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"A Less Proportion of Idle Proprietors": Madison, Property Rights, and the Abolition of Fee Tail

John F. Hart*

Introduction

The Virginia statute enacted in 1776 to abolish the fee tail estate in land forthrightly expresses a republican conception of property rights.¹ The preamble asserts:

[T]he perpetuation of property in certain families, by means of gifts made to them in fee tail, is contrary to good policy, tends to deceive fair traders, who give a credit on the visible possession of estates, discourages the holder thereof from taking care and improving the same, and sometimes does injury to the morals of youth, by rendering them independent of and disobedient to their parents²

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1. See Act of Oct. 1776, ch. XXVI, 9 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 226 (William Waller Hening ed., Richmond, Va., J & G. Cochran 1821) [hereinafter 9 LAWS OF VA.] (abolishing fee tail); GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776-1970, at 29-41 (1997) (analyzing Thomas Jefferson's ideology of civic republicanism); Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1, 15-16 (1977) [hereinafter Katz, *Republicanism and the Law of Inheritance*] (discussing Jefferson's goal of abolishing fee tail); Stanley N. Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J.L. & ECON. 467, 471-72 (1976) (same); see also ALEXANDER, *supra*, at 29 ("The core of American republican thought during the eighteenth century was the idea that private 'interests' could and should be subordinated to the common welfare of the polity."). Fee tail (entail) was an inheritable estate in land that could not be alienated in fee simple by the current tenant in tail; it passed at death to the heir in tail (typically determined by the rules of primogeniture). If the bloodline died out, with no remainder limited to follow, the land reverted to the grantor (or the grantor's heir) in fee simple. See A.W.B. SIMPSON, A HISTORY OF THE LAND LAW 81-82, 90 (2d ed. 1986) (noting that tenancy in tail resembled life tenancy). Today, only a handful of American states recognize fee tail. WILLIAM M. MCGOVERN, JR. ET AL., WILLS, TRUSTS AND ESTATES 463 (1988).

2. Act of Oct. 1776, ch. XXVI, 9 LAWS OF VA., *supra* note 1, at 226.

The Assembly accordingly converted fee tail estates (entails) into fee simple estates, explicitly extinguishing the corresponding interests of "the issue in tail, and those in reversion and remainder."³ The statute thus transformed fee tail estates already in existence as well as future fee tail estates.

It is well known that Thomas Jefferson led the effort to abolish fee tail in Virginia⁴ and that he later counted this legislation among his foremost achievements.⁵ For Jefferson, abolishing fee tail was "essential to a well ordered republic."⁶ Abolition of fee tail was a key part of a "system" of reforms "by which every fibre would be eradicated of antient [sic] or future aristocracy and a foundation laid for a government truly republican."⁷

What is not well known is that James Madison, too, endorsed Virginia's abolition of fee tail.⁸ Madison, of course, is known for protecting property rights, not for extinguishing them. Madison charged that state laws were unjustly violating private rights under the Articles of Confederation,⁹ and he

3. *Id.*

4. See JOURNAL OF THE HOUSE OF DELEGATES OF VIRGINIA [Oct. 7-Dec. 21, 1776] at 13, 23 (Richmond, Samuel Shepherd 1828) [hereinafter JOURNAL OF THE HOUSE OF DELEGATES (Oct. 7-Dec. 21, 1776)] (noting that Jefferson presented bill to abolish fee tail); 1 THE PAPERS OF THOMAS JEFFERSON 560-61 (Julian P. Boyd ed., 1950) (Jefferson's bill to enable tenants in fee tail to convey their lands in fee simple).

5. See THOMAS JEFFERSON, *Autobiography*, in 1 THE WRITINGS OF THOMAS JEFFERSON 68-69 (Paul Leicester Ford ed., New York, G. P. Putnam's Sons 1892) [hereinafter THOMAS JEFFERSON, *Autobiography*] (asserting importance of abolition of fee tail); THOMAS JEFFERSON, *Services of Jefferson*, in 7 THE WRITINGS OF THOMAS JEFFERSON 476 (Paul Leicester Ford ed., New York, G. P. Putnam's Sons 1896) (same).

