made concrete and extended the idea of the free alienability of land. But by making land legally equivalent to chattel property for purposes of debt collection in all of the remaining colonies, Parliament pushed colonial society away from the model of the English aristocracy. Thus, decades before the Revolution, traditional restrictions on alienability of land were reduced at the instigation of the English, and not as the consequence of the ideological opposition to English political and social life. The fact that it was the English who helped to dismantle in the colonies the inheritance system against which the Americans are said to have revolted suggests the need for a revision of the Republican interpretation.

This account does not suggest that the abolition of the entail and primogeniture in the Founding Era were not highly important events. Even after the enactment of colonial laws treating land as legally equivalent to chattel property and the *Debt Recovery Act*, colonial landowners could protect their property from creditors by entailing it or by a settlement process according to which the present possessor held only a life interest. This account reveals, however, that in the colonies by 1732 entailed lands had become islands removed from commerce in a world that otherwise treated land like other forms of chattel. Regrettably, to date there has been no conclusive study of the practice of entailing property in the colonies. Most scholars, however, have concluded that, particularly outside of Virginia, the use of the entail was rare.<sup>23</sup> The reform of property

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<sup>23</sup> Most historians have accepted the work of C. Ray Keim, who empirically studied wills in Virginia and found that only ten percent of wills entailed land. Keim concluded that entail “was not a general custom” among small property holders and only in the Tidewater region did the practice have “somewhat general use.” C. Ray Keim, *Primogeniture and Entail in Colonial Virginia*, 25 W. & MARY Q. 545 (1968). See

law described here, achieved by the 1730s, was therefore likely to have had more widespread and significant effects on inheritance practices than the abolition of primogeniture and the entail after the Revolution. And, again, it is remarkable that, with respect to creditors' claims, decades before the American Revolution, colonial property law treated real property as a commodity or, as Story later suggested, as a "substitute for money," rather than primarily as a mainstay of social and political stability deserving special protection.

Moreover, scholars of the Founding Era have overlooked the fact that the issue of whether land would be available to satisfy debts was an important and divisive issue throughout the period. Whig commentators praised the principles of the *Debt Recovery Act* as an important barrier against aristocracy.<sup>24</sup> Thomas Jefferson's writings, in contrast, suggest that he was more closely aligned with conservatives who believed that traditional English protections to real property and inheritance were necessary to the creation of a truly "independent" population qualified to participate fully in a democracy. To date, no scholar has described this feature of Jefferson's republican theory in detail.

Creditors' remedies became an important issue underlying American federalism in the Founding Era. The Virginian opposition to laws making real property available for

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also Bernard Bailyn, *Politics and Social Structure in Virginia*, in SEVENTEENTH-CENTURY AMERICA: ESSAYS IN COLONIAL HISTORY, at 90, 108-112 (James Morton Smith, ed. 1959) (concluding that, in colonial Virginia, a "mobile labor force free from legal entanglements and a rapid turnover of lands, not a permanent hereditary estate, were prerequisites of family prosperity"). Holly Brewer, however, has recently observed that Keim's methodology was flawed because, once entailed, land remained entailed through successive generations without the need for a subsequent will. Brewer estimates that a much greater percentage of land in Virginia was entailed. *Entailing Aristocracy in Colonial Virginia: "Ancient Feudal Restraints" and Revolutionary Reform*, 54 W. & MARY Q. 307 (1997). In my view, Brewer's important article, rather than being conclusive, is an invitation for a more precise study of the entail using land records, maps and wills. Her article is not conclusive because, without linking wills to land, it is not possible to know whether or not a specific parcel of entailed land appeared in more than one will.

<sup>24</sup> See, for example, Daniel Webster on Representation, Massachusetts Constitutional Convention of 1820-1821 in DEMOCRACY, LIBERTY, PROPERTY: THE STATE CONSTITUTIONAL CONVENTIONS OF THE 1820S at 91, 98-99 (Merrill D. Peterson, ed. 1966); Daniel Webster, *First Settlement of New England: A Discourse Delivered at Plymouth, on the 22<sup>nd</sup> of December, 1820*.



all forms of debt was the basis for a broader opposition toward federal government policies that would supersede state law. One important legacy of the *Debt Recovery Act* was to provide the legal backdrop against which the state and federal governments negotiated a balance of power. As an example, when the full impact of property exemption policies were experienced during recessions by debtors facing loss of freehold land and possible disenfranchisement, state legislatures responded with temporary debt relief legislation that seemingly conflicted with the principles of the *Debt Recovery Act* regime, which, again, eliminated many procedural limitations on creditors' ability to force a sale of land to satisfy unpaid debts. Fear of the consequences of such democratically-enacted policies was one of the reasons for inclusion in the United States Constitution of the Contracts Clause, which was a means by which federal courts could regulate state legislatures' debt relief measures. Moreover, contrasting conceptions between the states of the appropriate procedural protections to real property ownership and inheritance led to limited consensus for uniform, federal policies in areas related to debt collection. Tensions over the issue of property exemptions, for example, were powerful enough to defeat the first attempts at a national bankruptcy bill that would have taken all of the debtor's assets for the benefit of creditors.<sup>25</sup> In sum, the history of the *Debt Recovery Act* and its legacy is important to an understanding of federalism in Founding Era America.

Part I examines creditors' remedies against the land in England in the period relevant to the laws of colonial America, the seventeenth and eighteenth centuries. It

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<sup>25</sup>MANN, *supra* note 13, at 209-20. Indeed, even our current federal bankruptcy code still permits those who declare bankruptcy to invoke favorable state property exemption laws, again a characteristic of the English post-feudal tradition.

describes the substantive and procedural protections to families' long-term title interests in land from seizure by creditors. Part II describes the transformation of English property law relating to creditors' claims in the American colonial period. It examines how several New England and Mid-Atlantic colonies rejected English limitations on seizing real property to satisfy debts in order to expand the amount of credit extended in their colonies. It then analyzes the adoption of the *Debt Recovery Act*, its connection to the expansion of slave imports financed with English credit, and the legal transformation throughout the colonies experienced as a result of the *Act*. In addition, it describes how the *Debt Recovery Act* was later depicted by English authorities as an important precedent for the Stamp Act and as an example of how Parliamentary oversight of colonial legislation was essential to the rapid economic growth of the colonies.

Part III describes the extension of the principles of the *Debt Recovery Act* in the Founding Era. Most state legislatures reenacted the *Debt Recovery Act* after the Revolution in order to expand the amount of credit extended within their states, and courts typically adhered to the principles of the *Act*—treating real property as legally equivalent to chattel property for debt collection purposes—in the voluminous litigation over credit and inheritance matters that emerged after the Revolution. Part III also describes the opposition to the principles of the *Act*, both on philosophical grounds—reflected in Jefferson's writings—in state court decisions, in state debt relief legislation, and in national policies. This opposition represented the strong sense among many in the Founding Era that the ownership of real property had a unique role in social and political life that merited special procedural and substantive protections from creditors.

Part IV concludes by analyzing the broader importance of the history of property laws relating to creditors' claims to land and slaves to historical accounts of the colonial and founding periods. For over a century, from the late seventeenth century in New England, and from the enactment of the *Debt Recovery Act* in 1732 in many other colonies, through the 1840s, America experienced a unique period in which the desire for more extensive credit led to laws that provided relatively few protections to real property from creditors' claims.<sup>26</sup> The two most important consequences of the *Act* were, first, its role in providing the credit conditions for expanding the slave system of labor in America and, second, in prioritizing commercial interests over the long-term family interests in particular landed estates achieved through the inheritance system. The transformation toward less restrictive land policies also likely led to greater treatment of land as a commodity, expanded the market for land, and surely advanced the economy in America toward modern capitalism.

The status of the colonies as colonies in the British Empire, the colonists' desire for credit to develop the nascent colonial economy, and the direct oversight of colonial legislatures by Parliament presented a unique and powerful circumstance in which the law of property was radically transformed: American property law was fundamentally shaped by its colonial origins. The legal transformation, however, set the stage for the more rapid development of the American economy—including an expansion of the slave system of labor—and for a political transformation away from rule by a landed aristocracy toward democracy.

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<sup>26</sup> As I describe below, real property remained protected from creditors in two contexts after the *Debt Recovery Act*: when the real property was voluntarily entailed, and when the real property was subject to the widows' dower interests.

## I. THE PROTECTION OF FAMILY OWNERSHIP OF REAL PROPERTY IN ENGLISH LAW

The body of property law carried over and administered in the colonies was English law. The legislatures of the British colonies in continental North America and the West Indies derived their law-making authority either by charters issued by the crown, by proprietary grants to individuals under patent, or by direct rule of the crown. The charters and patents that conveyed legislative power generally included a proviso that the laws adopted would either be “in agreement with” or “would not be repugnant to” the common law and statutory law of England. English law was also applied in the colonies governed directly by the crown.<sup>27</sup> This Part describes the body of English law that served as the foundation upon which colonial law developed.

The English law of property was defined by stark distinctions in the treatment afforded real property<sup>28</sup> and personal or chattel property.<sup>29</sup> Land had a unique status in English law deriving from its historical role as the foundation of economic, political, and social life. Real property was distinguishable from personal property, as the eminent English legal historian J.H. Baker explains, because “[i]t outlives its inhabitants, is immune from destruction by man, and therefore provides a suitably firm base for institutions of government and wealth. Control of land could not, indeed, be readily

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<sup>27</sup> See MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE* 40-46 (2005); JOSEPH HENRY SMITH, *APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS* 465 (1950). For an analysis of the legal issues relating to transmission of English common law and statutory law to the colonies, see Daniel J. Hulsebosch, *The Ancient Constitution and the Expanding Empire: Sir Edward Coke’s British Jurisprudence*, 21 L. & HIST. REV. 439, 460-79 (2003).

<sup>28</sup> “Real” property includes all possessory interests in land held for indeterminate periods, such as fee simple estates, defeasible fees, and life estates. “Chattel” property includes moveables, such as livestock and physical possessions, as well as possessory interests in land held for specifically determined periods, such as leases (referred to as “chattels real” as opposed to “chattels personal”).

<sup>29</sup> J.H. Baker describes the distinction between real and personal property as the “most fundamental distinction in the English law of property.” J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 223 (2002). Pollock and Maitland characterize the division of all material things into these two classes as “one of the main outlines of [English] medieval law.” 2 F. POLLOCK & F.W. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 2 (1952).

divorced from power and jurisdiction, from ‘lordship.’”<sup>30</sup> In England from the late medieval period through the modern era, ownership of landed estates was associated with political privileges ranging from, at the highest levels, membership in the House of Lords, to local political offices and social influence.<sup>31</sup>

English law was characterized by a clear preference for keeping landed estates intact over the generations.<sup>32</sup> The most obvious example of this preference was the dominance of the intestacy doctrine of primogeniture, administered until 1925, which passed all real property ownership interests to the eldest male heir, thereby ensuring that the estate in land would remain concentrated in one parcel and not divided. The economic value of the heir’s ownership interest was typically circumscribed in a family “settlement” agreement entered into at the time of marriage that often included charges on the land for the benefit of the landowner’s mother (her dower or jointure interests as a widow), his wife (specified pin money), and “portions” for younger siblings (either in lump sums or in annuities).<sup>33</sup> The settlement would outline the nature of the landowner’s

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<sup>30</sup> BAKER, *supra* note 29, at 223.

<sup>31</sup> As A.W.B. Simpson has noted, in England through the late eighteenth century, real property was acquired more frequently to gain “locally based political and social power” than for reasons of geographic mobility or for economic production. A.W.B. Simpson, *Land Ownership and Economic Freedom*, in THE STATE AND FREEDOM OF CONTRACT 13, 33 (Harry N. Scheiber, ed. 1998). The House of Lords was constituted by the peers of the realm, a group of approximately two hundred landowners of large estates, who held hereditary titles of nobility that passed by primogeniture. WOOD, *supra* note 19, at 25. In 1881, a study of English land ownership relying on *The New Domesday Book* of 1871, estimated that “a landed aristocracy consisting of about 2,250 persons own together nearly half the enclosed land in England and Wales.” GEORGE C. BRODRICK, ENGLISH LAND AND ENGLISH LANDLORDS: AN ENQUIRY INTO THE ORIGINS AND CHARACTER OF THE ENGLISH LAND SYSTEM 165 (London 1881).

<sup>32</sup> See JOHN HABAKKUK, MARRIAGE, DEBT AND THE ESTATES SYSTEM: ENGLISH LANDOWNERSHIP, 1650-1950, at 55 (1994) (“The sense of obligation to keep the patrimony intact and in the family was so strong that the owner of an inherited estate of any reasonable size and antiquity, even when he was the last of his line and was free to dispose of the property, did not naturally consider selling it, unless his financial circumstances obliged him to do so. He sought among his friends or acquaintances for someone to continue the undivided ownership . . . .”)

<sup>33</sup> For a description of a typical settlement on marriage, see BAKER, *supra* note 29, at 293-94. The customary practice was for the family estate to be “resettled” in every generation, to account for events such as deaths, births, and marriages. The resettlement process, however, was most often used to tighten a family’s hold on its real property interests, rather than to remove impediments to alienation. According to

tenancy, which could range from a fee simple interest in some or all of the lands on one extreme, to a life estate with no powers of conveyance and with trustees appointed to preserve the contingent remainder on behalf of future generations, on the other. The present possessor's interest could also be circumscribed by a will "entailing" the land such that the land would descend through the family line in perpetuity, with each generation obtaining only a life interest. Settlements and entails, however, provided for wealth distribution within the family while appointing one person (typically the eldest son) as manager of the estate to protect the integrity of the land as a cohesive parcel. It was expected that each generation would pass the estate to the next in at least a similar, or hopefully an augmented, condition.<sup>34</sup> The law of inheritance was crucial to this social and economic framework.<sup>35</sup>

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Baker, "[T]he widespread employment by the landed classes of the strict settlement, with resettlement in each generation, served to shackle much of the land in England to the same families until Victorian times and beyond." *Id.* at 295. According to A.W. Simpson, Under the strict settlement, "the land was managed by a succession of life tenants, the settlement being reconstituted each generation to ensure that no single individual ever acquired an unfettered power to appropriate the family capital for his individual purposes. It is remarkable that in spite of Blackstone's exaltation of private *individual* property rights, the landowning class in reality had little use for them.") Simpson, *Introduction* to 2 BLACKSTONE, *supra* note 2, at xi. See also John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 632-33(1995) (describing use of trust device in to provide for wives, daughters and younger sons).

<sup>34</sup> As described by Sir Lewis Namier,

The English political family is a compound of "blood," name, and estate, this last . . . being the most important of the three. . . . The name is a weighty symbol, but liable to variations. . . . the estate . . . is, in the long run, the most potent factor in securing continuity through identification. . . . Primogeniture and entails psychically preserve the family in that they tend to fix its position through the successive generations, and thereby favour conscious identification.

LEWIS B. NAMIER, *ENGLAND IN THE AGE OF THE AMERICAN REVOLUTION* 22-23 (1930). As later described by Alexis Tocqueville, who was from a French aristocratic family,

Among nations whose law of descent is founded upon the right of primogeniture, landed estates often pass from generation to generation without undergoing division; the consequence of this is that family feeling is to a certain degree incorporated with the estate. The family represents the estate, the estate the family, whose name, together with its origin, its glory, its power, and its virtues, is this perpetuated in an imperishable memorial of the past and as a sure pledge of the future.

1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 48 (Harvey C. Mansfield & Delba Winthrop, eds. 2000). For a description of more recent debates about the role of settlements in the broader society, see BAKER, *supra* note 29, at 295.

<sup>35</sup> John Locke, known best today for his emphasis on an individual's natural right to property acquired through labor, defended the English inheritance system on the grounds that all children—irrespective of

In the seventeenth and eighteenth centuries, England was a commercially developing society. England had active land markets and credit markets. The law, however, protected the cohesion of English estates and the inheritance of real property in a variety of ways beyond the enforcement of voluntary settlements and entails. First, English law protected freehold interests in land from the claims of all unsecured creditors. Second, the Chancery court protected land both by creating procedural hurdles to the seizure of land to satisfy secured debts, and through privileging the long-term family interests in land in inheritance proceedings. These laws and practices will be discussed below.

A. *The Protection of Family Real Property Interests in English Courts of Law*

From the late thirteenth century onward in England, an unsecured creditor who obtained a judgment in court against a debtor was limited to one of four writs of execution (remedies available to enforce judgments at law). First, the writ of *feri facias* directed the sheriff to seize the goods and chattels of the defendant, and to sell the items, and to deliver the proceeds to the plaintiff.<sup>36</sup> Second, the writ of *levari facias* authorized

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whether or not they labored on behalf of the family—naturally enjoyed a “shared title” with their parents to the family property. John Locke viewed England’s inheritance system as a natural consequence of the powerful instinct of humans to procreate which led to a sense of obligation of parents to provide for their children. According to Locke, this principle “gives Children a Title, to share in the *Property* of their Parents, and a Right to Inherit their Possession. . . . Men are not Proprietors of what they have merely for themselves, their Children have a Title to part of it, and have their Kind of Right joyn’d with their Parents.” JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 87, at 224 (Peter Laslett ed. 1964). In contrast, Blackstone, who as mentioned, described inheritance as the centerpiece of English real property law, was more skeptical about inheritance and justified it on the basis of convenience—relatives were more likely to be close to the deceased, and possibly in possession of the deceased’s property at the time of death—rather than on the basis of natural law. 2 BLACKSTONE, *supra* note 2, at \*11-12. See also Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1, 4-9 (1977) (discussing Locke’s, Blackstone’s and other theories of inheritance).

<sup>36</sup> 3 BLACKSTONE, *supra* note 2, at \*417-18; LORD GILBERT, THE LAW OF EXECUTIONS 17-18 (2d ed. Dublin: 1763). In the process of levying on the debtor’s property, the sheriff was permitted to break open chests and to break the locks on barns, but he was not permitted to forcefully enter the main dwelling-house. He could only seize the goods located inside the house if he found the doors unlocked. *Id.* at 19 (referring to “the Privilege a Man had by Common Law to defend his own House.”)

the sheriff, similarly, to seize and sell the debtor's goods and chattels, but additionally imposed a lien on the future earnings of the debtor's real property on behalf of the creditor until the debt was satisfied.<sup>37</sup>

Third, under the writ of *elegit*, the sheriff obtained an appraisal of the debtor's goods and chattels. The creditor accepted the goods at the appraised value. If the debtor's chattel property failed to satisfy the debt, however, the creditor was put into possession of one half of the debtor's real property as a tenant for the specific number of years, based on a court-ordered appraisal, that it would take for the debt to be fully satisfied.<sup>38</sup> The debtor retained possession of half of his property, as well as his "Oxen and Beasts of his Plough," presumably to ensure that he was able to fulfill his obligations to his landlord and to the King as well as to provide for his family. Outside of the common law courts, the Merchant Court and Staple Court offered creditors the remedy of a temporary tenancy of all of the debtor's land until the debt was satisfied (by "*extent*") if the debtor formally acknowledged the debt in court.<sup>39</sup> Creditors who took possession of their debtors' property as tenants' by *elegit* or *extent* could maximize the productivity of the land during the years of their tenancy.<sup>40</sup> In contrast, according to the *levari facias*,

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<sup>37</sup> 3 BLACKSTONE, *supra* note 2, at \*417. See also 2 POLLOCK & MAITLAND, *supra* note 29, at 596.

