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ARTICLES

CREATING AN AMERICAN PROPERTY LAW:
ALIENABILITY AND ITS LIMITS IN AMERICAN HISTORY

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CREATING AN AMERICAN PROPERTY LAW: ALIENABILITY AND ITS LIMITS IN AMERICAN HISTORY

Claire Priest*

This article analyzes an issue central to the economic and political development of the early United States: laws protecting real property from the claims of creditors. Traditional English law, protecting inheritance, shielded a debtor's land from the reach of creditors in two respects. An individual's freehold interest in land was exempted from the claims of unsecured creditors both during life and in inheritance proceedings. In addition, even when 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. In 1732, to advance the economic interests of English merchants, Parliament enacted a sweeping statute, the Act for the More Easy Recovery of Debts in His Majesty's Plantations and Colonies 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 substantially dismantled the legal framework of the English inheritance system by giving unsecured creditors priority to a deceased's land over heirs. The Act also required that the courts hold auctions to sell both slaves and real property to satisfy debts in most colonies. More broadly, this legal transformation likely led to greater commodification of real property, the expansion of slavery, and more capital for economic development. American landholders, however, were subjected to greater financial risk than would have been the case in the absence of the Act.

The Act for the More Easy Recovery of Debts was reenacted by most, but not all, state legislatures in the founding era. One legacy of the colonial era was that, through the 1840s, most states exempted only minimal amounts of property from creditors' claims. 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

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property law, the economic development of the colonies and states, the expansion of slavery, and American federalism.

INTRODUCTION

Joseph Story, writing about American legal development in his *Commentaries on the Constitution*, 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.”¹

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 few legal and procedural hurdles impeded the use of land in market exchanges, and therefore that land was potentially available for full economic use.

Story’s comment also implies that America had departed from the traditional English law of real property which treated land as the source of wealth of families that, like an endowment, would persist through the generations. English law reflected a society in which political and social authority was vested in a landed class that perpetuated itself through long-term ownership of real property. Blackstone’s *Commentaries* of the late eighteenth century described “the principal object of the laws of real property in England” as the law of inheritance.² 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 more opportunity for political participation than existed in European society. As Noah Webster stated 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*.”³

Traditional English laws and procedures stabilized the inheritance system of the English landed class by protecting real property from the claims of creditors in multiple ways. The law incorporated a default

¹ 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 182 (Boston, Hilliard, Gray, & Co. 1833).

² WILLIAM BLACKSTONE, 2 COMMENTARIES *201; 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.”).

³ NOAH WEBSTER, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION 47 (Phila., Prichard & Hall 1787).

rule that protected property owners' titles to land from the claims of all unsecured creditors — that is, claims to collect debts when land had not been explicitly offered as security.⁴ 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 Sir Samuel Romilly described, an English landowner was "allowed to live in splendour on his property, while his honest creditors remain[ed] unpaid, struggling perhaps with all the vicissitudes of trade, or reduced to bankruptcy and ruin."⁵

Under English law, landowners could alienate freehold interests in land by satisfying the formalities of secured credit agreements such as mortgages, bonds, deeds, or wills — formalities not undertaken for unsecured debt. Creditors seeking to force the seizure of land pledged in secured credit agreements, however, suffered the procedural costs of having to obtain a judgment in a common law court and a foreclosure decree in the Court of Chancery. Moreover, the Court of Chancery gave landed inheritance preferential treatment over debt satisfaction in its 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, was likely to have reduced capital available for productive investment. The exemption of title interests in land from creditors' claims meant that all unsecured creditors assumed the risk that debtors (landowners or not) 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 Court of Chancery. This structure of property rules suggests that, in England, greater stability in real property ownership over the generations was valued more highly than the more extensive credit and investment in economic growth that would have resulted from less restrictive land credit policies and the reform of Chancery.

⁴ For a discussion of English remedies, see *infra* section I.A, pp. 401–03.

⁵ Samuel Romilly, Freehold Estates Bill (Feb. 7, 1816), in 2 THE SPEECHES OF SIR SAMUEL ROMILLY IN THE HOUSE OF COMMONS 74, 75 (William Peter ed., London, James Ridgway & Sons 1820).

As this Article shows, the status of the American colonies *as colonies* in the British Empire, distinguishable socially and politically from England, and the desire among English creditors and colonial subjects to improve credit conditions in the Empire led to the removal throughout the colonies of traditional English protections to land from creditors. Initially, most colonial courts and legislatures administered the English body of laws exempting real property from the claims of creditors. In the late seventeenth century, however, a number of colonial legislatures in New England and the 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 America⁶ ("Debt Recovery Act"). The Debt Recovery Act applied to all of the North American and West Indian British colonies. It 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 property, chattel property, and slaves in relation to the claims of creditors. Under the Act, land and slaves could be seized and sold to satisfy any type of debt, including many widely used forms of unsecured debt.⁷ 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. In all colonies in America after 1732, in contrast to the English regime, an heir to real property took only the land that remained after the claims of all of the deceased's creditors had been satisfied.

Procedurally, the Act required courts to extend to real property and to slave property the local processes in place for seizing and selling

⁶ 5 Geo. 2, c. 7 (1732) (Eng.).

⁷ The most widely used forms of unsecured debt in the eighteenth century were book accounts (similar to tabs), bills of exchange, and promissory notes (similar to checks). See Claire Priest, *Currency Policies and Legal Development in Colonial New England*, 110 YALE L.J. 1303, 1328–32 (2001).

debtors' chattel property in satisfaction of debts. These processes 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 later by 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.⁸

Moreover, 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. 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, the Act removed protections to real property that had increased stability in landownership and had safeguarded inheritance, and it came close to abolishing the age-old distinctions between real and chattel property.

Joseph Story stated that "the growth of the respective colonies was in no small degree affected by" this legal transformation.⁹ The transformation was socially and politically significant as well. English political life was dominated by the landed elite whose wealth (in land) enjoyed protections from commercial and financial risks. The landed class was distinguished from the class of merchants and traders whose wealth was subject to those risks.¹⁰ In America, the treatment of land as legally equivalent to any other form of chattel in relation to creditors' claims obliterated the division between landed wealth and commercial wealth, and thus between landowners and merchants. In America, prior to the 1840s, all forms of wealth were subject to the commercial risks incurred by the property owner, with the exceptions of land that was entailed during the colonial period and land that was covered by a widow's limited dower interest.¹¹

Remarkably, no historian to date has thoroughly examined the Debt Recovery Act or American colonial laws relating to the use of real property as security for debts. Some economic historians have briefly noted the importance of creditors' remedies to the rise of slav-

⁸ See *infra* notes 210-212 and accompanying text.

⁹ 1 STORY, *supra* note 1, § 182.

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

¹¹ See *infra* pp. 436-37.

ery in the West Indies: Jacob M. Price and Russell R. Menard have contrasted the “Anglo-Saxon or creditor defense model” of legal remedies against the land with the “Latin model” used in Brazil where, under Portuguese rule, landed estates were protected from creditors’ claims.¹² Menard attributes the rise of centralized plantation slavery in Barbados, but not in Brazil, to this distinction.¹³ But these scholars’ analyses are limited to a comparison of slavery in those two colonies. Scholars of United States history, however, have overlooked the issue, aside from very brief references to the potential importance of property exemption laws to the colonial economy and to the legal history of bankruptcy.¹⁴

¹² Jacob M. Price, *Credit in the Slave Trade and Plantation Economies*, in *SLAVERY AND THE RISE OF THE ATLANTIC SYSTEM* 293, 296, 298 (Barbara L. Solow ed., 1991) (internal quotation marks omitted); see also 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).

¹³ See Menard, *supra* note 12, at 161; see also RICHARD B. SHERIDAN, *SUGAR AND SLAVERY*, 288–90 (1994) (describing briefly the Debt Recovery Act in the context of the slave trade in the West Indies).

¹⁴ See JOHN M. HEMPHILL, II, *VIRGINIA AND THE ENGLISH COMMERCIAL SYSTEM*, 1689–1733, at 180–89 (Garland Publ’g, Inc. 1985) (1964) (examining the legislative history of the Debt Recovery Act and its importance as a political issue in Virginia); 1 STORY, *supra* note 1, § 182 (noting a “strong tendency of the colonies to make lands liable to the payment of debts” and citing the Debt Recovery Act); Philip Girard, *Land Law, Liberalism, and the Agrarian Ideal: British North America, 1750–1920*, in *DESPOTIC DOMINION* 120, 121 (John McLaren, A.R. Buck & Nancy E. Wright eds., 2005) (mentioning the Act briefly, but emphasizing aspects of property law that continued to impede alienation in the nineteenth century — principally dower and conditional estates); 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) (discussing the Debt Recovery Act briefly). The only systematic examinations of this Article’s topic in the historical or legal literature are brief discussions in 4 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 425–31 (New York, O. Halsted 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 lists the statutory law on remedies. Historians of bankruptcy law have emphasized that property exemptions were a central issue in debates over federal bankruptcy legislation in the founding era but have not systematically examined the law in each of the states. See BRUCE H. MANN, *REPUBLIC OF DEBTORS* 209–20 (2002); CHARLES WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* 12–21 (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 TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 131 (1977) (locating property law reforms in the early nineteenth century); WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW* 41–43, 147–54 (1975) (describing state of debtor-creditor law in Massachusetts before and after the American Revolution). GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY* (1997), 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 land to satisfy creditors’ claims.

Some legal historians of Canada and Australia have recognized the local impact of the Debt Recovery Act or similar reforms there. See, e.g., JOHN C. WEAVER, *THE GREAT LAND RUSH*

Of course, scholars of property law and of American history have acknowledged the transformation of American property law from its English roots. Current scholarship provides two general explanations of that transformation. Each of these 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 in which 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 thus often described 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*.”¹⁵ Patrick Atiyah has added that, “to a considerable degree, freedom of contract began by being freedom to deal with property by contract.”¹⁶ More recently, Robert Ellickson has concluded that “[m]odernity . . . fosters alienability. . . . As groups modernize, they therefore tend not only to lengthen their standard time-spans of land ownership, but also to relax traditional restrictions on transfer.”¹⁷ This historical account of the rise of alienation is taught in law school classrooms today. 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.¹⁸

AND THE MAKING OF THE MODERN WORLD, 1650–1900, at 244–50 (2003) (discussing mortgage law reform in British colonies); Girard, *supra*, at 121; 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).

¹⁵ HENRY SUMNER MAINE, *ANCIENT LAW* 170 (Transaction Publishers 2002) (3d ed. 1866).

¹⁶ P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 85 (1979).

¹⁷ Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1376–77 (1993).

¹⁸ See, e.g., JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 197–220 (5th ed. 2002). Dukeminier and Krier emphasize that “[b]y the end of the thirteenth century . . . the fee was freely alienable.” *Id.* at 210.

This explanation can be extended to suggest the impact of market development and industrialization on property. 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,

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 individuals’ ability to sell fee simple interests in land markets. Historically, a more common form of alienation — or potential alienation — involved 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. Land is an ideal form of collateral because it cannot be moved or hidden from creditors. In terms of its role in economic development, the ability to secure debts with land is likely to be even more significant than the ability to voluntarily sell land in the market.¹⁹ 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 of a steady march toward alienability and modernity are inaccurate. As this account shows, the Debt Recovery Act re-

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 16; 1 WILLIAM CUNNINGHAM, *THE GROWTH OF ENGLISH INDUSTRY AND COMMERCE* 462–66 (5th ed. 1910); HORWITZ, *supra* note 14; JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956). For accounts of changes in the laws of property and contract over the eighteenth through early twentieth centuries, see Rowland Berthoff, *Independence and Attachment, Virtue and Interest: From Republican Citizen to Free Enterpriser, 1787–1837*, in *UPROOTED AMERICANS* 97 (Richard L. Bushman et al. eds., 1979); Charles W. McCurdy, *The “Liberty of Contract” Regime in American Law*, in *THE STATE AND FREEDOM OF CONTRACT*, *supra* note 2, at 161; and John V. Orth, *Contract and the Common Law*, in *THE STATE AND FREEDOM OF CONTRACT*, *supra* note 2, at 44. 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).

¹⁹ 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 and ten percent of their respective gross national products. See 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); WORLD BANK, *BUILDING INSTITUTIONS FOR MARKETS: WORLD DEVELOPMENT REPORT 2002*, at 93 (2002), available at <http://www.worldbank.org/wdr/2001/fulltext/fulltext2002.htm> (citing Fleisig, *supra*, in discussing the negative economic impact of barriers to secured transactions); Mehnaz Safavian, Heywood Fleisig & Jevgenijs Steinbuks, *Unlocking Dead Capital*, *PUB. POL’Y FOR PRIVATE SECTOR* (World Bank Group, Washington, D.C.), Mar. 29, 2006, available at http://rru.worldbank.org/documents/publicpolicyjournal/307Safavian_Fleisig_Steinbuks.pdf (noting that 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).

flected the unique context of British colonialism and imperial rule: the Act applied only to the colonies and not to England. In addition, 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 and after substantial economic growth, most state legislatures reversed their policies and enacted homestead legislation allowing debtors to exempt real property or monetary amounts from creditors’ claims. The homestead exemption movement was a legal development that reflected a desire to secure the stability of land ownership and reduce landowners’ financial risk, returning to a legal regime more closely resembling that of early modern England. The connection between debtor-creditor law and modernity is therefore complex.

A second explanation of the transformation of the law of property and inheritance 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.²⁰ Scholars have emphasized 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 an even greater intensity and on a more widespread basis. Political leaders such as Thomas Jefferson advocated dismantling some remnants of aristocracy by adopting policies that would lead to the dispersion of property.²¹ The doctrines of primogeniture and the entail were abolished in all states by 1800.²² Alexis de Tocqueville later identified the abolition of pri-

²⁰ The principal works on the significance of property and inheritance law to founding-era political, social, and economic life are ALEXANDER, *supra* note 14, at 26–88; GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION 182–84* (1992); 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, *supra* note 18, at 77; 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 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). Jedediah Purdy has recently asserted that there are republican underpinnings to the American transformation of the property doctrine of waste. Jedediah Purdy, *The American Transformation of Waste Doctrine: A Pluralist Interpretation*, 91 CORNELL L. REV. 653, 681–89 (2006).

²¹ See, e.g., THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 137 (William Peden ed., W.W. Norton 1954) (1787); NOAH WEBSTER, *On the Education of Youth in America*, in *A COLLECTION OF ESSAYS AND FUGITIV WRITINGS ON MORAL, HISTORICAL, POLITICAL, AND LITERARY SUBJECTS* 1, 24 (Boston, I. Thomas & E.T. Andrews 1790).

²² See sources cited *infra* note 249.

mogeniture and the entail and the dispersed nature of American property as central features of American democracy.²³ In *The Radicalism of the American Revolution*, Gordon S. Wood describes the demise of the freehold requirement for the franchise and the treatment of land as a commodity as further extensions of revolutionary values, and asserts that “the entire Revolution could be summed up by the radical transformation Americans made in their understanding of property.”²⁴ Thus, this explanation — which I call the republicanism 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 republicanism 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 British colonies in America, Parliament pushed colonial society away from the model of the English aristocracy in 1732. Thus, decades before the Revolution, English inheritance law was partially repealed at the instigation of the English, and not as the consequence of the ideological opposition to English political and social life. The fact that it was the English who helped to dismantle in the colonies the inheritance system against which the Americans are said to have revolted suggests the need for a revision of the republicanism 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 the Debt Recovery Act and of colonial laws treating land as legally equivalent to chattel property, 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 chattel. Regrettably, to date there has been no conclusive study of the practice of en-

²³ See 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 47–50 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. Chi. Press 2000) (1835). James Kent has also observed:

Entailments are recommended in monarchical governments, as a protection to the power and influence of the landed aristocracy; but such a policy has no application to republican establishments, where wealth does not form a permanent distinction, and under which every individual of every family has his equal rights, and is equally invited, by the genius of the institutions, to depend upon his own merit and exertions.

