

## Creating an American Property Law: Alienability and Its Limits in American History

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, though not chattel property, from the reach of creditors in two respects. Under English law, an individual's freehold interest in land was exempted entirely from the claims of unsecured creditors both during life and in inheritance proceedings. In addition, even where land had been explicitly pledged as collateral in mortgage agreements, Chancery court procedures imposed substantial costs on creditors using legal process 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 were voluntarily rejected by several colonies that sought to improve the terms upon which credit would be extended, laws exempting land from debts were administered in many colonies. In 1732, however, 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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Creating an American Property Law:  
Alienability and Its Limits in American History

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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>

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 available for full economic use.

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<sup>1</sup> 1 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES*, § 182, at 168 (1833).

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 economic productivity of real property, Blackstone's *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, "[a]n 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. The laws of England protected creditors' claims in multiple ways. The law incorporated a default rule that protected property owners' title to land from the claims of all unsecured creditors: claims to collect debts when 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 English landowner was "allowed to live in splendour on his property, while his honest creditors remain

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<sup>2</sup> William Blackstone, 2 *Commentaries* \*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.").

<sup>3</sup> Noah Webster, *An Examination into the Leading Principles of the Federal Constitution* 47 (Philadelphia, 1787).

<sup>4</sup> For a discussion of English remedies, see *infra* TAN //–52.

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 over debt satisfaction 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 seize the debtors’ chattel property. Each of these risks would have 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

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<sup>5</sup> 2 Sir Samuel Romilly, *The Speeches of Sir Samuel Romilly in the House of Commons* 74, 75 (London: 1820).

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 legislature of Barbados attempted to expand the extent of credit offered within their colonies by rejecting English protections to real property from creditors. Then, during a recession 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, a group of English creditors concerned about debt collection in colonies that had relied on English credit to expand slave labor forces 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. 2"). 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

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<sup>6</sup> 5 Geo. 2, ch. 7 (1732).

<sup>7</sup> See *infra* notes 193–195 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

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and slaves over heirs when a debtor died. In 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 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 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, other than land that was entailed during the colonial period, and land covered by a widow's limited dower interest.<sup>11</sup>

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(similar to checks). See Claire Priest, *Currency Policies and Legal Development in Colonial New England*, 110 Yale L.J. 1303, 1328–32 (2001).

<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).

<sup>11</sup> See *infra* TAN //--.

Remarkably, no historian to date has thoroughly examined the Debt Recovery Act or American colonial and state laws relating to the use of real property as security for debts. 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 a comparison of slavery in the West Indies to that in Brazil where, under Portuguese rule, landed estates were protected from creditors’ claims.<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>12</sup> 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); 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); see also Richard B. Sheridan, *Sugar and Slavery: An Economic History of the British West Indies, 1623–1775, at 288–90 (1994) (briefly describing Debt Recovery Act)*.

<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* 120, 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); John M. Hemphill, *Virginia and the English Commercial System, 1689–1733*, at 180–89 (reprint of unpublished Ph.D. dissertation 1985) (examining legislative history of Act and its importance as a political issue in Virginia); David Thomas König, *The Virgin and the Virgin’s Sister: Virginia, Massachusetts, and the Contested Legacy of Colonial Law*, in *The History of the Law in Massachusetts* 81, 97–98 (Russell K. Osgood, ed. 1992) (briefly discussing Debt Recovery Act); 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) (1830), and Stefan A. Riesenfeld, *Enforcement of Money Judgments in Early American History*, 71 *Mich. L. Rev.* 691 (1973). Riesenfeld’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, 242–46 (2000). See also Morton J. Horwitz, *The*

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 of 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 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 a 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

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Transformation of American Law, 1780–1860, at 131 (1977) (locating property law reforms in the early nineteenth century); William E. Nelson, The Americanization of the Common Law at 41–43, 147–54 (1975) (describing state of debtor-creditor law in Massachusetts prior to and after the American Revolution). Gregory S. 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, e.g.*, Despotism Dominion, *supra* note 13; 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); 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).

<sup>14</sup> Henry Sumner Maine, *Ancient Law* 170 (photo. reprint 2002) (1866).

<sup>15</sup> P.S. Atiyah, *The Rise and Fall of Freedom of Contract* 85 (1979).

therefore tend not only to lengthen their standard time-spans of land ownership, 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>

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. Historically, a more common form of alienation — or potential alienation — involves property owners offering their property as security for loans. 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. These resources enable landowners 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

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

<sup>17</sup> See, e.g., Jesse Dukeminier & James E. Krier, *Property* 197–220 (5th 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); James 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 eighteenth through early twentieth centuries, see Charles W. McCurdy, *The “Liberty of Contract” Regime in American Law, in The State and Freedom of Contract* 161 (Harry N. Scheiber ed., 1998) and John V. Orth, *Contract and the Common Law in The State and Freedom of Contract, supra* at 44.; 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).

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debts with real property is likely to be even more significant than the ability to voluntarily sell property in the market.<sup>18</sup> This account is a first step toward a broader narrative that would place the desire for credit at the forefront of the historiography of property law.

Moreover, the history of property doctrines relating to credit suggests that depictions describing a steady march toward alienability and modernity are misplaced. As this account shows, the Debt Recovery Act reflected the unique context of British colonialism and imperial rule: the Act applied only to the colonies, and not to England, inconsistent with the modernity hypothesis. Moreover, Parliament enacted the Act primarily to quell the concerns of merchants lending to colonies for slave purchases, a controversial 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 secure the stability of land ownership and reduce landowners’ financial risk, closely resembling the legal regime of early modern England. The connection between debtor/creditor law and modernity is therefore complex.

A second 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 asserts in *The Radicalism of the American Revolution* 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

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<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 five to ten percent of their respective gross national products. Heywood Fleisig, *Secured Transactions: The Power of Collateral*, 33 *Fin. & Dev.* 44, 44 (1996). See also Gershon Feder et al., *Land Policies and Farm Productivity in Thailand* 109–32, 137–47 (1988) (noting that legally titled farmers had better access to credit, improved their lands more, and produced more than squatters); Mehnaz Safavian, Heywood Fleisig, and Jevgenijs Steinbuks, *Unlocking Dead Capital*, World Bank (March 2006) (reforming collateral law in Albania and Romania led to a reduction of the interest rate in secured transactions by five percent and twenty percent respectively); *Building Institutions for Markets: World Development Report* 93 (2002); Omar Munif Razzaz, *Law, Urban Land Tenure, and Property Disputes in Contested Settlements: The Case of Jordan* 62–75 (1991).

<sup>19</sup> 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 Drew R. McCoy, *The Elu-*

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 interpretation — describes the transformation of the conception of property in America as a consequence of the ideological opposition to the English aristocratic political regime.

But the republican interpretation 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 in 1732. 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

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sive Republic: Political Economy in Jeffersonian America (1980); Alexander, *supra* note 13, at 26-88; Holly Brewer, *Entailing Aristocracy in Colonial Virginia: "Ancient Feudal Restraints" and Revolutionary Reform*, 54 *Wm. & Mary Q.* 307 (1997); Richard L. Bushman, "This New Man": *Dependence and Independence, 1776*, in *Uprooted Americans* (Richard L. Bushman et al. eds. 1979); Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 *Mich. L. Rev.* 1 (1977) [hereinafter Katz, *Republicanism and the Law of Inheritance*]; 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*, 10 *Law & Hist. Rev.* 33 (1992).

<sup>20</sup> See, e.g., Thomas Jefferson, *Notes on the State of Virginia* 137 (W. Peden ed., 1787); Noah Webster, *On the Education of Youth in America*, in *A Collection of Essays and Fugitive Writings* 24 (reprint 1977) (1788).

<sup>21</sup> See sources cited *infra* note 228.

<sup>22</sup> See 1 Alexis de Tocqueville, *Democracy in America* 47-50 (Harvey C. Mansfield & Delba Winthrop eds., Univ. Chi. Press 2000) (1835).

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.<sup>23</sup> The reform of property law described here, achieved by the 1730s, however, was 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 im-

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<sup>23</sup> Until recently, most historians accepted the work of C. Ray Keim, who empirically studied wills in Virginia and found that only a small percent of wills entailed land. C. Ray Keim, *Primogeniture and Entail in Colonial Virginia*, 25 *Wm. & Mary Q.* 545, 557–61 (1968). 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." *Id.* at 561. See also Bernard Bailyn, *Politics and Social Structure in Virginia, in Seventeenth-Century America* 90, 108–12 (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. See Brewer, *supra* note 19 at 311, 315–16. 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.

portant 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.<sup>25</sup> 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 all forms of debt was the basis for a broader opposition to 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 debtors experienced the full impact of property exemption policies during recessions — the possible loss their of freehold land and 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, the states held contrasting conceptions of the appropriate procedural protections to real property ownership and inheritance which 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>26</sup> In sum, the history of the Debt Recovery Act and its legacy is important to an understanding of federalism in Founding era America.

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<sup>24</sup> See, e.g., Daniel Webster on Representation, Massachusetts Convention of 1820 – 1821, in *Democracy, Liberty, and Property: The State Constitutional Conventions of the 1820's* 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* in *The Life, Eulogy, and Great Orations of Daniel Webster* 95, (1854).

<sup>25</sup> See *infra*, TAN //–// ~201.

<sup>26</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.

Part I describes the substantive and procedural protections to families' long-term title interests in land from seizure by creditors in England in the period relevant to the laws of colonial America, the seventeenth and eighteenth century. Part II describes the transformation of English property law relating to creditors' claims in the American colonial period. It examines how English protections to real property were transplanted and administered in many colonies. Part II 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 that resulted on account 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 in the voluminous litigation over credit and inheritance matters emerging after the Revolution. Part III also describes the opposition to the principles of the Act, on philosophical grounds — reflected in Jefferson's writings — in state court decisions, in state debt relief legislation, and in national policies.

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. The two most important consequences of the Act were, first, its role in providing the credit conditions for expanding slave labor in America and, second, in prioritizing commercial interests over the inheritance of land. The transformation toward less restrictive land policies also likely led to greater treatment of land as a commodity, expanded the market for land, and advanced the economy in America toward modern capitalism.

As we shall see, 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 set the stage for the more rapid development of the American economy

— including an expansion of slave labor — and for a political transformation away from rule by a landed aristocracy toward democracy.

### I. The Protection of Family Ownership of Real Property in English Law

English colonies administered English property law. The legislatures of the British colonies in continental North America and the West Indies derived their lawmaking authority either by charters issued by the crown, by proprietary grants to individuals under patent, or by direct rule of the crown. English law applied in the colonies governed directly by the crown.<sup>27</sup> 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.<sup>28</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 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. As the eminent English legal historian J.H. Baker explains, land “outlives its inhabitants, is immune from destruction by man, and therefore provides a suitably firm base for institutions of government and wealth.”<sup>30</sup> In England from the late medieval period through the modern era,

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<sup>27</sup> The extension of English law to the colonies is discussed in Smith, *supra* note 28, at 464–522.

<sup>28</sup> See Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* 40–46 (2004); 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 *Law & Hist. Rev.* 439, 460–79 (2003).

<sup>29</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”). J.H. Baker describes the distinction between real and personal property as “[t]he 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 Frederic Pollock & Frederic William Maitland, *The History of English Law Before the Time of Edward I* 2 (1952).

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

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> According to Baker, “Control of land could not, indeed, be readily divorced from power and jurisdiction, from ‘lordship’.”<sup>32</sup>

English law was characterized by a clear preference for maintaining the integrity and cohesiveness of landed estates over the generations.<sup>33</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>34</sup> The settlement would outline the nature of the land-

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<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. Simpson, *supra* note 2, at 33. 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 inheritance. See 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* 165 (1881).

<sup>32</sup> Baker, *supra* note 29, at 223.