<sup>38</sup> The writ of *elegit* was introduced in a Parliamentary act of 1285 as part of Edward I's reform of feudal law. He that recovereth Debt may sue Execution by *Fieri Facias* or *Elegit*, Westminster II, 13 Edw. I, c. 18 (1285). See also 4 BLACKSTONE, *supra* note 2, at \*418 (describing writ of *elegit*). The impact of this statute on the closing of the commons in England is an intriguing topic that no scholar has examined. Once creditors gained possessory rights to land (however partial) and became willing to offer credit on the basis of these rights, one would imagine that the incentives for individuals to own parcels in fee simple absolute would dramatically increase: only fee simple owners would have access to the additional credit.

<sup>39</sup> Statute of Merchants, Westminster II, 13 Edward I, c.1 (1283); Statute of the Staple, 27 Edward III, st. 2. (1353).

<sup>40</sup> Creditors were limited only by the debtor's ability to sue under the waste doctrine, which prevented creditors from diminishing the underlying value of the property. When it was introduced, the tenancy by *elegit* represented an expansion of creditors' rights. Blackstone described the *elegit* as a "speedier way for the recovery of debts" and a "benefit to a trading people," 3 BLACKSTONE, *supra* note 2, at \*419.



the debtor retained possession of all of his land and was obliged to pay the creditor part of the annual profits on an ongoing basis.

Fourth, under the writ of *capias ad satisfaciendum*, the sheriff seized the body of the debtor for imprisonment.<sup>41</sup> Peers and other Members of Parliament, as well as executors of estates, were exempt from this remedy.<sup>42</sup> While the debtor was in prison, the creditor could not force a seizure of the debtor's land.<sup>43</sup> The principal use of the *capias ad satisfaciendum* was to threaten the debtor and his family in order to encourage them to pay the debt at issue or to provide greater security for the debt by means of a secured credit agreement.<sup>44</sup> More infrequently, a debtor could use debtors' prison to his advantage by having a "friendly" creditor imprison him to allow his family to remain in possession of all of his freehold lands.<sup>45</sup>

Notably, each of these writs provided a remedy to creditors without jeopardizing the freehold interest of the landed estate and its ability to be inherited. The writ of *elegit*, as mentioned, offered a creditor the opportunity of temporary possessory rights (not a fee simple interest) in one half (not all) of a debtor's land upon default of a debt agreement. The *capias ad satisfaciendum* threatened the debtor, but not his land. The *feri facias* was limited to the debtor's goods and chattels.

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<sup>41</sup> 3 BLACKSTONE, *supra* note 2, at \*414-15.

<sup>42</sup> *Id.* at 414.

<sup>43</sup> As Blackstone described, it was possible "that body and goods many be taken in execution, or land and goods; but not body and land too, upon any judgment between subject and subject in the courts of the common law." 3 BLACKSTONE, *supra* note 2, at \*419-20.

<sup>44</sup> See Joanna Innes, *The King's Bench Prison in the Later Eighteenth Century: Law, Authority and Order in a London Debtors' Prison*, in *An Ungovernable People: The English and their Law in the Seventeenth and Eighteenth Centuries* 250, 254 (John Brewer & John Styles, eds. 1980); MANN, *supra* note 13, at 25 (noting that in colonial America, the attachment of a debtor's body was often a tactic "to obtain security for the debt, either from the debtor or from sympathetic friends or relatives.").

<sup>45</sup> Innes, *supra* note 44, at 256. Once he left jail, if the debt remained unsatisfied, the creditor could then sue for a writ of *elegit*. (Such principles did not apply in the Merchant and Staple courts.)

Moreover, each of these remedies was limited to the life of the debtor. According to the prevailing custom, when a property owner died, the unsecured creditors of the deceased instituted debt actions against the executors of the deceased's estate. The executors of the estate, however, assumed control over the deceased's *personal* property, but not the land.<sup>46</sup> The real property immediately descended to the eldest son. Inherited land never came under an executor's control. The executors therefore satisfied the debts out of the deceased's *personal* property. Unsecured creditors had no legal recourse against the heirs and devisees.<sup>47</sup> The landed inheritance remained legally protected from all unsecured creditors, unless the deceased explicitly stated in his will that the land should be sold to pay his debts. If the personal property was insufficient to satisfy the debts, the unsecured creditors would simply lose the value of the remaining debts, unless the heirs and devisees felt obliged to pay the debts out of a sense of honor, or a desire to extend the ancestor's credit line for their own purposes.<sup>48</sup>

#### B. *The Protection of Family Real Property Interests in the Chancery Court*

Under English law, real property was alienable so long as mandatory formalities were satisfied.<sup>49</sup> An owner of a fee simple absolute could sell or mortgage land,<sup>50</sup> or

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<sup>46</sup> For a discussion of what constituted "chattel" property over which the executors assumed control, see BAKER, *supra* note 29, at 380-81.

<sup>47</sup> 2 POLLOCK & MAITLAND, *supra* note 29, at 336.

<sup>48</sup> For a discussion of the failure of landowners to repay unsecured debts, see HABAKKUK, *supra* note 32, at 307-12.

<sup>49</sup> The colonists practiced livery of seisin, a public ceremony formalizing land transfers, as well as written modes of formalizing the conveyance of property. The Statute of Frauds abolished livery of seisin and established written formalities for transferring title to real property. 29 Car. II, c. 3 (1677).

<sup>50</sup> In 1290, Parliament enacted the Statute *Quia Emptores Terrarum* ("*Quia Emptores*") which was the first, legal recognition of the right to alienate real property after the Norman Conquest. Historians have established that *Quia Emptores* reflected Edward I's response to the fact that landowners were already transferring their interests for the purpose of obtaining credit—either by leasing the property, or by the process of "subinfeudation." Subinfeudation was a process by which a tenant would sell his possessory interest in land to a third party. Subinfeudation could be economically detrimental to the lord, particularly if the tenant subinfeudated to a religious corporation that, as an organizational form, would not give rise to the incidents (payments) linked to family-related events, such as a tenant's marriage (the lord could sell an

devise it to a non-family member.<sup>51</sup> Secured creditors—who extended credit on the basis of specific pledges of land as collateral for the debts, formalized by signatures and the debtors’ seals—could force a seizure of the real property pledged in secured credit agreements.

Moreover, secured creditors had the ability to bind future heirs to secured credit agreements by explicitly stating that all “heirs, executors, and administrators” were responsible for the debt. (The identity of the actual person who would inherit, of course, was unknown until the time of death.) When the generic “heirs” were made parties to the secured credit agreement, the creditor could pursue a cause of action in court against the heir after the debtor’s death, and the heir might have had to discharge the debt out of the real property that he inherited.<sup>52</sup>

Secured creditors seeking to seize the land pledged by the debtor, however, could not do so simply by bringing an action at law. The Chancery court recognized family rights to redeem real property after default on mortgage agreements. The early form of mortgage involved a conveyance of land to the creditor (the mortgagee) in return for a sum of money. The agreement typically provided that when the money plus interest was repaid, title to the land would revert back to the borrower. If the loan was not repaid, the land would be forfeited to the mortgagee.<sup>53</sup> In the common law courts, mortgage

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heir in marriage) and death (wardship, relief, and escheat). *Quia Emptores* was enacted to formalize the requirement that those in possession of land held the land by the same feudal obligations as their predecessors. See A.W.B. SIMPSON, AN INTRODUCTION TO THE HISTORY OF THE LAND LAW 50-51 (1961).<sup>51</sup> The Statute of Wills of 1540 gave landowners the freedom to devise their lands to whomever they chose and therefore introduced the possibility that the eldest son might not receive his father’s entire freehold estate.

<sup>52</sup> 2 BLACKSTONE, *supra* note 2, at \*340.

<sup>53</sup> In the most common form of mortgages and bonds, A demises land to X for a term of years, and there is provision that, if at the end of that term A does not pay the debt, then X is to hold the land in fee. 2 POLLOCK & MAITLAND, *supra* note 29, at 122; 2 BLACKSTONE, *supra* note 2, at 340, 465. Bonds were structured similarly. If a creditor obtained a judgment against a debtor under a bond, the sheriff would be

agreements were interpreted strictly. A delay of any sort in tendering payment under the mortgage could result in the loss of the entire property interest to the creditor, even when the value of the mortgage was less than the value of the land.

In the early seventeenth century, however, the Chancery court determined that a mortgagor had an equity right to redeem the land within a reasonable period, irrespective of the actual terms of the mortgage agreement. Recognition of the “equity of redemption” meant that, to gain secure title in the fee interest, the mortgagee (the lender) was required both to obtain a legal judgment in the common law courts on the debt, followed by a separate a decree of foreclosure in the Chancery court, quieting the equity of redemption.<sup>54</sup>

Chancery, however, was known for its high costs and procedural delays.<sup>55</sup> Actions in Chancery court inevitably took a long time because all relevant parties were given opportunities to be heard and to appeal the courts’ decision, the docket was large, and the court did not meet continuously.<sup>56</sup> Moreover, prior to obtaining a formal foreclosure in the Chancery court, and at times *after* the creditor obtained a foreclosure (if a family member could successfully appeal the foreclosure decree), the mortgagor was permitted to redeem the property from the mortgagee by paying the remaining amount

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directed to first try to satisfy the debt out of the obligor’s personal estate. If the personal estate was insufficient, then the debt would be discharged out of the real property.

<sup>54</sup> SIMPSON, *supra* note 50, at 226-29; R.W. TURNER, THE EQUITY OF REDEMPTION 26 (1931); David Sugarman & Ronnie Warrington, *Land Law, citizenship, and the invention of “Englishness”: The strange world of the equity of redemption*, in EARLY MODERN CONCEPTIONS OF PROPERTY 111, 113-14 (John Brewer & Susan Staves, eds. 1996).

<sup>55</sup> According to Baker, “For two centuries before Dickens wrote *Bleak House*, the word “Chancery” had become synonymous with expense, delay and despair.” BAKER, *supra* note 29, at 111.

<sup>56</sup> Chancery court procedures are described in HENRY HORWITZ, CHANCERY EQUITY RECORDS AND PROCEEDINGS, 1600-1800, at 9-26 (1995). *See also* BAKER, *supra* note 29, at 111-13 (describing the “defects” of Chancery procedure). For a detailed discussion of foreclosure, see Sheldon Tefft, *The Myth of Strict Foreclosure*, 4 U. CHI. L. REV. 575, 576-82 (1937) (describing opportunities given to mortgagors to extend right to redeem during and even after conclusion of foreclosure process).

due on the mortgage, plus interest and costs.<sup>57</sup> The foreclosure requirement therefore added costs to the process of acquiring title to land under a mortgage.

Chancery Court judges also at times exercised discretion on behalf of family members at the expense of creditors, in order to pursue a policy of privileging the preservation of families' long-term interest in land.<sup>58</sup> Hofri-Winogradow describes examples of Chancery interpreting a will as entailing land on behalf of the possible, future "children" of a then-childless, estranged couple in their fifties (not likely to have children), when the land otherwise would have been sold to pay debts.<sup>59</sup> Chancery judges chose to preserve the land when faced with ambiguous language in a will as to whether or not the realty should be sold to pay debts. Moreover, Chancery judges upheld family settlement agreements that protected land when faced with creditors' challenges to the validity of those agreements on the grounds of lack of consideration.<sup>60</sup>

Chancery's general policy was to protect the integrity of the family estate in land when possible. The most prominent example of this policy is that mortgage debts, in which parcels of land were specifically pledged as collateral, were charged to the landowner's *personal* property first, rather than to the real property that had been pledged as security. The mortgaged land would be sold only if the personal property were

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<sup>57</sup> For anecdotal evidence of the difficulty even secured creditors had getting landowners to pay their debts, see Habakkuk, *supra* note 66, at 208-10.

<sup>58</sup> A careful examination of the Chancery court and its decisions has been absent in the legal historical scholarship. Adam Hofri-Winogradow's P.D. Dissertation in progress at Oxford University on the Chancery court in the late eighteenth century promises to contribute to this scholarship. In one chapter, Hofri-Winogradow analyzes the numerous ways in which the Chancery court privileged the long-term interest in family property over the claims of creditors and family members. See Adam S. Hofri-Winogradow, "Estate Preservation and Preserving Estates: Protection of Family Property against Creditors in the Late Eighteenth Century Chancery" (unpublished manuscript on file with author). Hofri-Winogradow's conclusions confirm what scholars have long suspected about Chancery. Robert W. Gordon, for example, has noted that, "[w]hile the common law promoted alienability, equity promoted dynastic preservation." Robert W. Gordon, *Paradoxical Property*, in *EARLY MODERN CONCEPTIONS OF PROPERTY* 95, 102 (John Brewer & Susan Staves, eds. 1996).

<sup>59</sup> Hofri-Winogradow, *supra* note 58, at 20.

<sup>60</sup> *Id.* at 22-25, 28.

insufficient to pay the debt.<sup>61</sup> This policy did not affect creditors' interests. It had the effect of reducing the encumbrances on the family land. In doing so, it privileged the heir at the expense of the deceased's other children, who typically shared equal portions of the deceased's personal property after the unsecured debts were paid.

As will be described in Part III, whether American courts would recognize the equity of redemption was an issue that was litigated heavily in the Founding Era. A second issue controversial issue was whether or not courts would continue to recognize a English privilege extended to heirs of real property that their inheritance would not be seized at their fathers' deaths without their participation. Blackstone, in describing the features of what he referred to as the "absolute" right of property, emphasized the English laws stating that "no man shall be disinherited, nor put out of his franchises or freehold, unless he be duly brought to answer, and be forejudged by courts of law."<sup>62</sup> The English courts provided landowners and the heir the right to be a party to judicial proceedings in which the inheritance or the freehold interest might be lost.<sup>63</sup>

### *C. Conclusion: Creditors' Remedies against Real Property in England*

In sum, the English legal regime of the early modern era allowed free alienation, but the common law courts offered no remedy that directly threatened a family's freehold interest in land. The inheritance of real property was further protected in the Chancery

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<sup>61</sup> This practice was overturned by statute in 1854. An Act to amend the Law Relating to the Administration of the Estates of Deceased Persons 17 & 18 Victoria c.113 (1854). See also BRODRICK, *supra* note 31, at 345 (describing the practice as a "monstrous perversion of justice").

<sup>62</sup> 1 BLACKSTONE, *supra* note 2, at \*133-34.

<sup>63</sup> The equity courts protected landed inheritance in one other way in the early modern era: to ensure the transmission to the heir of the entire estate in land, by common practice the heir was exempted from a rule that money advanced to sons during their father's lifetime should be deducted from the share they received at his death. Anglo-American law has always viewed the sovereign as the ultimate "owner" of property. On these grounds, it has always been the law—and it is a principle in effect today—that a freehold interest can be forfeited for failure to satisfy obligations to the sovereign, such as to pay taxes.

court by its practices of recognizing the equity of redemption and of privileging landed inheritance over the interests of creditors in its proceedings.

The presence of these protections on land ownership, however, did not mean that English landowners never sold their land to satisfy unsecured debts. The most common circumstance in which family property was sold was when a landowning family's debt became so large (after possibly accumulating over the generations) that, without a sale of land, the family members were unable to access credit for resources needed to manage the property.<sup>64</sup> In addition, the threat of debtors' prison or of the sheriff stripping away all of the families' goods and chattels and selling them at auction also induced landowners to sell their real property to pay unsecured creditors.<sup>65</sup> Landowners whose powers to convey property were circumscribed in family settlements could petition for a private Act of Parliament to allow a sale of settled land.<sup>66</sup> An entail could be removed through a conveyance referred to as a "common recovery."<sup>67</sup>

In each of these circumstances, however, the law gave landowners the privilege of voluntarily choosing to sell the land, and the land was sold on terms consented to by the landowners. The absence of the power of an individual unsecured creditor to force a seizure and sale of the land gave landowners important opportunities to delay the

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<sup>64</sup> For an extended discussion of the occasions when English landowners, however reluctantly, sold their real property, see Christopher Clay, *Property Settlements, Financial Provision for the Family, and Sale of Land by the Greater Landowners, 1660-1790*, in 21 J. BRIT. STUD. 18, 23 (1981).

<sup>65</sup> Clay found that "the prospect of inheriting a house stripped bare of furnishing, even bedding, let alone valuables, a home farm without livestock or implements, and possibly a park denuded of timber" left families with little alternative other than to agree to the barring of an entail or to a request a private act of Parliament to allow the sale of real property held in life estate. *Id.* at 25.

<sup>66</sup> Private acts of parliament to allow the sale of land are the subject of John Habakkuk, *The Rise and Fall of English Landed Families, 1600-1800: II*, in 30 TRANSACTIONS OF THE ROYAL HISTORICAL SOCIETY 199 (5<sup>th</sup> Ser. 1980).

<sup>67</sup> The common recovery involved a conveyance of entailed land to an accomplice in fee simple, with a third party paid to provide a false warranty of title. Under the law, the remainderman's only recourse was against the real property of the party who provided the false warranty of title, and the only people who agreed to perform this function were people (usually petty officials) who owned no real property. The "barred issue" were therefore left without a meaningful remedy. See BAKER, *supra* note 29, at 282.

repayment of their debts. English law therefore limited the extent to which a family's ownership interests would be subject to commercial and other financial risk. This was the legal regime brought over and instituted in the American colonies. Colonial and Parliamentary legislation dismantled this body of laws throughout the American colonies by 1732.

## II. THE TRANSFORMATION OF PROPERTY LAW IN COLONIAL AMERICA

### A. *Colonial Property Law Prior to Parliamentary Regulation*

The originating documents and early statutes of many colonies promised adherence to the English protections to real property from creditors' claims. New York's 1683 Charter of Liberties, for example, promised its subjects that lands would not be characterized as chattel property, but as "an estate of inheritance" according to the laws of England and explicitly stated that courts in New York had no authority to "grant out any Execucion or other writt whereby any mans Land may be sold . . . without the owners consent."<sup>68</sup> Similarly, Virginia, North Carolina, South Carolina, Rhode Island, Maryland, Jamaica, St. Kitts and Antigua maintained the traditional English protections to real property.

A Virginia statute of 1705 describing the authorized process for seizing debtors' goods in satisfaction of debts exemplifies the nature of the legal regime in these colonies. The Act outlines the procedures according to which sheriffs could seize either the "goods and chattels" or the body of a debtor to satisfy debts. It describes the English writs of *feri facias*, *levari facias*, and *capias ad satisfaciendum* and makes no mention of seizing

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<sup>68</sup> Charter of Liberties and Privileges granted by his Royall Highnesse to the Inhabitants of New York and its Dependencyes (Oct. 30, 1683) in 1 THE COLONIAL LAWS OF NEW YORK 111, 114 (Albany, 1894).



real property interests.<sup>69</sup> Maryland statutes enacted in 1705 and 1718 similarly limit execution to the seizure of “goods, chattels and credits” to satisfy debts.<sup>70</sup> A 1647 Connecticut statute clarified that creditors could take possession of debtors’ real property, as tenants for a term, until their debts were satisfied, but did not describe any means by which the creditor could seize a freehold interest in land for unsecured debts.<sup>71</sup> Some colonies adopted remedial regimes that were more protective of land and debtors’ freedom than under English law. In St. Kitts and Antigua, for example, freehold property interests were entirely immune from the claims of unsecured creditors (meaning that the writ of *elegit* was not available) and freehold property owners were entirely exempt from arrest and placement in debtors’ prison.<sup>72</sup>

Merchants lending to residents of these colonies, however, often complained about the fact that unsecured creditors were prohibited from seizing their debtors’ freehold interest in real property. As an example, Robert Carter, one of the most prominent planters in Virginia, complained that he suffered the negative impact of these

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<sup>69</sup> An Act directing the manner of levying executions, and for relief of poor prisoners for debt, ch. 37 (1705), in 3 LAWS OF VIRGINIA (William Waller Hening, ed. Philadelphia 1823), at 385. Indeed, the writ of *elegit*, allowing creditors a possessory interest in debtors’ land, was not introduced in Virginia until 1726. See An Act to declare the law concerning executions, ch. 3 (1726), in 4 *id.* at 151 (describing process of execution under writs of *fiery facias*, *capias ad satisfaciendum*, and *elegit*).