6. THOMAS JEFFERSON, *Autobiography*, *supra* note 5, at 49.

7. *Id.* at 68.

8. See JOURNAL OF THE HOUSE OF DELEGATES OF VIRGINIA [Oct. 17, 1785-Jan. 21, 1786], at 13 (Richmond, Va. 1786) [hereinafter JOURNAL OF THE HOUSE OF DELEGATES (Oct. 17, 1785-Jan. 21, 1786)] (reporting Madison's introduction of bill "For regulating conveyances" that extended scope of Act of 1776). The legislature approved the bill. Act of Oct. 1785, ch. LXII, 12 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 154, 156-57 (William Waller Hening ed., Richmond, Va., George Cochran 1823) [hereinafter 12 LAWS OF VA.]; see also Letter from James Madison to Robert Walsh (Mar. 2, 1819), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 122 (New York, R. Worthington 1884) (attributing harm of "unequal distribution of property" to laws adopted from English common law); *id.* at 477 (recalling "suffering" caused by entails); JAMES MADISON, *Notes on Suffrage*, in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 30 (New York, R. Worthington 1884) [hereinafter 4 MADISON, *Notes on Suffrage*] (suggesting that new "republican laws of descent and distribution" might promote shift in production from "luxuries" to "necessaries"); *infra* notes 129-31, 142-56, and accompanying text (discussing Madison's views).

9. See, e.g., JAMES MADISON, *Vices of the Political System of the United States*, in 9 THE PAPERS OF JAMES MADISON 345-57 (Robert A. Rutland et al. eds., 1975) [hereinafter 9 THE PAPERS OF JAMES MADISON] (asserting "injustice" of state laws, giving Rhode Island paper money legislation as example).

was prominent in drafting the Constitution.¹⁰ Madison composed lasting arguments in favor of constitutional protection for property rights in *The Federalist*,¹¹ and he drafted and introduced in Congress the amendments that became the Bill of Rights,¹² proposing the Takings Clause himself.¹³ Therefore, Madison's support for abolishing fee tail, which extinguished property rights deriving from fee tail tenure, merits investigation.

Virginia's abolition of fee tail shows, I will argue, that we need to revise substantially our historical understanding of what property rights Madison thought deserved constitutional protection. The prevailing view among modern scholars is that Madison and other framers of the Constitution and Bill of Rights favored withdrawing property rights generally from the realm of politics to that of fundamental law, to insulate private property from legislative interference.¹⁴ But the abolition of fee tail shows that even Madison was not nearly

10. RECORDS OF THE FEDERAL CONVENTION OF 1787 *passim* (Max Farrand ed., photo. reprint 1966) (1937).

11. See THE FEDERALIST NOS. 10, 51 (James Madison), in 10 THE PAPERS OF JAMES MADISON 263, 265, 476-79 (Robert A. Rutland et al. eds., 1977) [hereinafter 10 THE PAPERS OF JAMES MADISON] (asserting importance of protecting property rights).

12. See CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS xiii-xiv, 11-14 (Helen E. Veit et al. eds., 1991) (reproducing Madison's proposed resolution of amendments that became Bill of Rights).

13. See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 791, 837 (1995) (analyzing Madison's role in drafting of Takings Clause).

14. See JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 42-48 (2d ed. 1998) (stating that framers "viewed popular government as a potential threat to property rights"); RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 3-5, 16 (1985) ("[P]rotection of private property was a central objective of the original constitutional scheme."); JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 90-92, 150-52, (1990) (examining desire of Gouverneur Morris and James Madison to place property rights beyond reach of politics); BARRY A. SHAIN, THE MYTH OF AMERICAN INDIVIDUALISM: THE PROTESTANT ORIGINS OF AMERICAN POLITICAL THOUGHT 144-45 (1994) (protection of individual property rights from legislative interference was of primary importance to Madison); CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 17 (1990) ("organizing principle" of Bill of Rights was "desire to prevent collective interference with private ordering"); Stuart Bruchey, *The Impact of the Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 WIS. L. REV. 1135, 1144-45 (1980) (discussing framers' concern for security of property rights); James W. Ely, Jr., "That Due Satisfaction May Be Made": *The Fifth Amendment and the Origins of the Compensation Principle*, 36 AM. J. LEGAL HIST. 1, 1-2, 17 (1992) (similar); Roger Pilon, *Freedom, Responsibility and the Constitution: On Recovering Our Founding Principles*, 68 NOTRE DAME L. REV. 507, 513 (1993) (stating that Founders envisioned "a world of private law"); Bernard H. Siegan, *One People as to Commercial Objects*, in LIBERTY, PROPERTY & THE FOUNDATIONS OF THE AMERICAN CONSTITUTION 101 *passim* (Ellen Frankel Paul & Howard Dickman eds., 1986) ("[t]he right to property—the freedom to acquire, use and dispose of it" was "major concern" of framers).