⁴ KENT, *supra* note 14, at 20.

²⁴ WOOD, *supra* note 20, at 269.

tailoring property in the colonies.²⁵ The reform of property law described here, achieved by the 1730s, however, likely 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 whether land would be available to satisfy debts was an important and divisive issue throughout the period. Federalist commentators praised the principles of the Debt Recovery Act as an important barrier against aristocracy.²⁶ 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.²⁷ 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. 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 the Act during recessions — the possible loss of their freehold land and disenfran-

²⁵ 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. See C. Ray Keim, *Primogeniture and Entail in Colonial Virginia*, 25 WM. & MARY Q. 545, 557–61 (1968). Keim concludes 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 is 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 20, 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. Without linking wills to land, it is not possible to know whether a specific parcel of entailed land appeared in more than one will.

²⁶ See, e.g., Daniel Webster, Speech at the Massachusetts Convention of 1820–1821 (Dec. 15, 1820), in DEMOCRACY, LIBERTY, AND PROPERTY: THE STATE CONSTITUTIONAL CONVENTIONS OF THE 1820'S 91, 98–99 (Merrill D. Peterson ed., 1966); DANIEL WEBSTER, A DISCOURSE, DELIVERED AT PLYMOUTH, DECEMBER 22, 1820, IN COMMEMORATION OF THE FIRST SETTLEMENT OF NEW-ENGLAND 95 (Boston, Wells & Lilly 1821) [hereinafter WEBSTER, PLYMOUTH DISCOURSE].

²⁷ See *infra* pp. 450–51. For Jefferson's views on federal bankruptcy legislation according to which a bankrupt's lands would be seized and sold, see *infra* p. 453.

chisement — state legislatures responded with temporary debt relief legislation that conflicted with the Act's regime. Fear of the consequences of such democratically enacted policies was one of the reasons for including the Contracts Clause in the United States Constitution, as a means for the federal courts to 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. The Virginian opposition to laws making land available to satisfy all debts was the basis for a broader opposition to federal government policies that would supersede state law. 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 the debtor's land for the benefit of creditors.²⁸ In sum, the history of the Debt Recovery Act and its legacy is important to an understanding of federalism in founding-era America.

Part I of this Article describes the substantive and procedural protections to families' long-term title interests in land from seizure by creditors in England in the seventeenth and eighteenth centuries, the period relevant to the laws of colonial America. 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 from the Act's adoption. In addition, it describes how English authorities later depicted the Debt Recovery Act 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 founding era legislation that extended the Act that appears in state debt relief legislation, in state court decisions, in Jefferson's writings, and in national policies.

²⁸ See MANN, *supra* note 14, at 209–20. Indeed, 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.

The Article concludes by analyzing the broader importance of the history of creditors' claims to land and slaves in the colonial and founding periods. For over a century, from the late seventeenth century in New England and 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 prioritizing commercial interests over the inheritance of land and, second, its role in providing the credit conditions for expanding slave labor in America. The transformation toward less restrictive land policies also likely increased the 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 property law served as the foundation for the property law of the colonies. The charters and patents that conveyed legislative power to the colonies generally included provisos either prohibiting colonial legislatures from making laws “repugnant to” the laws of England or requiring that the enacted laws be “not contrary to but as near as conveniently may be made agreeable to the Laws, Statutes & Government of this Our Realm of England.”²⁹ This Part describes the body of English creditor remedies that served as the original source of colonial law.

The English law of property was defined by stark distinctions in the treatment afforded real property and personal property.³⁰ The

²⁹ DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE* 44–45 (2005); *see also* MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION* 40 (2004); JOSEPH HENRY SMITH, *APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS* 525 (1950).

³⁰ “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”).

unique status of land in English law derived 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.”³¹ In England from the late medieval period through the modern era, ownership of landed estates was associated with political privileges ranging from, at the highest levels, membership in the House of Lords to local political offices and social influence.³² According to Baker, “[c]ontrol of land could not . . . be readily divorced from power and jurisdiction, from ‘lordship’.”³³

English law was characterized by a clear preference for maintaining the integrity and cohesiveness of landed estates over the generations.³⁴ 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 undivided parcel.³⁵ The economic value of the heir’s

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 (4th ed. 2002). Frederick Pollock and Frederic Maitland characterize the division of all material things into these two classes as “one of the main outlines of [English] medieval law.” 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 2 (2d ed. 1968).

³¹ BAKER, *supra* note 30, at 223.

³² As A.W.B. Simpson has noted, in England through the late eighteenth century, land 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 20, 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 (London, Cassel, Petter, Galpin & Co. 1881).

³³ BAKER, *supra* note 30, at 223.

³⁴ See generally David Sugarman & Ronnie Warrington, *Land Law, Citizenship, and the Invention of “Englishness”: The Strange World of the Equity of Redemption*, in EARLY MODERN CONCEPTIONS OF PROPERTY 111, 121–25 (John Brewer & Susan Staves eds., 1995) (emphasizing English law’s support of the landed class). This legal preference reflected a powerful social preference for cohesive estates. See JOHN HABAKKUK, MARRIAGE, DEBT AND THE ESTATES SYSTEM: ENGLISH LANDOWNERSHIP, 1650–1950, at 55 (1994) (“The sense of obligation to keep the patrimony intact and in the family was so strong that the owner of an inherited estate of any reasonable size and antiquity, even when he was the last of his line and was free to dispose of the property, did not naturally consider selling it, unless his financial circumstances obliged him to do so. He sought among his friends or acquaintances for someone to continue the undivided ownership . . .”).

³⁵ See Administration of Estates Act, 1925, 15 Geo. 5, c. 23, § 45 (Eng.) (abolishing primogeniture in England); 2 BLACKSTONE, *supra* note 2, at *214–16 (discussing primogeniture); 4 KENT, *supra* note 14, at 377–80 (same); see also HOLLY BREWER, BY BIRTH OR CONSENT 17–44

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).³⁶ The settlement would outline the nature of the landowner’s tenancy, which could range from, on one extreme, 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.³⁷ 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 a similar, or hopefully an augmented, condition.³⁸

(2005) (describing primogeniture as the centerpiece of a broader political and social order based on a patriarchal ideology).

³⁶ For a description of a typical settlement agreement, see BAKER, *supra* note 30, at 293–94. The customary practice was for the family estate to be “resettled” in every generation, to account for events such as deaths, births, and marriages. *Id.* at 294. 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 Simpson, under the strict settlement:

[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 land-owning class in reality had little use for them.

A.W. Brian Simpson, *Introduction* to WILLIAM BLACKSTONE, 2 COMMENTARIES xi (Univ. of Chi. Press 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).

³⁷ See BAKER, *supra* note 30, at 293–95.

³⁸ 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 vir-

The law of inheritance was crucial to this social and economic framework.³⁹

In the seventeenth and eighteenth centuries, England was a commercially developing society with active land and credit markets. The law, however, maintained the cohesion of English estates and protected the inheritance of real property from involuntary seizure by creditors in two ways. First, English law protected freehold interests in land from the claims of all unsecured creditors. Second, the Court of Chancery protected land by creating procedural hurdles to the seizure of land to satisfy secured debts and by privileging families' long-term 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, unsecured creditors who obtained judgments against debtors in the common law courts were limited to one of four writs of execution (remedies available to enforce judgments at law). First, the writ of *fieri 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.⁴⁰ Second, the writ of *levari facias* directed the sheriff to seize and sell the debtor's goods and chattels, like the writ of *fieri facias*, but additionally imposed a lien on behalf of the creditor on the future earnings of the debtor's real property until the debt was satisfied.⁴¹

tues. It is an imperishable witness to the past and a precious pledge of existence to come.

1 DE TOCQUEVILLE, *supra* note 23, at 48. For a description of more recent debates about the social implications of English settlements, see BAKER, *supra* note 30, at 295.

³⁹ John Locke, best known 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. Locke viewed England's inheritance system as a natural consequence of the powerful instinct of humans to procreate, which led to a sense of obligation of parents to provide for their children. According to Locke, this principle “gives Children a Title, to share in the *Property* of their Parents, and a Right to Inherit their Possessions. Men are not Proprietors of what they have meerly 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 244 (Peter Laslett ed., Cambridge Univ. Press, rev. ed. 1965) (1690). In contrast, Blackstone, who 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 20, at 4–9 (discussing theories of inheritance posited by Locke, Blackstone, and others).

⁴⁰ See BAKER, *supra* note 30, at 66; 3 BLACKSTONE, *supra* note 2, at *417.

⁴¹ See 3 BLACKSTONE, *supra* note 2, at *417–18; 2 POLLOCK & MAITLAND, *supra* note 30, at 596.

Third, the writ of *elegit* allowed for a limited possessory interest in the debtor's real property.⁴² Under 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 for the number of years necessary to satisfy the remainder of the debt, based on a court-ordered appraisal.⁴³ The debtor retained possession of half of his property, as well as "his Oxen and Beasts of his Plough,"⁴⁴ 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. A closely related but more valuable remedy could be obtained if a debtor appeared in the Merchant Court or the Staple Court to formally acknowledge his debt. These Courts offered creditors the remedy of a temporary tenancy of all of the debtor's land until the debt was satisfied (a "tenancy by *extent*").⁴⁵ 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.⁴⁶

Fourth, under the writ of *capias ad satisfaciendum*, the sheriff seized the body of the debtor for imprisonment.⁴⁷ While the debtor was in prison, the creditor could not force a seizure of the debtor's land.⁴⁸ The principal use of the writ of *capias ad satisfaciendum* with regard to landowners 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.⁴⁹ Less frequently, a debtor would use debtors' prison to

⁴² Parliament introduced the writ of *elegit* in 1285 as part of Edward I's reform of feudal law. See Statute of Westminster II, 13 Edw., c. 18 (1285) (Eng.); see also 3 BLACKSTONE, *supra* note 2, at *418 (describing the writ of *elegit*). The impact of this statute on the closing of the commons in England is an intriguing topic that no scholar has examined. Once creditors gained possessory rights to land (however partial) and became willing to offer credit on the basis of these rights, one would imagine that the incentives for individuals to own parcels in fee simple absolute would dramatically increase: only fee simple owners would have access to the additional credit.

⁴³ See 3 BLACKSTONE, *supra* note 2, at *418-19.

⁴⁴ 13 Edw., c. 18.

⁴⁵ See Statute of the Staple, 27 Edw. 3, c. 9 (1353); Statute of Merchants, 13 Edw., c. 1 (1285).

⁴⁶ 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." 4 BLACKSTONE, *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. 3 BLACKSTONE, *supra* note 2, at *227-29.

⁴⁷ See 3 BLACKSTONE, *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.

⁴⁸ See *id.* 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 the common law").

⁴⁹ See Joanna Innes, *The King's Bench Prison in the Later Eighteenth Century: Law, Authority and Order in a London Debtors' Prison*, in AN UNGOVERNABLE PEOPLE 250, 254 (John Brewer & John Styles eds., 1980); see also MANN, *supra* note 14, at 25 (noting that in colonial

his advantage by having a “friendly” creditor imprison him to allow his family to remain in possession of all of his freehold lands.⁵⁰

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 writ of *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 writ of *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.⁵¹ The executors of the estate assumed control over the deceased’s *personal* property, but not the land.⁵² 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.⁵³ The executors therefore satisfied the debts out of the deceased’s personal property. Moreover, unsecured creditors had no legal recourse against heirs and devisees.⁵⁴ 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 desired to extend the ancestor’s credit line for their own purposes.⁵⁵

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”).

⁵⁰ See Innes, *supra* note 49, 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.

⁵¹ 2 BLACKSTONE, *supra* note 2, at *510–12.

⁵² For a discussion of what constituted chattel property over which the executors assumed control, see BAKER, *supra* note 30, at 380–81.

⁵³ See *id.*

⁵⁴ See 2 POLLOCK & MAITLAND, *supra* note 30, at 336.

⁵⁵ See HABAKKUK, *supra* note 34, 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.⁵⁶ An owner of a fee simple absolute could sell or mortgage land⁵⁷ or devise it to a non-family member.⁵⁸ Secured creditors — who extended credit on the basis of specific pledges of land as collateral, formalized by signatures and the debtors' seals — could force a seizure of the real property that was pledged.⁵⁹

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.⁶⁰ When the generic "heirs" were made parties to the secured credit agreement, the creditor could pursue a cause of action against the heir after the debtor's death, and the heir might be compelled to discharge the debt out of the real property that he inherited. The remedies of secured creditors were strengthened by a 1691 statute that provided secured creditors with causes of action against both devisees and heirs of a deceased debtor.⁶¹ Under the statute, attempts by the deceased to devise land that he had pledged as security, or by the heirs or devisees to transfer such land, were deemed fraudulent.⁶²

⁵⁶ In the early seventeenth century both in England and in the colonies, landowners formalized the transfer of title to land by livery of seisin, a public ceremony, as well as by written deeds. The Statute of Frauds abolished livery of seisin and required written formalities for transferring title to real property. See *An Act for Prevention of Frauds and Perjuries*, 29 Car. 2, c. 3, § 3 (1676).

⁵⁷ In 1290, Parliament enacted the Statute *Quia Emptores Terrarum* ("*Quia Emptores*"), 18 Edw., c. 1 (1290), 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." See A.W.B. SIMPSON, *AN INTRODUCTION TO THE HISTORY OF THE LAND LAW* 22, 50–51 (1961). Subinfeudation was a process by which a tenant would sell his possessory interest in land to a third party. See *id.* 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.*

⁵⁸ The Statute of Wills of 1540, 32 Hen. 8, c. 1, gave landowners the freedom to devise their lands to whomever they chose. See BAKER, *supra* note 30, at 256.

⁵⁹ See 2 BLACKSTONE, *supra* note 2, at *340.

⁶⁰ The identity of the actual person who would inherit, of course, was unknown until the time of death.

⁶¹ *An Act for Relief of Creditors Against Fraudulent Devises* (Statute of Fraudulent Devises), 3 & 4 W. & M., c. 14 (1691).

⁶² *Id.* § 2. The statute closed a loophole that had denied secured creditors a remedy against heirs when the heirs sold the land they had inherited before the creditor filed a claim in court against them. See *id.* § 5.

Secured creditors seeking to seize the land the debtor had pledged, however, could not do so simply by bringing an action at law.⁶³ In the early seventeenth century, the Court of Chancery 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.⁶⁴ Recognition of the “equity of redemption” meant that to gain secure title in the fee interest, the mortgagee (the lender) was required to obtain both a legal judgment in the common law courts on the debt and a separate decree of foreclosure in the Court of Chancery, quieting the equity of redemption.⁶⁵

Chancery, however, was known for its high costs and procedural delays.⁶⁶ Actions in Chancery inevitably took a long time because the docket was large, the court did not meet continuously, and all relevant parties were given an opportunity to be heard.⁶⁷ Most important, secured creditors seeking to seize land that had been pledged as security had to contend with the claims of family members in all preexisting family settlement agreements.⁶⁸ Settlement agreements established prior claims against the land over subsequent secured creditors.⁶⁹ Contending with family members who claimed under family settlement agreements was likely to be the costliest component of foreclosing in Chancery. In addition, the requirement that heirs were bound only by mortgage agreements that explicitly named them as a party was expanded by the English courts into a broader “privilege” allow-

⁶³ 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. See 2 BLACKSTONE, *supra* note 2, at *340, *465; 2 POLLOCK & MAITLAND, *supra* note 30, at 122. In the common law courts, mortgage agreements were interpreted strictly. See SIMPSON, *supra* note 57, at 226–27. 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. See *id.*

Bonds were structured similarly. If a creditor obtained a judgment against a debtor under a bond, the court would direct the sheriff first to 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. See 2 BLACKSTONE, *supra* note 2, at *340–41, *465.

⁶⁴ See SIMPSON, *supra* note 57, at 227–29; R.W. TURNER, THE EQUITY OF REDEMPTION 26–27 (1931); Sugarman & Warrington, *supra* note 34, at 113–14.