<sup>70</sup> An Act directing the manner of Suing out Attachments in this Province and Limiting the Extent of them (Sept. 5, 1704), in LAWS IN MARYLAND NOW IN FORCE, at 4 (Annapolis 1707); An Act directing the manner of Suing out Attachments in this Province, and Limiting the Extent of them in THE LAWS OF THE PROVINCE OF MARYLAND 91-92 (Philadelphia 1718); An Act directing the manner of Suing out Attachments in this Province and Limiting the Extent of them, in A COMPLETE COLLECTION OF THE LAWS OF MARYLAND, at 81-84 (Annapolis 1727). The Maryland laws published in 1718 and 1727 also exempt chattel property that would “deprive [debtors] of all Livelihood for the future, [such as] Corn for necessary Maintenance, Bedding, Gun, Ax, Pot, and Labourers[’] necessary Tools, and such like household Implements and Ammunition for Subsistence.” See *id.* at 83.

<sup>71</sup> 1 PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 518-519 (J.H. Trumbull ed. 1850).

<sup>72</sup> On the Antigua legal regime, see *Meynell v. Moore*, 4 Brown 103 (1727) (House of Lords judicial decision holding slaves liable for unsecured debts in Antigua, but not freehold); RICHARD PARES, MERCHANTS AND PLANTERS 46 (1960). On St. Kitts practice, see PARES, *supra*, at 87 n.50 (citing Minutes of Council Assembly, July 5, 1684, C.O. 1/57 no. 48). Similarly freehold property owners of ten acres were exempt from arrest in Barbados until the marshall had attempted to satisfy the debt owed by means of seizing all of the chattel property and lands of the debtor. See *id.* at 45; Jonathan Blumeau, *Remarks on Several Acts of Parliament Relating More Especially to the Colonies* 11-12 (London 1742).

laws personally after lending money or goods to a man he describes as “Mr. Lee.” After Mr. Lee died, Carter found that Lee’s personal property was insufficient to satisfy his debts, but that his estate included recently-acquired land. Carter suspected that Lee had purchased the land “just as Lee found himself tottering, to defraud his creditors, and to do something for his wife and children at other men’s cost.”<sup>73</sup> In a 1720 letter to his son John, Carter described his concern about the impact on credit of applying English protections to land from unsecured creditors. According to Carter,

If this be the law, we in the Plantations are in a very dangerous condition, for we have nothing but the merchants’ accounts for our security, and any merchant for the advancement of his family may throw all the money he has of others to purchase a real estate with; and when he’s dead, his family goes into the possession of it and his claimers are without remedy.<sup>74</sup>

A 1723 letter from a Virginia factor to the Bristol merchant Isaac Hobhouse described a similar problem. The factor explained that the merchant would not likely be paid because the debtor’s land had descended to the debtor’s son:

Its my opinion yet my lyd’s nor yr selves wont be paid without ye land could be sold. Weh wont be done by no means what ever: for its left to ye son of mr robt. Baylor after ye death of John Baylor: which is a very strong argument for Robt not to agree to ye sale.<sup>75</sup>

As Carter described, book accounts (and other forms of unsecured credit like promissory notes) were an integral part of the Atlantic economy.

In an effort to attract credit on better terms, however, the legislatures of some colonies displayed a reluctance to implement the English laws and equity court practices that protected real property from creditors in their entirety. As mentioned, the colonial

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<sup>73</sup> Letter from Robert Carter to John Carter (July 19, 1720), in *LETTERS OF ROBERT CARTER, 1720-1727*, at 32-33 (Louis B. Wright ed. 1940).

<sup>74</sup> *Id.*

<sup>75</sup> Letter from John Dixon to Isaac Hobhouse (May 2, 1723), in *The Virginia Letters of Isaac Hobhouse, Merchant of Bristol* (Walter E. Minchinton ed.), in 66 VA. MAG. HIST. BIOGRAPHY 278, 291 (Jul. 1958).

charters and patents typically authorized the colonial legislatures to enact laws that were “not repugnant” to the laws of England. In most cases, the “repugnancy” requirement was understood to mean that English law applied in the colonies. Colonial enactments that reformed English law for the purpose of advancing creditors’ interests were not automatically “repugnant” to English law, however, because they were consistent with another over-arching and widely-accepted English policy that the role of the colonies within the British empire was to advance English mercantilist economic interests.<sup>76</sup>

Moreover, English authorities came to accept that not all English laws and practices were appropriate to unique local conditions.<sup>77</sup> The English authorities were amenable to legal reforms that responded to local needs *and* that also advanced the interests of the Empire by providing greater security to English creditors.

Some colonial legislatures made modest modifications to the English remedial regime. The legislature of New Plymouth (later part of Massachusetts), for example, enacted a law in 1633 that departed from English law by stating that, if a creditor could demonstrate that a debtor had purchased land for the purpose of avoiding the payment of his unsecured debts, then his freehold interest in land would be available to satisfy those

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<sup>76</sup> This policy is illustrated by the Staple Act of 1663, which regulated trade with the colonies. The Act states that it was enacted to maintain “a greater Correspondence and Kindness” between the colonies and mother country; to keep the colonies “in a firmer Dependence” upon England, and to render them “yet more beneficial and advantageous” to the mother country by furthering the “Employment and Increase of English Shipping and Seamen,” by increasing the sale of “English Woollen and other Manufactures,” by rendering navigation to and from the colonies “more safe and cheap,” and by making England “a Staple, not only of the Commodities of those Plantations, but also of the Commodities of other Countries and Places, for the Supplying of them.” An Act for the Encouragement of Trade (July 27, 1663), 15 Charles II, c. 7. For an examination of English mercantilism and its rejection in Founding Era America, see Claire Priest, *Law and Commerce, 1580-1815* in THE CAMBRIDGE HISTORY OF LAW IN AMERICA (forthcoming).

<sup>77</sup> In her recent study of the trans-atlantic legal culture of Rhode Island, Bilder notes that “As an *English* colony, Rhode Island’s laws and governmental structures were to reflect those of England. As an *English colony*, however, these laws and structures were expected to be in some way divergent.” See BILDER, *supra* note //, at 3.

debts.<sup>78</sup> The law provided, however, that notwithstanding any improper motives of the debtor in purchasing the land, if the land was found to be necessary for the subsistence of the deceased's family, "such lands remaine to the survivors his or her heires no seizure being allowed the creditors in that case."<sup>79</sup> William Penn's Charter of Liberties of 1682 included a clause that departed from English law by providing generally for the liability of lands for debts. The Charter of Liberties, however, protected the inheritance rights of eldest sons by stating that, once a debtor gave birth to a child, the amount of real property available to satisfy his debts would be limited to one third of his holdings.<sup>80</sup>

In 1700, the Pennsylvania legislature radically revised its remedial regime and adopted a statute making lands available to satisfy unsecured debts. It stated as its purpose "that no creditors may be defrauded of the just debts due to them by persons . . . who have sufficient real estates, if not personal, to satisfy the same." It enacted that "*all lands and houses whatsoever*, within this government, shall be liable to sale, upon judgment and execution obtained against the defendant, the owner, his heirs, executors or administrators, where no sufficient personal estate is to be found."<sup>81</sup> Five years later, however, the Pennsylvania legislature apparently decided that its law subjected landowners to excessive financial risk. In 1705, it enacted a new regime, according to which if the debt could be satisfied out of the *earnings* from real property *within seven*

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<sup>78</sup> The Charter of the Colony of New Plymouth in PLYMOUTH COLONY LAWS 33 (1836).

<sup>79</sup> *Id.*

<sup>80</sup> The precise language of the fourteenth clause of the Charter of Liberties states that "all lands and goods shall be liable to pay debts, except where there is legal issue, and then all the goods and one-third of the land only." Penn's Charter of Liberties (1682) in THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 3061 (Francis Newton Thorpe, ed. 1909).

<sup>81</sup> With respect to the debtor's house, it permitted a one year right of redemption, but afterwards it "shall be and remain a clear and free estate to the purchaser or creditor, . . . his heirs and assigns forever, as fully and amply as ever they were to the debtor." An Act for taking lands in execution for the payment of debts, where the Sheriff cannot come at other effects to satisfy the same, ch. 48 (1700) *reprinted in* 1 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 7-8 (1810).

years, then the creditor would be limited to a tenancy by *elegit*, that is, possession of the land for a term.<sup>82</sup> If an unsecured debt was so large that it could not be satisfied with seven years worth of earnings from the debtor's real property, however, the real property would be sold at auction.

The 1705 Pennsylvania Act also tried to improve the terms of secured credit within the colony by explicitly abolishing mortgagors' equitable redemption rights. According to the preamble of the statute, the use of mortgages for the "payment of monies" was widespread, but mortgages were "no effectual security, considering how low the annual profits of tenements and improved lands are here and the discouragements which the mortgagees meet with, by reason of the equity of redemption remaining in the mortgagors." The statute replaced the traditional English approach—of recognizing redemption rights in equity—with a one-year *statutory* right of redemption to be recognized by the law courts. At the end of the year, the mortgagor was to be given the chance in court to contest the sale. If he could not "show cause why the property should not be sold," then the property was to be sold at auction, with a fee simple title going to the purchaser.<sup>83</sup>

Some colonial legislatures instituted more fundamental changes of the English real property and inheritance laws in the late seventeenth and early eighteenth centuries. In Barbados as early as 1656, land was treated as legally equivalent to chattel property in all debt collection proceedings, although there is no record of a statute authorizing the

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<sup>82</sup> The statute states that if yearly rents or profits of the lands would *satisfy the debt within seven years*, then the lands would be delivered to the plaintiff "until the debt or damages be levied by reasonable extent, in the same manner and method as lands are delivered upon writs of *elegits* in England." An Act for Taking Lands in Execution for the Payment of Debts, ch. 152 (1705) in 1 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 57, 58 (1810).

<sup>83</sup> *Id.* at 58-60. See also Graff v. Smith's adm'rs. 1 Dallas 481-82. [note: long description of subsequent laws and cases on page 8-9]

practice.<sup>84</sup> The legislature of West New Jersey in 1682 enacted a law making land liable for unsecured debts if the debtor's personal estate was found to be insufficient to satisfy the debts.<sup>85</sup> A Massachusetts law of 1675, like the practice in Barbados and New Jersey, was revolutionary in that it explicitly permitted a creditor to take an individual's freehold interest in land to satisfy an unsecured debt.<sup>86</sup> Unlike the Pennsylvania Act, the Massachusetts law did not establish a minimum debt amount that would permit creditors to seize debtors' real property. Other New England colonies enacted similar laws in the same period. Connecticut enacted a statute making lands liable for debts in 1705.<sup>87</sup> In

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<sup>84</sup> Jonathan Blumeau, *Remarks on Several Acts of Parliament Relating More Especially to the Colonies* 18-19 (London 1742) ("the Practice . . . [of defining] all their Estates . . . no more than Chattels for the Payment of Debts . . . a Doctrine probably set on foot in the Infancy of the Island for the Encouragement of Trade to it. . . . And notwithstanding . . . there is no Express Law in Being whereon the Usage was at first founded, yet it is not unlikely that some such there was, and by the Casualties incident to that Place, is now lost."); PARES, *supra* note //, at 89 n.59; *Turner v. Cox*, 14 Eng. Rep. 111, 116, 8 Moore's P.C. 288, 301 (1853) (referring to early practice in Barbados of selling land for unsecured debt and citing 1745 Barbados law that stated "all lands have ever been looked upon as chattels for the payment of debts, though what remains afterwards to descend to the heir-at-law, or go to the devisee").

<sup>85</sup> Clause 12, Acts and Laws of the General Free Assembly (May 2-6, 1682), in THE GRANTS, CONCESSIONS, AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW JERSEY 447 (Philadelphia 1881). The Act states that its purpose is to "prevent[] . . . fraud, deceit and collusions, between debtor and creditor, and that creditors may not be hindered from the recovery of their just debts." *Id.*

<sup>86</sup> The Act states that the recording of title of "houses & lands taken upon execution . . . shall be a legal assurance of such houses & lands to [the plaintiff] & his heirs forever", meaning that the creditor would have a fee simple title. General Court enactment, May 12, 1675, in 5 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 28-29 (Nathaniel B. Shurtleff ed. 1854). In 1647, Massachusetts's first Code of law, the *Book of General Laws and Liberties*, provided that a writ of execution should permit an officer to levy on the goods and chattels of the debtor. In contrast to the law in England, the officer was permitted to break open the doors of the house if necessary. To satisfy criminal fines, the officer was permitted to "levie his land or person according to law" if personal property was insufficient. Levies, in GENERAL LAWS AND LIBERTIES OF MASSACHUSETTS (1647), 34 (1929 Reprint of 1648 Huntington Library ed. Note: 1998 ed. exists.).

A 1692 statute was even more explicit. It provided that "all lands or tenements belonging to any person . . . in fee simple shall stand charged with the payment of all just debts owing by such person, as well as his personal estate, and shall be liable to be taken in execution for satisfaction of the same." The statute then clarifies that it intends the conveyance of the entire *fee simple* interest to creditors. It provides that, after the transfer of title was recorded in the county registry, the creditor would have a "good title" to the real property, for "his heirs and assigns forever." An Act for Making of Lands and Tenements Liable to the Payment of Debts, Oct. 18, 1692, ch. 29, in 1 ACTS AND RESOLVES OF THE PROVINCE OF MASSACHUSETTS BAY 68-69 (Boston: Wright & Potter 1869). This Act was disallowed by the Privy Council in 1695 because it failed to provide for debts due to the crown. The Act was then reenacted in 1696 with a provision specifying that debts due to the crown had priority over all other debts. See *id.* at 69 (for explanation of disallowance) and at 254 (for 1696 Act).

<sup>87</sup> Add cite.

1718, New Hampshire adopted a statute making lands, but not houses, liable for the debts of a debtor who was alive. Upon death, however, the executor could distribute the lands and the house of the deceased debtor to his creditors.<sup>88</sup>

The New England and the Barbados practices modified English law in two important respects. First, as mentioned, they enabled creditors to seize a debtor's freehold interest in land in addition to his personal property to satisfy unsecured debts. In Massachusetts, for example, after 1701, the legislatively prescribed form for the writ of *fiery facias* directed the sheriff to seize the debtor's "goods, chattels or lands," instead of simply "goods and chattels" as was the case in England.<sup>89</sup> The writ of *elegit* fell out of use entirely because title to a debtor's land was more valuable than possession of a debtor's land.

The New England colonies and Barbados, however, unlike Pennsylvania and Delaware, adopted a unique limitation on creditor's remedies. Lands seized in execution were not sold at public auction as chattel property ordinarily would have been. The laws provided that the real property would be appraised and then transferred to the creditors in satisfaction of their judgment. The creditors had to accept an in-kind remedy.<sup>90</sup>

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<sup>88</sup> An Act for Making Lands and Tenements Liable to the Payment of Debts (1718) in ACTS AND LAWS OF HIS MAJESTY'S PROVINCE OF NEW HAMPSHIRE 78-80 (Portsmouth: Fowle 1761).

<sup>89</sup> An Act Prescribing the Forme of Writts for Possession, Scire Facias, and Replevin (June 12, 1701), c. 3, in 1 ACTS AND RESOLVES OF THE PROVINCE OF MASSACHUSETTS BAY 461 (Boston: Wright & Potter 1869). See also 1 THOMAS HUTCHINSON, THE HISTORY OF THE COLONY AND PROVINCE OF MASSACHUSETTS-BAY 376 (Mayo ed. 1936) ("the county courts . . . consider[ed] real estates as mere *bona*, and they did not confine themselves to any rules of distribution then in use in England. . . . [These legal modifications were] excusable in a new plantation, where most people soon spent what little personal estate they had, in improvement upon their lands.")

<sup>90</sup> *Phillips v. Dean*, a 1720 court case in the Plymouth County, Massachusetts Court of Common Pleas illustrates how the law functioned: Joseph Phillips successfully sued Thomas Dean on a book account debt for "Sadlary Ware" and received a judgment of eight pounds, ten shillings and nine pence plus court costs. The court issued a writ of execution for the sheriff to satisfy the debt. Three people were appointed to appraise Dean's land. The sheriff then put Phillips in possession of just over six acres of Dean's land. Under the law, once Phillips recorded his interest in the county registry, he would have full legal title—a

The second important effect of the New England statutes and the Barbados practice was to extend the law to allow unsecured creditors priority to the deceased's real property over the heirs. The 1692 Massachusetts statute explicitly identifies as the issues that it intends to remedy that, although debtors' houses and lands "give them credit," some debtors are "remiss in paying of their just debts" and "others happen[] to dye before they have discharged the same."<sup>91</sup> The broader consequence of the 1692 law was that the inheritance of real property could no longer be viewed as a birthright: Heirs took real property subject to the claims of all of their fathers' unsecured creditors. Land—the inheritance—could be taken "involuntarily" based on highly informal obligations such as book accounts,<sup>92</sup> without the participation of the heir and without the landowner expressly signing a security agreement, a grant, or a will.

The colonial laws described thus far implicitly reveal an important feature of imperial regulation within the British Empire prior to the *Debt Recovery Act*. Lawmaking authority relating to debt collection and creditors' remedies was initially firmly vested in, and under the control of, local colonial legislatures and courts. Parliament and the crown, through the Board of Trade and the Privy Council, reviewed and modified colonial law to advance English economic interests. The Privy Council and House of Lords had appellate jurisdiction over litigation instituted in the colonies. These imperial authorities, however, initially chose not to intervene in the realm of colonial court procedures. In resolving inter-colonial disputes, the Privy Council and House of Lords applied the relevant local colonial law, and not English law. Colonial laws were

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fee simple interest—in Dean's real property. See *Phillips v. Dean* (June 1720), in 5 PLYMOUTH COURT RECORDS, 1686-1859, at 113 #16 (David Thomas Konig, ed. 1979).

<sup>91</sup> 1 ACTS AND RESOLVES OF THE PROVINCE OF MASSACHUSETTS BAY, *supra* note //, at 68.

<sup>92</sup> Book accounts functioned like a tab and were a popular form of unsecured debt instrument through the mid-nineteenth century. See Priest, *Currency Policies*, *supra* note 8, at 1328-30.



overturned if they were found to be repugnant to the laws of England but, in the absence of such a ruling, colonial law prevailed.<sup>93</sup>

### B. *Creditors' Claims to Slaves Prior to Parliamentary Regulation*

The legislative history of the *Debt Recovery Act* involves concerns among English creditors that the English property laws were being used in the colonies to defeat their efforts to collect upon their debts. The merchants were centrally concerned with credit extended to slave colonies, and the legislative history of the *Debt Recovery Act* relates to slave property in two ways. First, slave colonies were more likely than non-slave colonies to retain the English inheritance laws and other laws protecting real property from creditors.<sup>94</sup> English creditors' concern about the impact of English property exemptions on debt collection was therefore relevant more often to slave colonies and to credit extended for slave purchases than to non-slave colonies. Second, English creditors were concerned that colonial legislatures might characterize slaves as real property and thereby make the slaves legally immune from seizure by creditors. I will discuss these issues in turn.

Why were slave colonies more likely to retain English protections to property from the claims of creditors? The body of English inheritance laws and creditor remedies were assumed by many in England to have an important economic function. It was thought to be good social policy to prevent the piecemeal dismantling of estates in order to retain the value that could only be captured when they functioned as an entirety. Involuntary execution on land leading to the sale of some or all of the estate for

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<sup>93</sup>See, for example, *Meynell v. Moore*, 4 Brown 103, 110 (1727), in 2 THE ENGLISH REPORTS, HOUSE OF LORDS 70, 74 (1901) (applying Antiguan law).