so libertarian as has been thought. Virginia's Act of 1776, by extinguishing the property rights of heirs, reversioners, and remaindermen growing out of fee tail tenure,¹⁵ took wealth and transferred it to tenants in tail. Madison's support for abolishing fee tail shows that his political philosophy of protecting private property and his sense of fundamental justice allowed far greater scope for legislative intervention than has been recognized.

Abolishing fee tail was part of a legislative program supported by Madison as well as Jefferson, a program that was designed to shorten the longevity of inherited wealth¹⁶ and thereby lessen the "proportion of idle proprietors" in Virginia society.¹⁷ Another purpose of the legislation was to promote "a greater simplicity in manners" and "a less consumption of manufactured superfluities."¹⁸ By this legislation, Madison hoped that although "great wealth" might still come to "individuals" "for a certain time," "the opportunities may be diminished and the *permanency* defeated by the equalizing tendency of the laws."¹⁹ Madison's support for abolishing fee tail shows that in some circumstances he believed it was legitimate to prefer the welfare of the community over the property rights of individuals.

The historical significance of Virginia's abolition of fee tail in 1776 depends, of course, on where matters stood before 1776. Here my thesis challenges the conclusion of some modern historians that the private legislation of the colonial Assembly "docking" entails was essentially a procedural formality permitting tenants in tail to defeat the rights of heirs in tail and others.²⁰ My thesis also challenges the conclusion of other modern historians that Virginia's

15. Act of Oct. 1776, ch. XXVI, 9 LAWS OF VA., *supra* note 1, at 226.

16. Related measures displaced primogeniture with partible inheritance as the rule governing intestate succession to land, and abolished the doctrine of survivorship among joint tenants. See *infra* notes 139-42 and accompanying text.

17. Letter from James Madison to Thomas Jefferson (June 19, 1786), in 9 THE PAPERS OF JAMES MADISON, *supra* note 9, at 77.

18. *Id.*

19. 4 MADISON, *Notes on Suffrage*, *supra* note 8, at 24 (emphasis added). Dictating "permanency" of land ownership in a bloodline was the purpose served by creating a fee tail estate. See *infra* notes 28-34, 36-57, and accompanying text (describing mechanics of succession).

20. See DANIEL J. BOORSTIN, *THE AMERICANS: THE COLONIAL EXPERIENCE* 120 (1958) (explaining Virginia's legislative power of giving tenant in tail full ownership of entailed land as "routine," comparable to "routine court procedures" in England); GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 182 (1992) (stating "docking of entails" was "very common in Virginia" before 1776); Bernard Bailyn, *Politics and Social Structure in Virginia*, in *COLONIAL AMERICA: ESSAYS IN POLITICS AND SOCIAL DEVELOPMENT* 135, 154-55 (Stanley N. Katz ed., 1971) (stating special acts commonly used to "break" entails); see also *infra* notes 70-76 and accompanying text (discussing legislative process permitting substitution of fee simple property for entailed property between 1710 and 1776).

abolition of fee tail was merely symbolic rather than practical in significance because fee tail had not been utilized widely there.²¹