⁶⁵ See HENRY HORWITZ, CHANCERY EQUITY RECORDS AND PROCEEDINGS, 1600–1800, at 4 & n.14, 31 (1995).

⁶⁶ According to Baker, “[f]or two centuries before Dickens wrote *Bleak House*, the word ‘Chancery’ had become synonymous with expense, delay and despair.” BAKER, *supra* note 30, at 111.

⁶⁷ Chancery court procedures are described in HORWITZ, *supra* note 65, at 9–26. See also BAKER, *supra* note 30, at 111–12 (describing the “defects” of chancery procedure).

⁶⁸ The 1691 statute against fraudulent devises clarified that notwithstanding its provisions, family settlement agreements made in writing before marriage would continue to be recognized “in full force.” 3 & 4 W. & M., c. 14, § 4 (1691).

⁶⁹ 3 & 4 W. & M., c. 14, § 4 (1691).

ing the heir a procedural right to contest any action in which he might lose the landed inheritance. 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 unduly brought to answer, and be forejudged by course of law.”⁷⁰ 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 who had separate legal claims to the wealth inherent in the land through family settlements.

Moreover, prior to the chancery court’s formal foreclosure decree, and at times *after* 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.⁷¹ These complicated procedures for foreclosure 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 families’ long-term interests in land.⁷² 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 (a couple not likely to have children) in order to prevent a sale of the land to pay debts.⁷³ Chancery judges chose to preserve the family’s ownership of land when faced with language in a will that was ambiguous as to whether the realty should be sold to pay debts.⁷⁴ More-

⁷⁰ 1 BLACKSTONE, *supra* note 2, at *134–35.

⁷¹ For anecdotal evidence of the difficulty even secured creditors faced 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 ROYAL HIST. SOC’Y (5th ser.) 199, 208–10 (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 the right to redeem during and even after conclusion of the foreclosure process).

⁷² See Adam S. Hofri-Winogradow, Protection of Family Property Against Creditors in the Enlightenment-Era Court of Chancery (Aug. 4, 2006) (unpublished manuscript, on file with the Harvard Law School Library). A careful examination of the chancery court and its decisions has been absent from legal historical scholarship. Adam Hofri-Winogradow’s Ph.D. dissertation, in progress at Oxford University, promises to contribute to this scholarship. In one chapter, Hofri-Winogradow analyzes the numerous ways in which the chancery court privileged the long-term interest in family property over the claims of creditors and family members in the eighteenth century. *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., 1995).

⁷³ Hofri-Winogradow, *supra* note 72, at 20.

⁷⁴ *Id.* at 22–25.

over, chancery judges upheld family settlement agreements that protected land when faced with creditors' challenges to the validity of those agreements.⁷⁵

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 was insufficient to pay the debt.⁷⁶ 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.⁷⁷

* * * *

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 Court of Chancery further protected the integrity of estates and the inheritance of land by recognizing the equity of redemption and by 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 (possibly after 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.⁷⁸ In addition, the threat of debtors' prison or of the sheriff stripping away all of the family's goods and chattels and selling them at auction also induced landown-

⁷⁵ *Id.* at 28.

⁷⁶ This practice was overturned by statute in 1854. See An Act To Amend the Law Relating to the Administration of the Estates of Deceased Persons, 17 & 18 Vict., c. 113 (1854) (Eng.); see also BRODRICK, *supra* note 32, at 345 (describing the practice as a "monstrous perversion of justice").

⁷⁷ 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. See BRODRICK, *supra* note 32, at 345.

⁷⁸ For an extended discussion of the occasions when English landowners, however reluctantly, sold their real property, see Christopher Clay, *Property Settlements, Financial Provision for the Family, and Sale of Land by the Greater Landowners, 1660-1790*, 21 J. BRIT. STUD. 18 (1981).

ers to sell their real property to pay unsecured creditors.⁷⁹ 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.⁸⁰ An entail could be removed through a conveyance referred to as a “common recovery.”⁸¹

In each of these circumstances, however, the law gave landowners the privilege to 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 interest in land 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 had 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 residents that lands would not be characterized as chattel property, but as “an estate of inheritance” according to the laws of England.⁸² The Charter explicitly stated that courts in New York had no authority to “grant out any Execucon or other writt whereby any

⁷⁹ 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.

⁸⁰ Private acts of Parliament to allow the sale of land are the subject of Habakkuk, *supra* note 71.

⁸¹ 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 30, at 282.

⁸² The Charter of Liberties and Priviledges Granted by His Royall Highnesse to the Inhabitants of New Yorke and Its Dependencies (1683), in 1 THE COLONIAL LAWS OF NEW YORK 111, 114 (Albany, James B. Lyon 1896).

mans Land may be sold . . . without the owners Consent.”⁸³ A 1647 Connecticut statute adopted the English body of remedies, clarifying that creditors could take possession of debtors’ land only until their debts were satisfied, as under the writ of *elegit*.⁸⁴

Indeed, several colonies adopted remedial regimes that were even more protective of land than the English regime in that they omitted the writ of *elegit*. The absence of the writ of *elegit* 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 thus outlined the procedures according to which sheriffs could seize either the “goods and chattels” or the body of a debtor to satisfy his debts.⁸⁵ Maryland statutes enacted in 1705 and 1715 limited execution to the seizure of “goods chattels and credits” to satisfy debts.⁸⁶ A Jamaican statute of 1681 allowed the sheriff to seize “goods and chattels,” and if the goods and chattels were insufficient, then “negroes, working cattle, or necessary utensils,” but did not mention the writ of *elegit* or other claims against the land.⁸⁷ In St. Kitts, the writ of *elegit* was not available, freehold property interests were entirely immune from the claims of unsecured creditors, and freehold property owners were exempt from arrest and placement in debtors’ prison.⁸⁸

⁸³ *Id.*

⁸⁴ CODE OF LAWS (1650), in PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 509, 518–20 (J. Hammond Trumbull ed., Hartford, Brown & Parsons 1850).

⁸⁵ An Act Directing the Manner of Levying Executions, and for Relief of Poor Prisoners for Debt, ch. 37 (1705), in 3 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 385 (William Waller Hening ed., Phila., Thomas Desilver 1823) [hereinafter 3 LAWS OF VIRGINIA]. 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, § 3 (1726), in 4 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 151, 152–56 (William Waller Hening ed., Richmond, Samuel Pleasants 1814) [hereinafter 4 LAWS OF VIRGINIA] (describing process of execution under writs of *fiery facias*, *capias ad satisfaciendum*, and *elegit*).

⁸⁶ An Act Directing the Manner of Suing Out Attachments in This Province and Limiting the Extent of Them (1704), in ALL THE LAWS OF MARYLAND NOW IN FORCE 4, 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 (1715), in A COMPLEAT COLLECTION OF THE LAWS OF MARYLAND 81, 83 (Annapolis, William Parks 1727) (exempting chattel property that would “deprive [debtors] of all Livelihood for the Future[, such as] Corn for necessary Maintenance, Bedding, Gun, Axe, Pot and Labourers necessary Tools, and such like Houshold-Implements and Ammunition for Subsistence”).

⁸⁷ An Act for Establishing Courts, and Directing the Marshal’s Proceedings, Act 19 (1681), in 1 ACTS OF ASSEMBLY, PASSED IN THE ISLAND OF JAMAICA 26, 29 (Kingston, Alexander Aikman 1787).

⁸⁸ See RICHARD PARES, MERCHANTS AND PLANTERS 45, 87 n.50 (1960) (citing Minutes of Council Assembly (July 5, 1684), Public Records Office, Colonial Office Papers 1/57 no. 48). Similarly, freehold property owners of ten acres were exempt from arrest in Barbados until the marshal had attempted to satisfy the debt owed by means of seizing all of the chattel property and land of the debtor. See *id.*; JONATHAN BLUMEAU, REMARKS ON SEVERAL ACTS OF

Merchants lending to residents of these colonies, however, often complained about the fact that the law offered unsecured creditors no remedies against debtors' land. 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."⁸⁹

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.⁹⁰ After Lee died, Carter found that his personal property was insufficient to satisfy his debts, but that his estate included recently acquired land. 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."⁹¹ 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:

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.⁹²

A 1723 letter from a Virginia factor to the Bristol merchant Isaac Hobhouse described a similar problem.⁹³ 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 Mr 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 Sale⁹⁴

PARLIAMENT RELATING MORE ESPECIALLY TO THE COLONIES ABROAD 11-12 (London, T. Cooper 1742).

⁸⁹ Get Act Making Jamaica Lands Extendable (1715), in 1 ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS, 1670-1776, at 339, 339 (Leonard Woods Labaree ed., 1967).

⁹⁰ See Letter from Robert Carter to John Carter (July 19, 1720), in LETTERS OF ROBERT CARTER, 1720-1727, at 32 (Louis B. Wright ed., 1940).

⁹¹ *Id.* at 33.

⁹² *Id.* at 32.

⁹³ Letter from John Dixon to Isaac Hobhouse et al. (May 2, 1723), in *The Virginia Letters of Isaac Hobhouse, Merchant of Bristol* (Walter E. Minchinton ed.), 66 VA. MAG. HIST. & BIOGRAPHY 278, 291 (1958).

⁹⁴ *Id.* (typeset altered for readability).

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 Chancery practices. 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 overarching and widely accepted English policy, that the role of the colonies within the British Empire was to advance English mercantilist economic interests.⁹⁵ Moreover, English authorities came to accept that not all English laws and practices were appropriate to unique local conditions.⁹⁶ The English authorities were amenable to legal reforms that responded to local needs *and* that 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 the court would allow the seizure of his freehold interest in land to satisfy those debts.⁹⁷ 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.”⁹⁸ William Penn’s Charter of Liberties of 1682 included a section that departed from English law by providing generally for the liability of lands for debts.⁹⁹ The Charter of Liberties, however, protected the inheritance rights of eldest sons by stating that once a debtor had a

⁹⁵ See Claire Priest, *Law and Commerce, 1580–1815*, in *THE CAMBRIDGE HISTORY OF LAW IN AMERICA* (forthcoming 2008) (examining English mercantilism and its rejection in founding-era America).

⁹⁶ In her recent study of the transatlantic legal culture of Rhode Island, Mary Sarah Bilder notes that “[a]s 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 29, at 3.

⁹⁷ See Act of July 1, 1633, in *THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY OF NEW PLYMOUTH* 31, 33 (William Brigham ed., Boston, Dutton & Wentworth 1836).

⁹⁸ *Id.*

⁹⁹ See Penn’s Charter of Liberties of 1682, Laws Agreed upon in England § 14 (Pa.), in 5 *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS* 3047, 3061 (Francis Newton Thorpe ed., 1909).

child, only one third of his land would be available to satisfy his debts.¹⁰⁰

In 1700, however, the Pennsylvania legislature radically revised its remedial regime and adopted a statute making all of a debtor's land available to satisfy unsecured debts, even if the debtor had a child.¹⁰¹ Five years later, the Pennsylvania legislature apparently decided that its law subjected landowners to excessive financial risk. It enacted a new law (which, notably, became the law of the Northwest Territory in 1795)¹⁰² according to which if the debt could be satisfied out of the *earnings* from the debtor's land within seven years, then the creditor would be limited to a tenancy by *elegit*, that is, possession of the land for a term.¹⁰³ But if an unsecured debt was so large that it could not be satisfied with seven years' worth of earnings, the land would be sold at auction.¹⁰⁴

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 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 mortgagers."¹⁰⁵ The statute allowed mortgagees to force the sale of mortgaged land no sooner than one year from the day on which a debt was owed. At the end of the year, the mortgagor

¹⁰⁰ The precise language of section 14 of the Charter 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.*

¹⁰¹ See 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, pmb. (1700), in 1 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 7, 7 (Phila., John Bioren 1810) ("[A]ll 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." (emphasis added)). The Act's 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." *Id.* 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.*

¹⁰² See *infra* p. 453.

¹⁰³ 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, § 2 (1705), in 1 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA, *supra* note 101, at 57, 58.

¹⁰⁴ See *id.* § 3, at 58.

¹⁰⁵ *Id.* § 6, at 59.

or his or her “heirs, executors or administrators” were given the procedural privilege of an opportunity to contest the sale in court.¹⁰⁶ If he or they could not provide an acceptable defense to the court action, the property was to be sold at auction, with a fee simple title going to the purchaser.¹⁰⁷

Some colonial legislatures experimented with more fundamental changes to 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.¹⁰⁸ The Barbados legislature, 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.¹⁰⁹ Then, in a reversal, a 1672 law declared that slaves would be treated as chattel and liable to the claims of unsecured creditors.¹¹⁰ Creditors of the Barbadian planters, however, complained about the exemption of land 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].”¹¹¹ 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 would “draw certain ruin upon the place.”¹¹² Although no statute has survived, by 1677 Barbados appears to have returned to the policy

¹⁰⁶ *Id.* § 6, at 60.

¹⁰⁷ *See id.*; *see also* *Graff v. Smith’s Admors.*, 1 U.S. (1 Dall.) 481, 481–82 (Pa. Ct. Com. Pl. 1789) (discussing the 1700 and 1705 statutes).

¹⁰⁸ *See* *Turner v. Cox*, (1853) 8 Moore 289, 301, 14 Eng. Rep. 111, 116 (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” (quoting *An Act To Quiet the Inhabitants of This Island in the Peaceable Possession of Their Estates*, No. 35, pmb. (1745), in 1 *LAWS OF BARBADOS* 37, 37 (London, William Clowes & Sons 1875)) (internal quotation mark omitted)); BLUMEAU, *supra* note 88, at 18–19 (noting the practice in Barbados of defining “all their Estates” as “in the nature of, and no more than, Chattels for the Payment of Debts” and noting that this doctrine was “probably set on foot in the Infancy of the Island, for the Encouragement of Trade to it”); PARES, *supra* note 88, at 89 n.59.

¹⁰⁹ *See* PARES, *supra* note 88, at 89 n.58; Price, *supra* note 12, at 306 n.26. For a discussion of when slaves were characterized as real or chattel property, see *infra* pp. 418–21.

¹¹⁰ *See* sources cited *supra* note 109.

¹¹¹ Reenact Law for Sale by Outcry of Debtors’ Lands, in 1 *ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS*, 1670–1776, *supra* note 89, at 338, 338–39.

¹¹² *Id.* at 339.

of treating both land and slaves as legally equivalent to chattel for the purpose of satisfying debts.¹¹³

Like the practice in Barbados, a Massachusetts law of 1675 was revolutionary in that it explicitly permitted a creditor to take an individual's freehold interest in land to satisfy an unsecured debt.¹¹⁴ In contrast to the 1705 Pennsylvania statute, the Massachusetts law did not establish a minimum debt amount below which creditors would be unable to seize debtors' real property.¹¹⁵ Other New England colonies enacted similar laws in the same period. In 1682 the legislature of West New Jersey enacted a law making land liable for unsecured debts if the debtor's personal estate was found to be insufficient to satisfy the debts.¹¹⁶ Connecticut enacted a statute in 1702 making lands liable for debts.¹¹⁷ In 1718, New Hampshire adopted a statute making

¹¹³ See 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 one example at least of everything can be found sticking out." PARES, *supra* note 88, at 89 n.58.

¹¹⁴ See General Court Enactment of May 12, 1675, in 5 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 29 (AMS Press 1968) (Nathaniel B. Shurtleff ed., 1854) (stating that the recording of title of "houses & lands taken upon execution . . . shall be a legall assurance of such houses & lands to [the plaintiff] & his heires forever," meaning that the creditor would have a fee simple title). 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. THE BOOK OF GENERAL LAWS AND LIBERTIES CONCERNING THE INHABITANTS OF MASSACHUSETTS 34 (Max Ferrand ed., 1929) (1648).