<sup>94</sup> There are exceptions to this generalization: Barbados, for example, was a major slave colony that made land liable for debts.

unsecured debts was believed to decrease the total economic efficiency of the society. In a characteristic eighteenth century account, a pamphleteer described a Barbados estate as “like a looking glass which when once broke to pieces will not fetch quarter part of what it would when kept whole and entire.”<sup>95</sup>

One might ask, however, why these efficiency concerns did not lead planters in New England to retain the English inheritance laws? The persistence of the English remedial regime in the South and in select Northern colonies may have been a policy preference that they could afford given the fact that creditors would lend to them on the basis of annual yields of a staple crop. Creditors to New England may similarly have feared that execution on land would result in large amounts of lost value in terms of productivity, but the New England colonies had no equivalent staple crops and suffered more severely from liquidity problems than the South.<sup>96</sup> Most wealth in New England was held in the form of land: in 1774, 81% of New England wealth was in the form of real property.<sup>97</sup> This can be contrasted with the Mid-Atlantic region, where real property constituted 68.5% of wealth, and the South where real property constituted only 48.6% of wealth and slaves constituted 35.6%.<sup>98</sup> Abolishing the distinctions between real and personal property increased credit to New England and increased the viability of using mortgages as a “currency” in the absence of other valuable chattel property that might

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<sup>95</sup> John Ashley, *The Fall of Barbados since the French Edict in 1726*, quoted in RICHARD PARES, *MERCHANTS AND PLANTERS* 88 (1960).

<sup>96</sup> Priest, *Currency Policies*, *supra* note 8, at 1321-32.

<sup>97</sup> ALICE HANSON JONES, *WEALTH OF A NATION TO BE: THE AMERICAN COLONIES ON THE EVE OF THE REVOLUTION* 98 (1980); see also MARC EGNAL, *NEW WORLD ECONOMIES: THE GROWTH OF THE THIRTEEN COLONIES AND EARLY CANADA* 14-15 & tbl. 1.2 (1998) (analyzing Jones’s data). Economic differences between the colonies may also explain variation in inheritance laws. See Lee J. Alston & Morton Owen Schapiro, *Inheritance Laws Across Colonies: Causes and Consequences*, 44 J. ECON. HIST. 277 (1984).

<sup>98</sup> JONES, *supra* note //, at 98; EGNAL, *supra* note //, at 14-15 & tbl. 1.2.

serve as a commodity money.<sup>99</sup> Liquidity concerns were different in the South, where farmers engaged in production of staple crops—that served as the basis for credit from England and, locally, as commodity money—and where slaves were a highly-valuable form of chattel property that had no analog in the North.

As mentioned, a second concern was that colonial legislatures might characterize slaves as real property and thereby make the slaves legally immune from seizure by creditors. From the moment slavery was instituted in the colonies, each slave colony had to address the issue of how to treat slaves within the traditional English property regime. Were slaves real property or personal property?

The question was relevant both to credit conditions and to the economic impact of the English inheritance laws. The economic advantage to slaveholders of characterizing slaves as real property was that, under the inheritance practice of primogeniture, slaves and land would both descend to the eldest son at the death of a landowner. In contrast, if slaves were characterized as chattel property, intestacy laws provided that the eldest son would inherit the real property, but not the slaves. Younger children inherited all chattel property in equal shares after the deceased's debts were satisfied. Slaves were viewed as essential to the value of an estate. If the eldest son obtained the land but no slaves, the plantation might sit idle, potentially forever, while he gathered enough funds either to purchase his father's slaves from his siblings or to purchase new slaves. Thus the land was of little value without slaves.

Characterizing slaves as real property, however, diminished credit, and the need for credit overwhelmed the economic advantage of tying slaves to property. Slaves

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<sup>99</sup> G.B. Warden's study of Massachusetts mortgage markets found that land transferred hands so rapidly that the mortgages themselves likely constituted a form of currency. G.B. Warden, *The Distribution of Property in Boston, 1692-1775*, 10 PERSPECTIVES IN AM. HIST. 81 (1976) at //; Priest, *Currency Policies*.

functioned as the primary collateral for debts among the wealthy in the southern colonies. Slaves were valued as an investment, in part, because of the relative ease with which they could be sold to pay off debts in relation to land.<sup>100</sup> Slaves were typically purchased on credit. If slaves were characterized as real estate, they would be protected entirely from the claims of unsecured creditors both during the life of the debtor and when his estate was distributed at his death. An additional threat to creditors was the problem described in Robert Carter's letter: money borrowed on an unsecured basis might be used to purchase slaves for the specific purpose of shielding wealth from the claims of creditors. In a slave economy, the effects on credit would be highly detrimental. As described in a 1727 Virginia statute, "to bind the property of slaves, so as they might not be liable to the payment of debts, must lessen, and in process of time, may destroy the credit of the country."<sup>101</sup>

In order to secure slaves to the land they worked upon, southern and Caribbean legislatures characterized slaves as real property, but included special provisions making slaves a form of real estate that could be sold to satisfy debts to unsecured creditors, even in the event of the death of the debtor.<sup>102</sup> As an example, the 1727 Virginia Act

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<sup>100</sup> See, for example, RICHARD KILBOURNE, *DEBT, INVESTMENT, SLAVES: CREDIT RELATIONS IN EAST FELICIANA PARISH, LOUISIANA, 1825-1885*, at 5 (1995) ("Slaves represented a huge store of highly liquid wealth that ensured the financial stability and viability of planting operations even after a succession of bad harvests, years of low prices or both. Slave property clearly collateralized a variety of credit instruments and was by far the most liquid asset in most planter portfolios . . . . An investment in slaves was a rational choice, given the alternatives for storing savings in the middle of the [nineteenth] century.") *But see* GAVIN WRIGHT, *OLD SOUTH, NEW SOUTH: REVOLUTIONS IN THE SOUTHERN ECONOMY SINCE THE CIVIL WAR* (1986) (asserting that the economics of slavery placed pressure on slaveowners to put slaves to their most productive use, which led to active land markets and geographical moves).

<sup>101</sup> An Act to explain and amend the Act declaring the Negro, Mulatto, and Indian slaves within this Dominion, to be Real Estate, ch. 11 (1727) in 4 *STATUTES AT LARGE* (William Waller Hening ed 1814), at 222, 226.

<sup>102</sup> A 1705 Virginia Act, for example, stated that:

For the better settling and preservation of estates . . . all negro, mulatto, and Indian slaves, in all courts of judicature, . . . shall be held . . . to be real estate (and not chattels;) and shall descend

mentioned above characterized slaves as real property, and authorized the practice of entailing slaves to particular parcels of real property. Entailing property, of course, would ordinarily make the property immune from seizure by a creditor. The 1727 Act noted, however, that credit was usually extended on the basis of a debtor's visible property, and that "the greatest part of the visible estates of the inhabitants of this colony, doth generally consist of slaves."<sup>103</sup> The statute therefore provided that even entailed slaves "shall be liable to be taken in execution, and sold for the satisfying and paying the just debts of the tenant in tail," with the exception of those slaves allocated to the widow as dower.<sup>104</sup> A 1730 Virginia opinion, *Tucker v. Sweny*, interpreted the statute in a case that raised the issue of whether slaves born after the death of a debtor could be taken in execution to satisfy his debts. The judge determined that "Negroes, notwithstanding the act making them real estate, remain in the hands of the executors by that act as chattels, and as such, do vest in them for payment of debts. So that in this case, they are considered no otherwise than as horses or cattle."<sup>105</sup> The Virginia law is typical of the

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unto the heirs and widows of persons departing this life, according to the manner and custom of land of inheritance, held in fee simple.

A later provision clarified that, notwithstanding the treatment of real property for the purpose of inheritance, "slaves shall be liable to the payment of debts, and may be taken by execution, for that end, as other chattels or personal estate may be."

An Act declaring the Negro, Mulatto, and Indian slaves within this dominion, to be real estate, ch. 23 (1705), reprinted in *LAWS OF VIRGINIA* (William Waller Hening, ed. Philadelphia 1823), at 333-34.

<sup>103</sup> An Act to explain and amend the Act declaring the Negro, Mulatto, and Indian slaves within this Dominion, to be Real Estate, ch. 11 (1727) in *4 STATUTES AT LARGE* (William Waller Hening ed 1814), at 222, 226.

<sup>104</sup> *Id.* at 224. The Act said that its primary purpose was "to preserve slaves for the use and benefit of such persons to whom lands and tenements shall descend . . . for the better improvement of the same." *Id.* at 226. *Blackwell v. Wilkinson* (October 1768), in Jefferson *Reports of Cases . . . in the General Court of Virginia*, 73-74, 76, 82, 84. As the historian Thomas Morris has noted, the judge in this case overlooked the provision of the Virginia statute requiring the exhaustion of personal property before slaves were to be sold. See THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619-1860*, at 70 (1996).

<sup>105</sup> *Tucker v. Sweny*, 1 Va. Colonial Dec. R39, 1731 WL 31 (Va Gen. Ct.)

laws in other American slave colonies.<sup>106</sup> In sum, in most slave colonies, unsecured creditors could claim debtors' chattel property and slaves, but not the land.

B. *Parliamentary Regulation of Colonial Property: The Act for More Easy Recovery of Debts*

Although colonial legislatures initially defined the debt collection procedures administered by their courts, their power to legislate in this area was subject to the review and control of English imperial authorities. The context of Empire provided English merchants with a unique political position: English merchants were able to represent their interests to the crown and Parliament in London with little input from the colonists themselves. Colonial legislation that affected the collection of English debts was one of the merchants' central concerns. In the late 1720s and early 1730s, English imperial authorities began to more actively monitor colonial practices.<sup>107</sup>

English creditors, however, became unsatisfied with these remedies because they left open the possibility that debtors might convert their chattel and slave property into real property, thereby making it immune from seizure, or that debtors could conceal their chattel and slave assets from the sheriff when he came to seize the property. In August 1731, several merchants in London petitioned the crown to respond to colonial acts and practices which they complained left them "without any Remedy for the Recovery of their just Debts" or remedies that were "very partial and precarious."<sup>108</sup> In a subsequent

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<sup>106</sup> See MORRIS, *supra* note //, at 66-72.

<sup>107</sup> See, for example, Representation of the Board of Trade relating to the laws made, manufactures set up, and trade carried on, in His Majesty's Plantations in *America* (Jan. 23, 1734) (comprehensive Board of Trade Report analyzing all colonial laws and practices suspected to be contrary to the interests of English merchants); BILDER, *supra* note //, at 90, 116 (describing dramatic increase in appeals of Rhode Island cases heard by the Privy Council after 1729).

<sup>108</sup> Petition from the Merchants of London (1731) *quoted in* Representation of the Board of Trade relating to the laws made, manufactures set up, and trade carried on, in His Majesty's Plantations in *America* (Jan.

memo detailing their concerns, the merchants complained specifically about the fact that land and houses were not liable for debts in Jamaica and Virginia.<sup>109</sup> A letter written from John Tymms, a Jamaican merchant, in September 1731 clarified that the need for a law subjecting real property to the claims of creditors derived from the fact that “As it is, the principal parts of [Jamaican] estates are exempted by law from the payment of debts and negroes are frequently driven away into the woods or mountains out of the Marshall’s way.”<sup>110</sup> Tymms added that “This is an evil which prevents better settlement of the island.”<sup>111</sup>

The London merchants’ petition also listed several other colonial laws that merchants believed unfairly discriminated against them in favor of local merchants.<sup>112</sup> In response to the merchants’ petition, Privy Council asked the Board of Trade to draft a more detailed report on all colonial legislation that might conflict with English interests. The subsequent Board of Trade Report emphasized the problems confronting creditors during the execution process, because of the laws in some of the colonies, “particularly that of Jamaica, to exempt their Houses, Lands, and Tenements, and in some places their Negroes also, from being extended for Debt.”<sup>113</sup>

## 2. *The Debt Recovery Act*

In 1732, Parliament enacted the *Act for the More Easy Recovery of Debts in his Majesty’s Plantations and Colonies in America*. It stated that its purpose was “to revive

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23, 1734) (hereinafter 1734 Board of Trade Report). See also 4 PROCEEDINGS AND DEBATES OF THE BRITISH PARLIAMENTS RESPECTING NORTH AMERICA, at 89, 128-29 n.13, 130, 153, 154 (Leo Francis Stock, ed. 2003) (records of 1731-1732 Parliamentary sessions referring to enactment of statute).

<sup>109</sup> Particular facts and instances in support of the Merchants’ Petition, Item 434i, Vol. 38 (1731), pp. 293-94 in CALENDAR OF STATE PAPERS, COLONIAL: NORTH AMERICA AND THE WEST INDIES, 1574-1739 (2000).

<sup>110</sup> John Tymms to Humfrey Morice (Sept. 13, 1731), Item 434 ii, Vol. 38 (1731) *id.* at 294-95.

<sup>111</sup> *Id.*

<sup>112</sup> Petition from the Merchants of London, *supra* note //, at //.

<sup>113</sup> Board of Trade Report to Parliament (Jan. 21, 1732), *supra* note //, at 9.

the Credit . . . formerly given to the Natives . . . of the Plantations, and to the advancing of the trade of this Kingdom.” The statute ensured English merchants that colonial legislatures would no longer be able to defeat debt collection efforts through application of English real property law. All forms of property were to be available to satisfy any type of debt. Toward this end, beginning on September 29, 1732, all “houses, lands, negroes, and other hereditaments and real estates” were to be liable for “all just debts, duties and demands, of what nature or kind soever.”<sup>114</sup> These property interests—houses, lands, and slaves, and others—were to be “assets for the satisfaction” of debts “in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other specialty.” The statute also provided that houses, lands, and slaves would be “subject to the like remedies and process for seizing and selling the same for the satisfaction of such debts, as personal estates in the colonies were liable to for seizure and sale.”<sup>115</sup> In other words, the individual colonies were to use the same procedures for selling land and slaves to satisfy debts as were already in place for selling personal property.

The *Debt Recovery Act* took power away from local colonial legislatures to define whether houses, or land, or slaves would be available to satisfy unsecured debts. All forms of wealth were now available to satisfy unsecured debts. Notably, the statute was not limited to colonial debts to English creditors. The language of the statute required that colonial courts apply the *Act* locally in all cases involving court awards in which

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<sup>114</sup> 5 Geo. II, c. 7 (1732). Parliament at times responded to generalized fears of colonial debt relief legislation with sweeping statutes that were not responsive to local conditions. The 1764 Currency Act, banning paper money in the American colonies, is another example.

<sup>115</sup> 5 Geo. 2, c. 7 (1732). A separate provision of the statute was equally controversial to colonists: it provided that English merchants could prove their debts and obtain judgments against colonial debtors in English courts. Colonists were incensed about this provision of the statute and believed it violated their right to defend themselves in court. This provision of the statute has an interesting history—state courts repealed it during the American Revolution—but it is beyond the scope of this Article.



enforcement of the judgment was required by means of execution. The *Act* applied only in the colonies, however, and not in England.<sup>116</sup>

The primary participation by colonists in the process of the enactment of the *Debt Recovery Act* was by Virginians who fiercely opposed the *Act*. Virginia sent Isham Randolph as its agent to Parliament. Randolph submitted a petition to Parliament to request a hearing on the *Act*. Randolph's petition stated that "said bill will greatly affect the rights and propertys in the landed interest of his Majestys subjects residing in the said colony."<sup>117</sup> Randolph received a hearing on March 17, 1731, and voiced his opposition to the statute. The enactment of the statute indicates Randolph's failure to persuade Parliament to defeat the bill.

C. *Reaction in the Colonies to the Act for the More Easy Recovery of Debts.*

1. *Legal Effects of the Act for the More Easy Recovery of Debts in the Colonies*

How did the law change in the colonies after the enactment of the *Debt Recovery Act*? The statute radically changed the legal regulation of property in New York, Maryland, North Carolina, South Carolina, Rhode Island, Antigua and, later, Georgia and Kentucky.<sup>118</sup> The statute was recognized as authority throughout New England and Barbados (although the effects of the *Act* were more subtle in colonies that had already

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<sup>116</sup> England retained its traditional real property exemptions for over a century after the enactment of the *Debt Recovery Act*, until 1833. See 3 & 4 Wm. & Mary IV, ch. 104 (1833).

<sup>117</sup> Petition of Isham Randolph Esquire Agent for the colony of Virginia, cited in 4 PROCEEDINGS AND DEBATES OF THE BRITISH PARLIAMENT RESPECTING NORTH AMERICA 153-154 (Stock ed.)

<sup>118</sup> See, for example, An Act for rendering more effectual the Laws making Lands and other real Estates Liable to the Payment of Debts, 1764 Session Laws of North Carolina (*Debt Recovery Act* had been in effect and "many lands and other real estates . . . have accordingly been seized and sold . . . as well in the Life-time of such Debtors, as after their Decease; statute reaffirms that execution sales lead to the transfer of the entire interest in the real property owned by the debtor); Peckham's v. Fryers and Peckham's v. Allen, Rhode Island Equity Court Records, 1741 (equity court decisions holding that the *Debt Recovery Act* is in force in Rhode Island and applying the *Act* to disputes related to inheritance), Rhode Island State Archives (photocopies on file with author). See also writs of execution, North Carolina State Archives, authorizing sheriffs to seize all forms of personal and real property, but the property was to be taken in the following order until the debt was satisfied: first, personal property; second, slaves; third, land.

adopted similar laws independently).<sup>119</sup> The *Act* transformed the law in Virginia for approximately a decade, until the Virginians devised a means of limiting its application to debts to English creditors.<sup>120</sup>

In practice the *Debt Recovery Act* had three principal effects. First, land was to be treated just like personal property with respect to the claims of unsecured creditors. Again, according to the language of the *Act*, “houses, lands, negroes, and other hereditaments and real estates” were to be liable for “all just debts, duties and demands, of what nature or kind soever.” In each of the British colonies, by the mid-1730s, land, houses and slaves could be seized to satisfy the claims of unsecured creditors. The *Act* was implemented by expanding the writ of *fiery facias*—which traditionally authorized the sheriff to seize the goods and chattels of a debtor, including slaves—to authorize the seizure of land.<sup>121</sup> After the enactment of the *Debt Recovery Act*, the writ of *elegit* was abandoned in New York, Maryland, North Carolina and South Carolina.<sup>122</sup>

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<sup>119</sup> As an example, New Hampshire’s 1718 law prevented the seizure of debtor’s *houses* during the life of the debtor, although it did permit such a seizure after the death of the debtor. The *Debt Recovery Act* led to a change in New Hampshire law to allow the seizure of houses during the life of the debtor. [add cite—New Hampshire judicial opinion] See also 1771 list in which *Debt Recovery Act* is named as one of the “permanent laws” in operation in the colony.

In contrast, in Connecticut, the *Act* simply provided more formal authority for the existing practice. Governor Talcott of Connecticut, for example, responded to the enactment of the *Debt Recovery Act* (described below) by stating that Connecticut courts would be “blameless in reassuming our former Rules, in putting the Administrator . . . in the room and stead of the deceased Debtor, to alienate his lands, for the payment of his just Debts.” Governor Talcott to Francis Wilks (October 1734), in TALCOTT PAPERS, 4 CONNECTICUT HISTORY SOCIETY COLLECTIONS 260. Add cite to New Jersey Legislative debates relating to the *Act* between governor and legislators.

There is no confirming evidence that the *Debt Recovery Act* led to legal reform in Pennsylvania and Delaware. These colonies appear to have retained their policies of selling land at auction to satisfy debts when the debts exceeded seven years of earnings from the real property.

<sup>120</sup> See *infra* text accompanying notes //--//.

<sup>121</sup> See generally, 4 KENT, COMMENTARIES, *supra* note //, at 425-31.