<sup>33</sup> See John Habakkuk, *Marriage, Debt and the Estates System: English Landownership, 1650–1950* 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>34</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 “re-settled” 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 Baker, “the 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. Brian Simpson, under the strict settlement:

owner's tenancy, which could range, on one extreme, from a fee simple interest in some or all of the lands to, on the other, a life estate with no powers of conveyance and with trustees appointed to preserve the contingent remainder on behalf of future generations.<sup>35</sup> 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 entire estate. It was expected that each generation would pass the estate to the next in at least a similar, or hopefully an augmented, condition.<sup>36</sup> The law of inheritance was crucial to this social and economic framework.<sup>37</sup>

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[T]he 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.

A.W. Brian Simpson, *Introduction TO WILLIAM BLACKSTONE*, 2 COMMENTARIES iii, xi (Univ. of Chicago Prses 1979) (1766); see also John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 632 - 33 (1995) (describing the use of trust devices to provide for wives, daughters, and younger sons).

<sup>35</sup> BAKER, *supra* note 29, at 293 - 95.

<sup>36</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.

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

In peoples where estate law is founded on the right of primogeniture, territorial domains pass most often from generation to generation without being divided. The result is that family spirit is in a way materialized in the land. The family represents the land, the land represents the family; it perpetuates its name, its origin, its glory, its power, its virtues. It is an imperishable witness to the past and a precious pledge of existence to come.

I DE TOCQUEVILLE, *supra* note 22, at 48. For a description of more recent debates about the social implications of English settlements, see BAKER, *supra* note 29, at 295.

<sup>37</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 ground that all children — irrespective of whether 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

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 from involuntary seizure by creditors in a variety of ways. 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 are 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 a common law court against a debtor was limited to one of four writs of execution (remedies available to enforce judgments at law). First, the writ of *fiery facias* directed the sheriff to seize the goods and chattels of the defendant, to sell the items, and to deliver the proceeds to the plaintiff. Second, the writ of *levary facias* authorized the sheriff to seize and sell the debtor's goods and chattels, like the writ of *fiery facias*, 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>38</sup>

Third, in contrast to the *levary facias*, the writ of *elegit* allowed for a limited but possessory interest in the debtor's real property.<sup>39</sup> Under

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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 Possessions. 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 § 88 244 (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. See 2 BLACKSTONE, *supra* note 2, at \*11–12; see also Katz, *Republicanism and the Law of Inheritance*, *supra* note 19, at 4–9 (discussing Locke's, Blackstone's, and other theories of inheritance).

<sup>38</sup> 3 BLACKSTONE, *supra* note 2, at \*417–18; see also 2 POLLOCK & MAITLAND, *supra* note 29, at 596.

<sup>39</sup> The Parliament introduced the writ of *elegit* in 1285 as part of Edward I's reform of feudal law. See Westminster 2, 1285 13 Edw., c. 18. See also BLACKSTONE, 3 COMMENTARIES, *supra* note 2, at \*418 (describing writ of *elegit*). The impact of this statute on the closing of the commons in England is

the writ of *elegit*, the sheriff obtained an appraisal of the debtor's goods and chattels, and the creditor accepted the goods at the appraised value. If the debtor's chattel property failed to satisfy the debt, the creditor acquired a tenancy of one half of the debtor's real property limited to the number of years necessary to satisfy the remainder of the debt, based on a court-ordered appraisal.<sup>40</sup> The debtor retained possession of half of his property, as well as "his Oxen and Beasts of his Plough,"<sup>41</sup> 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 a creditor 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>42</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>43</sup>

Fourth, under the writ of *capias ad satisfaciendum*, the sheriff seized the body of the debtor for imprisonment.<sup>44</sup> While the debtor was in prison, the creditor could not force a seizure of the debtor's land.<sup>45</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 security for the debt by means of a secured credit agreement.<sup>46</sup> More infrequently, a debtor could use debt-

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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>40</sup> See BLACKSTONE, 3 COMMENTARIES, *supra* note 2, at 418–19.

<sup>41</sup> 13 Edw. 1, c. 18.

<sup>42</sup> See Statute of Merchants, 13 Edward, c. 1 (1285); Statute of the Staple, 1353 27 Edward 3, c. 9.

<sup>43</sup> 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." WILLIAM BLACKSTONE, 4 COMMENTARIES, *supra* note 2, at \*419. 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. BLACKSTONE, 3 COMMENTARIES, *supra* note 2, at 227–29.

<sup>44</sup> BLACKSTONE, 3 COMMENTARIES, *supra* note 2, at \*414–15. Peers and other Members of Parliament, as well as executors of estates, were exempt from this remedy. *Id.* at \*414.

<sup>45</sup> See BLACKSTONE, 3 COMMENTARIES, *supra* note 2, at \*419–20 (explaining that it was possible "that body and goods may be taken in execution, or land and goods; but not body and land too, upon any judgment between subject and subject in the course of law.").

<sup>46</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

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ors' 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>47</sup>

Notably, each of these writs provided a remedy to creditors while protecting the integrity of the estate and without jeopardizing a landowner's freehold interest in his land and the heir's ability to inherit it. The *fieri facias*, as mentioned, was limited to the debtor's goods and chattels. The writ of *levari facias* allowed the seizure of the income from land for a temporary period. The writ of *elegit* offered a creditor temporary possessory rights (not a fee simple interest) in one half (not all) of a debtor's land. The *capias ad satisfaciendum* threatened the debtor, but not his land.

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.<sup>48</sup> The executors of the estate assumed control over the deceased's *personal* property, but not the land.<sup>49</sup> In the absence of a will, the real property immediately descended to the eldest male heir. Inherited land never came under an executor's control.<sup>50</sup> 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>51</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>52</sup>

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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>47</sup> See Innes, *supra* note 46, at 256. Once the debtor 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.)

<sup>48</sup> BLACKSTONE, 2 COMMENTARIES, *supra* note 2, at 510–12.

<sup>49</sup> For a discussion of what constituted "chattel" property over which the executors assumed control, see BAKER, *supra* note 29, at 380–81.

<sup>50</sup> *Id.*

<sup>51</sup> 2 POLLOCK & MAITLAND, *supra* note 29, at 336.

<sup>52</sup> See HABAKKUK, *supra* note 33, at 307–12.

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>53</sup> An owner of a fee simple absolute could sell or mortgage land<sup>54</sup> or devise it to a non-family member.<sup>55</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.<sup>56</sup>

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 be compelled to discharge the debt out of the real property that was inherited.<sup>57</sup>

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<sup>53</sup> In the early seventeenth century both in England and the colonies, landowners formalized the transfer of title to land by livery of seisin, a public ceremony formalizing land transfers, as well as by 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. Charles II, 1676 29 Car. 2, c. 3, § 3.

<sup>54</sup> In 1290, Parliament enacted the Statute *Quia Emptores Terrarum* (“*Quia Emptores*”), 18 Edw., c. 1, 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. See A.W.B. SIMPSON, AN INTRODUCTION TO THE HISTORY OF THE LAND LAW 22, 50–51 (1961). Subinfeudation could be economically detrimental to the lord, particularly if the tenant subinfeuded 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 heir in marriage) and death (wardship, relief, and escheat). See *id.* *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 *id.*

<sup>55</sup> The Statute of Wills of 1540. 32 Hen. 8, c. 1, gave landowners the freedom to devise their lands to whomever they chose. BAKER, *supra* note 29, at 256.

<sup>56</sup> See, for example, BLACKSTONE, 2 COMMENTARIES, *supra* note 2, at 340.

<sup>57</sup> See *id.*

Secured creditors seeking to seize the land the debtor had pledged, however, could not do so simply by bringing an action at law. In the early seventeenth century, the Chancery court determined that a mortgagor held an equity right to redeem the land within a reasonable period, irrespective of the actual terms of the mortgage agreement.<sup>58</sup> 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>59</sup>

Chancery, however, was known for its high costs and procedural delays.<sup>60</sup> Actions in Chancery court inevitably took a long time because the docket was large, the court did not meet continuously, and because all relevant parties were given opportunities to be heard and to appeal the courts’ decision.<sup>61</sup> The requirement that heirs were only bound by mortgage agreements that explicitly included the heir as a party was expanded by the English courts into a broader “privilege” allowing the heir a procedural right to contest any action in which he might lose the landed inheritance (the heir’s “birthright”). 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 un-

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<sup>58</sup> 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 debtor repaid money plus interest, title to the land would revert back to the borrower. If the mortgagor did not repay the loan, he would forfeit the land. In the common law courts, mortgage 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. 2 POLLOCK & MAITLAND, *supra* note 29, at 122; BLACKSTONE, 2 COMMENTARIES, *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 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>59</sup> SIMPSON, *supra* note 54, 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 III, 113 (John Brewer & Susan Staves, eds. 1996).

<sup>60</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 III.

<sup>61</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 III–12 (describing the “defects” of Chancery procedure).

duly brought to answer, and be forejudged by course of law.”<sup>62</sup> The heir’s procedural right to be a party to litigation in which the freehold might be lost was in addition to the procedural rights of devisees and family members owed money in family settlements who had separate legal claims to the wealth inherent in the land.

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 due on the mortgage, plus interest and costs.<sup>63</sup> The complicated procedures for foreclosure 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>64</sup> In his study of Chancery Court decisions, Adam 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) in order to prevent a sale of the land to pay debts.<sup>65</sup> Chancery judges chose to preserve the family’s ownership of land when faced with ambiguous language in a will as to whether the realty should be sold to

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

<sup>63</sup> For anecdotal evidence of the difficulty even secured creditors had getting landowners to pay their debts, see John Habakkuk, Presidential Address: The Rise and Fall of English Landed Families, 1600–1800: II (Nov. 16, 1979), in 30 TRANSACTIONS OF THE ROYAL HISTORICAL SOCIETY, AT 208–10 (5<sup>th</sup> series, 1980). 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).

<sup>64</sup> See Adam S. Hofri-Winogradow, Protection of Family Property Against Creditors in the Enlightenment-Era Court of Chancery (unpublished manuscript on file with author). A careful examination of the Chancery court and its decisions has been absent in the legal historical scholarship. Adam Hofri-Winogradow’s Ph.D. dissertation in progress at Oxford University on the Chancery court in the late eighteenth century promises to contribute to this scholarship. See *id.* 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 *id.* at 17–33. Hofri-Winogradow’s conclusions confirm what scholars have long suspected about Chancery. Robert W. Gordon, for example, has noted that, “while the common law promoted alienability, equity promoted dynastic preservation.” Robert W. Gordon, *Paradoxical Property*, in EARLY MODERN CONCEPTIONS OF PROPERTY 95, 104 (John Brewer & Susan Staves, eds. 1996).

<sup>65</sup> Hofri-Winogradow, *supra* note 64, at 20.

pay debts.<sup>66</sup> Moreover, Chancery judges upheld family settlement agreements that protected land when faced with creditors' challenges to the validity of those agreements.<sup>67</sup>

Chancery's general policy was to protect the integrity of the family estate in land whenever 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 insufficient to pay the debt.<sup>68</sup> By paying mortgage debts with chattel property, Chancery reduced 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.<sup>69</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 integrity of estates and the inheritance of real property was further protected in the Chancery 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, family members were unable to access credit for resources needed to manage the remaining property.<sup>70</sup> In addition, the threat of

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<sup>66</sup> *Id.* at 22–25.

<sup>67</sup> *Id.* at 28.

<sup>68</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, 1854, 17 & 18 Vict., c. 113 (Eng.). See also BRODRICK, *supra* note 31, at 345 (describing the practice as a “monstrous perversion of justice”).

<sup>69</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.