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." An Act for Making of Lands and Tenements Liable to the Payment of Debts (1692 Land Liability Act), ch. 29, § 1 (1692), in 1 THE ACTS AND RESOLVES OF THE PROVINCE OF THE MASSACHUSETTS BAY 68, 68-69 (Boston, Wright & Potter 1869) [hereinafter ACTS AND RESOLVES OF MASSACHUSETTS]. 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." *Id.* § 1, at 69. This Act was disallowed by the Privy Council in 1695 because it failed to provide for debts due to the Crown. See 1 ACTS AND RESOLVES OF MASSACHUSETTS, *supra*, at 69 (noting that the Act was repealed for this reason). The Act was then reenacted in 1696 with a provision specifying that debts due to the Crown had priority over all other debts. See An Act for Making of Lands and Tenements Liable to the Payment of Debts, ch. 10 (1696), in 1 ACTS AND RESOLVES OF MASSACHUSETTS, *supra*, at 254.

¹¹⁵ See 1692 Land Liability Act § 1, at 69.

¹¹⁶ See The Acts and Laws of the General Free Assembly, ch. 12 (1682) (W. Jersey), in THE GRANTS, CONCESSIONS, AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW JERSEY 442, 447 (Aaron Leaming & Jacob Spicer eds., Phila., Honeyman & Co. 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.*

¹¹⁷ See Executions Act, in ACTS AND LAWS OF HIS MAJESTIES COLONY OF CONNECTICUT IN NEW-ENGLAND 32 (Boston, Bartholomew Green & John Allen 1702).

lands, but not houses, liable for the debts of a debtor who was alive.¹¹⁸ Upon the debtor's death, however, the executor could distribute the lands and the house of the deceased debtor to his creditors.¹¹⁹

The New England and post-1677 Barbados practices modified English law in two important respects. First, they enabled a creditor to force a seizure of a debtor's freehold interest in land in addition to his personal property to satisfy an unsecured debt. In Massachusetts after 1701, for example, the legislatively prescribed form for the writ of *feri facias* directed the sheriff to seize the debtor's "goods, chattels or lands," instead of simply "goods and chattels."¹²⁰ The writ of *elegit* fell out of use entirely because obtaining title to a debtor's land was more valuable than possessing 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 instead provided that real property would be appraised and then transferred to creditors in satisfaction of their judgments.¹²¹ The creditors thus had to accept an in-kind remedy, not cash after an auction.

The second important effect of the New England and Barbados practices was to extend the law to allow unsecured creditors priority over the heirs in the distribution of the deceased's real property. The 1692 Massachusetts statute explicitly stated 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

¹¹⁸ See 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, IN NEW-ENGLAND 84 (Portsmouth, Daniel Fowle 1761).

¹¹⁹ See *id.*

¹²⁰ An Act Prescribing the Forme of Writts for Possession, *Scire Facias*, and Replevin, ch. 3 (1701), in 1 ACTS AND RESOLVES OF MASSACHUSETTS, *supra* note 114, at 461; see also 1 THOMAS HUTCHINSON, THE HISTORY OF THE COLONY AND PROVINCE OF MASSACHUSETTS-BAY 376 (Lawrence Shaw 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.").

¹²¹ *Phillips v. Dean*, No. 16 (Ct. C.P. June 1720), in 5 PLYMOUTH COURT RECORDS, 1686–1859, at 113 (David Thomas Konig ed., 1979), 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. See *id.* Under the law, once Phillips recorded his interest in the county registry, he would have full legal title — a fee simple interest — to the real property. See also Executions Act, in ACTS AND LAWS OF HIS MAJESTIES COLONY OF CONNECTICUT IN NEW-ENGLAND, *supra* note 117 (calling for transfer of land to creditor after appraisal).

“others happen[] to dye before they have discharged the same.”¹²² The broader consequence of the 1692 law was that the inheritance of real property could no longer be viewed as an inevitable occurrence or a birthright: heirs took real property subject to the claims of all of their fathers’ unsecured creditors. Land — the inheritance — could be taken involuntarily based on highly informal obligations such as book accounts¹²³ without the participation of the heir and without the landowner expressly executing 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 firmly vested in local colonial legislatures and courts. The Board of Trade and the Privy Council reviewed and modified colonial law to advance English economic interests.¹²⁴ Parliament, however, initially chose not to legislate directly in the realm of legal remedies and colonial court procedures. In resolving intercolonial disputes, the Privy Council and House of Lords, which had appellate jurisdiction over litigation initiated in the colonies, applied not English law, but the relevant local colonial 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.¹²⁵

B. Creditors’ Remedies Against Slaves Prior to Parliamentary Regulation

The legislative history of the Debt Recovery Act was shaped by concerns among English creditors to the colonies that the colonists

¹²² 1692 Land Liability Act, ch. 29, in 1 ACTS AND RESOLVES OF MASSACHUSETTS, *supra* note 114, at 68.

¹²³ Book accounts functioned like a tab and were a popular form of unsecured debt through the mid-nineteenth century largely because of a dearth of cash currency. See Priest, *supra* note 7, at 1328–30.

¹²⁴ A parliamentary Act of 1696, intended to improve the enforcement of mercantilist commercial regulations, provided that colonial “laws, by-laws, usages or customs” that were “any ways repugnant to” parliamentary laws regulating the colonies “are illegal, null and void, to all intents and purposes.” 7 & 8 Wm. III, c. 22, § 9 (1696) (Eng.). The Board of Trade regularly issued formal Instructions to the colonial governors advising them on courses of action relating to local matters. Often these Instructions related to the economic interests of English creditors. See, e.g., Instructions cited *supra* notes 89, 111. To my knowledge, the first systematic accounting of colonial laws found to conflict with English economic interests was contained in a 1734 Board of Trade Report, the purpose of which was to describe all colonial laws conflicting with English “Trade, Navigation, and Manufactures.” M. BLADEN ET AL., REPRESENTATION OF THE BOARD OF TRADE RELATING TO THE LAWS MADE, MANUFACTURERS SET UP, AND TRADE CARRIED ON, IN HIS MAJESTY’S PLANTATIONS IN AMERICA (n.p. 1734) [hereinafter 1734 BOARD OF TRADE REPORT]. For an overview of the mercantilist nature of English commercial regulations, see Priest, *supra* note 95, at 10–26.

¹²⁵ See, e.g., *Meynell v. Moore*, (1727) 4 Brown 103, 110, 2 Eng. Rep. 70, 74 (H.L.) (applying Antiguan law).

were using English law to defeat their efforts to collect upon their colonial debts.¹²⁶ The merchants were centrally interested in the laws of Virginia and Jamaica, where planters relied on an increasing supply of English credit to purchase slaves. The creditors' concerns related 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 protections to land and inheritance from unsecured creditors.¹²⁷ English creditors' concerns about the impact of English property exemptions on debt collection were 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 those in New England. Second, English creditors were concerned that colonial legislatures might enact laws characterizing 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 colonial estates desired to replicate the features of the English legal regime that reduced short-term financial risk and 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 — through, for example, 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 be captured only when the land was assembled in its entirety.¹²⁸ 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.”¹²⁹

¹²⁶ See *infra* pp. 421–23.

¹²⁷ 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 colonial inheritance laws, see Lee J. Alston & Morton Owen Schapiro, *Inheritance Laws Across Colonies: Causes and Consequences*, 44 J. ECON. HIST. 277, 279–81 (1984).

¹²⁸ According to Pares, “[t]he colonial legislatures were . . . anxious to protect plantations from being pulled to pieces for small debts, or by reason of the scarcity of the currency.” PARES, *supra* note 88, at 45.

¹²⁹ *Id.* at 46 (quoting John Ashley, *The Fall of Barbados Since the French Edict in 1726*, Public Records Office, Colonial Office Papers 28/25, A. a. 60) (internal quotation mark omitted). Pares describes a plantation in Jamaica that in 1802 was valued for sale at £21,212 in its entirety and at £14,351 if the buildings, lands, slaves, and equipment were sold separately. *Id.* at 88 n.55. 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. One possible explanation is that Barbados was

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 their residents could afford because creditors would lend to them on the basis of annual staple crop yields regardless of slaves. New England planters may have similarly feared that allowing execution on land for unsecured debts elevated their exposure to financial risk and could threaten the long-term productivity of farms, but the New England colonies had no equivalent staple crops for which they could obtain credit and suffered more severely from liquidity problems than the South.¹³⁰ Most wealth in New England was held in the form of land: in 1774, 81.1% of New England wealth (capital goods) was in the form of land.¹³¹ By contrast, in the mid-Atlantic region, in 1774 land constituted 68.5% of wealth; in the South, land constituted only 48.6% of wealth, and slaves constituted 35.6%.¹³² Abolishing the distinctions between real and personal property expanded credit to New England and increased the viability of using mortgages as “currency” in the absence of other valuable chattel property that might serve as commodity money.¹³³ Liquidity concerns were less serious in the South, where farmers produced staple crops that served as the basis for English credit and, locally, as commodity money, and where slaves were a highly valuable form of chattel property that had more of a presence than in the North.

A second concern driving Parliament’s enactment of the Debt Recovery Act was that colonial legislatures might characterize slaves as

characterized by absenteeism (its landowners often lived in England) and its landowners may therefore have been less attached to particular estates in land. By reforming their body of remedies, the Barbados planters signaled to creditors that the legal regime would protect creditors’ interests. See JOHN J. McCUSKER & RUSSELL R. MENARD, *THE ECONOMY OF BRITISH AMERICA, 1607–1789*, at 154–55 (1991). 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. See *id.* at 151–52, 164–67. Price and Menard speculate 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, *passim*; Menard, *supra* note 12, at 159–62. Why Barbados moved to this body of remedies so early is a complex question deserving further exploration.

¹³⁰ See Priest, *supra* note 7, at 1321–32.

¹³¹ MARC EGNAL, *NEW WORLD ECONOMIES* 15 tbl.1.2 (1998); see also ALICE HANSON JONES, *WEALTH OF A NATION TO BE* 98 & tbl.4.5 (1980) (containing data underlying Egnal’s table).

¹³² EGNAL, *supra* note 131, at 14–15 & tbl.1.2; see also JONES, *supra* note 131, at 98 & tbl.4.5.

¹³³ 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 7, at 1317–34 (describing “money substitutes” in light of currency shortages in New England).

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 them 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 provided that the eldest son would inherit the real property, but not the slaves.¹³⁴ Rather, younger children would inherit the slaves as chattel property, which was divided into equal shares after the deceased's debts were satisfied. Yet if the eldest son obtained the land but no slaves, the plantation might sit idle, potentially forever, while he gathered enough funds either to purchase his father's slaves from his siblings or to purchase new slaves. Thus, inherited land was of little value if slaves were personal property.

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 they could be sold to pay off debts more easily than could land.¹³⁵ Yet 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 may not be liable to the

¹³⁴ See THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619-1860*, at 66 (1996).

¹³⁵ Richard Kilbourne, for example, observes:

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 . . . [A]n investment in slaves was a rational choice, given the alternatives for storing savings in the middle of the [nineteenth] century.

RICHARD HOLCOMBE KILBOURNE, JR., *DEBT, INVESTMENT, SLAVES* 5 (1995). Compare *id.* with GAVIN WRIGHT, *OLD SOUTH, NEW SOUTH* 24-26, 30-31 (1986) (asserting that the large amount of wealth invested in slaves placed pressure on slave owners to put slaves to their most productive use, which led to high rates of geographic mobility).

payment of debts, must lessen, and in process of time, may destroy the credit of the country.”¹³⁶

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 that could be sold to satisfy debts to unsecured creditors, even in the event of the death of the debtor.¹³⁷ As an example, the 1727 Virginia statute mentioned above characterized slaves as real property and authorized the practice of entailing slaves to particular parcels of real property. Entailing property 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.”¹³⁸ 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.¹³⁹ A 1731 Virginia opinion, *Tucker v. Sweney*,¹⁴⁰ interpreted the statute in determining 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.”¹⁴¹ The Vir-

¹³⁶ An Act to Explain and Amend the Act, for Declaring the Negro, Mulatto, and Indian Slaves, Within This Dominion, To Be Real Estate, ch. 11, § 14 (1727), in 4 LAWS OF VIRGINIA, *supra* note 85, at 222, 226.

¹³⁷ 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.

An Act Declaring the Negro, Mulatto, and Indian Slaves Within This Dominion, To Be Real Estate, ch. 23, pmbl., § 2 (1705), in 3 LAWS OF VIRGINIA, *supra* note 85, at 333, 333. A later section 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.” *Id.* § 4, at 334. Antiguan law was similar in that slaves, but not freehold estates, were liable for the satisfaction of unsecured debts. On the Antiguan legal regime, see *Meynell v. Moore*, (1727) 4 Brown 103, 2 Eng. Rep. 70 (H.L.).

¹³⁸ An Act To Explain and Amend the Act, for Declaring the Negro, Mulatto, and Indian Slaves, Within This Dominion, To Be Real Estate ch. 11, § 14, at 226.

¹³⁹ *Id.* § 15, at 226. The Act’s 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.* § 11, at 224.

¹⁴⁰ Jeff. 5 (Va. Gen. Ct. 1731).

¹⁴¹ *Id.* at 5. As the historian Thomas Morris notes, 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 MORRIS, *supra* note 134, at 70.

ginia law is typical of the laws in other American and West Indian colonies.¹⁴² Some colonial legislatures, however, characterized slaves as real estate despite the negative impact that such laws might have had on credit. As described below, Jamaican lower courts were not permitted to authorize seizure of slaves.¹⁴³ In most colonies relying heavily on slave labor, however, unsecured creditors could claim debtors' chattel property and slaves, but not their land.

C. *The Enactment of the Debt Recovery Act*

1. *A Perceived Need for Greater Parliamentary Regulation of Colonial Property.* — Although colonial legislatures initially defined the debt collection procedures administered by the courts, their power to legislate in this area was subject to the review and control of English imperial authorities.¹⁴⁴ In the late 1720s and the 1730s, a sharp decline in the prices of sugar and tobacco and general conditions of recession throughout the Atlantic economy transformed the relationship between the colonial legislatures and the imperial authorities.¹⁴⁵ Large numbers of colonial planters were unable to pay their debts to English factors and merchants. Such 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 an Instruction 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.¹⁴⁶ The legislature failed to provide the requested remedy. It tried to placate the imperial authorities with a law reaffirming that slaves would be available to satisfy debts.¹⁴⁷ 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.¹⁴⁸ In 1730, the Crown repealed the Virginia statute of limitations by royal

¹⁴² See MORRIS, *supra* note 134, at 81–101.

¹⁴³ See *infra* p. 422. As mentioned above, in 1668 Barbados enacted a short-lived statute that characterized slaves as real estate exempt from creditors' claims. See *supra* p. 413.

¹⁴⁴ See *supra* p. 416.

¹⁴⁵ See Price, *supra* note 12, at 306 (describing the “abysmally low prices in Europe for both sugar and tobacco”).

¹⁴⁶ See *id.* at 308. The Instruction, which was given to most of the colonies, can be found in 1 ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS, *supra* note 89, at 338.

¹⁴⁷ See *supra* p. 420.

¹⁴⁸ See Price, *supra* note 12, at 308; see also An Act Declaring How Long Judgments, Bonds, Obligations, and Accounts Shall Be in Force, ch. 34 (1705), in 3 LAWS OF VIRGINIA, *supra* note 85, at 377, 377–78.

proclamation.¹⁴⁹ The Virginia legislature enacted a new law to replace the 1705 law,¹⁵⁰ but the new law purposefully omitted a provision of the 1705 law that had allowed an English creditor to prove his debts by swearing to them in England, “in the court of that county where he shall reside,” or “before the governor or mayor of the place where he is.”¹⁵¹ 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 for 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.”¹⁵² To obtain remedies against these assets, creditors were required to seek relief in the Supreme Court.¹⁵³ 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.¹⁵⁴ 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 but warned the Board of Trade that the legislature had approved the bill.¹⁵⁵

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 with remedies that were “very partiall and precarious.”¹⁵⁶ In a subsequent memorandum detailing their concerns,

¹⁴⁹ See 3 LAWS OF VIRGINIA, *supra* note 85, at 377 (noting repeal by proclamation in margin). 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.