<sup>122</sup> As described in a later Maryland judicial opinion, the *Debt Recovery Act*:

was a radical innovation on existing remedies in the plantations and colonies to which its operation was confined. Not only was the totality of the debtor’s lands subjected to the payment of his debts, but they were made liable in the same manner as goods and chattels. . . . [T]he practice since that statute has been to sell lands under a *fi. fa.* in the same manner as goods and

A second effect was that the interests of heirs and devisees were now subordinated to those of unsecured creditors at the death of a debtor. The provision of the statute stating that real property would be available to satisfy debts “in like manner . . . [as] debts due by bond or speciality,” was intended to clarify that it abolished in the colonies the English doctrine that made inherited lands immune from the claims of unsecured creditors of the deceased. As Haywood, a prominent North Carolina lawyer, described in his argument in *Baker v. Webb*, “Before the passing of this Act lands could not be sold for the payment of debts, and the heir was not liable to the simple contract or other debts of the ancestor in which he was not named: since the passing of this act they are liable to be sold, and in the hands of the heir are liable to all debts justly owing from the ancestor.”<sup>123</sup>

Making inherited real property available to satisfy unsecured debts of the deceased created numerous procedural complexities. As mentioned, the prevailing practice in England was for the executor to marshal only the *personal* property of the deceased to satisfy his or her debts. The land automatically descended to the heir, unless the land was otherwise devised in the deceased’s will.<sup>124</sup> The *Debt Recovery Act*, however, stated that colonial courts were to subject land to the “like remedies and process for seizing and selling . . . for the satisfaction of . . . debts, as personal estates in the

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chattels. . . . [S]oon after the enactment of the [*The Act for the More Easy Recovery of Debts*], the remedy by *elegit* was abandoned. *McMechen v. Marman*, 8 G. & J. 57, 1836 WL 1870 (Md.) (Ct. App. Md. 1836), at \*3. See also, for example, *Bank of Utica v. Mersereau et. al.*, 3 Barb.Ch. 528 (1848) where the judge in dicta states “[W]hen the statute of 5 Geo. 2 subjected real estate in the colonies to sale upon execution, in the same manner as personal property, the writ of *elegit* was virtually abolished here.”

<sup>123</sup> *Baker v. Webb*, Haywood’s Reports (1794).

<sup>124</sup> 2 POLLOCK & MAITLAND, *supra* note 29, at 336 ([“T]he executor had nothing to do with the dead man’s land, the heir had nothing to do with the chattels.”).

colonies were liable to for seizure and sale.”<sup>125</sup> Colonial courts, thus, had to address whether, under the *Debt Recovery Act*, the executor would take control over the real property when a landowner died. If so, the heirs and devisees would be vulnerable to executors’ discretionary choices about how to satisfy deceaseds’ debts. Equally important, they would be denied the traditional procedural mechanism that afforded heirs and devisees the opportunity to defend their claim to inherited land in court.<sup>126</sup> Many colonies interpreted the *Debt Recovery Act* as requiring a procedural modification whereby executors would be in charge of distributing the deceaseds’ land as well as personal property. In an 1804 opinion, Chancellor James Kent, for example, stated that, under the *Debt Recovery Act*, in New York land was “to be treated exactly like personal property; and it came to be usual to regard lands and real estates as assets in the hands of executors, and to cause them to be sold on execution against executors.”<sup>127</sup>

Third, requiring that courts use the same procedures for selling land and slaves as they would for personal property meant that land and slaves would be sold at auction in most colonies. Selling land at auction raised the additional issue of whether traditional debtor redemption rights to land would be recognized after the sale. The statute explicitly states that “houses, lands, negroes *and other hereditaments and real estates*” were subject to the *Act*. Redemption rights were interests in real property that most courts interpreted as being covered by the *Act*, and therefore subject to sale at an execution auction. As described in *Bell v. Hill*, a 1794 North Carolina Superior Court

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<sup>125</sup> 5 Geo. 2, c. 7 (1732).

<sup>126</sup> As mentioned above, Blackstone named as an absolute right of property that no man shall be disinherited “unless he be duly brought to answer, and be forejudged by courts of law.” 1 BLACKSTONE, *supra* note 2, at \*133-34.

<sup>127</sup> *Waters v. Stewart*, (Kent, J. 1804); *See also* 4 JAMES KENT, COMMENTARIES ON AMERICAN LAW 425 (1984 reprint) (New York: 1830) (listing states that allowed land to be sold on a writ of *feri facias* with no right of redemption).

opinion, “[I]f a *fi. fa.* issues upon a subsequent judgment, and comes to the hand of the sheriff, and he sells the lands, the title of the vendee under such execution cannot ever afterwards be defeated—it is valid to every purpose. Were the law not so, it would be the most dangerous thing in the world to purchase lands at an execution sale.”<sup>128</sup>

Nonetheless, it was possible for judges to interpret the *Debt Recovery Act* as applying only to proceedings at law. The *Act* did not explicitly state that it applied to proceedings in equity. Equity courts (where they existed<sup>129</sup>) could have found that the *Act* did not apply to their proceedings and that, therefore, they were entitled to recognize traditional English redemption rights.<sup>130</sup> But colonial equity courts faced a problem: When law courts, such as the North Carolina court in *Bell v. Hill*, determined that *all* interests in real property were sold during an auction of real property at law, then on what basis could equity courts hold that some real property interest (the equitable redemption right) remained in the mortgagor after such a sale? The issue had never emerged in England because, in England, real property could not be sold pursuant to a legal writ of *fi. fa.* As will be described in the next Part, in most colonies and, then, states the *Debt Recovery Act* led to the abolition of equitable redemption rights.

Slaves had been used as collateral and had been sold in judicially-supervised auctions long before Parliament enacted the *Debt Recovery Act*. The *Act*, however,

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<sup>128</sup> *Bell v. Hill*, 2 N.C. 72 (1794). See also *Waters v. Stewart*, (Kent, J. 1804); 4 KENT, COMMENTARIES, *supra* note //, at 425.

<sup>129</sup> At the time of the Revolution, only Delaware, Maryland, New Jersey, New York and South Carolina had established separate equity courts. Stanley N. Katz, *The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century*, in LAW IN AMERICAN HISTORY 257, 263-64 (Donald Fleming & Bernard Bailyn eds., 1971). Then, after the American Revolution, several other states, typically in the South, either established equity courts, or granted full equity powers to common law courts. Alabama, Arkansas, Georgia, Kentucky, Maryland, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia all either established separate chancery courts or granted equity powers to their common law court systems. See *id.* at 264; MARYLYNN SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA 82-83 (1986).

<sup>130</sup> See case cited *infra* notes //-// and accompanying text.

transformed local practice, which could be overturned by legislation, into an imperial mandate. In the first known pamphlet on slave auctions, Bryan Edwards, a Member of the House of Commons, describes the practice of auctioning slaves to satisfy the slaveowners' secured and unsecured debts as a grievance "so remorseless and tyrannical in its principle, and so dreadful in its effects, though not originally created, is now upheld and confirmed by a British act of parliament."<sup>131</sup> Edwards says of the *Debt Recovery Act*: "It was an act procured by, and passed for the benefit of British creditors; and I blush to add, that its motive and origin have sanctioned the measure, even in the opinion of men who are among the loudest of the declaimers against slavery and the slave trade."<sup>132</sup> After describing the horrors of the slave auction and the fact that the practice of selling slaves at auction to satisfy debts "unhappily . . . occurs every day," Edwards states "Let this statute be totally repealed. It is injurious to national character; it is disgraceful to humanity. Let the negroes be attached to the land, and sold with it."<sup>133</sup>

The reality was that, in America, the provisions of the *Act* that required courts to treat slaves as chattel property had little additional effect because, as mentioned, colonial legislation already required courts to treat slaves as chattel for the purpose of satisfying debts. A question raised in the colonies by the enactment of the *Debt Recovery Act*, however, was: in what order should the sheriff seize the real property, slaves, and chattel property in executing a writ of *fieri facias*? The original writs in the North Carolina State

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<sup>131</sup> 2 Bryan Edwards, *The History of the British Colonies in the West Indies* 366 (Philadelphia 1806). Thomas Russell, the modern scholar most knowledgeable about American slave auctions, identifies the Edwards essay as the earliest writing on slave auctions. See Thomas D. Russell, *A New Image of the Slave Auction: An Empirical Look at the Role of Law in Slave Sales and a Conceptual Reevaluation of Slave Property*, 18 CARDOZO L. REV. 473, 481 (1996) (empirically analyzing slave auctions in antebellum South Carolina and finding that courts conducted or supervised a majority of slave auctions).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 367-68. Due to lobbying by Edwards, Parliament repealed the *Debt Recovery Act* with respect to slaves in the remaining British colonies in 1797. See 37 Geo. 3, ch. 119 (1797).

Archives establish a clear ranking of the types of property a sheriff could take to satisfy debts. The debtor's "Personal Estate . . . (Slaves Excepted)" were to be taken first. If that property was insufficient to satisfy the debt, then the debtor's "Personal Estate . . . including Slaves" were to be taken. Only if goods and chattels and slaves were insufficient to satisfy the debt, was the sheriff authorized to seize the debtor's "Lands, Tenements, Hereditaments and other real estate."<sup>134</sup> This scheme, similar to that adopted in other colonies, implemented the *Debt Recovery Act* while privileging debtors' vested interests in real property over their interests in slaves and other personal property.

To my knowledge, the *Act* did not affect landowners' ability to entail their property voluntarily and did not affect widows' dower interests in lands owned by their husbands. As described above, entailing property protected families' title interest to property because seizing and selling a landowner's real property to satisfy his debts would have conflicted with the vested interests of remaindermen. Once property was entailed, each present possessor held only a life interest in the property. The *Debt Recovery Act* did not explicitly abolish the practice of entailing. It required that courts throughout the colonies treat landowners' real property interests as they would chattel property. The *Act* would therefore have required courts to *sell* the possessory life interests of tenants in tail to satisfy their debts, as they would their chattel property. (The interest sold would be a tenancy for the duration of the life of the debtor.) But the *Act* does not explicitly prevent the practice of entailing real property.

Unfortunately, historical scholarship is ambiguous as to the extent and importance of the entail during the colonial period, although most historians have concluded that the

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<sup>134</sup> See, for example, North Carolina Writs of Fieri Facias, North Carolina State Archives, photocopies on file with author.

entail was not used extensively, particularly outside of Virginia.<sup>135</sup> It is possible to imagine that the *Debt Recovery Act* would have led to an expansion of the practice in some contexts and a contraction of the practice in others. Because the *Debt Recovery Act* abolished other traditional protections on real property from creditors' claims, the entail remained as the central means by which landowners could protect their land from creditors during the colonial period. Landowners who wanted to safeguard their real property from financial risks would have had greater incentive to make use of the entail after the *Debt Recovery Act* abolished other traditional protections on land. Those landowners who wanted greater credit, however, would have chosen not to entail their property. Indeed, creditors would have been likely to demand that their debtors remove the entail prior to extending credit on the basis of landed wealth. As this Article has shown, colonists' preference for subjecting real property to the financial risks of the landowner varied from colony to colony. The operation of the practice of entailing property in various colonies requires further study.

## 2. *Economic Effects of the Act for the More Easy Recovery of Debts*

The principal economic effects of the *Debt Recovery Act* would have been to expand credit markets and land markets.<sup>136</sup> With respect to credit markets, the *Act* gave greater security to creditors that their debts would be repaid out of debtors' assets. The *Act* created greater security both by overriding specific colonial laws that protected real property assets in the English tradition, and also by taking authority over debt collection

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<sup>135</sup> See *supra* note **Error! Bookmark not defined.**

<sup>136</sup> The economic effects of the *Debt Recovery Act* relate to land that was not entailed during the colonial period. As mentioned, the historical record on the extent to which land was entailed is ambiguous. As the next Part describes, most states reenacted the *Debt Recovery Act* in the Founding Era. The entail was abolished throughout the states by the late eighteenth century, which increased the effects of the *Debt Recovery Act* on land markets and credit conditions in that period.



processes away from the colonial legislatures. This greater security would have led to lower interest rates (greater supply of credit). Lower interest rates meant that more capital was available for productive investment. With respect to land markets, the *Act* increased the likelihood that land would be sold to satisfy the debts of a landowner, both during his life and at the time of his death. I will describe these effects in greater detail.

An important economic effect of the *Act* was to reduce the transactions costs related to entering a secured credit agreement in many instances. Under the traditional English legal regime, a creditor was required to enter a secured credit agreement to protect against the following events: 1) a debtor defaulting on his debts when his outstanding debts exceeded the value of his chattel property and the earnings from his land; 2) a debtor converting chattel assets into real property in order to protect the assets from seizure by creditors; 3) a debtor dying prior to paying his debts (after death, all unsecured debts were satisfied out of the chattel property only); 4) a debtor borrowing from many creditors: security was a means of establishing priority. By changing the default rule to one allowing unsecured creditors access to a debtor's fee simple interest in real property, secured credit was, in theory, no longer necessary to protect against the first three occurrences described above. Under the *Debt Recovery Act*: 1) when a debtor defaulted, all of the debtors' chattel and real property was available to satisfy his debts; 2) debtors could no longer purchase land to defraud creditors; 3) creditors' claims to the debtor's real property had priority over the heirs' inheritance of land. Security was still necessary to establish priority to a debtor's real and chattel property over the claims of competing creditors, but was not necessary to protect against the other risks listed above.

The second major effect on credit markets relates to the cost of secured credit. As described, in England, equity court procedures imposed costs on mortgagees seizing real property upon default of a mortgage agreement. Abolishing equity redemption rights vastly reduced the costs secured creditors faced in seizing debtors' real property. On the margin, a creditor is likely to pass the costs of collection to the debtor in the form of higher interest rates. By lowering the costs of collection, this legal transformation likely reduced interest rates on secured and unsecured credit.

It is important to note that the *Debt Recovery Act* affected *both* secured and unsecured credit because the interplay *between* secured credit and unsecured credit is complex. A law permitting an *unsecured* creditor to seize the real property would have importance only if some value remained in the property beyond the amount owed on the mortgage. Conversely, if all property is mortgaged to the extent of its full value, a law permitting unsecured creditors to seize real property is irrelevant. Moreover, the *exemption* of real property from the claims of all unsecured creditors might benefit *secured* creditors by clarifying that only secured creditors have the right under law to seize that property.<sup>137</sup> Thus in America, both secured credit and unsecured credit were transformed during the colonial period. The total amount of credit extended in the society was therefore likely to have expanded, irrespective of the allocation of credit between secured and unsecured.

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<sup>137</sup>See J. Berkowitz & R. Hynes, *Bankruptcy Exemptions and the Market for Mortgage Loans*, 42 J. LAW & ECON. 809 (1999). But see Emily Y. Lin & Michelle J. White, *Bankruptcy and the Market for Mortgage and Home Improvement Loans*, 50 J. URBAN ECON. 138 (2001) (finding that interest rates on mortgages are higher in jurisdictions offering exemptions on property from the claims of unsecured creditors); Reint Gropp, John Karl, & Michelle White, *Personal Bankruptcy and Credit Supply and Demand*, 112 Q. J. ECON. 217 (1997) (finding worse credit terms in states with higher property exemptions).

The *Act for More Easy Recovery Debts* was also likely to expand the market for land in America, although this result is difficult to measure. With respect to both unsecured and secured credit, courts in America could order judicial sales of real property (or in New England, in-kind transfers to creditors) with far greater ease. These court-ordered sales meant that more land was placed into circulation. Foreclosure sales would not, however, represent the full extent of the impact of the *Act* on property markets. When the law offers all creditors the remedy of judicial sale of debtors' property, debtors are likely to be far more willing to sell the land or some part of it to satisfy their debts in advance of such a sale. Indeed, one would expect that, in most instances, debtors who owned real property would choose to settle with their creditors outside of the court system, rather than wait for a foreclosure sale. By settling with creditors, debtors would avoid expensive court costs, lawyers' fees, and possible inefficiencies in the court-ordered auction process.<sup>138</sup> Changing the default rule to one permitting unsecured creditors to seize land would lead to far more voluntary sales of property.

Did the *Debt Recovery Act*, in fact, improve credit markets in the colonies? The clearest example of the *Act*'s economic effects is a statute enacted in 1739 in Jamaica which explicitly responded to the *Debt Recovery Act* by lowering the legal interest rate by twenty percent. The Jamaican statute stated that "Whereas by an act of parliament . . . entitled, 'An act for the more easy recovery of debts in his majesty's plantations and colonies in America,' creditors in the colonies are secured in their debts in a more ample

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<sup>138</sup> Colonial court fees were high. An empirical study of court fees and costs of court in litigation in 1740 in the Plymouth County, Massachusetts Court of Common Pleas found that fees and costs totaled 79% of the underlying debt amount for the lowest quartile of debts, and averaged 32.6% of all debts. See Claire Priest, *Colonial Courts and Secured Credit: Early American Commercial Litigation and Shays' Rebellion*, 108 YALE L.J. 2413, 2426 & tbl. 1 (1999). The full impact of a law making real property available to satisfy unsecured debts will, therefore, not be reflected in the absolute number of judicially-ordered foreclosure sales. Foreclosure sales are only likely to represent a small percentage of land sold to satisfy creditors' claims.

manner than when interest was established in this island at [ten percent per year]” it was appropriate that in all “mortgages, bonds, and other specialities” that the legal interest rate be reduced to “eight pounds for the forbearance of one hundred pounds for a year.”<sup>139</sup> A twenty percent decline in the interest rate—spread out over thousands of secured transactions—would have had significant effects on imports and credit available for productive investment.<sup>140</sup>

The Jamaican usury law is the most explicit evidence of the economic impact of the *Debt Recovery Act*. Pinpointing the precise economic effect of the statute is difficult by means of economic growth data or data on imports to the colonies, because economic trends were affected by many different variables (conditions in the English and European markets for goods like tobacco, wheat, and rice; crop production, which might be dependent on weather; productivity advances and, equally important, economic events in England, Europe, and Africa). It is well known, however, that a period of great colonial economic expansion, driven by credit, began in the 1740s. The terms upon which credit was extended improved considerably in the period after the enactment of the *Debt Recovery Act*. As an example, the economic historian Marc Egnal examined advertisements in the *Virginia Gazette* and found that, in the 1730s, advertisements for land or slaves typically demanded payment in cash. By the 1760s, similar advertisements offered credit terms of a year or more.<sup>141</sup> Egnal adds that “[s]tatistical series and planter correspondence illustrate the strong growth of credit after the 1740s.”<sup>142</sup> Customs

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<sup>139</sup> An act for the reducing the interest of money on all future contracts, and for the advancing the credit of bills of exchange, (1739, cap. 3) *Laws of Jamaica*, at 262-62.

<sup>140</sup> The Act would also have reduced interest rates in the colonies, such as Barbados and Massachusetts, that had voluntarily reformed their laws to make land available for debts, but the impact of the Act, of course, would have had a lesser effect in those colonies.

<sup>141</sup> EGNAL, *supra* note //, at 93 & fig. 5.12.