<sup>70</sup> For an extended discussion of the occasions when English landowners, however reluctantly, sold their real property, see Christopher Clay, *Property*

debtors' prison or of the sheriff stripping away all of the family's goods and chattels and selling them at auction also induced landowners to sell their real property to pay unsecured creditors.<sup>71</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>72</sup> An entail could be removed through a conveyance referred to as a "common recovery."<sup>73</sup>

In each of these circumstances, however, the law gave landowners the privilege to voluntarily choose to sell the land, and the land was sold only on terms to which they consented. The inability of an individual unsecured creditor to force a seizure and sale of the land gave landowners important opportunities to delay the 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 risks. This was the legal regime brought over and instituted in the American colonies. The next Part explains how 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 Creditors' Remedies Against the Land 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

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*Settlements, Financial Provision for the Family, and Sale of Land by the Greater Landowners, 1660–1790*, 21 J. BRIT. STUD. 18, 23 (1981).

<sup>71</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 request a private act of Parliament to allow the sale of real property held in life estate. *Id.* at 25.

<sup>72</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>73</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 people who typically 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.

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>74</sup> A 1647 Connecticut statute adopted the English body of remedies, clarifying that creditors could take possession of debtors’ real property only until their debts were satisfied, as under the writ of *elegit*.<sup>75</sup>

Indeed, several colonies adopted remedial regimes that were more protective of land than the English regime because they did not provide for the writ of *elegit*. The absence of the writ of *elegit*, however, likely reflected the fact that a temporary possessory interest in land was not a valuable remedy in the early stages of agricultural development when profits from land were low. A Virginia statute of 1705 outlined the procedures according to which sheriffs could seize either the “goods and chattels” or the body of a debtor to satisfy debts.<sup>76</sup> It described the English writs of *fieri facias*, *levari facias*, and *capias ad satisfaciendum* and made no mention of seizing real property interests.<sup>77</sup> Maryland statutes enacted in 1705 and 1718 limit execution to the seizure of “goods, chattels and credits” to satisfy debts.<sup>78</sup> A Jamaican statute of 1681 allowed the sheriff to seize the “goods and chattels,” and if the goods and chattels were insufficient, then the “negroes, working cattle, or necessary utensils,” but made no mention of the writ

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<sup>74</sup> The Charter of Libertyes and priviledges granted by his Royall Highnesse to the Inhabitants of New Yorke and its Dependenciey (Oct. 30, 1683), in 1 THE COLONIAL LAWS OF NEW YORK 111, 114 (Albany, James B. Lyon 1894).

<sup>75</sup> 1 PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 518–520 (J. Hammond Trumbull ed., Hartford, Brown & Parsons 1850).

<sup>76</sup> An Act directing the manner of levyng executions, and for relief of poor prisoners for debt, ch. 37 (1705), in 3 LAWS OF VIRGINIA 385 (William Waller Hening ed., Philadelphia 1823).

<sup>77</sup> *Id.* 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 *fieri facias*, *capias ad satisfaciendum*, and *elegit*).

<sup>78</sup> An Act directing the manner of Suing out Attachments in this Province and Limiting the Extent of them (Sept. 5, 1704), in ALL THE LAWS OF MARYLAND NOW IN FORCE 4 (Annapolis, Thomas Reading 1707). See also 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 81 – 84 (Annapolis 1727) (exempting 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.”); 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) (same).

of *elegit* or other claims against the land.<sup>79</sup> In St. Kitts and Antigua, the writ of *elegit* was not available, meaning freehold property interests were entirely immune from the claims of unsecured creditors, and freehold property owners were entirely exempt from arrest and placement in debtors' prison.<sup>80</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. In 1715, the Board of Trade issued a formal Instruction to the Governor of Jamaica directing him to persuade the legislature to introduce a remedy against the land by *elegit* or *extent*. The Instruction described the lack of such a remedy as "a great prejudice to creditors and discredit to trade."<sup>81</sup>

Others emphasized that the English legal regime threatened credit because English inheritance laws protected land from unsecured creditors when a debtor died. As an example, Robert Carter, one of the most prominent planters in Virginia, complained that he suffered the negative impact of these laws personally after lending money or goods to a Mr. Lee.<sup>82</sup> 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.<sup>83</sup> Carter suspected that Lee had purchased the land to avoid paying his debts "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>84</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:

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<sup>79</sup> An Act for establishing Courts, and directing the Marshal's Proceedings, Act 19 (1681) in 1 Acts of Assembly 26, 29 (Kingston 1787).

<sup>80</sup> On the Antiguan legal regime, see *Meynell v. Moore*, 2 Eng. Rep. 70, 4 Brown 103 (H.L. 1727) (House of Lords judicial decision finding slaves, but not freehold estates, liable for unsecured debts under Antiguan law); RICHARD PARES, *MERCHANTS AND PLANTERS* 46 (Econ. Hist. Review Supp. No. 4 1960). On St. Kitts practice, see *id.* (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).

<sup>81</sup> An Act Making Jamaica Lands Extendable, #471 in ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS, 1670-1776, at 339 (Leonard Woods Labaree ed., 1967).

<sup>82</sup> Letter from Robert Carter to John Carter (July 19, 1720), in LETTERS OF ROBERT CARTER, 1720-1727, at 32-34 (Louis B. Wright ed. 1940).

<sup>83</sup> *Id.* at 32.

<sup>84</sup> *Id.*

If this be 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>85</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 yt My Lyd's nor yr Selves wont be half pd without ye Land could be Sold: wch wont be done by no means what ever: for its Left to ye Son of Mr Robt Baylor after ye Death of Jno Baylor: wch is a very Strong Argument for: Robt not to agree to ye Sale.<sup>86</sup>

In an effort to attract credit on better terms, however, the legislatures of some colonies offered greater protections to creditors than existed under English laws and equity court practices that protected real property from creditors. As mentioned, the colonial 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>87</sup> Moreover, English authorities came to accept that not all English laws and practices were appropriate to unique local conditions.<sup>88</sup> The English authorities were amenable to legal reforms that responded to local needs *and* that also

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<sup>85</sup> *Id.*

<sup>86</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 (1958) (typeface changed from original for readability).

<sup>87</sup> See Claire Priest, *Law and Commerce, 1580 – 1815*, in THE CAMBRIDGE HISTORY OF LAW IN AMERICA (forthcoming) (unpublished manuscript on file with author) (examining English mercantilism and its rejection in Founding era America).

<sup>88</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 a far-off English *colony*, however, these laws and structures were expected to be in some way divergent.” BILDER, *supra* note 28, at 3.

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 debts.<sup>89</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>90</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.<sup>91</sup> 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>92</sup>

In 1700, however, the Pennsylvania legislature radically revised its remedial regime and adopted a statute making lands available to satisfy unsecured debts.<sup>93</sup> Its stated purpose was "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."<sup>94</sup> 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>95</sup> Five years later, though,

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<sup>89</sup> Laws of the Colony of New Plymouth, *in* THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY OF NEW PLYMOUTH 33 (Boston, Dutton and Wentworth 1836).

<sup>90</sup> *Id.*

<sup>91</sup> Charter of Liberties of 1682, *in* THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 3035 (Francis Newton Thope ed., 2002) (1909).

<sup>92</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." *Id.*

<sup>93</sup> 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), *in* 1 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 7–8 (1810).

<sup>94</sup> *Id.* at 7.

<sup>95</sup> With respect to the debtor's house, it permitted a one year right of redemption, but afterwards it "shall be and remain a free and clear estate to the purchaser or creditor, . . . his heirs and assigns for ever, as fully and amply as ever they were to the debtor." *Id.*

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 years*, then the creditor would be limited to a tenancy by *elegit*, that is, possession of the land for a term.<sup>96</sup> But 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, the real property would be sold at auction.<sup>97</sup>

The 1705 Pennsylvania Statute also tried to improve the terms of secured credit within the colony by replacing mortgagors' *equitable* redemption rights, recognized in equity, with a *statutory* redemption right, enforced in the law courts. 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."<sup>98</sup> The statute gave the mortgagors a one-year period after the judgment to redeem the property. At the end of the year, the mortgagor or his or her "heirs, executors or administrators" were given the chance in court to contest the sale.<sup>99</sup> If he or they could not provide a legitimate reason why the mortgagee should not have the property, then the property was to be sold at auction, with a fee simple title going to the purchaser.<sup>100</sup>

Some colonial legislatures experimented with 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 and slaves were treated as legally equivalent to chattel property in all debt collection proceedings.<sup>101</sup> The Barbados legisla-

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<sup>96</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 a 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 payment of debts, ch. 152 (1705) in 1 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 57, 58 (1810).

<sup>97</sup> *See id.*

<sup>98</sup> *Id.* at 59.

<sup>99</sup> *Id.* at 59–60.

<sup>100</sup> *Id.* at 60. *See also* Graff v. Smith's Admors, 1 Dall. 481–82 (1789) (discussing the 1700 and 1705 statutes).

<sup>101</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 80, at 89 n.59; Turner v. Cox, (1853) 14 Eng. Rep.

ture, however, appears to have changed course several times soon thereafter. In 1668 the legislature enacted a law declaring slaves to be real estate and making both slaves and land exempt from the claims of unsecured creditors.<sup>102</sup> Then, in reverse, a 1672 law declared that slaves would be treated as chattel and subject to the claims of unsecured creditors.<sup>103</sup> Creditors of the Barbadian planters, however, complained about the fact that real property was made exempt from the claims of unsecured creditors. A royal Instruction of 1673 directed the Barbadian governor to “get the assembly of Barbados to reenact that law whereby all lands seized by process of law for the satisfaction of debts should be sold as formerly by outcry [auction].”<sup>104</sup> According to the Instruction, merchants extending credit suffered “great inconveniences and prejudice” in trying to recover their debts and failing to strengthen creditors’ legal remedies “will draw certain ruin upon the place.”<sup>105</sup> Although no statute has survived, Barbados appears to have returned to the policy of treating both land and slaves as legally equivalent to chattel for the purpose of satisfying debts by 1677.<sup>106</sup>

Some colonial legislatures — in New England and New Jersey — also made fundamental changes to the body of English law on remedies. 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>107</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

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111, 116, & Moore 288, 301 (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>102</sup> See PARES, *supra* note 80, at 89 n.58. For a discussion of when slaves were characterized as real or chattel property, see *infra* TAN **ERROR! BOOKMARK NOT DEFINED.**-134.

<sup>103</sup> *Id.*

<sup>104</sup> Reenact Law for Sale by Outcry of Debtors’ Lands, in 1 ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS, 1670-1776, at 338-39 (Leonard Woods Labaree ed., 1967).

<sup>105</sup> *Id.* at 339.

<sup>106</sup> Price, *supra* note 12, at 306 n.26. Richard Pares describes the state of property exemption law in the Caribbean prior to 1732 as “a whirl of divergence between islands and of tergiversation in the same island, out of which at least one example of everything can be found sticking out.” Pares, *supra* note 80, at 89 n. 58.

<sup>107</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.*

freehold interest in land to satisfy an unsecured debt.<sup>108</sup> Unlike the 1705 Pennsylvania Statute, the Massachusetts law did not establish a minimum debt amount that would permit creditors to seize debtors' real property.<sup>109</sup> Other New England colonies enacted similar laws in the same period. Connecticut enacted a statute making lands liable for debts in 1702.<sup>110</sup> In 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>111</sup>

The New England and post-1677 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

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<sup>108</sup> The Act states that the recording of title of "houses & lands taken upon execution . . . shall be a legall 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. 1968 (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 THE ACTS AND RESOLVES OF THE PROVINCE OF THE 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>109</sup> See *id.*

<sup>110</sup> Executions. Acts and Laws of His Majesties Colony of Connecticut in New England (Boston: 1702).

<sup>111</sup> An Act for making of Lands and Tenements liable to the Payment of Debts (1718) in ACTS AND LAWS OF HIS MAJESTY'S PROVINCE OF NEW HAMPSHIRE 84-86 (Portsmouth, Fowle 1761).

lands,” instead of simply “goods and chattels” as was the case in England.<sup>112</sup> The writ of *elegit* fell out of use entirely because title to a debtor’s land was more valuable than possession of the land.