¹⁵⁰ See An Act for Ascertaining the Damage upon Protested Bills of Exchange, ch. 5 (1730), in 4 LAWS OF VIRGINIA, *supra* note 85, at 273.

¹⁵¹ An Act Declaring How Long Judgments, Bonds, Obligations, and Accounts Shall Be in Force para. 9.

¹⁵² An Act for Regulating Fees, Act 56, § 122 (1711), in 1 ACTS OF ASSEMBLY, PASSED IN THE ISLAND OF JAMAICA, *supra* note 87, at 86, 90.

¹⁵³ *Id.*

¹⁵⁴ Letter from Governor Hunter to the Council of Trade and Plantations (Aug. 3, 1728), in 36 CALENDAR OF STATE PAPERS, COLONIAL SERIES, AMERICA AND WEST INDIES, 1728–1729, No. 344, at 167, 168 (Cecil Headlam ed., Kraus 1964) (1937) (discussing the Act of July 18, 1728).

¹⁵⁵ *Id.* at 167–68. 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.* at 169.

¹⁵⁶ Petition of Several Merchants of the City of London (Aug. 12, 1731), in 38 CALENDAR OF STATE PAPERS, COLONIAL SERIES, AMERICA AND WEST INDIES, 1731, No. 367i, at 224, 225

the merchants complained specifically about the fact that land and houses were not liable for debts in Jamaica.¹⁵⁷ 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 “[a]s 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.”¹⁵⁸ Tymms added that “[t]his is an evil which prevents attempts at the better settlement of the island.”¹⁵⁹

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.”¹⁶⁰ It advised the Crown of the need for a parliamentary act on remedies.¹⁶¹

2. *The Text of the Act.* — In 1732, Parliament enacted the Act for the More Easy Recovery of Debts in his Majesty’s Plantations and Colonies in America.¹⁶² Its stated purpose was to “retriev[e] . . . the Credit formerly given . . . to the Natives and Inhabitants of the . . . Plantations,” and to “advanc[e] . . . the Trade of this Kingdom.”¹⁶³ 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.”¹⁶⁴ These property in-

(Cecil Headlam & Arthur Percival Newton eds., Kraus 1964) (1938) [hereinafter 38 CALENDAR OF STATE PAPERS], *quoted in* 1734 BOARD OF TRADE REPORT, *supra* note 124, at 7; *see also* 4 PROCEEDINGS AND DEBATES OF THE BRITISH PARLIAMENTS RESPECTING NORTH AMERICA 89, 128 n.13, 130, 153–54 (Leo Francis Stock ed., 2003) (referring to enactment of colonial statutes impeding the recovery of debts in parliamentary sessions of 1730 to 1732).

¹⁵⁷ *See* Particular Facts and Instances in Support of the Merchants’ Petition (Aug. 12, 1731), *in* 38 CALENDAR OF STATE PAPERS, *supra* note 156, No. 434i, at 293.

¹⁵⁸ Letter from John Tymms to Humfrey Morice (Sept. 13, 1731), *in* 38 CALENDAR OF STATE PAPERS, *supra* note 156, No. 434ii, at 294, 294.

¹⁵⁹ *Id.* at 295.

¹⁶⁰ 1734 BOARD OF TRADE REPORT, *supra* note 124, at 9.

¹⁶¹ *Id.* at 9–10.

¹⁶² 5 Geo. 2, c. 7 (1732) (Eng.).

¹⁶³ *Id.* pmbl.

¹⁶⁴ *Id.* § 4. 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) (Eng.).

terests — houses, lands, 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.”¹⁶⁵ This provision of the statute clarified that the 1691 Statute of Fraudulent Devises — which gave secured creditors priority to a deceased’s land over the heirs and devisees — applied throughout the American and West Indian colonies both to secured creditors and to unsecured creditors.¹⁶⁶

The Debt Recovery Act 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.”¹⁶⁷ 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.¹⁶⁸

The Debt Recovery Act took from all of the British colonial legislatures in America and the West Indies the power to define categories of assets that would be protected from creditors’ claims. Under the Act, all forms of wealth were available to satisfy unsecured debts. Notably, the statute was not limited to colonial debts to English creditors. The language of the statute required that colonial courts apply the Act locally in all cases involving court awards in which enforcement of the judgment was required by means of execution.¹⁶⁹ The Act applied only in the colonies, however; England retained its traditional real property exemptions for over a century after the enactment of the Debt Recovery Act, until 1833.¹⁷⁰

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. The primary participation by colonists in the process of enacting the Debt Recovery Act was by Virginians, who fiercely opposed the Act. Prior to enactment, Virginia sent Isham Randolph as its agent

¹⁶⁵ 5 Geo. 2, c. 7, § 4 (emphasis omitted).

¹⁶⁶ For a discussion of the Statute of Fraudulent Devises, see *supra* p. 404.

¹⁶⁷ 5 Geo. 2, c. 7, § 4.

¹⁶⁸ Colonists were incensed about this provision of the statute and believed it violated their right to defend themselves in court. This provision has an interesting history — some state courts repealed the provision during the American Revolution — but it is beyond the scope of this Article. See HEMPHILL, *supra* note 14, at 188, 227–28.

¹⁶⁹ 5 Geo. 2, c. 7, § 4 (mandating that such property would be liable to all debts “owing by any such Person to his Majesty, or any of his Subjects”).

¹⁷⁰ See 3 & 4 Will. 4, c. 104 (1833) (Eng.).

to Parliament. Randolph submitted a petition to Parliament requesting a hearing on the Act.¹⁷¹ Randolph's petition stated that "said bill will greatly affect the rights and propertys in the landed interest of his Majestys subjects residing in the said colony."¹⁷² Randolph received a hearing on March 17, 1731, and voiced his opposition to the statute, but his arguments failed to persuade Parliament.

3. *Political Reaction to the Act.* — 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.¹⁷³ The statute was recognized as authoritative throughout New England and Barbados, though the effects of the Act were more subtle in colonies that had already adopted similar laws independently. The Act did, however, have effects in New England. For example, New Hampshire's 1718 law prevented the seizure of debtor's *houses* during the life of the debtor.¹⁷⁴ The Debt Recovery Act explicitly includes houses in its list of property to be treated as legally equivalent to chattel property for the purpose of creditors' claims.¹⁷⁵ In contrast, in Connecticut, for example, the Act was perceived as simply providing more formal authority for the existing practice.¹⁷⁶

¹⁷¹ See Petition of Isham Randolph, Esq'r Agent for the Colony of Virginia (Mar. 17, 1731), quoted in 4 PROCEEDINGS AND DEBATES OF THE BRITISH PARLIAMENTS RESPECTING NORTH AMERICA, *supra* note 156, at 153.

¹⁷² *Id.*

¹⁷³ See, e.g., An Act for Rendering More Effectual the Laws Making Lands and Other Real Estates Liable to the Payment of Debts, ch. 4 (1764), in SESSION LAWS OF NORTH CAROLINA (Wilmington, Andrew Steuart 1764) (stating that the 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," and reaffirming 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. Ct. 1741) (on file with the Harvard Law School Library) (holding that the Debt Recovery Act was in force in Rhode Island and applying the Act to disputes related to inheritance); Peckham's v. Allen (R.I. Eq. Ct. 1741) (on file with the Harvard Law School Library) (same); Writ of Execution Against the Estate of William Harper, North Carolina State Archives (April 8, 1768) (on file with the Harvard Law School Library) (authorizing sheriffs to seize all forms of personal and real property in the following order until the debt was satisfied: first, personal property; second, slaves; third, land); Writ of Execution Against the Estate of Joseph Jennett, North Carolina State Archives (June 4, 1767) (on file with the Harvard Law School Library) (same).

¹⁷⁴ See 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, IN NEW-ENGLAND, *supra* note 118, at 84.

¹⁷⁵ 5 Geo 2, c. 7, § 4 (1732) (Eng.). For evidence that the Debt Recovery Act was recognized as authoritative in New Hampshire, see ACTS AND LAWS OF HIS MAJESTY'S PROVINCE OF NEW-HAMPSHIRE, IN NEW-ENGLAND iv, 233 (Portsmouth, Daniel & Robert Fowle 1771) (listing the Debt Recovery Act as one of the "perpetual laws" in operation in the colony and reprinting the law).

¹⁷⁶ Governor Talcott of Connecticut 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

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 as “cruell and unjust” in a letter to an English merchant.¹⁷⁷ Custis explained that he personally owed “no one in England a farthing” and locally “ha[d] many owing” him, so he had no economic motive in attacking the Act; his comments were “purely the result of [his] thoughts.”¹⁷⁸ 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 Specialty¹⁷⁹ and as wee are brittish Subjects wee might reasonably expect Brittish liberty wee desire nothing else than to bee 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 your selves to bee gainers by that act you will find yt you have so incensed ye Country; that you will force ym as soon as convenient to have nothing to do with you.¹⁸⁰

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,¹⁸¹ 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 carryed them into measures which I heartily wish from getting out of one extreme, we may not be involv'd in another.”¹⁸² 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 Oppressions upon us.”¹⁸³

Virginia initially complied with the Act. In 1738, the Virginia General Court issued a decision holding that land could be “sold as Goods

payment of his just Debts.” Letter from Governor Joseph Talcott to Francis Wilks (Oct. 1732), in 4 COLLECTIONS OF THE CONNECTICUT HISTORICAL SOCIETY 260–61 (1892).

¹⁷⁷ Letter from John Custis to Thomas Lloyd (1732), quoted in HEMPHILL, *supra* note 14, at 230.

¹⁷⁸ *Id.*

¹⁷⁹ “Specialty” is a term used to describe debts made under seal, or secured debts.

¹⁸⁰ HEMPHILL, *supra* note 14, at 230 (typeface altered for readability); see also Petition of Isham Randolph, Esq'r Agent for the Colony of Virginia, *supra* note 171.

¹⁸¹ See *supra* p. 410.

¹⁸² Letter from Robert Carter to Micajah Perry (July 10, 1732), quoted in HEMPHILL, *supra* note 14, at 228.

¹⁸³ *Id.*

taken on a [*feri facias*].”¹⁸⁴ The court emphasized that this was the first instance of land being sold under the Debt Recovery Act.¹⁸⁵ Nonetheless, in 1748 Virginia appears 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.¹⁸⁶

D. *The Impact in the Colonies of the Debt Recovery Act*

In 1774, William Knox, an English undersecretary of state in the American Department from 1770 to 1782,¹⁸⁷ 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.”¹⁸⁸ 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.”¹⁸⁹ Left alone, however, the colonial legislatures were likely to modify the laws to “injure their British creditors.”¹⁹⁰

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

¹⁸⁴ *Harrison v. Halley*, Jeff. 58, 58 (Va. Gen. Ct. 1739).

¹⁸⁵ *Id.*

¹⁸⁶ 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 55–56 (Williamsburg, William Parks 1748) (reporting that the Committee of Propositions and Grievances rejected a proposition from the County of Richmond to make the Debt Recovery Act apply in Virginia). Yet also in 1748, the Virginia legislature enacted a statute that explicitly adopted the traditional English approach to remedies (limiting the remedies to *feri facias* for “goods[] and chattels,” *levari facias*, and *elegit*). This statute thereby officially rejected the Debt Recovery Act with respect to intracolony debts. An Act Declaring the Law Concerning Executions; and for Relief of Insolvent Debtors, ch. 12 (1748), in 4 LAWS OF VIRGINIA, *supra* note 85, at 526.

¹⁸⁷ Knox was influential in setting English policy for the colonies during the period. See 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.”).

¹⁸⁸ WILLIAM KNOX, THE INTEREST OF THE MERCHANTS AND MANUFACTURERS OF GREAT BRITAIN, IN THE PRESENT CONTEST WITH THE COLONIES, STATED AND CONSIDERED 35 (Boston, Draper’s 1775).

¹⁸⁹ *Id.* at 36.

¹⁹⁰ *Id.* at 37.

payment of English book debts.”¹⁹¹ The Act, Knox said, “may truly be called the *Palladium of Colony credit*, and the *English merchants’ grand security*.”¹⁹² Similarly, 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.”¹⁹³ Were Knox and Story correct to describe the Debt Recovery Act as a source of colonial economic growth?

1. *Legal Effects of the Act in the Colonies.* — In practice, the 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.”¹⁹⁴ The colonial courts implemented the Act by expanding the writ of *fieri facias* — which traditionally authorized the sheriff to seize the goods and chattels of a debtor — to authorize the seizure of land.¹⁹⁵

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 enacted after the Debt Recovery Act establish a clear ranking of the types of property a sheriff could take to satisfy debts.¹⁹⁶ The debtor’s “Personal Estate . . . (Slaves Excepted)” was 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.¹⁹⁷ The sheriff was authorized to seize the debtor’s “Lands, Tenements, Hereditaments and other real Estate” only if goods, chattels, and slaves were insufficient to satisfy the debt.¹⁹⁸ This scheme was similar to that adopted in other colonies.

¹⁹¹ *Id.* at 38.

¹⁹² *Id.* (emphases 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 42.

¹⁹³ 1 STORY, *supra* note 1, § 182.

¹⁹⁴ 5 Geo. 2, c. 7, § 4 (1732) (Eng.).

¹⁹⁵ See 4 KENT, *supra* note 14, at 428–31.

¹⁹⁶ See writs of execution cited *supra* note 173.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

Second, the Act subordinated the interests of heirs to those of unsecured creditors at the death of a debtor.¹⁹⁹ 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. 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.²⁰⁰ The Act, however, stated that colonial courts were to subject land to the same "Remedies . . . and Process . . . for seizing . . . [and] selling . . . [for] the Satisfaction of such Debts . . . as Personal Estates."²⁰¹ Thus, colonial courts had to address whether, under the Act, the executors would take control over the real property when landowners died. If so, the heirs and devisees would be vulnerable to executors' discretionary choices about how to satisfy the deceaseds' debts. Equally important, they would be denied the traditional procedural mechanism that afforded heirs and devisees the opportunity to defend their claims to inherited land in court.²⁰² In an 1804 opinion, Chancellor James Kent stated that in New York, under the Debt Recovery Act, 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."²⁰³

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 stated that "Houses, Lands, Negroes, and other Hereditaments and real Estates" were subject to the Act.²⁰⁴ Redemption rights were interests in real property that most courts interpreted

¹⁹⁹ As John Haywood, a 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. (1 Hayw.) 43, 69 (Super. Ct. 1794) (Haywood arguing for the plaintiff).

²⁰⁰ 2 POLLOCK & MAITLAND, *supra* note 30, at 334 ("[T]he executor had nothing to do with the dead man's land, the heir had nothing to do with the chattels . . .").

²⁰¹ 5 Geo. 2, c. 7, § 4 (1732) (Eng.).

²⁰² As mentioned above, Blackstone described 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.

²⁰³ *Waters v. Stewart*, 1 Cai. Cas. 47, 71 (N.Y. Sup. Ct. 1804); see also 4 KENT, *supra* note 14, at 429 (listing states that allowed land to be sold on a writ of *fieri facias* with no right of redemption).

²⁰⁴ 5 Geo. 2, c. 7, § 4 (emphasis added).

as being covered by the Act, and therefore subject to sale at an execution auction. As described in *Bell v. Hill*,²⁰⁵ a 1794 North Carolina Superior Court opinion:

[I]f a [*fiery facias*] 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.²⁰⁶

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,²⁰⁷ could have found that the Act did not apply to their proceedings and that, therefore, they were entitled to recognize traditional English redemption rights.²⁰⁸ 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 real property could not be sold pursuant to a legal writ of *fiery facias*. As the next Part describes, in most colonies (and later, states) the Debt Recovery Act led to the abolition of equitable redemption rights.²⁰⁹ The Act therefore made it easier for both secured creditors and unsecured creditors to use legal process to obtain satisfaction of their debts.