<sup>142</sup> *Id.*

records reveal that imports to the colonies from England increased steadily from the 1730s and 1740s through the end of the colonial period. The colonies, for example, imported from England approximately £530,000 (pounds Sterling) in goods in 1732, the year that the *Debt Recovery Act* was enacted, and over double that amount, approximately £1,230,000, by 1749.<sup>143</sup> The terms of trade—the quantity of an imported good that could be purchased with a given unit of a colonial good—improved dramatically during the same period.<sup>144</sup> These imports led to increases in the standard of living and what historians such as T.H. Breen have referred to as a “consumer revolution” and an “empire of goods” by the 1750s.<sup>145</sup>

Slave imports expanded exponentially during the same period.<sup>146</sup> As mentioned, import levels and credit terms to the colonies were determined by many different economic factors (most prominently, economic conditions in England and Europe, productivity advances, and markets for colonial goods). Nonetheless, the best evidence suggesting an immediate and direct effect of the enactment of the *Debt Recovery Act* in 1732 is evidence relating to slave imports to Virginia. Virginia was a colony that, prior to the *Act*, maintained the traditional English regime of protecting real property (although not slaves) from unsecured creditors. Virginia laws were noted along with those of Jamaica as a concern by the English merchants petitioning Parliament for the *Act*. Slave

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<sup>143</sup> 2 HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 1176, tbl. 213-226 (U.S. Census Bureau 1975). See also EGNAL, *supra* note //, at 82 tbl. 5.6 (graph of per capita imports).

<sup>144</sup> See JOHN J. MCCUSKER & RUSSELL R. MENARD, THE ECONOMY OF BRITISH AMERICA, 1607-1789, at 68 (1991) (“The final thirty years of the colonial era were marked by a major improvement in the terms of trade as prices for American staples rose more rapidly than those for British manufactures.”)

<sup>145</sup> T.H. BREEN, THE MARKETPLACE OF REVOLUTION: HOW CONSUMER POLITICS SHAPED AMERICAN INDEPENDENCE xv (2004). See also RICHARD L. BUSHMAN, THE REFINEMENT OF AMERICA: PERSONS, HOUSES, CITIES (1992) (describing transformation of consumer culture and standard of living beginning in 1740s).

<sup>146</sup> See also EGNAL, *supra* note //, at 19 fig. 1.6 (graph showing slaves increasing as a proportion of southern population).

imports to Virginia equaled: 276 in 1730 and 184 in 1731; rising to 1,291 in 1732; and equaled 1,720, 1,587, 2,104, 3,222, and 2,174 in the successive years 1733 to 1737.<sup>147</sup>

These data are clearly not conclusive evidence that the *Debt Recovery Act* had important economic effects on colonial America, but they are suggestive of the effects.<sup>148</sup>

In 1774, William Knox, an English undersecretary of state in the American Department from 1770 to 1782, who was influential in setting English policy for the colonies during the period,<sup>149</sup> attempted to convince colonial subjects that Parliamentary regulation was in their best interests by describing the *Debt Recovery Act* as the primary source of colonial economic development. According to Knox, colonial British America had experienced more rapid economic growth than colonies of any other imperial power because of “the superior credit given to the planters by the English merchants.” Why were British colonists given better credit by English merchants? To Knox, it was because the *Debt Recovery Act* “follow[s . . . the merchants’] property, and secures it for them in the deepest recesses of the woods.”<sup>150</sup> Left alone, however, the colonial legislatures were likely to modify the laws to “injure their British creditors.”

Knox asserted that the Jamaican statute that had characterized slaves as real property without providing for the payment of debts was a perfect example of colonial legislatures’ propensity to damage credit conditions. But, according to Knox, Parliament saved the colonial legislatures by enacting the *Debt Recovery Act*, the effect of which he

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<sup>147</sup> 2 HISTORICAL STATISTICS, *supra* note //, at 1172 tbl. 146-149.

<sup>148</sup> In a brief discussion of the *Debt Recovery Act*, the great historian of colonial credit, Jacob Price speculated that, “the credit-based slave trade in many colonies could and did expand significantly in the ensuing decades” after the Act became effective. Price, *supra* note 13, at 310.

<sup>149</sup> Jack P. Greene, *William Knox’s Explanation for the American Revolution*, 30 W. & MARY Q. 293, 293 (1973) (“few people in power in Britain thought more seriously or more deeply about the quarrel with the colonies at any stage of its development”).

<sup>150</sup> William Knox, *The Interest of the Merchants and Manufactures of Great Britain, in the present contest with the colonies, stated and considered*, 35-36 (1774) (Reprint, Boston 1775).

described as “subjecting lands and negroes in the Colonies to the payment of English book debts.” The Act, according to Knox, “may truly be called the *Palladium of Colony credit*, and the *English merchants’ grand security*.” He noted that some colonists were calling for a repeal of the Act, by which the colonists would “ruin their trade and fortunes with their own hands.”<sup>151</sup> But, according to Knox, a repeal of the Act would not nearly be as damaging as what the colonists were also threatening: independence from all Parliamentary authority. The patriots, Knox said, were the “assassins of the British merchants’ security, and, by destroying their confidence in the Colonies, force them to withhold their credit, and thereby do the greatest injury to themselves.”<sup>152</sup> Joseph Story’s *Commentaries*, describing American laws making land liable for debts, suggested that “the growth of the respective colonies was in no small degree affected by this circumstance.”<sup>153</sup>

### 3. *Political Reaction to the Act for More Easy Recovery of Debts*

The Virginians—although alone among the colonists in this respect—were immediately hostile to the statute. John Custis, Councillor of Virginia and a major planter (and Martha Washington’s father-in-law before her first husband, Daniel Custis, died in 1757), referred to the statute in a letter to an English merchant as “cruell and unjust.” Custis explained that he personally owed “no one in England a farthing” and locally “have many owing me” so he had no economic motive in attacking the Act; his comments were “purely the result of my thoughts.” He expressed his astonishment that land could be sold to satisfy unsecured debts:

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<sup>151</sup> *Id.* at 38 (italics added).

<sup>152</sup> *Id.* at 42.

<sup>153</sup> 1 STORY, *supra* note 1, at 168.

[Y]our subjecting our Lands for book debts is contrary to ye Laws of our Mother Country; which cannot touch reall estate without a Specialty<sup>154</sup> and as we are brittish Subjects wee might reasonably expect Brittish liberty wee desire nothing else than to be subject to ye laws of our Mother Country but wee have great reason to think you aim at our possessions who have got most of your possessions by us; . . . and how ever you may flatter yourself to bee gainers by that act you will find that you have so incensed ye Country; that you will force y'm as soon as convenient to have nothing to do with you.<sup>155</sup>

Similarly, Robert Carter, who had complained about the impact of the English property exemptions on his own efforts at debt collection in a 1720 letter,<sup>156</sup> expressed concern about the *Debt Recovery Act* when it was enacted. Now President of the Virginia Council, he stated in a letter to a merchant in England that the “Severe act of Parliament . . . wearing the title, for the better Recovery of Debts . . . has rais’d so general a fury in the Assembly that hath carried them into measures which I heartily wish from getting out of one extreme, we may not be involv’d in another.” Carter stated that the “general crye” was that Virginians would rather “relye on the mercy of our Prince than . . . be subjected to the tyranny of the merchants who are daily encreasing their Oppression upon us.”<sup>157</sup>

Virginia initially complied with the *Act*. In 1738, the Virginia General Court issued a decision holding that land could be “sold as goods taken upon a *feri facias*.”<sup>158</sup> The court emphasized that this was the first instance of land being sold under the *Debt Recovery Act*.<sup>159</sup> Nonetheless, in 1748 the Virginians appear to have reversed course and

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<sup>154</sup>“Specialty” is a term used to describe debts made under seal, or secured debts.

<sup>155</sup> Custis letter cited in HEMPHILL, *supra* note //, at 229. See also CHARLES MCLEAN ANDREWS, GUIDE TO THE MANUSCRIPT MATERIALS FOR THE HISTORY OF THE UNITED STATES TO 1783 IN THE BRITISH MUSEUM, ETC., at 205 (1908) (petition to House of Lords from Virginia merchant complaining about Act).

<sup>156</sup> See *supra* text accompanying note //.

<sup>157</sup> Letter from Robert Carter, *cited in* HEMPHILL, *supra* note //, at 227-28.

<sup>158</sup> Harrison v. Halley, 2 Va. Colonial Dec. B80, Jeff. 58., 1738 WL 7 (Va. Gen. Ct).

<sup>159</sup> *Id.* (The court stated, “N.B. This is the first attachment that has been granted against lands since the statute 5 G. 2, for the more easy recovery of debts in the plantations. Upon the equity of which this is practice is founded.”)



opposed Parliamentary authority by applying the *Act* only to debts involving English and Scottish creditors and not to internal debts.<sup>160</sup>

In New York, Maryland, North Carolina, South Carolina, Rhode Island, Georgia and Kentucky, however, the *Debt Recovery Act* appears to have been accepted without a great deal of controversy. The statute was not controversial most likely because those serving as legislators typically represented merchants and planters who, though often indebted to English creditors, were also creditors to smaller planters and producers within their colonies. They supported the enactment of laws assisting them in their efforts to collect debts. As Haywood, a North Carolina lawyer, stated in his argument in *Baker v. Webb*, the *Debt Recovery Act* led to reforms that made economic sense in North Carolina because so much labor was required to cultivate land, creditors did not view the writ of *elegit* as a valuable remedy. According to Haywood, prior to the *Debt Recovery Act*,

[F]ew or none would content to hold lands by such a tenure as was offered by the writ [of *elegit*]: hence real property gave no credit to its owner—it could not in practice be made answerable for his debts. This was one of the inconveniences the [*Act for the More Easy Recovery of Debts*] was meant to remedy, and to that end it has made lands liable to be seized, extended, sold or disposed of, in like manner as personal estates, in any of the said plantations respectively, are seized, extended, sold or disposed of for the satisfaction of debts.<sup>161</sup>

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<sup>160</sup> The evidence is sparse on why Virginians decided to reject the *Act* internally. In 1748, however, a proposal was submitted in the House of Burgesses to make the *Debt Recovery Act* in force with respect to internal Virginia affairs, and the proposal was rejected without comment. Journal of the House of Burgesses (Nov. 24, 1748) in *Early American Imprint*, 1<sup>st</sup> Series, Evans, no. 6435 (filmed), at 55-56 (report that Committee of Propositions and Grievances rejected a Proposition from the County of Richmond to Enact the *Debt Recovery Act* to be in force in Virginia). In 1748, however, the Virginia legislature enacted a statute that explicitly enacted the traditional English approach to remedies (limiting the remedies to *fieri facias* for “goods and chattels,” *levari facias*, and *elegit*). This statute thereby officially rejected the *Debt Recovery Act* with respect to intra-colonial debts. An Act Declaring the Law Concerning Executions; and for Relief of Insolvent Debtors (1748), 4 STATUTES AT LARGE 526 (William W. Henning, ed.).

<sup>161</sup> *Baker v. Webb*, Haywood’s Reports (1794). See also Porter’s Lessee v. Cocke, 7 Tenn. 30, 1823 WL 455, at \*3 (Tenn. Err. & App.) (explaining that *Debt Recovery Act* resolved problem of inappropriateness of the writ of *elegit* in the colonies were possession of a debtor’s land would be an “annual incumbrance to the creditor, instead of procuring any annual profit.”)

Moreover, as mentioned, the *Act* did not abolish the practice of entailing property or protecting property through the trust device. During the colonial period—before entailing was abolished in the Founding Era—families could voluntarily entail their land to avoid the *Debt Recovery Act*.

D. *The Act for the More Easy Recovery of Debts and the Politics of Empire*

The *Debt Recovery Act* was an important Parliamentary regulation of internal colonial affairs. It was viewed by the English as exemplifying the economic advantage of Parliamentary oversight of colonial legislation. As the colonists became hostile toward Parliamentary regulation and taxation during the 1760s, the question emerged of how to interpret the *Debt Recovery Act* as a precedent. The Stamp Act was resented, in part, because it represented taxation upon internal colonial matters—perhaps most importantly, on judicial and other government paperwork—and not merely regulation of external trade, which colonists accepted as within the scope of Parliamentary authority. In a 1765 pamphlet responding to the Stamp Act crisis, William Knox, an English minister responsible for colonial policy, argued that the *Debt Recovery Act* had impinged upon central liberties inherent in English common and statutory law. Knox's motive was to make the Stamp Act seem less interventionist by comparison. According to Knox, the *Debt Recovery Act*:

*abrogates so much of the Common Law as relates to Descents of Freeholds in America, takes from the Son the Right of Inheritance in the Lands the Crown had granted to the Father, and his Heirs in absolute Fee, makes them Assets, and applies them to the Payment of Debts and Accounts contracted by the Father, without the Participation of the Son; . . . . The Power of Parliament having been exercised to take away the Lands of the People in America, the most sacred Part of any Man's Property, and disposing of them for the Use of Private Persons, Inhabitants of Great Britain, who can question . . . the Parliament's Right to take*

away a *small* Part of the Products of those Lands, and apply it to the *Public Service*?<sup>162</sup>

It is noteworthy that Knox owned large amounts of property in the State of Georgia, which was a state directly affected by the *Debt Recovery Act*, so that he had some practical basis for understanding the impact of the law.

Alexander Hamilton later reflected upon the *Debt Recovery Act* as an exercise of Parliamentary authority that the colonists should have opposed. In his Practice Manual of the early 1780s, (a manual he drafted on the operation of legal process in New York State, and the first legal treatise of American state law), Hamilton states,

The English *Fi fa*: affected only Chattels ours the Real Estate equally; this Extension of it was by Act of Parliament of Geo: 2d. particularly made for this Country, a memorable Statute & which Admitted more then our Legislature ought to have assented to; it was one of the Highest Acts of Legislature that one Country could exercise over another.<sup>163</sup>

The role of Parliament in monitoring colonial legislatures had profound implications in the Founding Era, as political leaders had to decide what powers to confer upon Congress in overseeing state laws. At the Constitutional convention, James Madison proposed giving the federal government the power to veto state legislation on

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<sup>162</sup> William Knox, *Claim of the Colonies to an Exception from Internal Taxes Imposed by Authority of Parliament* (1765). Daniel Dulaney, a private citizen from Maryland, wrote a pamphlet attacking the Stamp Act in response to Knox's defense of it. In response to Knox, Dulaney minimized the impact of the *Debt Recovery Act*, stating that its principal effect was only to "subject Real Estates to the Payment of Debts after the Death of the Debtor," and to ensure that colonial legislatures did not characterize slaves as real property which "very considerably diminished the personal Fund liable to *all* Debts." To Dulaney, "[t]his was, without Doubt, a Subject upon which the Superintendence of the Mother-Country might be justly exercised; it being relative to her Trade and Navigation, upon which her Wealth and her Power depend." Daniel Dulaney, *Considerations of the Propriety of Imposing Taxes in the British colonies, for the purpose of raising a revenue by act of Parliament* 37 (Annapolis, MD: Jonas Green 1765). Dulaney's dismissal of the Act's importance, however, is contradictory. If the Act only affected inheritance proceedings, and if that change in the laws had as little impact as Dulaney suggests, then why did characterizing slaves as real property damage credit?

<sup>163</sup> Alexander Hamilton, *Practical Proceedings in the Supreme Court of the State of New York*, in 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 55, 97 (Julius Goebel, Jr. ed. 1964) (emphasis added).

the Parliamentary model.<sup>164</sup> Ultimately, the model of routine Parliamentary supervision was rejected and the United States Constitution limited federal government oversight of state legislation in the commerce realm principally to the Contracts Clause and the Commerce Clause. Moreover, in opposition to the Parliamentary model, the states retained firm control over their debt satisfaction and property exemption policies.

Part III now turns to the extension of the Act by state legislatures in the Founding Era and the more specific legal implications of the Act on state law, and then as the subject of debate with respect to federal government policies. The body of statutory law and case law that evolved from the *Debt Recovery Act* reveal that the Founding period was one in which the interests of commerce generally outweighed the interests in shielding property from the claims of creditors to maintain social stability.

### III. LAND AS “ARTICLE OF COMMERCE” IN THE FOUNDING ERA

After gaining independence from Parliamentary authority, state courts and legislatures were no longer required to enforce the *Debt Recovery Act*. Most state legislatures, however, enacted statutes affirming that the remedial regime existing prior to the American Revolution would remain in place without substantial modification.<sup>165</sup>

Indeed, the early state legislation was even more explicit than analogous colonial

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<sup>164</sup> See Alison L. LaCroix, *The Authority for Federalism: Madison’s Negative and the Transition from Imperial to Federal Supremacy* (unpublished article on file with author) (describing the failure of Madisonian veto proposal in the Constitutional Convention as an explicit rejection of the English model of Privy Council review).

<sup>165</sup> In some states, the *Debt Recovery Act* remained enacted law. A New Hampshire judicial opinion of 1828 concluded that the *Debt Recovery Act* “is still the law of the land here at this day.” *Pritchard v. Brown*, 4 N.H. 397 (1828), 1828 WL 609 (N.H.) at \*5. The Act also remained enacted law in the parts of Washington, D.C. that Maryland had ceded to create the territory. See *Suckley’s Adm’r v. Rotchford*, 53 Va. 60 (1855) (“It . . . is fully shown by numerous adjudged cases in the Court of Appeals of Maryland, that the statute 5 George 2, ch. 7, §4, was in force in that state February 27<sup>th</sup>, 1801, when their laws were extended by Act of Congress to Washington county; and was in force in Washington county June 24<sup>th</sup> 1812, when the law of that county was extended to Alexandria county.”)

legislation that its purpose was to signal to creditors that the state's real property law offered few opportunities for debtors to shield assets from creditors' claims. A North Carolina statute of 1777 that extended the *Debt Recovery Act*, for example, stated that it was directed toward "divers Persons residing in other States or Governments [who] contract Debts with the Inhabitants of this State," and that "by the Policy and Genius of our present Constitution, Lands and Tenements ought to be made subject to the Payment of just Debts, when the Debtor hath not within the Limits of this State Goods and Chattels sufficient to satisfy the same."<sup>166</sup> The widespread abolition of the practice of entailing property through the American states in the 1780s might also be interpreted as an expansive attempt to improve the terms of credit offered to the newly independent states.<sup>167</sup> By abolishing the entail, the state legislatures obliterated the principal remaining mechanism by which landowners could protect their real property assets from the claims of creditors in the era after the *Debt Recovery Act* (although widows' dower interests remained as a limitation on alienation).

#### A. *Interpreting the Debt Recovery Act in the Founding Era*

The enactment of new state statutes, however, invited litigation concerning how the courts would interpret the new statutory language. Many suits were brought that

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<sup>166</sup> An Act for establishing Courts of Law, and for regulating Proceedings therein, ch. 2, Acts of Assembly of the State of North Carolina (1777). *See also* An Act Subjecting Lands and Tenements to the Payment of Debts (Feb. 15, 1791), in 5 LAWS OF NEW HAMPSHIRE 701-03(1916) (establishing regime whereby lands would be transferred to creditors in kind, with a one year statutory redemption period, when the personal property was deficient).

<sup>167</sup> *See* Act of 1785, ch. 60, §2, reprinted in 12 LAWS OF VIRGINIA 146 (W. W. Hening ed. 1823) (Virginia); GA. CONST. of 1777, art. 51, explained by Act of Feb. 22, 1785, reprinted in DIGEST OF THE LAWS OF THE STATE OF GEORGIA 313 (R. Watkins & G. Watkins ed. 1800); *See also* GA. CONST. of 1789, art. 3, §6, explained by Act of Dec. 23, 1789, reprinted in *id.* at 414; Act of 1784, ch. 22, §2 reprinted in 24 STATE RECORDS OF NORTH CAROLINA 574 (W. Clark ed. 1905) (dividing estate equally among sons); Act of 1795, ch. 435, in 1 LAWS OF NORTH CAROLINA 780 (H. Potter ed. 1821) (dividing estate equally among sons and daughters); Act of 1791, reprinted in 1 AN ALPHABETICAL DIGEST OF THE PUBLIC STATUTE LAW OF SOUTH CAROLINA 422-23 (J. Brevard ed. 1814). *See generally* 4 KENT, *supra* note //, at 14-17 (describing the entail as generally "abolished" in the United States).

involved the fundamental question of whether any legal distinctions would be made between real property and chattel property. In most states, either by statute or by court decision, the determination was made that, in the ordinary course of debt collection, land would be seized only when personal property was found insufficient.<sup>168</sup> The most highly litigated issues related to: 1) the status of the mortgagor's equity of redemption under the state statutes that superseded the *Debt Recovery Act*; and 2) what, if any, protections the laws offered landed inheritance from the claims of a deceased's creditors. This section examines three state judicial decisions in detail to illustrate the impact of the *Debt Recovery Act* in the Founding Era.