Still the New England colonies and Barbados, unlike Pennsylvania and Delaware, imposed a unique limitation on creditors’ remedies. Lands seized in execution were not sold at public auction as chattel property ordinarily would have been. The laws in these colonies provided that real property would be appraised and then transferred to creditors in satisfaction of their judgments. The creditors had to accept an in-kind remedy, not cash after an auction.<sup>113</sup>

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 identified that it intended to remedy the problem 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>114</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

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112 An Act Prescribing the Forme of Writts for Possession, *Scire Facias*, and Replevin (June 12, 1701), ch. 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.”)

113 *Phillips v. Dean*, a 1720 court case in the Plymouth County, Massachusetts Court of Common Pleas illustrates how the Massachusetts 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 fee simple interest — in Dean’s real property. See *Phillips v. Dean* (Ct. Com. Pl. 1720), in 5 PLYMOUTH COURT RECORDS, 1686–1859, at 113 No. 16 (David Thomas König ed., 1979). See also Executions. Acts and Laws of His Majesties Colony of Connecticut in New England (Boston: 1702). (Connecticut law calling for transfer of land to creditor after appraisal).

114 An Act for Making of Lands and Tenements Liable to the Payment of Debts (1692), in 1 ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY, *supra* note 112, at 68.

highly informal obligations such as book accounts<sup>115</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.<sup>116</sup> The Privy Council and House of Lords had appellate jurisdiction over litigation instituted in the colonies. The Board of Trade issued formal instructions to the colonial governors advising them on courses of action relating to local matters. These imperial authorities, however, initially chose not to directly intervene in the realm of legal remedies and 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 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>117</sup>

#### B. *Creditors' Remedies Against 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 their debts. The merchants were centrally interested in credit extended to Virginia and Jamaica, each of which relied on an increasing supply of slave labor purchased on credit. The legislative history of the Debt Recovery Act relates to slave property in two ways. First, colonies relying on slave labor to produce staple crops were more likely than colonies with smaller numbers of slaves to retain the English inheritance laws and other laws protecting real property from unsecured creditors.<sup>118</sup> Eng-

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<sup>115</sup> Book accounts functioned like a tab and were a popular form of unsecured debt instrument through the mid-nineteenth century largely because of a dearth of a cash currency. See Priest, *supra* note 8, at 1328–30.

<sup>116</sup> See BILDER, *supra* note 28; SMITH, *supra* note 28.

<sup>117</sup> See, e.g., *Meynell v. Moore*, 2 Eng. Rep. 70, 74, 4 Brown 103, 110 (H.L. 1727) (applying Antiguan law).

<sup>118</sup> There are exceptions to this generalization: Barbados, for example, was a major slave colony that made land liable for debts. For an economic analysis of variation in inheritance laws, see Lee J. Alston & Morton Owen Schapiro, *Inheritance Laws Across Colonies: Causes and Consequences*, 44 J. ECON. HIST. 277, 279–81 (1984).

lish creditors' concern about the impact of English property exemptions on debt collection was therefore relevant more often to colonies with large slave populations and to credit extended for slave purchases than to colonies with smaller slave populations, such as New England. 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.

Why were colonies with greater slave populations more likely to retain English inheritance laws and to exempt real property from the claims of creditors? One explanation is that the owners of profitable estates desired to replicate the features of the English legal regime that reduced short-term financial risk and that allowed landowners to maintain the integrity of their plantations as productive enterprises over the long term. Landowners may have wanted to prevent the piecemeal dismantling of their estates — such as through the seizure of some or all of the slaves, or some of the assembled land—in order to prevent the interruption of the estates' operations and to retain the value that could only be captured when the land was assembled in its entirety.<sup>119</sup> 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 one quarter part of what it would when kept whole and entire.”<sup>120</sup>

As a general matter, however, the persistence of the English remedial regime in many colonies in the South and West Indies (and New York and Rhode Island) may have been a policy preference that they

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<sup>119</sup> See generally ROBERT C. ALLEN, *ENCLOSURE AND THE YEOMAN* (1992).

<sup>120</sup> John Ashley, *The Fall of Barbados Since the French Edict in 1726*, quoted in PARES, *supra* note 80 at 46 & 88 n.55 (1960). One might ask, however, why Barbados and New England did not retain the English inheritance laws and other protections to land. Barbados is the principal exception to the general rule that colonies engaging primarily in staple crop production using slave labor maintained some version of English protections to land from creditors. By reforming their body of remedies, the Barbados planters signaled to creditors that the legal regime would protect their interests. Barbados developed rapidly, but it was characterized by absenteeism, meaning its landowners often lived in England. *Id.* at 154–55. These landowners relied on large numbers of imported slaves purchased on credit (the Barbados slave population did not reproduce itself until the end of the eighteenth century) and borrowed money to finance more capital-intensive sugar refining than the other sugar colonies. John J. McCusker & Russell R. Menard, *THE ECONOMY OF BRITISH AMERICA, 1607-1789*, at 151-52, 164-67 (1991). The historians Jacob Price and Russell Menard have speculated that Barbados's rapid development of the gang labor method of cultivation was related to its adoption of creditor-friendly remedies. See Price, *supra* note 12; Menard, *supra* note 12. Why Barbados moved to this body of remedies so early is a complex question deserving further exploration.

could afford given the fact that creditors would lend to them on the basis of annual yields of a staple crop regardless of slaves. New England farmers may similarly have feared that execution on land elevated their exposure to financial risk and lost productivity, but the New England colonies had no equivalent staple crops from which they could obtain credit and suffered more severely from liquidity problems than the South.<sup>121</sup> Most wealth in New England was held in the form of land: In 1774, 81% of New England wealth (capital goods) was in the form of real property.<sup>122</sup> In contrast, in the Mid-Atlantic region, in 1774 real property constituted 68.5% of wealth; in the South, real property constituted only 48.6% of wealth and slaves constituted 35.6%.<sup>123</sup> Abolishing the distinctions between real and personal property expanded credit to New England and increased the viability of using mortgages as a “currency” in the absence of other valuable chattel property that might serve as a commodity money.<sup>124</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 driving Parliament’s enactment of the Debt Recovery Act 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 colony with slaves had to address the issue of how to treat slaves within the traditional English property regime. Were slaves real property or personal property?

This 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

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<sup>121</sup> Priest, *supra* note 8, at 1321–32.

<sup>122</sup> MARC EGNAL, *NEW WORLD ECONOMIES: THE GROWTH OF THE THIRTEEN COLONIES AND EARLY CANADA 14–15* & tbl. 1.2 (1998); *see also* ALICE HANSON JONES, *WEALTH OF A NATION TO BE: THE AMERICAN COLONIES ON THE EVE OF THE REVOLUTION 48* & tbl. 4.5 (1980) (containing data underlying Egnal’s table).

<sup>123</sup> EGNAL, *supra* note 122, at 14–15 & tbl. 1.2; *see also* JONES, *supra* note 122, at 98 & tbl. 4.5.

<sup>124</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. *See* G.B. Warden, *The Distribution of Property in Boston, 1692–1775*, 10 *PERSP. AM. HIST.* 81, 87–98 (1976); *see generally* Priest, *supra* note 8, at 1317–34 (describing “money substitutes” in light of currency shortages in New England).

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. from the reach of creditors Inherited 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 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>125</sup> Slaves were typically purchased on credit.<sup>126</sup> 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>127</sup>

In order to secure slaves to the land they worked upon, southern and Caribbean legislatures characterized slaves as real property, but often included special provisions making slaves a form of real estate

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<sup>125</sup> See, e.g., 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."). Compare GAVIN WRIGHT, OLD SOUTH, NEW SOUTH: REVOLUTIONS IN THE SOUTHERN ECONOMY SINCE THE CIVIL WAR 24-25 (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).

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<sup>127</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.

that could be sold to satisfy debts to unsecured creditors, even in the event of the death of the debtor.<sup>128</sup> As an example, the 1727 Virginia Act 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>129</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>130</sup> A 1731 Virginia opinion, *Tucker v. Sweney*,<sup>131</sup> 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 Ex'ors by that Act as Chatels and as such do vest in them for the payment of Debts So that in this Case they are considered no otherwise than Horses or Cattle."<sup>132</sup> The Virginia law is typical of the laws in other American and

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<sup>128</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 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>129</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>130</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; *see also* *Blackwell v. Wilkinson*, Jeff. 73, 85 (Va. 1768), *available at* 1768 WL 4 (holding that 1727 Act did not permit the entail of slaves when they were not annexed to lands).

<sup>131</sup> *Tucker v. Sweney*, 1 Va. Colonial Dec. R39 (1731), *available at* 1731 WL

<sup>31</sup>.  
<sup>132</sup> *Id.* 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).

West Indian colonies.<sup>133</sup> Some colonial legislatures, however, characterized slaves as real estate despite the negative impact that such laws might have had on credit. As is described below, Jamaican lower courts were not permitted to authorize seizure of slaves.<sup>134</sup> In most colonies relying heavily on slave labor, however, unsecured creditors could claim debtors' chattel property and slaves, but not the land.

1. *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. In the late 1720s and the 1730s, a sharp decline in the prices of both sugar and tobacco and general conditions of recession throughout the Atlantic economy transformed the relationship between the colonial legislatures and the imperial authorities.<sup>135</sup> Large numbers of colonial planters were unable to pay their debts to the English factors and merchants. Depressed economic conditions made creditors' remedies a central issue in imperial politics.

The Debt Recovery Act responded in particular to actions of the Virginian and Jamaican legislatures. Concern about Virginia emerged in 1727 when, in response to pressure from England, Governor Gooch requested that the Virginia legislature enact a law allowing English creditors to seize the land of debtors who had formally declared bankruptcy in England. The legislature failed to provide the requested remedy, but tried to placate the imperial authorities with a law (described above) reaffirming that slaves would be available to satisfy debts.<sup>136</sup> English creditors then complained to the Board of Trade about a 1705 Virginia law establishing a three- to five- year statute of limitations (depending on the type of debt) for bringing a suit against a debtor.<sup>137</sup> In 1730, the crown repealed the Virginia statute of limita-

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<sup>133</sup> See *id.* at 66–72.

<sup>134</sup> See *infra* TAN 141. As mentioned above, in 1668 Barbados enacted a short-lived statute that characterized slaves as real estate exempt from creditors claims. See *supra* TAN 102.

<sup>135</sup> See Price, *supra* note 12, at 306 (describing the “abysmally low prices in Europe for both sugar and tobacco.”)

<sup>136</sup> The 1727 law was discussed above. See TAN 127–130.

<sup>137</sup> See Price, *supra* note 12, at 308; An Act Declaring how long Judgments, Bonds, Obligations, and Accounts shall be in Force, ch. 34 (1705) *in* 3 Hening, *supra* note //, at 377–78.

tions by royal proclamation.<sup>138</sup> The Virginia legislature enacted a new law to replace the 1705 law,<sup>139</sup> but the new law purposefully omitted a provision of the 1705 law which was highly beneficial to English creditors: The provision had allowed an English creditor to prove his debts by swearing to them in England, “in the county where he shall reside” or “before the governor or mayor of the place where he is.”<sup>140</sup> By failing to reenact this provision, the Virginia legislature implicitly changed the existing policy from one in which debts could be proved in England, to one requiring English creditors to produce evidence in the local colonial courts.