Slaves had been used as collateral and had been sold in judicially supervised auctions long before Parliament enacted the Debt Recovery Act. The Act, however, 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 auctioning slaves to satisfy the slave owner's secured and unsecured debts as a grievance

²⁰⁵ 2 N.C. (1 Hayw.) 72 (Super. Ct. 1794).

²⁰⁶ *Id.* at 95; see also *Waters*, 1 Cal. Cas. at 70–71; 4 KENT, *supra* note 14, at 429.

²⁰⁷ At the time of the Revolution, only Maryland, New Jersey, New York, Pennsylvania, 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). After the American Revolution, several other states either established equity courts, or granted full equity powers to common law courts. These included Alabama, Arkansas, Georgia, Kentucky, Maryland, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia. See MARYLYNN SALMON, *WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA* 82–83 (1986).

²⁰⁸ This argument was made (unsuccessfully) by lawyers in an 1804 New York case heard by the New York Supreme Court. See *infra* pp. 444–45.

²⁰⁹ See *infra* section III.A, pp. 440–47.

“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.”²¹⁰ Edwards says of the 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.”²¹¹ 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 then be totally repealed. It is injurious to the national character; it is disgraceful to humanity. Let the negroes be attached to the land, and sold with it.”²¹²

Despite this outcry, 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 colonial legislation already required courts to treat slaves as chattel for the purpose of satisfying debts.²¹³ 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. *Risks Eliminated by the Act.* — The legislative history suggests that the Debt Recovery Act was enacted to eliminate three principal risks facing creditors to the colonies. First, the presence of English property exemptions meant that all unsecured creditors assumed the risk that their debtors might purchase land strategically to reduce the pool of assets from which the creditors could collect. Actions of this nature represent a form of moral hazard in which a debtor increases the risks faced by a creditor after the credit has been extended. Robert Carter, it may be recalled, complained of a debtor who had purchased land after becoming fatally ill in order “to defraud his creditors, and to do something for his wife and children at other men’s cost.”²¹⁴ The Debt Recovery Act abolished all exemptions that allowed for such strategic behavior.

²¹⁰ 2 BRYAN EDWARDS, *THE HISTORY OF THE BRITISH COLONIES IN THE WEST INDIES* 366 (Phila., James Humphreys 1806). 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) (conducting an empirical analysis of slave auctions in antebellum South Carolina and finding that courts conducted or supervised a majority of slave auctions).

²¹¹ 2 EDWARDS, *supra* note 210, at 366.

²¹² *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) (Eng.).

²¹³ See *supra* pp. 420–21.

²¹⁴ Letter from Robert Carter to John Carter, *supra* note 90, at 33.

The second risk the Act sought to eliminate was more specific to colonies, such as Jamaica and Virginia, where planters relied extensively on credit to purchase slaves. This was the risk that debtors might conceal their slave and other chattel assets from the officials who came to collect on behalf of creditors. When the land was immune from seizure, debtors were able to prevent their creditors from having any effective collection remedy. The merchant John Tymms, for example, complained that “the principal parts of [Jamaican] estates are exempted by law from the payment of debts and negroes are frequently driven away into the woods or mountains out of the Marshall’s way.”²¹⁵ Making land available to satisfy the claims of unsecured creditors eliminated debtors’ incentives to conceal slave and chattel property from their creditors. In colonies heavily reliant on slave labor, the Debt Recovery Act likely led to greater seizure of slaves for debt satisfaction purposes.

The third risk eliminated by the Act was the risk that colonial legislatures might enact debt relief legislation that would hurt creditors’ interests. The Act created greater security both by overriding specific colonial laws that protected assets or inheritance from creditors and by removing colonial legislatures’ legal authority over creditors’ remedies and debt collection processes. By enacting a broad uniform rule, applicable throughout all of the British colonies in America and the West Indies, the English forestalled such legislation.²¹⁶

3. *Economic Effects of the Act.* — By eliminating the risks described above, the Act lowered the costs to creditors of obtaining a legal remedy when debtors defaulted on their debts. Moreover, under the traditional English remedies, an unsecured creditor who, say, applied for a writ of *levari facias* to impose a lien upon earnings of a debtor’s land might have had to wait years for the debt to be paid off. In contrast, under the regime of the Debt Recovery Act, a creditor could use legal process to force a sale of all of a debtor’s real and personal property in a short period of time either during the debtor’s life or after the debtor died.²¹⁷

In addition, as described, English equity court procedures imposed costs on mortgagees seizing real property upon default of a mortgage agreement. Abolishing rights of redemption vastly reduced the costs

²¹⁵ Letter from John Tymms to Humfrey Morice, *supra* note 158, at 294.

²¹⁶ Eliminating the risk of subsequent colonial legislation applied to all colonies, including those, such as Barbados and Massachusetts, that had voluntarily reformed their laws to make land available for debts prior to the Debt Recovery Act.

²¹⁷ In the works that have discussed potential economic implications of the Debt Recovery Act, Menard and Price emphasize the acceleration of legal relief as a central effect. See Menard, *supra* note 12, at 159–61; Price, *supra* note 12, at 294.

secured creditors faced in forcing a seizure of debtors' land.²¹⁸ On the margin, a creditor is likely to pass on the costs of collection to the debtor in the form of higher interest rates. The principal economic effects of the Debt Recovery Act were likely to be lower interest rates on both secured and unsecured credit²¹⁹ and expanded land markets.

Empirical studies of property exemptions have found a clear correlation between more expansive exemption laws and higher rates of interest. A recent study by Jeremy Berkowitz and Michelle J. White, for example, found that in states with unlimited homestead exemptions, interest rates on loans to small unincorporated firms were higher and these firms were more likely to be denied credit.²²⁰ Other studies have found similar results.²²¹

Lower interest rates would mean that more capital was available for productive investment. The precise economic effect of eliminating all property exemptions is complicated, however, by the fact that some debtors are more likely to borrow more — despite having to pay higher interest rates — when at least part of their assets are “insured” against seizure by creditors.²²² These effects are different for relatively low- versus high-risk borrowers. Lower interest rates increase de-

²¹⁸ 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 significance 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 between secured and unsecured credit.

²¹⁹ Menard describes lower interest rates as an effect of the Debt Recovery Act. Menard, *supra* note 12, at 161.

²²⁰ Jeremy Berkowitz & Michelle J. White, *Bankruptcy and Small Firms' Access to Credit*, 35 RAND J. ECON. 69, 78, 80–81 (2004).

²²¹ See Reint Gropp et al., *Personal Bankruptcy and Credit Supply and Demand*, 112 Q.J. ECON. 217 (1997) (finding worse credit terms in states with higher property exemptions); Emily Y. Lin & Michelle J. White, *Bankruptcy and the Market for Mortgage and Home Improvement Loans*, 50 J. URB. ECON. 138, 160–61 (2001) (finding that interest rates on mortgages are higher in jurisdictions offering exemptions on property from the claims of unsecured creditors).

²²² Wei Fan and Michelle J. White found that the probability of owning an unincorporated business is higher in states that offer higher property exemptions. Wei Fan & Michelle J. White, *Personal Bankruptcy and the Level of Entrepreneurial Activity*, 46 J.L. & ECON. 543 (2003); see also Frederick Link, *The Economics of Personal Bankruptcy* 155 (May 3, 2004) (unpublished Ph.D. dissertation, Massachusetts Institute of Technology) (on file with the Harvard Law School Library) (finding that higher homestead exemption levels lower the probability that a household owns a home; lower the probability that a household will have positive non-mortgage debt; but increase homeowners' levels of mortgage debt).

mand for credit by low-risk borrowers despite the greater availability of assets for debt collection. In contrast, enhanced collection remedies make borrowing riskier for high-risk borrowers.

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 that explicitly responded to the Act. The Jamaican statute lowered the legal interest rate by twenty percent.²²³ It 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."²²⁴ 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.

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. Moreover, in the colonial period, "interest rates" were likely to be expressed most often in terms of import levels. When creditors felt more secure about repayment, they would allow colonists to import more goods on the basis of the annual crop yields, and perhaps for longer terms.²²⁵ 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, however, because economic trends such as import levels were affected by many different variables. These variables included conditions in the English and European markets for goods like tobacco, wheat, and rice; crop production, which depends on weather; productivity advances; and equally important, economic events in England, Europe, and Africa. Moreover, the 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,

²²³ An Act for the Reducing the Interest of Money on All Future Contracts, and for the Advancing the Credit of Bills of Exchange, ch. 3 (1739), in 1 LAWS OF JAMAICA 262 (St. Jago de la Vega, Alexander Aikman 1792).

²²⁴ *Id.* pmb., at 262–63.

²²⁵ English creditors sold goods to colonial factors that the factors, in turn, sold to local colonial producers on credit for extended periods of time. See, e.g., SHERIDAN, *supra* note 13, at 284 (discussing the role of colonial factors); Priest, *supra* note 95, at 18–19 (same).

driven by credit, began in the 1740s. The terms upon which credit was extended appear to have improved considerably in the period after the enactment of the Debt Recovery Act, as reported in studies not addressing the Act. For example, the economic historian Marc Egnal has examined advertisements in the *Virginia Gazette* and found that “[i]n the 1730s the typical advertisement for land or slaves demanded payment in cash.”²²⁶ By the 1760s, similar advertisements offered credit terms of a year or more.²²⁷ Egnal adds that “[s]tatistical series and planter correspondence illustrate the strong growth of credit after the 1740s.”²²⁸ Customs records reveal that imports to the colonies from England increased steadily from the 1730s and 1740s through the end of the colonial period.²²⁹ 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, but over double that amount, approximately £1,230,000, by 1749.²³⁰ Over this period, colonial factors became willing to accept bills of exchange drawn for longer periods of time.²³¹ 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.²³² 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.²³³

Slave imports expanded during the same period.²³⁴ Although import levels and credit terms to the colonies were determined by many different economic factors, data on this expansion of slave imports in Virginia provides the best evidence of an immediate and direct effect of the enactment of the Debt Recovery Act in 1732. 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

²²⁶ See EGNAL, *supra* note 131, at 93.

²²⁷ *Id.* at 93 fig.5.12.

²²⁸ *Id.* at 93.

²²⁹ 2 BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 1176 (1975) [hereinafter 2 HISTORICAL STATISTICS]; see also EGNAL, *supra* note 131, at 83 fig.5.6 (graph of per capita imports).

²³⁰ 2 HISTORICAL STATISTICS, *supra* note 229, at 1176.

²³¹ See SHERIDAN, *supra* note 13, at 290.

²³² See MCCUSKER & MENARD, *supra* note 129, at 68 (“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.”).

²³³ T.H. BREEN, THE MARKETPLACE OF REVOLUTION xv (2004); see also RICHARD L. BUSHMAN, THE REFINEMENT OF AMERICA (1992) (describing transformation of consumer culture and standard of living beginning in 1740s).

²³⁴ See EGNAL, *supra* note 131, at 100–01 (showing the increase in slave imports into Charleston, South Carolina).

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, the numbers rose to 1,720, 1,587, 2,104, 3,222, and 2,174, respectively.²³⁵ 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.²³⁶

The Debt Recovery Act also likely expanded the market for land in America, although this result is also 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 sales 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 sales. 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 to 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.²³⁷ Changing the default rule to one permitting unsecured creditors to seize land would lead to an increase in voluntary property sales.

4. *The Question of Entailed Land.* — Measuring the precise effects of the Debt Recovery Act on credit markets and on land markets is further complicated, however, by the fact that the 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 interests of the remainder-

²³⁵ 2 HISTORICAL STATISTICS, *supra* note 229, at 1172 tbls.146-49.

²³⁶ In a brief discussion of the Debt Recovery Act, Price speculates 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 notes that slave imports to Virginia were "buoyant" following the Act. *Id.* at 310 n.36.

²³⁷ Colonial court fees were high. An empirical study of court fees and costs of court in litigation in 1740 in the Plymouth County, Massachusetts, Court of Common Pleas found that fees and costs totaled 79% of the underlying debt amount for the lowest quartile of debts, and averaged 32.6% of all debts. 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 likely to represent only a small percentage of land sold to satisfy creditors' claims.

men.²³⁸ The 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.²³⁹ It is possible to imagine that the Act would have led to an expansion of the practice in some contexts and a contraction of the practice in others. Because the Act abolished other traditional protections to land 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 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 practice of entailing property in various colonies requires further study.

E. The Debt Recovery Act 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 and did not merely regulate 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.²⁴⁰ Knox's motive was to make the Stamp Act seem less interventionist by comparison. According to Knox:

²³⁸ As described above, when estates were entailed, the present possessor held only a life interest — the right to full possessory use for the duration of the party's life. See *supra* p. 400.

²³⁹ See *supra* note 25.

²⁴⁰ See WILLIAM KNOX, THE CLAIM OF THE COLONIES TO AN EXCEPTION FROM INTERNAL TAXES IMPOSED BY AUTHORITY OF PARLIAMENT (London, W. Johnston 1765).

[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 [T]he 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 dispose of them for the use of private persons, inhabitants of Great Britain, [who can] question the parliament's having sufficient jurisdiction to take away a small part of the products of those lands, and apply it to the public service?²⁴¹

Alexander Hamilton later reflected upon the Debt Recovery Act as an exercise of parliamentary power 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 [*feri facias*] 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 than our Legislature ought to have assented to*; it was one of the Highest Acts of Legislature that one Country could exercise over another.²⁴²

It appears that Hamilton intended to emphasize that the Debt Recovery Act was a regrettable precedent for parliamentary regulation: it might have empowered Parliament to enact the offensive statutes leading to the American Revolution (such as the Stamp Act and the Townshend Act). His description of the Debt Recovery Act as “one of the Highest Acts of Legislature,” however, also reveals the importance placed upon creditors’ remedies as a matter of economic, social, and

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

²⁴¹ *Id.* at 10–11. Daniel Dulaney, a private citizen from Maryland, wrote a pamphlet attacking the Stamp Act in response to Knox’s defense of it. See DANIEL DULANEY, CONSIDERATIONS ON THE PROPRIETY OF IMPOSING TAXES IN THE BRITISH COLONIES, FOR THE PURPOSE OF RAISING A REVENUE BY ACT OF PARLIAMENT (Annapolis, Jonas Green 1765). 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.” *Id.* at 37. 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.” *Id.* 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?

²⁴² Alexander Hamilton, *Practical Proceedings in the Supreme Court of the State of New York* (circa 1782), in 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 55, 97 (Julius Goebel, Jr. ed., 1964) (emphasis added).

political concern in the founding era. As we shall see, the states were highly protective of their right to legislate in the area of creditors' remedies 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.²⁴³ The Convention ultimately rejected the model of routine parliamentary supervision, 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 opposition 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 implications of the Act and the issue of creditor remedies for American federalism.

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 enforced throughout the British colonies in America and the West Indies. After the colonists gained independence from British parliamentary authority, however, state legislatures and courts faced a choice when enacting laws in areas previously covered by the Act. The policies governing creditors' remedies, inheritance practices, and judicial process were related to deeper issues about the nature of the society as a whole. The founding era was a period in which landed wealth still played a large role in many people's conceptions of the economic, social, and political order.²⁴⁴ At the time of the Revolution, every state but one required freehold property ownership for participation in the franchise based upon the belief that real property ownership conferred an independence from corrupt influences necessary for political participation and led to the strongest form of attachment to the nation.²⁴⁵ A 1776 pamphlet, for example, concluded that

²⁴³ See Alison L. LaCroix, *The Authority for Federalism: Madison's Negative and the Transition from Imperial to Federal Supremacy* (Dec. 12, 2005) (unpublished manuscript, on file with the Harvard Law School Library) (describing the Madisonian veto proposal and identifying its failure in the Constitutional Convention as an explicit rejection of the English model of Privy Council review).

²⁴⁴ See *supra* note 25 and accompanying text.

²⁴⁵ 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 14, at 66–69 (discussing the civic republican view of property as a socializing force).