In ten states, through 1820, the courts sold real estate at auction without recognizing any right of redemption and without establishing that a minimum amount of the appraised value be obtained by means of the sale.<sup>169</sup> *Waters v. Stewart*,<sup>170</sup> which was decided by Chancellor Kent in 1804 and litigated by Alexander Hamilton among others,

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<sup>168</sup> Maryland was exceptional in allowing creditors to choose whether to take the debtors' personal property or real property. See *Hanson v. Barnes' Lessee*, 3 G. & J. 359, 1831 WL 1138, at \*5 (Md.) (The *Debt Recovery Act* "stripped lands in the Plantations, of the sanctity with which they had been guarded, and by subjecting them to sale, no longer considered them as a secondary fund for the payment of debts in the hands of a debtor, but rendered them equally liable with his personalty. It is at the election of the plaintiff, whether he will seize lands or goods, and this has always been the construction of the statute . . .") Statutes passed in New York in 1787 and 1801 were more typical: they required courts to treat land exactly like personal property for the satisfaction of debts, but added the requirement that the personal property be exhausted first.

<sup>169</sup> See, for example, James Kent's treatise of 1830 which states that the policy of having no right of redemption was still in force in New Jersey, Maryland, North Carolina, Tennessee, South Carolina, Georgia, Alabama and Mississippi when he wrote. 4 KENT, *supra* note //, at 426. New York followed the same policy until 1821, when the legislature adopted a fifteen month redemption period for land sold in execution sales. *Id.* at 427. Kent overlooked New Hampshire, where in 1828, New Hampshire's highest court held that the *Debt Recovery Act*—which was still in force—was properly interpreted as requiring the sale of the equity of redemption interest with the real property at foreclosure sales. *Pritchard v. Brown*, 4 N.H. 397 (1828), 1828 WL 609 (N.H.) at \*5. The court questioned whether the *Debt Recovery Act* necessarily implied that the equity of redemption should be sold but concluded that "this practice of too long standing, and is the foundation of too many titles to be now questioned." *Id.*

<sup>170</sup> 1 Cai. Cas. 47 (1804).

was a landmark case in this area.<sup>171</sup> The appellants, Thomas Waters and his sister Sarah, were devisees of seventy acres of real property, subject to a mortgage, under their step-father's will. They brought an action in Chancery court to redeem the property by paying the remaining mortgage debt. The case was complicated, however, by the fact that the equity of redemption interest had been sold separately under the directive of a law court to satisfy one of their step-father's debts during the settlement of his estate. In the lower court's words, the issue at hand was "whether an equity of redemption in lands mortgaged in fee, is subject to sale [under] a *fieri facias*?"<sup>172</sup> If the law court had not had authority to sell the equity of redemption interest, then the sale was void and Waters and his sister would inherit the land and be able to redeem it from the mortgagee.

To decide the case, the court was required to interpret the language of a 1787 New York statute, which superseded the *Debt Recovery Act*. The 1787 statute stated that "all and singular the lands, tenements, and real estate of every debtor shall be, and hereby are, made liable to be sold on execution."<sup>173</sup> At issue was whether the legislature intended to include equity of redemption interests within the term "real estate," or whether the statute envisioned a regime more analogous to English practice, where seizures of land could take place only after formal foreclosure proceedings in the equity courts.

The lower court had held for Stewart, the purchaser of the equity of redemption interest in the court-ordered sale. According to the lower court, the *Debt Recovery Act* had "in its operation, *so far as respected the interest of creditors*, completely converted

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<sup>171</sup> For more details about the case, see Joseph H. Smith, Editorial Comments in 3 THE LAW PRACTICE OF ALEXANDER HAMILTON, DOCUMENTS AND COMMENTARY 638-44 (Julius Goebel, Jr. & Joseph H. Smith, eds. 1980).

<sup>172</sup> 1 Cai Cas. at 49-50.

<sup>173</sup> An Act for Making Lands and Tenements liable to be sold by Executions for Debt . . . and the better Security and Relief of Purchasers and Creditors (Mar. 19, 1787) in LAWS OF THE STATE OF NEW-YORK at 108-109, ch 56 (1787). See also An Act concerning Judgments and Executions (Mar. 31 1801), in 1 LAWS OF THE STATE OF NEW-YORK, at 388, ch. 105 (2d ed. 1807) (reenacting 1787 law).

real into personal estate.”<sup>174</sup> The court disparagingly described traditional distinctions made between real and chattel property as a result of “solicitude of the holders of landed estates, to perpetuate them within families, combined with the genius of the *English* government.” The court noted, however, that happily, the “collision between the landed and commercial interest being merely *local*, as confined to *Great Britain*, and not so extending to its colonies . . . the same impediments did not present to the passing of the statute . . . for the more easy recovery of debts.”<sup>175</sup> The lower court judge then noted that since the enactment of the *Debt Recovery Act* “sales of equities of redemption have been uninterruptedly made.” The judge held that the language of the 1787 statute indicated the legislature’s desire to continue the regime adopted under the *Debt Recovery Act*.

In contrast, the lawyers for Thomas and Sarah Waters argued that the equity of redemption was an interest that only had legal validity in the equity courts—law courts in England did not recognize equitable redemption rights—and that without explicit legislative approval, such as by explicit inclusion of “equitable interests” as interests to be sold at execution sales, only equity courts could authorize sale of or foreclosure upon interests that were simply not recognized as relevant to legal actions.

In response, Alexander Hamilton and his colleague Josiah Hoffman, the lawyers for Stewart, argued that since mortgage law had evolved to treat the mortgagor as the owner of a legal interest, that interest should be viewed as “real estate” under the New York statute and subject to the remedies of the law courts. Chancellor Kent substantially adopted Hamilton’s and Hoffman’s arguments in affirming the decision of the lower court. Kent reasoned that “[i]f the mortgagor is to be deemed the owner of the land, as

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<sup>174</sup> *Id.*

<sup>175</sup> *Id.*



respects his own acts, and as respects the world, subject only to the *lien* of the mortgagee, it is neither unreasonable nor improper that courts of law, at the insistence of other creditors, should treat the land as his, under the same limitation.”<sup>176</sup> He stated that the “long and established practice in favour of such sales . . . is of itself deserving of considerable weight.” Kent noted that the New York statute at issue “adopted the same loose latitudinarian terms as those in the statute of *Geo. II* [the *Debt Recovery Act*]” and that “there can be no doubt that, I think, but that an equity of redemption will be comprehended by that expression.” Kent also notes that “If judgment creditors are under a necessity in every case of resorting to chancery, for leave to sell the land of the debtor, it would create double suits and double expense, and would lead to much inconvenience and delay.”<sup>177</sup> Kent emphasized that execution sales of real property were “agreeable to the general bent and spirit of the more modern decisions.”<sup>178</sup> Many other state legislatures enacted laws providing that land would be available to satisfy the landholder’s debts, and state courts, in interpreting the new statutes, came to a similar conclusion as Kent.<sup>179</sup>

Another heavily litigated issue was whether the executor of an estate should be permitted to distribute land as well as personal property to creditors without the consent of the heir. In the Founding Era, in at least nine states, courts permitted the executor to distribute all land as well as personal property, with no role in the proceedings for the heir. In an 1805 decision of the United States Supreme Court, Justice Marshall decided a

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<sup>176</sup> 1 Cai Cas. at 69.

<sup>177</sup> 1 Cai Cas. at 73.

<sup>178</sup> *Id.*

<sup>179</sup> 4 KENT, COMMENTARIES, *supra* note //, at 426-27. See also *Ingersoll v. Sawyer*, 19 Mass. 276, 1824 WL 1896 (Mass.) (holding that if a mortgagor does not redeem property sold at auction within the one year statutory period, he loses his freehold); *Bell v. Hill*, 2 N.C. 72 (N.C. Super. L. & Eq. 1794) (whole interest sold at auction); *Ford v. Philpot*, 5 H. & J. 312 (Md. Ct. App. 1821) (under *Debt Recovery Act* and Maryland statutory law, when fee simple interest is sold at auction, mortgagor retains no right to redeem).

case relating to Georgia law, holding that the Court had “received information as to the construction given by the courts of Georgia to the statute of 5 Geo. 2 making lands in the colonies liable for debts, and are satisfied that they are considered as chargeable without making the heir a party.”<sup>180</sup>

The issues involved are illustrated in *D’Urphey v. Nelson*,<sup>181</sup> an 1803 opinion issued by the Constitutional Court of Appeals of South Carolina, which unequivocally upheld the principle in that state. The facts of *D’Urphey* are similar in many respects to those of *Waters v. Stewart*. D’Urphey, the plaintiff, brought an action as the heir to his father’s estate in real property by means of intestacy. D’Urphey petitioned the court to hold void a deed of conveyance of the real property issued by the sheriff, after the property had been sold by the court to satisfy one of his father’s bond debts. The facts of the case involved some procedural irregularities that revealed the extent to which executors and administrators were often not aggressive in protecting the real property expectancies of heirs and devisees. The creditor had sued the administrators of the estate and, rather than responding to the legal action, the administrators had allowed a judgment to be entered by default. The appellate court also noted that, the lower court had violated an “old rule of court” that prior to an execution sale of real property, pleadings had to be filed demonstrating that the defendant’s chattel property was deficient to satisfy the debt. In this case, no such pleadings had been filed. Due to these procedural irregularities, the lower court had held for D’Urphey, finding that the deed of conveyance was void.

The Constitutional Court of Appeals, however, held that the *Debt Recovery Act* was still good law in South Carolina in 1803, and emphasized that it required lands to be

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<sup>180</sup> *Telfair v. Stead’s Executors*, 6 U.S. 407 (1805) (Marshall, J.).

<sup>181</sup> 3 S.C.L. 289, 1803 WL 295 (S.C.Const.App.).

seized and sold “in like manner as personal estates.” According to the Court, “[b]eing made liable in *like manner as personal estate*, the statute cannot be construed to make any distinction between lands and personal chattels, but they must be considered equally liable for satisfaction of debts and to be assets for that purpose in the hands of the personal representatives of the debtor.”<sup>182</sup> The Court concluded that the *Act* did not require a showing that the personal estate was deficient before authorizing the sale of real property. It noted that the *Act* was “certainly intended for the benefit of the creditor.” More dramatically, the Court stated that, due to the *Debt Recovery Act*, “the extreme anxiety observable in the common law of England to preserve the rights, and favor the claims, of the heir at law, has been entirely dismissed from our law. . . . And therefore there is no reason for giving notice to the heir . . . before issuing execution to seize and sell the land.”<sup>183</sup> The courts of New York, Maryland, New Jersey, New Hampshire and Massachusetts adopted similar policies.<sup>184</sup>

In other states, however, the courts were more respectful of traditional English legal distinctions between real and personal property. In North Carolina, for example, in *Baker v. Webb*,<sup>185</sup> the Superior Court decided a case addressing the same issue as that of *D’Urphye v. Nelson*. Did the heir have a right to be a party to a suit in which his landed inheritance might be sold to a creditor of his father? One of the judges stated that “the whole weight of this laboured case seems reducible to this question, what is the true

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<sup>182</sup> 1803 WL 295 at \*2.

<sup>183</sup> *Id.*

<sup>184</sup> 4 KENT, *supra* note //, at 425, 431 (New York).

<sup>185</sup> *Baker v. Webb* (North Carolina Superior Court 1794), in JOHN HAYWOOD, REPORTS OF CASES ADJUDGED IN THE SUPERIOR COURTS OF LAW AND EQUITY OF THE STATE OF NORTH CAROLINA FROM THE YEAR 1789 TO 1798, at 43 (Halifax, N.C. 1799).

construction of the 5<sup>th</sup> Geo. II, c. 7 [the *Debt Recovery Act*]?”<sup>186</sup> Did it abolish all distinctions between real and personal property, and therefore between law and equity?

Unlike the judges in *Waters v. Stewart* and *D’Urphey v. Nelson*, the court held that the *Debt Recovery Act* was compatible with fundamental legal distinctions between real and personal property and between law and equity. The judges held that, at the death of a landowner, his real property immediately descended to the heir at law. The land never came into the hands of the executor of the estate. The *Debt Recovery Act* transformed the law to create a cause of action on behalf of the deceased’s unsecured creditors against the heir with respect to the real property. It did not, however, eliminate the traditional privilege of the heir to be a party to a lawsuit in which he might be denied his inheritance.<sup>187</sup>

*Baker v. Webb* is interesting not only for interpreting the *Debt Recovery Act* in a more conservative manner than the way in which it was construed in New York and South Carolina. Haywood, the lawyer for the heir challenging the execution sale of his father’s real property, framed the issue to be decided as implying nothing less than the fundamental significance of real property ownership to American political life. Were traditional protections to real property a relic of feudalism and aristocracy? Or, in contrast, were protections on real property necessary to maintain the independence and attachment of the citizenry, and therefore equally essential to a republican form of

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<sup>186</sup> *Id.* at

<sup>187</sup> Judge Macay, for example, stated that the *Debt Recovery Act* “meant to provide for two things, the sale of lands for debts and the making them liable to all just debts in the hands of the heir: and I am of opinion, that since the act of Geo II. the same distinctions between real and personal property, is to be kept up as before—and that lands, upon the death of an ancestor, descend to the heir, and personal chattels go to the executor as before; and lands in the hands of an heir, are no more to be affected by an action or judgment against the executor, than the personal estate in the hands of an executor, are to be affected by a judgment against the heir: their interests are totally distinct and separate.” *Id.* at 71.

government? According to Haywood, the traditional privilege of an heir to be a party to proceedings in which their landed inheritance would be taken

is not any relick of the ancient feudal system. It is founded in the soundest policy, equally applicable to the condition of this country as to that of England . . . .

The more freeholders there are . . . the greater is the public strength and respectability—and the method the law has taken to encrease their number, is by placing freehold property as far out of the reach of creditors as was consistent with that other maxim of justice and good policy, that all just debts ought to be paid when the debtor has any property wherewith to pay them. These we think are sufficient reasons for the preference the law has given real over personal property; and notwithstanding the construction contended for, I believe it has always been understood since the passing of the act, that the law is so.<sup>188</sup>

To Haywood, the traditional privileges of the heir of real property strengthened the republican nature of the society by increasing the likelihood that freehold estates would descend through the generations.

In contrast to North Carolina, where the *Debt Recovery Act* was given a qualified acceptance into the body of remedial law, in Virginia, Pennsylvania, and Delaware, the legislatures and courts never fully implemented the *Act*. Indeed, Virginia rejected a proposal to reenact the *Debt Recovery Act* and maintained the traditional English

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<sup>188</sup> *Id.* at 54. Haywood continued:

*That property which is deemed the most sacred, and is the best secured by law, becomes more than any other the object of attention, because it is the most permanent, and it is good policy to make that property most the object of attention, which the most effectually attaches its proprietor to the country he lives in, and real property possesses this quality more than any other.*

. . . .  
An industrious man, who by his labour has collected wherewithal to purchase him a little property, naturally fixes his attention on that which in all probability will continue the longest with his posterity, and which the law has rendered the most difficult to be taken from him—a freehold becomes his object, as well for the reasons above mentioned, as because the constitution of the country has annexed to it certain privileges that advance him in the rank of citizenship; and the freehold, when acquired, is incapable of being moved away like personal property when the danger threatens or the state has occasion to call for personal or pecuniary aid, he is always ready to be called on, and to supply the emergencies of the commonwealth; when at the same time the holder of personal property, apprised of the services which the state needs, hath withdrawn both himself and his effects from the country, and possibly throw them into the scale of the enemy.

*Id.* at 54-55.

remedial regime until 1849.<sup>189</sup> Pennsylvania and Delaware maintained the remedial regimes they had adopted in the colonial era: their policy was to sell a debtor's land at auction only if the judgment exceeded seven years of earnings of the debtors' real property. These policies remained good law through at least 1920 in Pennsylvania and through 1925 in Delaware.<sup>190</sup> In Virginia, Pennsylvania, and Delaware, the writ of *elegit* remained an important creditor remedy throughout the nineteenth century.<sup>191</sup>

#### B. *Inter-Colonial Differences and Disputes over Property Exemption Policies*

As mentioned, the period immediately after the American Revolution was generally one in which states reenacted the *Debt Recovery Act* and courts upheld the treatment of land like other forms of chattel property. Without a Parliamentary mandate in this area, however, the context in which laws pertaining to property and the claims of creditors were enacted became increasingly complex. More specifically, state courts and legislatures were now institutionally able to address the concerns of the polity. The discrepancy between the decisions in the factually-similar cases *D'Urphey v. Nelson* and *Baker v. Webb* is evidence of a deep lack of uniformity among the states and their constituents in their understanding of what the most desirable policy was and should be. It is possible to identify, however, several dominant ideological positions on the issue in the late eighteenth century and early nineteenth century.

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<sup>189</sup> *Id.*; (add cite on 1849 change in VA law.)

<sup>190</sup> *Smith v. Ford*, 161 A. 214 (1932) describes the history of Delaware and Pennsylvania law making lands available to satisfy unsecured debts. The first statute in Pennsylvania to substantially modify the regime enacted in 1705 was an 1836 statute allowing an owner of land to waive his right to have his property subject to the writ of *elegit* and to allow it to be sold for debts worth less than seven years of earnings. Pa. Stat. 1920 §10463 (12 PS §2383), *Levy v. Spitz*, 146 A. 548. See also 4 KENT, COMMENTARIES, *supra* note //, at 428.

<sup>191</sup> Courts in these states heard cases relating to the *elegit*. In a case heard by the Delaware Chancery Court, for example, a tenant by *elegit* failed to rotate crops according to customary practice. The court relied on the waste doctrine to enjoin him from using any method other than the rotating three-fields system of tilling the land. *Wilds v. Layton*, 1 Del. Ch. 226 (1822).

One position, reflected in the numerous state laws which substantially reenacted the *Debt Recovery Act*, asserted that protections to real property from the claims of creditors were undesirable remnants of aristocratic England that had no place in republican America. In his famous Plymouth Oration of 1820, Daniel Webster, for example, emphasized the abolition of traditional protections to real property from creditors as a legislative reform that had pushed American society toward Republicanism. In describing the major reforms of colonial law that had set the stage for democracy, Webster stated that “alienation of the land was every way facilitated, even to the subjecting of it to every species of debt.”<sup>192</sup> In other writings, Daniel Webster condemned the English regime as epitomizing the brutal injustice and aristocratic nature of England’s criminal law, which protected landowners while imprisoning and impoverishing merchants and debtors who did not own land. According to Webster,

Noble lords have been known to say that for small debts there should be no remedy—so as not to encourage extravagance. In pursuance of this same policy, property, in a shape which noble lords and honourable men have more of their property than in all other shapes put together, is exempted from the obligation of affording the satisfactory remedy—in a word, from the obligation of paying debts, while property in these other shapes is left subject to it. Noble lords or honourable gentlemen contract debts, and instead of paying them, lay out the money in the purchase of land: land being exempted from the obligation of being sold for payment, creditors are thus cheated. Noble lord’s son is too noble, honourable gentlemen’s son too honourable, to pay the money, but not so to keep the land.<sup>193</sup>

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<sup>192</sup>Daniel Webster, First Settlement of New England (Plymouth Oration, 1820). Similarly, Noah Webster in describing the unique features of American society that were conducive to Republicanism emphasized as most important, reform of property law doctrines that ensured that America would never be governed by an aristocracy with a monopoly on land ownership. According to Webster,

[I]n an agricultural country, a general possession of land in fee simple, may be rendered perpetual; and the inequalities introduced by commerce, are too fluctuating to endanger government. An equality of property, with a necessity of alienation, constantly operating to destroy combinations of powerful families, is the very *soul of a republic*—While this continues, the people will inevitably possess both *power* and *freedom*; when this is lost, power departs, liberty expires, and a commonwealth will inevitably assume some other form.