The complaints relating to Jamaica concerned what types of property would be available to satisfy creditors’ claims. Jamaican law adopted a unique procedural hurdle to creditors wanting to force a seizure of debtors’ land or slaves: the inferior common law courts were directed not to “intermeddle with or determine any actions whatsoever, where Titles of land or Negroes are concerned.” Creditors were required to seek relief in the Supreme Court.<sup>141</sup> In 1728, both houses of the Jamaican legislature passed a bill proposing a legal tender law to “oblige creditors to accept . . . the produce of the Island in payment of their debts” at a specified rate.<sup>142</sup> Legal tender laws requiring creditors to accept goods at designated rates (often less than the market rate) were a popular form of debt relief legislation in the colonial era. The Governor refused to assent to the law and warned the Board of Trade that the legislature had approved the bill.<sup>143</sup>

Then, in August 1731, several merchants in London petitioned the crown to respond more generally to colonial acts and practices that they complained left them either “without any Remedy for the Recovery of their just Debts” or remedies that were “very partial and precarious.”<sup>144</sup> In a subsequent memorandum detailing their concerns,

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138 See 3 Hening, *supra* note //, at 377. The Board of Trade advised the crown that the law conflicted with an English act that made rights created by judgment or by bond unlimited in time. See Price, *supra* note 12, at 308.

139 Ch. 5 (1730), 4 Hening, *supra* note //, at 273

140 An Act Declaring how long Judgments, Bonds, Obligations, and Accounts shall be in Force, ch. 34 (1705) in 3 Hening, *supra* note //, at 380.

141 An Act for regulating Fees, Act 56, sec. 122 (1711), in ACTS OF ASSEMBLY 86, 90 (Kingston, 1787).

142 Calendar of State Papers Colonial: America and West Indies, 1728-1729, #344, at 167-69.

143 *Id.* A petition to the Governor signed by thirty-five merchants and traders formally objected to the bill and explained “that it will injure the credit of the Island and ruin many of the inhabitants.” *Id.*

144 Petition from the Merchants of London (1731), quoted in 1734 BOARD OF TRADE REPORT, *supra* note 158, at 7; see also 4 PROCEEDINGS AND DEBATES OF THE BRITISH PARLIAMENTS RESPECTING NORTH AMERICA 89, 128-29 n.13, 130, 153, 154 (Leo Francis Stock ed., 2003) (records of 1730-

the merchants complained specifically about the fact that land and houses were not liable for debts in Jamaica.<sup>145</sup> A letter written by 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 Marschall’s way.”<sup>146</sup> Tymms added that “This is an evil which prevents attempts at the better settlement of the island.”<sup>147</sup>

Tymms’s letter emphasizes an important relationship between laws exempting slaves from creditors’ claims and laws exempting land from creditors’ claims. Protections to land threatened creditors’ interests even when slaves were legally available to satisfy their claims and the debtor owned a sufficient number of slaves to satisfy his or her debts. Protections to land left open the possibility that debtors might convert their chattel and slave property into land, thereby making it immune from seizure. Moreover, as suggested explicitly in Tymms’s letter, debtors could conceal their chattel and slave assets from the sheriff when he came to seize the property. If the land was protected, the creditor might have no relief. Land, however, cannot be concealed from creditors. Making land available to satisfy the claims of unsecured creditors eliminated debtors’ incentives to convert wealth held in slaves into land, or to conceal slaves and chattel property from their creditors.

In response to the London merchants’ petition, the Privy Council asked the Board of Trade to review the merchants’ concerns and to advise the crown on how to proceed. The 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>148</sup> It advised the crown of the need for a Parliamentary Act on remedies.<sup>149</sup>

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1732 Parliamentary sessions referring to enactment of colonial statutes impeding the recovery of debts).

<sup>145</sup> Particular Facts and Instances in Support of the Merchants’ Petition (1731), in 38 CALENDAR OF STATE PAPERS, COLONIAL: NORTH AMERICA AND THE WEST INDIES, 1574–1739 293–94, item 434i (Routledge CD-ROM 2000) [hereinafter CALENDAR OF STATE PAPERS].

<sup>146</sup> Letter from John Tymms to Humfrey Morice (Sept. 13, 1731), in 38 CALENDAR OF STATE PAPERS, *supra* note 145, at 294–95, item 434ii.

<sup>147</sup> *Id.*

<sup>148</sup> Board of Trade Report to the King (1732), in 1734 BOARD OF TRADE REPORT, *supra* note 158, at 9.

<sup>149</sup> Board of Trade Letter to Crown, quoted in *id.* at 9–10.

## 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.<sup>150</sup> It stated that its purpose was “to reviv[e] . . . the Credit formerly given . . . to the Natives and Inhabitants of the . . . Plantations,” and to “advanc[e] . . . the Trade of this Kingdom.”<sup>151</sup> 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>152</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.”<sup>153</sup> 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>154</sup> In other words, the colonies were individually to use the same procedures for selling land and slaves to satisfy debts as were already in place for selling personal property. 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.<sup>155</sup>

The Debt Recovery Act took away from all of the British colonial legislatures in America and the West Indies the power 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

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<sup>150</sup> 5 Geo. 2, c. 7 (1732).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* Parliament at times responded to generalized fears of colonial debt relief legislation with sweeping statutes that were not responsive to local conditions. *See, e.g.*, An Act to Prevent Paper Bills of Credit, hereafter to be Issued in Any of his Majesty's Colonies or Plantations in America, from Being Declared to be Legal Tender, 4 Geo. 3, c. 34 (1764).

<sup>153</sup> 5 Geo. 2, c. 7 (1732) (emphasis omitted).

<sup>154</sup> *Id.*

<sup>155</sup> 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.

courts apply the Act locally in all cases involving court awards in which enforcement of the judgment was required by means of execution.<sup>156</sup> The Act applied only in the colonies, however, and not in England. England retained its traditional real property exemptions for over a century after the enactment of the Debt Recovery Act, until 1833.<sup>157</sup>

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. The primary participation by colonists in the process of the enactment of the Debt Recovery Act was by Virginians who fiercely opposed the Act. Prior to enactment, Virginia sent Isham Randolph as its agent to Parliament. Randolph submitted a petition to Parliament to request a hearing with respect to the Act.<sup>158</sup> Randolph's petition stated that "said bill will greatly affect the rights and propriety in the landed interest of his Majesty's subjects residing in the said colony."<sup>159</sup> Randolph received a hearing on March 17, 1731, and voiced his opposition to the statute. Randolph's arguments failed to influence Parliament.

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

The Debt Recovery Act radically changed the legal regulation of property in New York, Maryland, North Carolina, South Carolina, Rhode Island, Antigua, Virginia (for approximately a decade) and, later, Georgia and Kentucky.<sup>160</sup> The statute was recognized as authority throughout New England and Barbados, though the effects of the

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<sup>156</sup> *Id.* (mandating that such property would be liable to all debts "owing by any such Person to his Majesty, or any of his Subjects").

<sup>157</sup> See 3 & 4 W. & M. 4, c. 104 (1833).

<sup>158</sup> See Petition of Isham Randolph Esquire Agent for the colony of Virginia, quoted in 4 PROCEEDINGS AND DEBATES OF THE BRITISH PARLIAMENT RESPECTING NORTH AMERICA 153-154 (Leo Francis Stock ed., 2003).

<sup>159</sup> *Id.*

<sup>160</sup> See, e.g., 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." The statute reaffirms that execution sales led to the transfer of the entire interest in the real property owned by the debtor.); *Peckham's v. Fryers*, R.I. Eq. (1741) (holding that the Debt Recovery Act is in force in Rhode Island and applying the Act to disputes related to inheritance); *Peckham's v. Allen*, R.I. Eq. (1741); 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.

Act were more subtle in colonies that had already adopted similar laws independently.<sup>161</sup>

The Virginians — alone among the colonists — 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.”<sup>162</sup> 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.”<sup>163</sup> He expressed his astonishment that land could be sold to satisfy unsecured debts:

[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>164</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>165</sup>

<sup>161</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. ACTS AND LAWS OF HIS MAJESTY'S PROVINCE OF NEW HAMPSHIRE, *supra* note 111. The Debt Recovery Act led to a change in New Hampshire law to allow the seizure of houses during the life of the debtor. *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 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.

For Pennsylvania and Delaware, two other states that had already modified English law, 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>162</sup> HEMPHILL, *supra* note 13, at 229.

<sup>163</sup> *Id.*

<sup>164</sup> “Specialty” is a term used to describe debts made under seal, or secured debts.

<sup>165</sup> HEMPHILL, *supra* note 13, at 229. *See also* CHARLES MCLEAN ANDREWS & FRANCES G. DAVENPORT, GUIDE TO THE MANUSCRIPT

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>166</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>167</sup>

As mentioned, Virginia initially complied with the Act. In 1738, the Virginia General Court issued a decision holding that land could be “sold as Goods taken on a *Fi. fa.*”<sup>168</sup> The court emphasized that this was the first instance of land being sold under the Debt Recovery Act.<sup>169</sup> Nonetheless, in 1748 the Virginians appear to have reversed course and opposed parliamentary authority by applying the Act only to debts involving English and Scottish creditors and not to internal debts.<sup>170</sup>

### C. *The Impact in the Colonies of the Debt Recovery Act.*

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MATERIALS FOR THE HISTORY OF THE UNITED STATES TO 1783 IN THE BRITISH MUSEUM, IN MINOR LONDON ARCHIVES, AND IN THE LIBRARIES OF OXFORD AND CAMBRIDGE, at 205 (1908) (petition to House of Lords from Virginia merchant complaining about Act).

<sup>166</sup> See *supra* TAN 82.

<sup>167</sup> Letter from Robert Carter, cited in HEMPHILL, *supra* note 13, at 227–28.

<sup>168</sup> Harrison v. Halley, (1739) 2 Va. Colonial Dec. B80, Jeff. 58., 1738 WL 7 (Va. Gen. Ct.).

<sup>169</sup> *Id.* (The court stated, “This is the first Attachment that has been granted against Lands since the Stat. 5 Geo. 2. For the more easy Recovery of Debts in the Plantations upon the equity of which this is practice is founded.”)

<sup>170</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) *microformed on* Early American Imprint, 1st Series, Evans, no. 6435, at 55–56 (reporting 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. Hening, ed.).

In 1774, William Knox, an English undersecretary of state in the American Department from 1770 to 1782,<sup>171</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, the economy of colonial British America grew more rapidly than those of the colonies of any other imperial power because of “the superior credit given to the planters by the English merchants.”<sup>172</sup> 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>173</sup> Left alone, however, the colonial legislatures were likely to modify the laws to “injure their British creditors.”<sup>174</sup>

Knox asserted that the Jamaican protections to land and slaves from creditors were perfect examples of colonial legislatures’ propensity to damage credit conditions. Parliament improved economic conditions by enacting the Debt Recovery Act, the effect of which he described as “subjecting lands and negroes in the Colonies to the payment of English book debts.”<sup>175</sup> The Act, Knox said, “may truly be called the *Palladium of Colony credit*, and the *English merchants’ grand security*.”<sup>176</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>177</sup> Were Knox and Story correct to describe the Debt Recovery Act as a source of colonial economic growth?

#### 1. *Legal Effects of the Debt Recovery Act in the Colonies*

<sup>171</sup> Knox was influential in setting English policy for the colonies during the period. Jack P. Greene, *William Knox’s Explanation for the American Revolution*, 30 WM. & MARY Q. 293, 293 (1973) (“[F]ew people in power in Britain thought more seriously or more deeply about the quarrel with the colonies at any stage of its development.”).

<sup>172</sup> William Knox, *The Interest of the Merchants and Manufacturers of Great Britain, in the present contest with the colonies, stated and considered*, 15 (Reprint 1775) (1774).

<sup>173</sup> *Id.*

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

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

<sup>176</sup> *Id.* at 16 (emphasis added). Writing in 1774, Knox 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.” *Id.* For 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 were the “assassins of the British merchant’s security, and, by destroying their confidence in the Colonies, force them to withhold their credit, and thereby do the greatest injury to the Colonies themselves.” *Id.* at 17.

<sup>177</sup> 1 STORY, *supra* note 1, at 168.