Americans were particularly well suited for republicanism because they were “a people of property; almost every man is a freeholder.”²⁴⁶

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 states enacted laws pertaining to property and the claims of creditors became increasingly complex. Each state had to decide how to balance the desire for credit and economic advancement with the competing desire to safeguard the landowners’ “independence” and families’ financial security. State policies and court decisions in the 1780s and afterward reveal a pervasive 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.

*A. The Extension of the Debt Recovery Act
in State Legislation and Court Decisions*

The Debt Recovery Act had a lasting legacy in founding-era America. It was incorporated 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 they 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 “commercial republican” 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 contrasted sharply with the English aristocracy, which based social and political privilege upon land ownership and inheritance. Commercial republicans defended the policy of making land available to satisfy debts and the streamlined nature of legal process under the Debt Recovery Act on the ground that subjecting landed wealth to commercial risks would prevent the entrenchment of a domestic aristocracy.

Most state legislatures enacted statutes affirming that the remedial regime existing prior to the American Revolution would remain in

²⁴⁶ WOOD, *supra* note 20, at 234 (quoting PA. PACKET, Nov. 26, 1776; S.C. & AM. GAZETTE, Nov. 6, 1777) (internal quotation marks omitted).

place without substantial modification.²⁴⁷ Indeed, the early state legislation 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."²⁴⁸

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.²⁴⁹ By abolishing the entail, the state legislatures removed the principal remaining mechanism by which landowners could protect their real property as-

²⁴⁷ In some states, the Debt Recovery Act remained valid law. For example, 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. Rotchford*, 53 Va. (12 Gratt.) 60, 67 (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 27th, 1801, when their laws were extended by act of congress to Washington county; and was in force in Washington county June 24th, 1812, when the law of that county was extended to Alexandria county.").

²⁴⁸ An Act for Establishing Courts of Law, and for Regulating the Proceedings Therein, ch. 2, § 29 (1777), in *ACTS OF ASSEMBLY OF THE STATE OF NORTH CAROLINA* 8, 16 (Newbern, James Davis 1778); *see also* Act of Feb. 15, 1791, 1791 N.H. Laws 122 (establishing a regime whereby lands would be transferred to creditors in kind, with a one-year statutory redemption period, when a debtor's personal property was deficient).

²⁴⁹ *See* GA. CONST. of 1777, art. 51, *explained by* An Act To Explain the Fifty-First Article of the Constitution, Respecting Intestate Estates; and also Concerning Marriages, No. 307 (1785), in *DIGEST OF THE LAWS OF THE STATE OF GEORGIA* 313 (Robert Watkins & George Watkins eds., Phila., R. Aitken 1800); An Act Concerning Wills; the Distribution of Intestates Estates; and the Duties of Executor and Administrators, ch. 61, § 25 (1785), in *12 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA* 140, 146 (William Waller Hening ed., Phila., Thomas Desilver 1823); *see also* GA. CONST. of 1789, art. 3, § 6, *explained by* An Act To Carry into Effect the Sixth Section of the Fourth Article of the Constitution, No. 429 (1789), in *DIGEST OF THE LAWS OF THE STATE OF GEORGIA*, *supra*, at 414; An Act To Amend an Act Passed at Hillsborough, ch. 435 (1795), in *1 LAWS OF THE STATE OF NORTH-CAROLINA* 780 (Hen. Potter, J.L. Taylor & Bart. Yancey eds., Raleigh, J. Gales 1821) (dividing estate equally among sons and daughters); An Act To Regulate the Descent of Real Estates, To Do Away with Entails, To Make Provision for Widows, and Prevent Frauds in the Execution of Last Wills and Testaments, ch. 22, § 2 (1784), in *24 STATE RECORDS OF NORTH CAROLINA* 572, 572-73 (Walter Clark ed., 1905) (dividing estate equally among sons); Intestates' Estate Act (1791), in *1 AN ALPHABETICAL DIGEST OF THE PUBLIC STATUTE LAW OF SOUTH-CAROLINA* 422 (Joseph Brevard ed., Charleston, John Hoff 1814). *See generally* 4 KENT, *supra* note 14, at 14-17 (describing the entail as generally "abolished" in the United States).

sets 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, first, the procedural issue of whether to extend heirs the privilege of being made parties to legal actions in which the inheritance of land was at stake and, second, the status under the new state legislation of the mortgagor's equity of redemption.²⁵⁰

Blackstone, it may be recalled, described 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."²⁵¹ 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 real as well as personal property to creditors without the formal participation of the heir.

The issues involved are illustrated by *D'Urphey v. Nelson*,²⁵² an 1803 opinion of the Constitutional Court of Appeals of South Carolina, which unequivocally denied the traditional privilege in that state. D'Urphey brought an action as heir to his father's estate. His father's land 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 by the sheriff on the ground that he had not been given an opportunity to appear in court to contest the sale before the land was sold.²⁵³

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*

²⁵⁰ A less controversial issue involved whether the personal property had to be exhausted before the sheriff seized the debtor's real property. Most states, either by statute or court decision, determined that, in the ordinary course of debt collection, the sheriff could seize land only when the debtor's personal property could not satisfy the debt. Maryland was exceptional in allowing creditors to choose whether to take the debtor's personal property or real property. *See Hanson v. Barnes' Lessee*, 3 G. & J. 359, 367 (Md. 1831) (noting that 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, *see sources cited infra* note 263, 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.

²⁵¹ 1 BLACKSTONE, *supra* note 2, at *134-35.

²⁵² 3 S.C.L. (1 Brev.) 289 (S.C. Const. Ct. 1803).

²⁵³ *Id.* at 290.

*personal estates.*²⁵⁴ 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.”²⁵⁵ It noted that the Debt Recovery Act was “certainly intended for the benefit of the creditor.”²⁵⁶ 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.²⁵⁷

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 requiring that a minimum amount of the appraised value be obtained by means of the sale.²⁵⁸ *Waters v. Stewart*²⁵⁹ was a landmark case in this area.²⁶⁰ 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 stepfather’s will. They brought an action in chancery court to redeem the property by paying the remaining mortgage debt. The equity of redemption, however, had been sold under the directive of a court of law to satisfy one of their stepfather’s debts during the settlement of his estate. In the lower court’s words, the is-

²⁵⁴ *Id.* at 291.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 292.

²⁵⁷ *Id.* 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.” *Telfair v. Stead’s Ex’rs*, 6 U.S. (2 Cranch) 407, 418 (1805). Kent notes that the same policy existed in Pennsylvania. 4 KENT, *supra* note 14, at 417.

²⁵⁸ James Kent’s treatise of 1830 states that the policy of affording 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 14, 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 the state’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 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.*

²⁵⁹ 1 Cai. Cas. 47 (N.Y. 1804).

²⁶⁰ See 3 THE LAW PRACTICE OF ALEXANDER HAMILTON 638–44 (Julius Goebel, Jr. & Joseph H. Smith eds., 1980).

sue at hand was “whether an equity of redemption in lands mortgaged in fee [was] subject to a sale [under] a *fiery facias*.”²⁶¹ If the court of law lacked authority to sell the equity of redemption, then the sale would have been void and Waters and his sister would inherit the land and be able to redeem it from the mortgagee.²⁶²

To decide the case, the court was required to interpret the language of a 1787 New York statute that superseded the Debt Recovery Act. The statute stated that “the lands, tenements, and real estate of every debtor shall be, and hereby are, made liable to be sold on execution.”²⁶³ At issue was whether the legislature intended to include equities of redemption 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 held for Stewart, the purchaser of the equity of redemption 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.”²⁶⁴ 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.”²⁶⁵ The court noted, 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 in the colonies.”²⁶⁶ It then noted that, since the enactment of the Debt Recovery Act, “sales of equities of redemption have been uninterruptedly made.”²⁶⁷ The court held that the language of the 1787 statute indicated the legislature’s desire to continue the regime adopted under the Debt Recovery Act.

Before the Supreme Court of Judicature of New York, Thomas and Sarah Waters argued that the equity of redemption was an interest that only had legal validity in the equity courts — courts of law in England did not recognize equitable redemption rights. They also argued that without explicit legislative approval, such as by explicit inclusion of “equitable interests” as interests to be sold at execution sales,

²⁶¹ *Waters*, 1 Cai. Cas. at 49–50.

²⁶² *See id.* at 68.

²⁶³ Act of Mar. 19, 1787, ch. 56, 1787 N.Y. Laws 108; *see also* Act of Mar. 31, 1801, ch. 105, 1801 N.Y. Laws 388 (reenacting 1787 law).

²⁶⁴ *Waters*, 1 Cai. Cas. at 52.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

only equity courts could authorize sale of or foreclosure upon interests that were simply not recognized as relevant to legal actions.²⁶⁸

The court, however, upheld the decision of the lower court. With regard to the law, Chancellor Kent's opinion adopted the argument made by Alexander Hamilton and Josiah Hoffman, the lawyers for Stewart, who had purchased the land at the execution sale. It 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 available in courts of law.²⁶⁹ Kent's opinion reasoned that the interest should therefore be viewed as "real estate" under the New York statute.²⁷⁰ Kent noted that the New York statute at issue "adopted the same loose latitudinary terms as those in [the Debt Recovery Act]"²⁷¹ and that "there can be no doubt, I think, but that an equity of redemption will be comprehended in the expression."²⁷²

Kent's opinion also emphasized, however, two practical issues. First, it 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 deserving of considerable weight."²⁷³ 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."²⁷⁴ Kent emphasized that execution sales of real property were "agreeable to the general bent and spirit of the more modern decisions."²⁷⁵ 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 conclusions similar to Kent's.²⁷⁶

North Carolina's state legislation and judicial decisions, such as *D'Urphey* and *Waters*, reflected a broader ideological position that as-

²⁶⁸ See *id.* at 54–55.

²⁶⁹ See *id.* at 68–69.

²⁷⁰ *Id.* at 69.

²⁷¹ *Id.* at 71.

²⁷² *Id.*

²⁷³ *Id.* at 70.

²⁷⁴ *Id.* at 73.

²⁷⁵ *Id.* at 70.

²⁷⁶ See, e.g., *Ford v. Philpot*, 5 H. & J. 312 (Md. 1821) (holding, under the Debt Recovery Act and Maryland statutory law, that when a fee simple interest is sold at auction, the mortgagor retains no right to redeem); *Ingersoll v. Sawyer*, 19 Mass. (2 Pick.) 276 (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. (1 Hayw.) 72 (1794) (holding that whole interest may be sold at auction); see generally 4 KENT, *supra* note 14, at 426–27.

served 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 state explicitly that the laws at issue purposefully rejected the value system of the English landed class that privileged heirs. In doing so, these judges related protecting creditors' interests and streamlining judicial process with dismantling the vestiges of feudalism (which historians have previously associated with the abolition of primogeniture and the entail).

Over the years, the commercial republican 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 an event 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."²⁷⁷

As is reflected in these writings, the focus of the commercial republican 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 nonlandowners.²⁷⁸ It is interesting that there is no hint of concern relating to the possibility that commerce might create inequalities of its own, inequalities that could influence, and potentially corrupt, politics. As Noah Webster stated in a 1787 pamphlet, "the inequalities introduced by commerce, are too fluctuating to endanger government."²⁷⁹ The commercial republican view narrowly focused on the belief that subjecting land ownership to the risks of commercial life would prevent the rule of an American aristocracy on the English model.

²⁷⁷ WEBSTER, PLYMOUTH DISCOURSE, *supra* note 26, at 72.

²⁷⁸ Daniel Webster would likely have approved of 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 debtors who did not own land. According to Jeremy Bentham:

[N]oble lords have been known to say . . . that for small debts . . . there ought to be no remedy. In pursuance of this same policy, property, in a shape which noble lords and honourable gentlemen 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, JUSTICE AND CODIFICATION PETITIONS 84–85 (Fred B. Rothman & Co. 1992) (1829).

²⁷⁹ WEBSTER, *supra* note 3, at 47.

B. Founding-Era Opposition to the Debt Recovery Act Regime

The commercial republican 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 that treated land as legally equivalent to chattel property.²⁸⁰ Some form of debt relief legislation was enacted in the 1780s in Virginia, Pennsylvania, Maryland, Massachusetts, New Hampshire, North Carolina, and South Carolina.²⁸¹

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, 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*,²⁸² 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]?"²⁸³ 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 landowner, his real property immediately descended to the heir at law.²⁸⁴ The land never came into the hands of the executor of the estate. The Debt Recovery Act had transformed the law to create a cause of action

²⁸⁰ See ROBERT J. TAYLOR, WESTERN MASSACHUSETTS IN THE REVOLUTION 105–20 (1954); WARREN, *supra* note 14, at 147. For the economic context of Shays's Rebellion, see Priest, *supra* note 237, at 2440–44.

²⁸¹ MANN, *supra* note 14, at 174–75; WARREN, *supra* note 14, at 147. These debt relief 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. WARREN, *supra* note 14, at 146–48. Legal tender laws allowed debtors to satisfy their debts with either real property or chattel property of a lesser value than was explicitly contracted for. See *supra* p. 422.

²⁸² 2 N.C. (1 Hayw.) 43 (Super. Ct. 1794).

²⁸³ *Id.* at 71 (Macay, J.).

²⁸⁴ See *id.*

on behalf of the deceased's unsecured creditors against the heir with respect to inherited land. 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.²⁸⁵

Baker v. Webb is interesting not only for interpreting the Debt Recovery Act more conservatively than New York or South Carolina courts had. Haywood, the lawyer for the heir challenging the execution sale of his father's land, framed the issue as implicating nothing less than the fundamental significance of landownership to American political life. Were traditional protections to land a relic of feudalism and aristocracy? Or, in contrast, were protections to land necessary to maintaining the independence and attachment of the citizenry and therefore equally essential to preserving a republican form of government? Speaking of the traditional privilege of heirs to be parties to proceedings in which their landed inheritance would be taken, Haywood contended:

This rule 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.²⁸⁶

²⁸⁵ 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.

²⁸⁶ *Baker*, 2 N.C. at 54–55 (Haywood, J.). 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 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 dan-

To Haywood, heirs' traditional procedural privileges 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, the legislatures and courts in Virginia, Pennsylvania, and Delaware never fully implemented the Act. Indeed, Virginia rejected a proposal to reenact the Debt Recovery Act and instead maintained the traditional English remedial regime until 1849.²⁸⁷ 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 debtor's real property. These policies remained good law through at least 1920 in Pennsylvania and through 1925 in Delaware.²⁸⁸ In Virginia, Pennsylvania, and Delaware, the writ of *elegit* remained an important creditor remedy throughout the nineteenth century.²⁸⁹

A second dominant ideological perspective, which might be referred to as the Virginia position, gave support to the continued 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 and ideally 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.²⁹⁰

ger 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.

²⁸⁷ See VA. CODE ch. 186, § 9 (1849); Riesenfeld, *supra* note 14, at 712.

²⁸⁸ *Smith v. Ford*, 161 A. 214 (Del. 1932), describes the history of Delaware and Pennsylvania laws making lands available to satisfy unsecured debts. See *id.* at 216–17. The first statute in Pennsylvania to substantially modify the regime enacted in 1705 was an 1836 statute allowing a landowner 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. Act of June 16, 1836, No. 191, 1836 Pa. Laws 755; see also *Levy v. Spitz*, 146 A. 548, 549 (Pa. 1929); 4 KENT, *supra* note 14, at 428.

²⁸⁹ In a case heard by the Delaware Court of Chancery, for example, a tenant by *elegit* failed to rotate crops according to customary practice. See *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.

²⁹⁰ 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. For example, in the 1820s, Daniel Webster 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 Webster, *supra* note 26, at 97–101.