Noah Webster, *An Examination into the Leading Principles of the Federal Constitution* (Philadelphia, 1787).

<sup>193</sup> Daniel Webster, *Abridged Petition for Justices*, 531-533

As reflected in these writings, the focus of the Whig politicians was on using real property law to protect against landed “monopolies” and the aristocracy that emerged in association with concentrated landholdings, and also to ensure that debtor-creditor law did not privilege the landowning class at the expense of non-landowners. Subjecting landownership to the risks inherent to commercial life served as an essential barrier to aristocratic forms of governance

This view was often connected to a deep desire for the newly-independent state and federal governments to enact policies that would advance the American economy. Thus, some opposed Virginia’s body of laws—which retained the traditional English remedial regime, described in Part I—on grounds that its property exemptions were economically detrimental. One Virginian’s letter of November 14, 1787, published under the name “A True Friend,” argued that Virginia’s protection of land from creditors harmed Virginians and the Virginian economy. The author suggests that Parliament’s role in monitoring colonial legislatures to advance English economic interests was crucial to Virginia’s economic development, and expressed fear about the absence of Parliament as a check on local legislatures.

According to the letter, Virginians remained “in the chains of British slavery” because state laws protecting land drove capital elsewhere, even though “we have the best mortgage to offer, which is immense and fruitful lands.” Virginians thus:

have enjoyed none of the great advantages, which independence promised us . . . . For this axiom is certain, *nothing is lent to those that have nothing, and credit is offered, at its lowest rate, to those that offer the best securities.* Therefore as long as the law will subsist in Virginia that the creditor cannot seize, lay attachment and sell the land of his debtor, at the epoch the debt fall due, it is as we had nothing, and as long as it will be by the tediousness of the courts of justice almost impossible to force the debtor, we shall not find money lenders, none but usurers



will offer, that will ruin us.—Specie of course will turn its course towards other states that will have better and more political laws.

America (and principally Virginia) is of necessity a borrower. The extent of her lands which demand great advances to grub them up, her commerce just rising of which the first funds ought to be laid, and her manufactures of chief wants which ought to be established, require assistance and credit. When we were under the tuition of Great Britain, she presided over our laws, and in a manner digested them. We could pass no act tending to hurt, or annihilate the rights and interests of British creditors; consequently they did not fear to advance considerable sums, on which they drew an annual interest higher than the rate in England, besides the profits arising from a trade in which the balance was always in their favor, and which has brought us five millions of pounds sterling in their debt. Those services and advances, though so dearly bought, were however indispensable, and augmented in a greater proportion the mass of the produce of population, and our territorial riches. By running in debt with the mother country, America increased really in power. We may from thence judge how much more rapid and prodigious her progress would be, was she (as she might) by her union and unanimity, to purchase at this moment her assistance cheaper, and in a way less burdensome for her. It would be then only she would enjoy the advantages of her liberty and her independence.<sup>194</sup>

The Whig position, however, was highly contested by a second dominant ideological view of property exemptions. In the late 1780s, debtors' movements such as Shays's Rebellion in Massachusetts led state legislatures to enact laws temporarily relieving debtors of the severity of the remedial regime instituted by New England's voluntarily-enacted laws treating land like chattel and the *Debt Recovery Act*.<sup>195</sup> These laws were typically either stay laws or legal tender laws. Stay laws, literally "stayed" the process of execution for a period of time, such as for a year. Legal tender laws, in this context, allowed debtors to satisfy their debts with either real property or chattel property of a lesser value than the specie that was explicitly contracted for. In the 1780s, some

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<sup>194</sup> "A True Friend," *Virginia Independent Chronicle* (Nov. 14, 1787, Richmond), in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 161 (John P. Kaminski et al eds. 1988).

<sup>195</sup> CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 147 (1991).

form of debt relief legislation was enacted in Virginia, Pennsylvania, Maryland, Massachusetts, New Hampshire, North Carolina, and South Carolina.<sup>196</sup>

The debt relief legislation of the 1780s expressed a sentiment that would gain greater force over time in American history: that the regime of the *Debt Recovery Act* subjected landowners to an undesirable level of financial risk. Unsecured credit was ubiquitous in the Founding Era. Early America was a period in which landed wealth still played a large role in many people's conception of the economic, social, and political order. At the time of the Revolution, all states but one required freehold property ownership for participation in the franchise upon the belief that real property ownership conferred independence from corrupt influences necessary for political participation and led to the strongest form of attachment to the nation.<sup>197</sup> A 1776 pamphlet, for example, concluded that Americans were particularly well-suited for republicanism because they were "a people of property; almost every man is a freeholder."<sup>198</sup>

During times of economic recession, a great number of people were likely to experience the threat of losing their land and homes due to their inability to pay their debts. The loss of, or potential loss of, a freehold estate in this period was a matter of serious social and political concern. Over the course of the nineteenth century, economic recessions were routinely followed by law reform movements in which protections to debtors' assets from the claims of creditors were expanded. The debt relief legislation of the 1780s was enacted in response to such a period of general economic recession

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<sup>196</sup> *Id.*

<sup>197</sup> See Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STANFORD L. REV. 335, 339-40 (1989). See also ALEXANDER, *supra* note //, at //.

<sup>198</sup> Pamphlet cited in WOOD, *supra* note //, at 234.

combined with a perceived lack of liquidity, based on monetary conditions.<sup>199</sup> It is notable that as politicians like Webster in the 1820s were extolling the virtues of the laws that made real property more alienable to creditors as essential features of the new republican meritocracy, the popularity of the Whig position on this issue was waning on a widespread basis throughout America. The preference for property exemptions was increasing among those who believed that subjecting all forms of property to commercial risk jeopardized democracy—or at least the livelihoods of families within the democracy—by creating conditions in which a mere economic downturn might lead a family to be forced out of the landowning class and into the ranks of the indigent. The legislation of the 1780s, which violated the legitimate expectations of creditors, but which was typically of a limited duration, however, was different than the English regime where *all* freehold interests in real property were protected from the claims of creditors.

The third dominant ideological perspective, which might be referred to as the Virginia position, gave continued support to the implementation of the old English regime, but without the concentrated landholdings that resulted from primogeniture. As mentioned, Virginians chose to retain the English remedial regime until the mid-nineteenth century. This position reflected a world view reminiscent of the English perspective that land was a natural family endowment, ideally to be a source of family prosperity through the generations. Haywood's argument, described above, claimed that protections from creditors *increased* the number of freeholders in the society.<sup>200</sup>

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<sup>199</sup> For the economic context of Shays's Rebellion, see Priest, *supra* note 138, at 2440-2444.

<sup>200</sup> It was possible, of course, to value freehold property ownership as a prerequisite to political participation and defend laws subjecting real property to the claims of all unsecured creditors. In the 1820s, Daniel Webster, for example, simultaneously attacked the English laws exempting property from creditors' claims, while defending the proposition that government representation should be structured so that property owners exercised political power in proportion to the amount of property they owned. Daniel Webster, Speech on Representation (Massachusetts Constitutional Convention, 1820-1820), in DEMOCRACY,

Thomas Jefferson's statements on debt suggest that he opposed the regime enacted under the *Debt Recovery Act*. His views are expressed in his famous statement in his 1789 letter to Madison that it is self-evident that "*the earth belongs in usufruct to the living*." A few lines down, he explains the comment by stating that:

[N]o man can by natural right oblige the lands he occupied, or the persons who succeed him in that occupation, to the payment of debts contracted by him. For if he could, he might during his own life, eat up the usufruct of the lands for several generations to come, and then the lands would belong to the dead, and not to the living, which would be the reverse of our principle.<sup>201</sup>

The theory of property expressed in Jefferson's comment reveals his assumption that real property, at least according to "natural right," involved not simply the fee simple of ownership of one person, but also the claims of family members. It is particularly striking that Jefferson chose to use the term "usufruct," (a right to use property, and to transmit it to the next possessor in substantially the same state) in the course of describing an individual's relation to his real property. Americans in the Founding Era typically viewed American republicanism as rooted in the country's unique attribute of having widespread freehold ownership. Usufructory rights have more in common with the traditional English approach toward real property, in which a dominant mode of ownership, often formalized by the strict settlement, was a life tenancy (with the remainder held in trust). Stating that a property owner violated his heirs' natural rights to property when he incurred debts that might "eat up" his heirs interests and treated the land as though it "belonged" entirely to him and not to his heirs was antithetical to the Whig fee simple worldview. The Whig view was that the right of the living freehold

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LIBERTY, AND PROPERTY: THE STATE CONSTITUTIONAL CONVENTIONS OF THE 1820S, at 97-101 (Merrill D. Peterson ed. 1966).

<sup>201</sup> Thomas Jefferson to James Madison (Sept. 6 1789), in 15 THE PAPERS OF THOMAS JEFFERSON, 392 (Julian P. Boyd, ed. 1958).

owner was total, and included the right to alienate the property or to incur debts on the basis of the owner's real property holdings. James Kent, for example, viewed America as distinct from England in its rejection of the societal dependence on inheritance. As he remarked in his treatise, "[e]very family, stripped of artificial supports, is obliged in this country to repose upon the virtue of its descendants for the perpetuity of its fame."<sup>202</sup> Jefferson's statement that the "world belongs in *usufruct* to the living" is thus deeply conservative.

Thomas Jefferson's comment that no natural right permits burdening the family property with debts, although derived from English conceptions of natural law, might also be viewed as an intellectual development emerging after over fifty-five years of living under the regime of the *Debt Recovery Act*. Virginia planters had experienced decades of an alternative body of laws. It is likely that Jefferson's ideal of a democratic republic of yeomen farmers involved some protections to real property. Protecting the land from creditors gave fee simple owners the independence, virtue, and loyalty to government necessary for participation in such a republic. He opposed the entail on grounds it led to an aristocracy and, therefore, an aristocratic form of government. But his letter to Madison suggests a desire to defend Virginia's policy of retaining the safeguards on real property of the old English feudal order.

The issue of exempting real property from debts was debated in relation to national policy as well as local policy. The Parliamentary model, of course, was one of a uniform imperial policy toward property exemptions determined at the highest levels of legislative authority. Ceding responsibility over property exemption issues to the state legislatures reflected both a rejection of the Parliamentary model of centralized

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<sup>202</sup>4 KENT, *supra* note 127, at 20.

control,<sup>203</sup> and a recognition of the economic and cultural discrepancies between states in the Founding Era. In the new American system, not only did states retain legislative authority over their own court procedures and remedial regimes, but the states also insisted that the federal courts recognize and implement the local state execution processes in the cases that they decided.<sup>204</sup> In 1790, President George Washington advised Congress to consider “whether a uniform process of execution on sentences issuing from the federal courts, be not desirable through all the States.”<sup>205</sup> But opposition to a federal policy was strong enough that a federal remedial policy was not enacted for much of the nineteenth century, meaning that the federal courts were required to implement the relevant state remedies in federal court disputes.

The question of whether land would be available to satisfy unsecured debts emerged with respect to two other issues of national policy. One issue was what policy should apply to the Northwest Territory. Congress adopted the Pennsylvania policy, of allowing sale of the debtor’s property only if the debt could not be paid with seven years of earnings of the property.<sup>206</sup> This policy choice might be viewed as a rejection of the principles of the *Debt Recovery Act* and a desire to use property exemptions and minimized financial risks in order to attract immigrants to frontier areas.

The issue of whether land would be available to satisfy debts was also central to the debates over the first Bankruptcy Bill in 1799. Under the Bill, a bankrupt’s lands

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<sup>203</sup> See Cole, *supra* note 13, at 230 & 242-46 (describing variation in property exemption laws in colonial and Founding Era America, recognized under nineteenth century bankruptcy statutes, as evidence of the “federalist character” of early bankruptcy policy).

<sup>204</sup> Act Sept. 29, 1789, c. 21, 1 Stat. 93; ANNALS OF CONG., 1<sup>st</sup> Cong., 1<sup>st</sup> Sess. (Senate Reports, Sept. 17, 1789) (House Reports, Sept. 23, 24, 29, 1789). See Charles Warren, *Federal Process and State Legislation*, 16 VA. L. REV. 421, 426-30 (1930).

<sup>205</sup> ANNALS OF CONG., 1<sup>st</sup> Cong., 3<sup>rd</sup> Sess. (Senate Reports, Dec. 8, 1790).

<sup>206</sup> A Law Subjecting Real Estate to Execution for Debt (Aug. 15 1795) in THE LAWS OF THE NORTHWEST TERRITORY, 1788-1800, at 131-32 (Theodore Calvin Pease ed. 1925).

could be seized and sold. The Federalists were dedicated to the new order in which land was used as security for debts and in which credit terms were improved to promote economic development. James A. Bayard, a young Federalist, for example, described state laws making land immune from the payment of debts as “a remnant of the feudal system, of the principle of the ancient aristocracy of England, which was imported hither from that country by our ancestors.” To Bayard, the “principle goes to the root of commercial credit; because a merchant must know, that if he gives credit to a large amount, that the whole of that money may be vested in land by his debtor, and then he cannot touch it. . . . Commerce, and a law like this, cannot live and flourish on the same soil.”<sup>207</sup> The Republicans, in contrast, wanted a general exemption from the statute for all agrarian debtors. Albert Gallatin, the most prominent Republican in Congress, argued that protections on real property, such as that of Virginia or Pennsylvania’s limitation on execution sales to debts larger than seven years worth of earnings, were necessary “in order to prevent the sacrificing of land at a rate so much below its value as it must sometimes be sold for if it were always liable to be sold for debt as personal property.” The Bill allowing execution against a bankrupt’s land was enacted, but was repealed a year later under the Jefferson administration. Tensions between states over property exemptions was a central reason for the failure of bankruptcy legislation for much of the nineteenth century.

#### IV. CONCLUSION

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<sup>207</sup> ANNALS OF CONG., 5th Cong., 3<sup>rd</sup> Sess. (House Reports, Jan, 1799), at 2660.

Subsequent history involved a building up of protections to real property. During the early nineteenth century, state legislatures enacted laws exempting various types of personal property from the claims of creditors.<sup>208</sup> The first major wave of reform laws, however, consisted of enactments in the aftermath of the recession of 1817 to 1818. The demand for greater protections to real property and, in particular, to the family homestead, became increasingly popular. In response to the recession, many states enacted another wave of temporary stays on execution and “appraisal laws,” laws requiring that land only be sold if the price obtained constituted a specified percentage (say two thirds) of the property’s appraised value.<sup>209</sup> Many state legislatures expanded the amount of personal property that was exempt from unsecured creditors’ claims.<sup>210</sup> Many states also enacted statutory periods during which mortgagors and other debtors could redeem their property after creditors obtained judgments in a court of law. The New York Revised Laws of 1821, for example, introduced a statutory period of redemption of fifteen months during which mortgagors could redeem their property after a judgment at law.<sup>211</sup> Notwithstanding these legal reforms, the *Debt Recovery Act* still had a profound impact during this period. James Kent’s treatise of 1830 states that the

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<sup>208</sup> See, for example, An Act to Exempt Certain Goods and Chattels of Debtors from Attachment and Execution (June 16, 1807), in 7 LAWS OF NEW HAMPSHIRE (1918) (stating that “wearing apparel necessary for immediate use, one comfortable bed, bedstead and bedding necessary for the same, the bibles and school books in actual family use, together with one cow, and one swine, or in case the debtor be a mechanic, tools of his occupation to the value of twenty dollars in lieu of said Cow, shall be altogether exempted from attachment and execution.”) Colonial legislation typically exempted only “tools of the trade.”

<sup>209</sup> WARREN, *supra* note //, at 26-27.

<sup>210</sup> See EDWARD J. BALLEISEN, NAVIGATING FAILURE: BANKRUPTCY AND COMMERCIAL SOCIETY IN ANTEBELLUM AMERICA 10 (2001); 3-4 ANNUAL LAW REGISTER OF THE UNITED STATES (William Griffith ed. 1822) (listing state property exemptions). In response to the proliferation of education institutions, many of the new state laws exempted “bibles and school books,” “books of professional men,” or “professor’s books” from creditors’ claims. See Morton J. Horwitz, *Conceptualizing the Right of Access to Technology*, 79 WASH. L. REV. 105, 113 & n. 37 (2004).

<sup>211</sup> 4 KENT, *supra* note //, at 427 (“all . . . redemptions must be within the fifteen months from the time of the sheriff’s sale; for the sheriff is then to execute a deed to the person entitled, and the title so acquired becomes absolute in law.”)



policy of having no right of redemption, which he traces to the *Debt Recovery Act*, was still in force in New Jersey, Maryland, North Carolina, Tennessee, South Carolina, Georgia, Alabama and Mississippi.<sup>212</sup>

The Panic of 1837 led to a widespread movement among state legislatures to go beyond former laws and to provide means by which homeowners could register and record their property as entirely exempt from the claims of creditors. Almost every state enacted a law in the 1840s allowing married women to hold and register property in their own names that would be immune from the claims of their husbands' creditors.<sup>213</sup> Then, in the 1850s, state legislatures enacted homestead exemption laws that established a minimum amount of acres (typically 40 to 50 acres) or land of a certain value to be immune from creditors' claims.<sup>214</sup> The homestead exemption laws typically required that homeowners pre-register their property as exempt—by signing a certificate which was then attached to the title recorded by the county—prior to obtaining the benefits of the law. States enacted laws providing for periods of time during which mortgagors could redeem their property after foreclosure. These laws remain on the books today.

This account suggests the importance of the colonial experience to American property law. As debtors in the vast Atlantic trade, residents of the colonies were

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<sup>212</sup> *Id.* at 426.

<sup>213</sup> See Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359, 1398-1404 (1983) (citing laws of Mississippi enacted in 1839; Maryland in 1842 and 1843; Michigan in 1844; Maine in 1844; Massachusetts in 1845; Connecticut in 1845; Vermont in 1845; Florida in 1845; Ohio in 1846; New Hampshire in 1846; Alabama in 1846; Kentucky in 1846; Arkansas in 1846; Iowa in 1846; Indiana in 1847; New York in 1848; Pennsylvania in 1848; Missouri in 1849; North Carolina in 1849; Tennessee in 1850; Wisconsin in 1850; and New Jersey in 1852).

<sup>214</sup> Alison D. Morantz, *There's No Place Like Home: Homestead Exemption and Judicial Construction of the Family in Nineteenth Century America*, 24 LAW & HIST. REV. 1 (2006); Paul Goodman, *The Emergence of Homestead Exemption in the United States: Accommodation and Resistance to the Market Revolution, 1840-1880*, J. AM. HIST. 470 (1993); William T. Vukowich, *Debtors' Exemption Rights*, 62 GEORGETOWN L.J. 779 (1974).

amenable to enacting laws that would increase the availability of credit. As Joseph Story explained in his discussion of the laws, they were “a natural result of the condition of the people in a new country, who possessed little monied capital; whose wants were numerous; and whose desire of credit was correspondingly great.”<sup>215</sup> The implication of the laws, however, was that commercial considerations would take priority over the stability in political and social relationships deriving from the traditional English system. The embrace of commercial values in the colonial period, however, had a lasting legacy in American economic and political developments.

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<sup>215</sup> 1 STORY, *supra* note 1, at 168.