In practice the Debt Recovery Act had three principal effects. First, the Act required colonial courts to treat all land, houses, and slaves as legally equivalent to chattel property for the purpose of satisfying 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.”<sup>178</sup> The colonial courts implemented the Act by expanding the writ of *fiery facias* — which traditionally authorized the sheriff to seize the goods and chattels of a debtor — to authorize the seizure of land.<sup>179</sup>

A debtor’s land remained protected from creditors only in one sense: it was typically the last asset that the sheriff was permitted to seize under colonial writs of execution. As an example, the North Carolina writs of execution after the Debt Recovery Act establish a clear ranking of the types of property a sheriff could take to satisfy debts.<sup>180</sup> 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” was to be taken.<sup>181</sup> The sheriff was authorized to seize the debtor’s “Lands, Tenements, Hereditaments and other real Estate” only if goods and chattels and slaves were insufficient to satisfy the debt.<sup>182</sup> This scheme is similar to that adopted in other colonies.

Second, the Act subordinated the interests of heirs 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.<sup>183</sup>

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<sup>178</sup> 5 Geo. 2, c. 7 (1732).

<sup>179</sup> See generally, 4 KENT, *supra* note 13, at \*428 – 31.

<sup>180</sup> North Carolina Writs of Fieri Facias, North Carolina State Archives, photocopies on file with author.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> As Haywood, the prominent North Carolina lawyer, stated 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.

*Baker v. Webb*, 2 N.C. 43, 69 (1 Hayw. 55, 82) (1794) (Haywood arguing for the plaintiff). *Id.* at 53 (65).

Many colonies interpreted the Debt Recovery Act as requiring a procedural modification whereby executors would be in charge of distributing a deceased's land as well as personal property. As mentioned, under English law, the executor marshalled 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>184</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 such Debts . . . as Personal Estates" in the colonies were liable to for seizure and sale.<sup>185</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>186</sup> In an 1804 opinion, Chancellor James Kent stated that, under the Debt Recovery Act, in New York land was "to be treated exactly like personal property; and it became 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>187</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, however, 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.<sup>188</sup> 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 opinion:

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<sup>184</sup> 2 POLLOCK & MAITLAND, *supra* note 29, at 334 ("[T]he executor had nothing to do with the dead man's land, the heir had nothing to do with the chattels . . .").

<sup>185</sup> 5 Geo. 2, c. 7 (1732).

<sup>186</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 course of law." 1 BLACKSTONE, *supra* note 2, at \*134-35.

<sup>187</sup> *Waters v. Stewart*, 1 Cai. Cas. 47, 71 (N.Y. Sup. Ct. 1804); *see also* 4 KENT, *supra* note 13 at \*429 (listing states that allowed land to be sold on a writ of *fiери facias* with no right of redemption).

<sup>188</sup> 5 Geo. 2, c. 7 (1732) (emphasis added).

[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>189</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>190</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>191</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.<sup>192</sup> The Debt Recovery Act therefore made it easier for both secured creditors and unsecured creditors to use legal process to obtain a remedy for their debts.

Slaves had voluntarily been used as collateral and had been sold in judicially supervised auctions long before Parliament enacted the Debt Recovery Act. The Act, however, transformed local practice, which could be overturned by legislation, into an imperial mandate. In 1806, in the first known pamphlet on slave auctions, Bryan Edwards, a Member of the House of Commons, describes the practice of auction-

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<sup>189</sup> *Bell v. Hill*, 2 N.C. 72, 95 (1 Hayw. 85, 109) (1794). See also *Waters*, 1 Cai. Cas. at 70–71; 4 KENT, *supra* note 13, at \*429.

<sup>190</sup> At the time of the Revolution, only Pennsylvania, Maryland, New Jersey, New York and South Carolina had established separate equity courts. See 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 MARYLYNN SALMON, *WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA* 82–83 (1986).

<sup>191</sup> See case cited *infra* notes 11–253 and accompanying text.

<sup>192</sup> See *id.*

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ing 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," which, "though not originally created, is now upheld and confirmed by a British act of parliament."<sup>193</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>194</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>195</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.<sup>196</sup> The Act's principal effect with regard to slaves was to eliminate the possibility that the colonial legislatures might reform their laws and allow slaves to be protected from seizure for debts.

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

The principal economic effects of the Debt Recovery Act were to expand credit markets and land markets.<sup>197</sup> With respect to credit markets, the Act gave greater security to creditors that their debts

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<sup>193</sup> 2 BRYAN EDWARDS, *THE HISTORY OF THE BRITISH COLONIES IN THE WEST INDIES* 366 (1806) (citing 5 Geo. 2, c. 7 (1732)). Thomas Russell, the modern scholar most knowledgeable about American slave auctions, identifies the Edwards essay as the earliest known writing on the frequency of 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>194</sup> 2 EDWARDS, *supra* note 193, at 366.

<sup>195</sup> *Id.* at 367–68. Parliament repealed the Debt Recovery Act with respect to slaves in the remaining British colonies in 1797. See 37 Geo. 3, c. 119 (1797).

<sup>196</sup> See *supra* note 193.

<sup>197</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.

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 by taking authority over debt collection processes away from the colonial legislatures. In practice, the Debt Recovery Act shortened the time in which it took creditors to obtain a legal remedy when debtors failed to pay their debts. Under the traditional English remedies, an unsecured creditor who, say, applied for a writ of *levari facias* to impose a lien upon earnings of the debtor's land might have to wait years for the debt to be paid off. Moreover, the creditor assumed the risk of losing the amount of the debt if the debtor died before the debt was repaid. In contrast, under the regime of the Debt Recovery Act, the creditor could use legal process to force a sale of all a debtor's real and personal property in a short period of time either during the debtor's life or after the debtor died.<sup>198</sup>

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.<sup>199</sup> Lower interest rates meant that more capital was available for productive investment.<sup>200</sup>

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<sup>198</sup> In two of the only works that have discussed potential economic implications of the Debt Recovery Act, Russell R. Menard and Jacob M. Price emphasize the acceleration of legal relief as the most important effect. See Menard, *supra* note 12, at 159-61; Price, *supra* note 12, at 294.

<sup>199</sup> 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 real property has importance only if some value remains 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. See Jeremy Berkowitz & Richard Hynes, *Bankruptcy Exemptions and the Market for Mortgage Loans*, 42 J.L. & ECON. 809 (1999) (demonstrating the importance of the distinction between secured and unsecured credit for bankruptcies that fund home mortgages). 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 as between secured and unsecured credit.

<sup>200</sup> Menard describes lower interest rates as an effect of the Debt Recovery Act. Menard, *supra* note 12, at 161.

Did the Debt Recovery Act, in fact, improve credit markets in the colonies? The clearest example of the Act's economic effect is a statute enacted in 1739 in Jamaica which explicitly responded to the Debt Recovery Act. The Act lowered the legal interest rate by twenty percent.<sup>201</sup> The Jamaican statute stated that "[w]hereas 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 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>202</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>203</sup>

The Jamaican usury law is strong evidence that contemporaries believed the Debt Recovery Act "secured [creditors'] debts in a more ample manner," but statutes establishing maximum legal rates of interest were not always complied with when the legal interest rate differed substantially from the market interest rate. Recent empirical studies examining market interest rates, however, have found a clear correlation between more expansive property exemption laws and higher rates of interest.<sup>204</sup>

In the colonial period, interest rates were likely to be most often expressed in terms of import levels. English creditors sold goods to colonial factors that the factors, in turn, sold to local colonial producers on credit for extended periods of time. Pinpointing the precise economic effect of the Debt Recovery Act 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

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<sup>201</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>202</sup> *Id.*

<sup>203</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 Act, of course, would have had a lesser effect in those colonies.

<sup>204</sup> See Emily Y. Lin & Michelle J. White, *Bankruptcy and the Market for Mortgage and Home Improvement Loans*, 50 J. URB. 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 Scholz & 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).

rice; crop production, which might be dependent on weather; productivity advances; and equally important, economic events in England, Europe, and Africa). Moreover, the Debt Recovery Act was enacted during a period of economic recession, so the immediate economic effects are difficult to disaggregate from the growth one would expect in the aftermath of a recession. 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 appeared to improve considerably in the period after the enactment of the Debt Recovery Act, as reported in studies not addressing the Act. As an example, the economic historian Marc Egnal examined advertisements in the *Virginia Gazette* and found that, “[i]n the 1730s the typical advertisement for land or slaves demanded payment in cash.”<sup>205</sup> By the 1760s, similar advertisements offered credit terms of a year or more.<sup>206</sup> Egnal adds that “[s]tatistical series and planter correspondence illustrate the strong growth of credit after the 1740s.”<sup>207</sup> Customs records reveal that imports to the colonies from England increased steadily from the 1730s and 1740s through the end of the colonial period.<sup>208</sup> 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>209</sup> Over this period, colonial factors became willing to accept bills of exchange drawn for longer periods of time.<sup>210</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>211</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>212</sup>

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<sup>205</sup> See EGNAL, *supra* note 122, at 93.

<sup>206</sup> *Id.* at 93 fig.5.12.

<sup>207</sup> *Id.*

<sup>208</sup> U.S. BUREAU OF THE CENSUS, 2 HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 1176 tbl.213 – 226 (1975). See also EGNAL, *supra* note 122, at 83 tbl.5.6 (graph of per capita imports).

<sup>209</sup> *Id.*

<sup>210</sup> See SHERIDAN, *supra* note 12, at 290.

<sup>211</sup> See JOHN J. MCCUSKER & RUSSELL R. MENARD, THE ECONOMY OF BRITISH AMERICA, 1607–1789 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>212</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).

Slave imports expanded during the same period.<sup>213</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 relates 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. And Virginia's laws were noted along with those of Jamaica as a concern by the English merchants petitioning Parliament for the Act. Slave imports to Virginia equaled 276 in 1730 and 184 in 1731; rising to 1,291 in 1732; and, in the years following, from 1733 to 1737, to 1,720, 1,587, 2,104, 3,222, and 2,174, respectively.<sup>214</sup> These data are not conclusive evidence that the Debt Recovery Act had important economic effects on colonial America, but they are suggestive of the effects.<sup>215</sup>

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 sell separately to pay off creditors or to settle with their creditors outside of the court system, rather than endure a foreclosure sale. By selling separately or settling with creditors, debtors would avoid expensive court costs, lawyers' fees, and other transaction costs in the court-ordered auction process.<sup>216</sup> Changing the default rule to one permitting

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<sup>213</sup> EGNAL, *supra* note 122, at 100 – 01 (showing the increase in slave imports into Charleston, South Carolina).

<sup>214</sup> 2 HISTORICAL STATISTICS, *supra* note 208, at 1172 tbl.146–149.

<sup>215</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 12, at 310. Price noted that slave imports to Virginia were “buoyant” following the Debt Recovery Act. *Id.* at 310 n.36.

<sup>216</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

unsecured creditors to seize land would lead to an increase in voluntary sales of property.

### 3. The Question of Entailed Land

Measuring the precise effects of the Debt Recovery Act on credit markets and on land markets is complicated, however, by the fact that the Debt Recovery Act did not disrupt landowners' ability to entail their property voluntarily and did not affect widows' dower interests in lands owned by their husbands. Land that was entailed could not be sold or seized by court order because such a sale would have conflicted with the vested interests of remaindermen.<sup>217</sup> The Debt Recovery Act did not change the effect of entailing land. 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.)

Unfortunately, historical scholarship is ambiguous as to the extent and importance of the entail during the colonial period.<sup>218</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 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 risk—at the expense of creditors—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. The operation of the practice of entailing property in various colonies requires further study.

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amount for the lowest quartile of debts, and averaged 32.6% of all debts. 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.

<sup>217</sup> See *supra* TAN 22–24.

<sup>218</sup> See *supra* note 23.

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. The English viewed the Act as exemplifying the economic advantage of parliamentary oversight of colonial legislation. As the colonists became increasingly hostile toward parliamentary regulation and taxation during the 1760s, the question emerged as to 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 a 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, argued that the Debt Recovery Act had severely impinged upon central liberties inherent in English common and statutory law.<sup>219</sup> 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>220</sup>*

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<sup>219</sup> Knox owned large amounts of property in Georgia, a state directly affected by the Debt Recovery Act, so that he had some practical basis for understanding the impact of the law.