Thomas Jefferson's statements on debt suggest that he opposed the regime enacted under the Debt Recovery Act. His views are famously expressed in his 1789 letter to Madison, in which he claimed that it is self-evident that "*the earth belongs in usufruct to the living.*"²⁹¹ A few lines down, he explained 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.²⁹²

The theory of property expressed in Jefferson's comment reveals his assumption that real property, at least according to "natural right," involved not just the fee simple 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 land. Americans in the founding era typically viewed American republicanism as rooted in the country's unique attribute of having widespread freehold ownership. Usufructuary rights have more in common with the traditional English approach toward real property, in which a dominant mode of ownership, often formalized by the strict settlement, was a life tenancy (with the remainder held in trust). Stating that a property owner violated his heirs' natural rights to property when he incurred debts that might "eat up" his heirs' interests and treated the land as though it "belonged" entirely to him was antithetical to the commercial republican fee simple world view. The commercial republican 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.²⁹³ As Kent 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."²⁹⁴ Jefferson's statement that the "earth 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

²⁹¹ 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).

²⁹² *Id.* at 393 (footnotes omitted).

²⁹³ See 4 KENT, *supra* note 14, at 18.

²⁹⁴ *Id.* at 27.

conceptions of natural law, might also be viewed as an intellectual development emerging after more than fifty-five years under the regime of the Debt Recovery Act. Virginia planters, under the Act, had experienced decades of a legal alternative to the English regime. Jefferson opposed primogeniture on the grounds that it led to an aristocracy and, therefore, an aristocratic form of government.²⁹⁵ But his letter to Madison suggests a desire to defend Virginia's policy of retaining the safeguards to real property of the old English feudal order. Protecting the land from creditors gave fee simple owners the independence, virtue, and loyalty to government necessary for participation in a republic.

The "commercial republican" and "Virginia" positions were not held universally in any one state. Indeed, some Virginians opposed Virginia's body of laws on grounds that its property exemptions were economically detrimental. One Virginian's letter of November 14, 1787, published under the name "A True Friend," argued that Virginia's protection of land from creditors harmed Virginians and the Virginia economy.²⁹⁶ The author suggested that Parliament's role in monitoring colonial legislatures to advance English economic interests was crucial to Virginia's economic development, and he expressed fear about the absence of Parliament as a check on local legislatures.²⁹⁷

According to the letter, Virginians remained "in the chains of British slavery"²⁹⁸ because state laws protecting land drove capital elsewhere, even though "[w]e have the best mortgage to offer, which is immense and fruitful lands."²⁹⁹ Thus:

[Virginians] have 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

²⁹⁵ 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." Thomas Jefferson, *Autobiography, 1743–1790*, in 1 *THE WRITINGS OF THOMAS JEFFERSON* 1, 68 (Paul Leicester Ford ed., N.Y., G.P. Putnam's Sons 1892); see also *A Bill Concerning Wills; the Distribution of Intestate's Estates; and the Duty of Executors and Administrators*, in 2 *THE PAPERS OF THOMAS JEFFERSON* 394 (Julian P. Boyd ed., 1950) (describing the process for settling deceaseds' estates); *A Bill Directing the Course of Descents*, in 2 *THE PAPERS OF THOMAS JEFFERSON*, *supra*, at 391 (abolishing primogeniture).

²⁹⁶ See *A True Friend, To the Inhabitants of Virginia*, VA. INDEP. CHRON., Nov. 14, 1787, reprinted in 8 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 159 (John P. Kaminski et al. eds., 1988).

²⁹⁷ *Id.* at 161–64.

²⁹⁸ *Id.* at 160.

²⁹⁹ *Id.* at 161.

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 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.³⁰⁰

As this letter suggests, the economic implications of rejecting the principles of the Debt Recovery Act were perceived to be severe.

C. *Property Exemptions and Federalism*

The issue of exempting land from creditors' claims was debated in relation to national, as well as local, policy. The Debt Recovery Act model, of course, was one of a uniform imperial policy toward property exemptions determined at the highest levels of legislative authority. Ceding responsibility over creditors' remedies to the state legislatures reflected both a rejection of the parliamentary model of centralized control and a recognition of the economic and cultural discrepancies between the states. 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.³⁰¹ 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

³⁰⁰ *Id.*

³⁰¹ 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).

through all the States.”³⁰² 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 litigation.³⁰³

The question whether land would be available to satisfy unsecured debts emerged with respect to two other issues of national policy. One issue was what policy should apply to the Northwest Territory. Congress adopted Pennsylvania’s policy of allowing sale of the debtor’s property only if the debt exceeded seven years of the property’s earnings.³⁰⁴ This policy choice might be viewed as a rejection of the principles of the Debt Recovery Act and as a furtherance of the desire to use property exemptions and reduced financial risks 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 nation’s first bankruptcy legislation. Under all of the proposed legislation, a bankrupt’s lands would be seized and sold as a condition of obtaining a fresh start. As early as 1792, Thomas Jefferson questioned the desirability of a federal policy involving “seizing and selling lands.” He noted that “[h]itherto, we had imagined the General Government could not meddle with the title to lands.”³⁰⁵ He emphasized that bankruptcy legislation providing for the seizure of land was suited for a commercial or mercantile society, but not for one based on agriculture. He asked:

Is Commerce so much the basis of the existence of the U.S. as to call for a bankrupt law? On the contrary are we not almost merely agricultural? Should not all laws be made with a view essentially to the husbandman? When laws are wanting for particular descriptions of other callings, should not the husbandman be carefully excepted from their operation, and preserved under that of the general system only, which general system is fitted to the condition of the husbandman?³⁰⁶

In the debates over the Bankruptcy Bill of 1798 (the first bankruptcy bill that was seriously considered), the Federalists (commercial republicans), however, were dedicated to the new order of minimal property exemptions in which credit terms were improved to promote

³⁰² 2 ANNALS OF CONG. 1730 (1790).

³⁰³ See Warren, *supra* note 301 (describing the use of state remedies in the federal courts through the first half of the nineteenth century).

³⁰⁴ See A Law Subjecting Real Estate to Execution for Debt (1795), in THE LAWS OF THE NORTHWEST TERRITORY, 1788–1800, at 131 (Theodore Calvin Pease ed., 1925).

³⁰⁵ Letter from Thomas Jefferson to Thomas Mann Randolph, Jr. (Dec. 21, 1792), in 24 THE PAPERS OF THOMAS JEFFERSON 775 (John Catanzariti ed., 1990).

³⁰⁶ Thoughts on the Bankruptcy Bill (circa Dec. 10, 1792), in 24 THE PAPERS OF THOMAS JEFFERSON, *supra* note 305, at 722. For a more detailed discussion of Jefferson’s views on bankruptcy legislation, see MANN, *supra* note 14, at 196–98.

economic development. For example, James A. Bayard, a young Federalist, described state law 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.”³⁰⁷ 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.”³⁰⁸ 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 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.”³⁰⁹

A Bankruptcy Act allowing execution against a bankrupt’s land was enacted in April of 1800, but it was repealed three years later under the Jefferson administration.³¹⁰ Tension between states over property exemptions was a central reason for the failure of bankruptcy legislation for much of the nineteenth century.³¹¹

Subsequent history saw a building up of protections to real property. Over the course of the nineteenth century, economic recessions were routinely followed by law reform movements that expanded protections for debtors’ assets from the claims of creditors.³¹² It is notable that, in the 1820s, as politicians like Webster 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 Federalist/commercial republican 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

³⁰⁷ 9 ANNALS OF CONG. 2660 (1799).

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 2651.

³¹⁰ 1 ANNALS OF CONG. 533–34 (Joseph Gales ed., 1851); WARREN, *supra* note 14, at 19–20.

³¹¹ See Cole, *supra* note 14, 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).

³¹² See William T. Vukowich, *Debtors’ Exemption Rights*, 62 GEO. L.J. 779, 783 (1974).

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.³¹³ The first major wave of reform laws, however, consisted of enactments in the aftermath of the recession of 1817 to 1818.³¹⁴ In those years, many states enacted more temporary stays on execution as well as “appraisal laws,” which required that land only be sold if the price obtained constituted a specified percentage (say two-thirds) of the property’s appraised value.³¹⁵ Many state legislatures also expanded the amount of personal property that was exempt from unsecured creditors’ claims³¹⁶ and enacted statutory periods during which mortgagors and other debtors could redeem their property after creditors obtained judgments in a court of law. The Revised Statutes of the State of New York of 1829, for example, introduced a statutory period of redemption of fifteen months during which mortgagors could redeem their property after a judgment at law.³¹⁷ Notwithstanding these legal reforms, the Debt Recovery Act still had a profound impact during this period. Indeed, 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.³¹⁸

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.³¹⁹ In

³¹³ See, e.g., Act of June 16, 1807, 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.”

³¹⁴ WARREN, *supra* note 14, at 26–27.

³¹⁵ See *id.*; EDWARD J. BALLEISEN, NAVIGATING FAILURE 12 (2001).

³¹⁶ See BALLEISEN, *supra* note 315, at 12; see also 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 Morton J. Horwitz, *Conceptualizing the Right of Access to Technology*, 79 WASH. L. REV. 105, 113 & n.37 (2004).

³¹⁷ 4 KENT, *supra* note 14, at 427 (“[A]ll . . . redemptions must be within the fifteen months from the time of the sheriff’s sale; for the sheriff is then to execute a deed to the person entitled, and the title so acquired becomes absolute in law.” (citing 2 REVISED STATUTES OF THE STATE OF NEW YORK 370–74 (Albany, Packard & Van BenThuyssen 1829))).

³¹⁸ *Id.* at 426.

³¹⁹ See Richard H. Chused, *Married Women’s Property Law: 1800–1850*, 71 GEO. L.J. 1359, 1400–04 (1983).

the 1840s, almost every state enacted a law allowing married women to hold and register property in their own names — property that would be immune from the claims of their husbands' creditors.³²⁰ Then, over the next few decades (and particularly in the 1850s), state legislatures immunized land from creditors' claims through homestead exemption laws based either on a minimum number of acres (typically ranging from 40 to 160 acres) or on a set monetary value of land.³²¹ States enacted laws providing for periods of time during which mortgagors could redeem their property after foreclosure. These laws — a partial return to the family-based societal conception of early modern England — remain on the books today.

CONCLUSION

As this article has shown, for over a century, from 1732 to the 1850s, American property law offered few protections from commercial risks. Joseph Story explained this legal development as “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.”³²² Story is likely correct that the economic conditions of the colonies, the lack of internal capital sources, and the strong desire for credit might explain why colonial opposition to the Debt Recovery Act was not stronger. But Story's explanation does not capture the profound effects of the Debt Recovery Act on American economic, social, and political life.

The most important effect was to diminish the role of landed inheritance in American society by privileging the claims of creditors over heirs when debtors died. In England, land descended automatically to the heir free of the deceased's unsecured debts. In contrast, in America under the Debt Recovery Act regime, the inheritance of land occurred only when the deceased's debts were small enough to be sat-

³²⁰ See *id.* at 1398–99 & nn.207–09 (citing laws enacted in Mississippi in 1839; Maryland in 1842 and 1843; Florida, Maine, Massachusetts, Michigan, and Vermont in 1845; Connecticut in 1845 and 1849; Alabama, Arkansas, Iowa, Kentucky, New Hampshire, and Ohio in 1846; Indiana in 1847; New York and Pennsylvania in 1848; Missouri and North Carolina in 1849; Tennessee and Wisconsin in 1850; and New Jersey in 1852).

³²¹ The homestead exemption laws typically required that homeowners preregister their property as exempt — by signing a certificate that was then attached to the title recorded by the county — prior to obtaining the benefits of the law. 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 312, at 783 (discussing economic depressions and other factors as impetuses for homestead exemption laws in Southern and Western states).

³²² 1 STORY, *supra* note 1, § 182.

isfied out of the deceased's personal property. The profound impact of the Debt Recovery Act on inheritance is clearly expressed in writings assessing the Act after the American Revolution. One need look no further than *D'Urphey v. Nelson*, in which the judge referred to the Debt Recovery Act as an explanation for why "the extreme anxiety observable in the common law of England to preserve the rights, and favor the claims, of the heir at law, *has been entirely dismissed from our law*";³²³ or the lower court opinion in *Waters*, which described the exemption of land from debts as a result of the "solicitude of the holders of landed estates, to perpetuate them within families, combined with the genius of the English government," which was "*local, . . . confined to Great Britain, and not . . . extending to its colonies*";³²⁴ or Kent's opinion in *Waters*, which held that equitable rights of redemption did not survive execution sales, in part on the ground that such execution sales were "agreeable to the general bent and spirit of the more modern decisions";³²⁵ or the Federalist congressman James Bayard, who described the exemption of land from creditors' claims as a "remnant of the feudal system, of the principle of the ancient aristocracy of England."³²⁶ These statements reveal that the transformation of creditors' remedies in relation to land and inheritance was an important component of founding-era debates over the legal preconditions of a republic. Historians have overlooked this feature of the founding-era revolutionary movement. This history demonstrates, however, that American republicanism was the outgrowth of an earlier transformation toward a truly "colonial" law: a law developed in an imperial constitutional framework and suited to meet the ends of empire. Republicanism was not simply the product of an immediate explosion of hostility to English life. It was an expression of how far American social and political life had diverged from that of the English.

This account also ties the dismantling of English inheritance law to slavery, an institution not normally viewed as supported strongly by republican values. In enacting the Debt Recovery Act, Parliament was centrally concerned with the laws of colonies that had relied on English credit to import increasing numbers of slaves. The English exemptions of land from debt were most threatening to creditors when slaves were present: either when wealth held in the form of slaves might be converted into landed wealth or hidden from creditors, or when a colonial legislature might enact a law defining slaves as real property and therefore as exempt from creditors' claims. Parliament's Debt Recovery Act promoted the slave trade by explicitly repealing all

³²³ See *supra* p. 443.

³²⁴ See *supra* p. 444.

³²⁵ See *supra* p. 445.

³²⁶ See *supra* p. 454.

colonial property exemptions to land, houses, and slaves and by requiring colonial courts to administer streamlined processes for seizing and selling these assets. In response to abolitionist protest, in 1797 Parliament repealed the Debt Recovery Act with respect to slaves in all of the remaining British colonies.³²⁷ In America, however, the Debt Recovery Act regime for slaves remained a fixture of the law. Indeed, after the American Revolution, when republicanism was at its strongest, America was moving toward a regime of pure “chattel” slavery.

Another important consequence of the Debt Recovery Act was to expand the commodification of land. Streamlining the procedures associated with the sale of land by execution made it easier and less costly for both unsecured and secured creditors to seize land. The Act likely increased the instances in which debtors sold their land to settle with their creditors in advance of an execution sale.

Finally, during the eighteenth century, the English exemptions of land from creditors’ claims led, in England, to a categorical division between landholders, whose wealth was protected from immediate financial risks, and “merchants” and “traders” who became by definition people whose assets were subjected to greater financial risk. In 1732, Parliament introduced bankruptcy legislation that offered a fresh start to people legally defined as “traders,” who were willing to give up their land to satisfy debts in the proceedings.³²⁸ In 1807, Parliament enacted a more expansive statute stating that all land of persons defined as “traders” would be available to satisfy their unsecured debts both during life and at the time of death.³²⁹ In America, such categorical differences never emerged: American colonies had neither discrete classes of “merchants” and “traders,” nor a discrete landed class. During the colonial period, all forms of wealth were subjected to commercial risks. After the American Revolution, the vast differences in local preferences on the issue of creditors’ remedies expressed themselves, not through occupational categorization, but instead through interstate variation and hostility toward federal government policies that might have imposed a uniform regime reminiscent of the Debt Recovery Act. Federalism emerged, in part, in response to hostility toward imperial policies. In sum, the colonial history of creditors’ remedies had a lasting legacy through its influence on American economic, social, and political developments.

³²⁷ See *supra* note 212.

³²⁸ An Act To Prevent the Committing of Frauds by Bankrupts, 5 Geo. 2, c. 30 (1732).

³²⁹ An Act for More Effectually Securing the Payment of the Debts of Traders, 47 Geo. 3, c. 74 (1807). As mentioned, in 1833, Parliament repealed all protections to land from the claims of unsecured creditors as part of a broad reform of English property law. See *supra* p. 424.