<sup>220</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 Brit-*

Alexander Hamilton later reflected upon the Debt Recovery Act as an exercise of parliamentary authority that exceeded the bounds of legislative authority to which the colonists should have submitted. 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>221</sup>

It appears that Hamilton intends to emphasize that the Debt Recovery Act was a regrettable precedent for parliamentary regulation that may have empowered Parliament to enact the offensive statutes leading to the American Revolution (such as the Stamp Act and the Townshend Act). Hamilton's statement also, however, has significance in understanding the role of creditors' remedies in Founding era politics: Describing the Debt Recovery Act as the "one of the Highest Acts of legislature" reveals the importance placed upon creditors' remedies as a matter of economic, social and political concern. As we shall see, the states were highly protective of their right to legislate in this area and were unwilling to cede authority to the federal government in the way that the colonies had, through tacit acceptance, ceded authority to Parliament and the Board of Trade in the colonial era. At the Constitutional convention, James Madison proposed giving the federal government the power to veto state legislation on the Parliamentary model.<sup>222</sup> Ultimately, the model of routine Parliamentary supervision was rejected and the United States Constitution limited federal government oversight of state legislation on commercial matters principally to the Contracts Clause and the Commerce Clause. In opposi-

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*ish 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>221</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).

<sup>222</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).

tion to the imperial model, the states retained firm control over their debt satisfaction and property exemption policies.

The next Part discusses the extension of the Debt Recovery Act by state legislatures and in state court decisions in the Founding Era. It then discusses the Act as the subject of debate with respect to federal government policies.

### *III. Defining the Role of Land and Inheritance in Founding Era America*

The Debt Recovery Act brought greater uniformity to the body of creditor remedies enacted throughout the British colonies in America and the West Indies. After the colonists' gained independence from British parliamentary authority, however, state legislatures and courts were forced to enact laws relating to creditors' remedies, inheritance, and judicial process, each of which had previously been governed by the Act. The question of creditors' remedies and legal process related to deeper issues about the nature of the society as a whole. 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.<sup>223</sup> 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 the independence from corrupt influences that was necessary for political participation and led to the strongest form of attachment to the nation.<sup>224</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>225</sup>

Contemporaries viewed the issues at hand as involving the definition of the role of real property in the society: Was land simply a form of wealth like other chattel property? If not, to what extent should government policy isolate land from commercial risks? What was the proper role of inheritance in post-Revolutionary America? Without a parliamentary mandate, the context in which laws pertaining to property and the claims of creditors were enacted became increasingly complex. Each state had to decide how to balance the desire for credit and economic advance with the competing desire to

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<sup>223</sup> See *supra* note 19 and TAN.

<sup>224</sup> See Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 339–40 (1989); see also ALEXANDER, *supra* note 13, at 66 – 69 (discussing the civic republican view of property as a socializing force).

<sup>225</sup> WOOD, *supra* note 19, at 234 (quoting PA. PACKET, Nov. 26, 1776) (internal quotation marks omitted).

safeguard the landowners “independence” and families’ financial security. State policies and court decisions in the 1780s and afterward reveal a deep lack of uniformity among the states and their constituents in their understanding of the most desirable economic and inheritance policies. These differences among the states became a powerful barrier to strong federal government authority.

This Part will discuss the legacy of the Debt Recovery Act through an examination of state legislation, court decisions, and theoretical discussions. It will then discuss the implications for American federalism of inter-state diversity on the question of protections to real property from creditors in the Founding Era.

*A. The Extension of the Debt Recovery Act in State Legislation, Court Decisions on Inheritance, and Whig Theory*

The Debt Recovery Act had a lasting legacy in Founding era America. It was extended by many state legislatures and courts into the newly created state law. Its extension in these states reflected two dominant concerns: First, after the states gained their independence, the state legislatures—viewing themselves as in competition for credit—were eager to signal to outside investors that state law would promote the interests of creditors and investors. Second, state judges and legislators were influenced by one of the dominant ideological positions of the Founding era—referred to here as the Whig view—which emphasized the importance of the expansion of commerce to the creation of an American meritocracy. According to this view, the new American republican order was painted as in stark contrast to the older English order in which social and political privilege were related to land ownership and inheritance. The policy of making land available to satisfy debts, and the streamlined nature of legal process under the Debt Recovery Act were defended on the ground that the circulation of land would prevent the entrenchment of a domestic aristocracy.

*1. Extending the Debt Recovery Act in State Legislation and Court Decisions*

Most state legislatures enacted statutes affirming that the remedial regime existing prior to the American Revolution would remain in place without substantial modification.<sup>226</sup> Indeed, the early state legis-

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<sup>226</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, 404 (1828). 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.*

lation was even more explicit than analogous colonial 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>227</sup>

The abolition of the practice of entailing property in the 1780s was another means by which state legislatures attempted to improve the terms of credit offered to the newly independent states.<sup>228</sup> By abolishing the entail, the state legislatures removed 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.

The enactment of new state statutes, however, invited litigation concerning how the courts would interpret the new statutory language. The most highly litigated issues under the state statutes that superseded the Debt Recovery Act related to: (1) the procedural issue of whether heirs would be extended the privilege of being made parties to

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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.")

<sup>227</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>228</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 13, at 14–17 (describing the entail as generally "abolished" in the United States).

legal actions in which the inheritance of land was at stake; and (2) the status under the new state legislation of the mortgagor's equity of redemption.<sup>229</sup>

Blackstone, it may be recalled, described as an “absolute” right of property that “no man shall be disinherited . . . unless he be unduly brought to answer, and be forejudged by course of law.”<sup>230</sup> The issue of whether this traditional privilege would be recognized emerged repeatedly in the Founding Era. State courts had to decide whether executors of estates should be permitted to distribute land as well as personal property to creditors without the formal participation of the heir. 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 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>231</sup>

The issues involved are illustrated by *D’Urphey v. Nelson*,<sup>232</sup> an 1803 opinion issued by the Constitutional Court of Appeals of South Carolina, which unequivocally upheld the principle in that state. D’Urphey, the plaintiff, brought an action as the heir to his father’s estate in real property by means of intestacy. His father’s real property had been sold by the lower court to satisfy one of his father’s bond debts. D’Urphey petitioned the South Carolina Constitutional Court of Appeals to hold void the deed of conveyance of the property issued

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<sup>229</sup> A less controversial issue involved whether the personal property had to be exhausted before the sheriff seized the debtor’s real 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. 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, 367 (Md. 1831) (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>230</sup> See note 62 and accompanying text.

<sup>231</sup> *Telfair v. Stead’s Executors*, 6 U.S. (2 Cranch) 407, 418 (1805) (Marshall, J.).

<sup>232</sup> 3 S.C.L. (1 Brev.) 289 (Const. (t. 1803).

by the sheriff because his consent had not been obtained before the land was sold.

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 seized and sold “*in like manner as personal estate.*”<sup>233</sup> According to the court, “the statute cannot be construed to make any distinction between lands and personal chattels, but they must be considered as equally liable for satisfaction of debts, and to be assets for that purpose in the hands of the personal representatives of the debtor.”<sup>234</sup> It noted that the Debt Recovery Act was “certainly intended for the benefit of the creditor.”<sup>235</sup> More dramatically, the Court stated that due to the Debt Recovery Act:

[T]he 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>236</sup>

A second issue under the new state legislation involved the question of whether mortgagors retained the traditional equitable right of redemption after a judgment at law. 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>237</sup> *Waters v. Stewart*,<sup>238</sup> which was decided by Chancellor Kent in 1804 and litigated by Alexander Hamilton (among others), was a landmark case in this

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<sup>233</sup> *Id.* at 291.

<sup>234</sup> 1803 WL 295 at \*2.

<sup>235</sup> *Id.* at 292.

<sup>236</sup> *Id.* The courts of New York, Maryland, New Jersey, New Hampshire and Massachusetts adopted similar policies. 4 KENT, *supra* note 13, at 425, 431 (New York).

<sup>237</sup> See, e.g., 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 13, 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, 404 (1828). The court questioned whether the Debt Recovery Act necessarily implied that the equity of redemption should be sold but concluded that “this practice is of too long standing, and is the foundation of too many titles to be now questioned.” *Id.*

<sup>238</sup> 1 Cai. Cas. 47 (N.Y. 1804).

area.<sup>239</sup> The facts in *Waters* are similar to the facts in *D'Urphey*. 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 equity of redemption interest (meaning the interest in the land held by the mortgagor after pledging his land in the mortgage agreement), however, had been sold under the directive of a law court to satisfy one of their step-father's debts during the settlement of his estate. The question involved: 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 *fiery facias*?"<sup>240</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>241</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, in which 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 real into personal estate."<sup>242</sup> The court disparagingly described traditional distinctions made between real and chattel property as "solicitude of the holders of landed estates, to perpetuate them within families, combined with the genius of the *English* government."<sup>243</sup> The court noted,

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<sup>239</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>240</sup> 1 Cai. Cas. at 49-50.

<sup>241</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 108-09, 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).

<sup>242</sup> 1 Cai. Cas. at \_\_\_.

<sup>243</sup> *Id.*

however, that 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>244</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.”<sup>245</sup> 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. The lawyers also argued 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.<sup>246</sup>

Chancellor Kent upheld the decision of the lower court. With regard to the law, Kent adopted the argument made by Alexander Hamilton and Josiah Hoffman, the lawyers for Stewart (the person who had purchased the land at the execution sale). He held that since mortgage law had evolved to treat a mortgage as simply a lien on land, rather than a title interest in land, the mortgagor should be treated as having a *legal* interest, subject to the remedies applicable in courts of law. Kent held that that interest should therefore be viewed as “real estate” under the New York statute.<sup>247</sup> Kent noted that the New York statute at issue “adopted the same loose latitudinary terms as those in the statute of *Geo. II* [the Debt Recovery Act]”<sup>248</sup> and that “there can be no doubt that, I think, but that an equity of redemption will be comprehended by that expression.”<sup>249</sup>

Kent also emphasized, however, two practical issues. First, he noted that courts of law had been selling land subject to mortgages in execution sales since the Debt Recovery Act and stated that the “long and established practice in favour of such sales . . . is of itself deserv-

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<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

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<sup>247</sup> Kent reasoned that “[i]f the mortgagor is to be deemed the owner of the land, as 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 instance of other creditors, should treat the land as his, under the same limitation.” 1 Cai. Cas. at 69.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

ing of considerable weight.”<sup>250</sup> Kent also noted the importance of offering low-cost procedures to creditors. According to Kent, “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>251</sup> Kent emphasized that execution sales of real property were “agreeable to the general bent and spirit of the more modern decisions.”<sup>252</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, often came to a similar conclusion as Kent.<sup>253</sup>

The North Carolina state legislation and judicial decisions, such as *D’Urphey v. Nelson* and *Waters v. Stewart* described above, reflect a broader ideological position that asserted that protections to real property from the claims of creditors were undesirable remnants of aristocratic England that had no place in republican America. It is notable that the judges in both the *D’Urphey* and *Waters* opinions felt compelled to explicitly state that the laws at issue purposefully rejected the value system of the English landed class that privileged heirs. Perhaps implicitly, these judges related creditors’ interests and streamlined judicial process with the dismantling of the vestiges of feudalism (which historians have previously associated with the abolition of primogeniture and the entail).

The connections between the alienability of land and the rejection of the aristocratic mode of governance were made explicitly in a 1787 pamphlet by Noah Webster. 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

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<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> 4 KENT, COMMENTARIES, *supra* note 13, at 426–27. See also *Ingersoll v. Sawyer*, 19 Mass. (1824) (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).

this is lost, power departs, liberty expires, and a commonwealth will inevitably assume some other form.<sup>254</sup>

Over the years, the Whig position reinforced and extended this line of argument. 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>255</sup>

As is 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. It is interesting that there is no hint of concern relating to the possibility that greater commerce might create inequalities of its own, inequalities that could influence, and potentially corrupt, politics. The Whig view narrowly focused on the belief that subjecting landownership to the risks of commercial life would prevent rule an American aristocracy on the English model.

## 2. *Opposition to the Debt Recovery Act Regime in Founding Era America*

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<sup>254</sup> NOAH WEBSTER, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION 47 (Philadelphia, Prichard & Hall 1787).

<sup>255</sup> DANIEL WEBSTER, A DISCOURSE, DELIVERED AT PLYMOUTH, DECEMBER 22, 1820, IN COMMEMORATION OF THE FIRST SETTLEMENT OF NEW-ENGLAND 72 (Boston, Wells and Lilly 1821). Daniel Webster would likely have agreed with the reform movement that developed in the 1820s and 1830s that 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 Jeremy Bentham:

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.

Jeremy Bentham, Abridged Petition for Justices, 531-533.

The Whig position 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>256</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.<sup>257</sup> Legal tender laws, as mentioned, 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 form of debt relief legislation was enacted in Virginia, Pennsylvania, Maryland, Massachusetts, New Hampshire, North Carolina, South Carolina, and Rhode Island.<sup>258</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. 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.

Moreover, some state court judges were highly respectful of traditional English legal distinctions between real and personal property. In *Baker v. Webb*,<sup>259</sup> for example, the North Carolina Superior Court addressed the same issue as that of *D'Urphey 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 "[t]he whole weight of this labored case, seems reducible to this question, what is the true construction of the 5th Geo. II. Ch. 7. [the Debt Recovery Act]?"<sup>260</sup> Did the Act 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 in *Baker* held that the Debt Recovery Act was compatible with fundamental legal distinctions between real and personal property and between law and equity. The court held that, at the death of a land-

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<sup>256</sup> SEE CHARLES WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* 147 (1991); ROBERT J. TAYLOR, *WESTERN MASSACHUSETTS IN THE REVOLUTION* 105–20 (1974). For the economic context of Shays's Rebellion, see Priest, *supra* note 11, at 2440–44.

<sup>257</sup> WARREN, *supra* note 256, at 146–48.

<sup>258</sup> *Id.* at 147; MANN, *supra* note 13, at 174–75.

<sup>259</sup> 2 N.C. (1 Hayw.) 43 (1799).

<sup>260</sup> *Id.* at 71 (Macay, J.).

owner, 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>261</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 as implicating 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 to real property necessary to maintain the independence and attachment of the citizenry and therefore equally essential to a republican form of government? According to Haywood, the traditional privilege of heirs to be parties 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 this act, that the rule of law is so.<sup>262</sup>

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<sup>261</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 [sic] 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.

<sup>262</sup> *Id.* at 54–55. Haywood said further:

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

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 re-enact the Debt Recovery Act and maintained the traditional English remedial regime until 1849.<sup>263</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>264</sup> In Virginia, Pennsylvania, and Delaware, the writ of *elegit* remained an important creditor remedy throughout the nineteenth century.<sup>265</sup>

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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 as 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.*

<sup>263</sup> Va Code of 1849, ch. 186, §9; Riesenfeld, *supra* note 13, at 712.

<sup>264</sup> *Smith v. Ford*, 161 A. 214 (Del. 1932) describes the history of Delaware and Pennsylvania law making lands available to satisfy unsecured debts. *Id.* at 216 – 17. 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, 549 (Pa. 1929). See also 4 KENT, *supra* note 13, at 428.

<sup>265</sup> Courts in these states heard cases relating to the writ of *elegit*. In a case heard by the Delaware Chancery Court, for example, a tenant by *elegit* failed to rotate crops according to customary practice. *Wilds v. Layton*, 1 Del. Ch. 226 (1822). 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. *Id.* at 229.

A second 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. 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>266</sup>

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.*"<sup>267</sup> 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>268</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, as mentioned, typically viewed American republicanism as rooted in the country's unique attribute of having widespread freehold ownership. Usufructuary rights have

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<sup>266</sup> It was possible, of course, to value freehold property ownership as a prerequisite to political participation and to 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 and defended the proposition that government representation should be structured so that property owners exercised political power in proportion to the amount of property they owned. See Daniel Webster, Speech on Representation at the Massachusetts Constitutional Convention 1820–1821, in *DEMOCRACY, LIBERTY, AND PROPERTY: THE STATE CONSTITUTIONAL CONVENTIONS OF THE 1820S*, at 97–101 (Merrill D. Peterson ed., 1966).

<sup>267</sup> Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 *THE PAPERS OF THOMAS JEFFERSON* 392 (Julian P. Boyd ed., 1958) (internal quotation mark omitted).

<sup>268</sup> *Id.* at 393.

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 world view. The Whig view was that the right of the living freehold 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.<sup>269</sup> 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>270</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 a legal alternative to the English regime. 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.<sup>271</sup> 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 "Whig" and "Virginia" positions, however, were not held universally in any one state. Indeed, some Virginians opposed Virginia's body of laws — again, which retained the traditional English remedial regime — on grounds that its property exemptions were eco-

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<sup>269</sup> See 4 KENT, *supra* note 13, at 18.

<sup>270</sup> *Id.*

<sup>271</sup> Jefferson described the abolition of primogeniture as necessary to destroy "every fibre . . . of ancient or future aristocracy" as the basis of "a foundation . . . for a government truly republican." Jefferson, "Autobiography," in 1 THE WRITINGS OF THOMAS JEFFERSON 73 (Andrew A. Lipscomb ed., 1903). See also A Bill Directing the Course of Descents, in 2 THE PAPERS OF THOMAS JEFFERSON 391 (1950) (abolishing primogeniture); A Bill Concerning Wills; the Distribution of Intestate's Estates; and the Duty of Executors and Administrators, in *id.* at 394 (describing process for settling deceaseds' estates).

nomically 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.<sup>272</sup>

According to the letter, Virginians remained "in the chains of British slavery"<sup>273</sup> because state laws protecting land drove capital elsewhere, even though "[w]e have the best mortgage to offer, which is immense and fruitful lands."<sup>274</sup> Virginians thus:

[H]ave enjoyed none of the great advantages, which independence promised us . . . . For this axiom is certain, *nothing is lent 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

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<sup>272</sup> *A True Friend*, VA. INDEP. CHRON., Nov. 14, 1787, reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 161 – 64 (John P. Kaminski et al. eds., 1988).

<sup>273</sup> *Id.* at 160.

<sup>274</sup> *Id.* at 161.

of 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 of her independence.<sup>275</sup>

As this letter suggests, the question of property exemptions was highly contentious.

### 3. *Property Exemptions and Federal Government Policies*

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 control<sup>276</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>277</sup> In 1790, President George Washington advised Congress to consider “whether an uniform process of execution, on sentences issuing from the federal courts, be not desirable through all the States.”<sup>278</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.<sup>279</sup>

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.

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<sup>275</sup> *Id.*

<sup>276</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>277</sup> See Act of Sept. 29, 1789, ch. 21, 1 Stat. 93; Charles Warren, *Federal Process and State Legislation*, 16 VA. L. REV. 421, 426–30 (1930).

<sup>278</sup> 2 ANNALS OF CONG. 1730 (1790).

<sup>279</sup> See Warren, *supra* note 277 (describing the use of state remedies in the federal courts through the first half of the nineteenth century).

Congress adopted Pennsylvania's policy of allowing sale of the debtor's property only if the debt exceeded seven years of the property's earnings.<sup>280</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 Bankruptcy Bill of 1798 (THE FIRST BANKRUPTCY BILL THAT WAS SERIOUSLY CONSIDERED). Under the Bill, a bankrupt's lands 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."<sup>281</sup> 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>282</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."<sup>283</sup>

A Bankruptcy Act allowing execution against a bankrupt's land was enacted in April of 1800, but was repealed three years later under the Jefferson administration.<sup>284</sup> Tensions between states over property exemptions was a central reason for the failure of bankruptcy legislation for much of the nineteenth century.

### Conclusion

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<sup>280</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).

<sup>281</sup> 9 ANNALS OF CONG. 2660 (1799).

<sup>282</sup> *Id.*

<sup>283</sup> ANNALS OF CONGRESS, 5th Cong., 3d Sess. (House Reports) at 2651.

<sup>284</sup> Annals of Congress, 6<sup>th</sup> Cong., 1<sup>st</sup> Sess. 533-534 (Feb. 21, 1800); WARREN, *supra* note 259, at 19-20.

Subsequent history involved a building up of protections to real property. 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.<sup>285</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.

During the early nineteenth century, state legislatures enacted laws exempting various types of personal property from the claims of creditors.<sup>286</sup> The first major wave of reform laws, however, consisted of enactments in the aftermath of the recession of 1817 to 1818.<sup>287</sup> 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>288</sup> Many state legislatures expanded the amount of personal property that was exempt from unsecured creditors' claims.<sup>289</sup> Many states also enacted statutory periods during

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<sup>285</sup> See William T. Vukowich, *Debtors' Exemption Rights*, 62 GEO. L.J. 779, 783 (1974).

<sup>286</sup> See, e.g., An Act to Exempt Certain Goods and Chattels of Debtors from Attachment and Execution, 1807 N.H. Laws 19 (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>287</sup> WARREN, *supra* note 13, at 26–27.

<sup>288</sup> See *id.*; EDWARD J. BALLEISEN, NAVIGATING FAILURE: BANKRUPTCY AND COMMERCIAL SOCIETY IN ANTEBELLUM AMERICA 12 (2001).

<sup>289</sup> See BALLEISEN, *supra* note 288, at 12 (2001); 3–4 ANNUAL LAW REGISTER OF THE UNITED STATES (William Griffith ed., 1822) (listing state property exemptions). In response to the proliferation of educational institutions, many of the new state laws exempted "bibles and school books," "books of professional men," or "books of a student" from creditors' claims. See Mor-

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>290</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 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>291</sup>

Further reform occurred when 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.<sup>292</sup> 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>293</sup> Then, over the next few decades (and particularly in the 1850s), state legislatures enacted homestead exemption laws that established a minimum number of acres (typically ranging from 40 to 160 acres) or a set dollars' worth of land to be immune from creditors' claims.<sup>294</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

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ton J. Horwitz, *Conceptualizing the Right of Access to Technology*, 79 WASH. L. REV. 105, 113 & n.37 (2004).

<sup>290</sup> 4 KENT, *supra* note 13, at 467 (“[A]ll . . . redemptions must be within the fifteen months from the time of the sale; for the officer is then to execute a deed to the person entitled, and the title so acquired becomes absolute in law.”)

<sup>291</sup> *Id.* at 426.

<sup>292</sup> See Richard H. Chused, *Married Women's Property Law: 1800–1850*, 71 GEO. L.J. 1359, 1400–1404 (1983).

<sup>293</sup> See *id.* at 1398 – 99 & nn.207 – 09 (citing laws of Mississippi enacted in 1839, Maryland in 1842 and 1843, Michigan in 1844, Maine in 1844, Massachusetts in 1845, Connecticut in 1845 and 1849, 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>294</sup> See Paul Goodman, *The Emergence of Homestead Exemption in the United States: Accommodation and Resistance to the Market Revolution, 1840–1880*, 80 J. AM. HIST. 470, 470–72 (1993); see also Alison D. Morantz, *There's No Place Like Home: Homestead Exemption and Judicial Construction of Family in Nineteenth-Century America*, 24 LAW & HIST. REV. 245, 252–54 (2006) (describing by region the spread of homestead exemption laws); Vukowich, *supra* note 11, at 783 (discussing economic depressions and other factors as impetuses for homestead exemption laws in southern and western states).

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 amenable to enacting laws that would increase the availability of credit. As Joseph Story explained, these laws 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>295</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>295</sup> 1 STORY, *supra* note 1, § 182, at 168.