I will show that fee tail, even if not pervasively used among Virginia landowners, was nonetheless common enough that its abolition was meaningful for practical as well as procedural or symbolic reasons. Many of the legislators who voted to abolish fee tail in 1776 were quite familiar with Virginia's distinctive law of fee tail estate because they personally had encountered its constraints, in some public or private capacity.²² Private acts docking entail in colonial Virginia generally had transformed, rather than redistributed, wealth. The colonial Assembly, by insisting that fee simple property be substituted in exchange for releasing entailed property, had guarded the property rights of heirs in tail, reversioners, and remaindermen.²³ The state Assembly's fee tail acts of 1776 and 1785, which explicitly extinguished all rights in entailed property except those of the current tenant in tail,²⁴ therefore marked a sharp turnabout in Virginia's substantive law. Because of this practical impact, the legislation abolishing fee tail poses a concrete test of the character and scope of contemporary constitutionalism. It shows that Madison and others viewed some property rights as legitimately subject to legislative intervention for the common welfare.²⁵ Indeed, Madison viewed the abolition of fee tail as a source of analogy for future legislative interference with other forms of property.²⁶

I. The Fee Tail Estate in Colonial Virginia

To evaluate the practical impact of the Act of 1776 enacted to abolish fee tail, it is necessary to assess the substance of Virginia's law of fee tail before 1776. Analysis must begin with a look at the English background. Fee tail or entail was a grant of land to "A and the heirs of his body." It was already in use before 1285 when Parliament enacted the statute *de Donis Conditionalibus*, responding to petitions from landowners who wanted to bestow on a child and the heirs of his or her body an inheritable estate in land that could

21. See ALEXANDER, *supra* note 1, at 38, 40, 395 (in America, significance of entail was "symbolic" rather than "functional;" even in Virginia, entail was not "prevailing custom"); Katz, *Republicanism and the Law of Inheritance*, *supra* note 1, at 13-14 (abolition of entail in Virginia and other states was "largely formal and symbolic").

22. See *infra* notes 79-97 and accompanying text (describing experience of particular Virginia legislators with constraints of legislative fee tail process).

23. See *infra* notes 36-57 and accompanying text (discussing procedure to remove entailment).

24. Act of Oct. 1776, ch. XXVI, 9 LAWS OF VA., *supra* note 1, at 226; Act of Oct. 1785, ch. LXII, 12 LAWS OF VA., *supra* note 8, at 154, 156-57.

25. See *infra* notes 143-63 and accompanying text (discussing reasons given by Madison and Jefferson favoring legislative alteration of private property rights).

26. See *infra* notes 161-67 and accompanying text (discussing Madison's views).

not be alienated in fee simple.²⁷ The first tenant in tail would hold the rough equivalent of a life estate. If he or she died with no heir and no remainder limited to follow, the land would revert by operation of law to the grantor or the grantor's heir, in fee simple.²⁸

For many years after 1285, it was uncertain how long fee tail's restraints on alienation were effective. Some thought the restraint on alienation was enforceable only against the first tenant in tail; others thought the restraint good for three generations,²⁹ or until the entry of the third heir in tail.³⁰ The view that fee tail was potentially infinite in duration eventually prevailed over time.³¹ But this development was in turn largely eclipsed by another. English courts permitted tenants in tail to bar (defeat) the entail by using collusive legal proceedings that resulted in a "common recovery."³² These proceedings, properly orchestrated, left the heir in tail, the reversioner, and any remaindermen with worthless causes of action against a nominal defendant (sometimes the court crier), while converting the tenant's interest into fee simple.³³ Collusive common recoveries had become so familiar over the years as to be considered a matter of right, prior to the English settlement of Virginia.³⁴

English colonists in seventeenth century Virginia created fee tail estates in their wills and deeds, and at some point Virginia courts evidently began permitting tenants in tail to bar entails as in England. In 1710 the Virginia Assembly blocked this practice, prohibiting tenants in tail from using "fine or recovery" to "cut off or defeat any estate in fee tail," or to avoid fee tail "by any ways or means whatsoever, except only by an Act of the General Assembly of this Dominion . . . in such particular case, respectively to be had and

27. 13 Edw., c.1 (1285), THE STATUTES AT LARGE 163 (Danby Pickering ed., Cambridge, Joseph Bentham 1762); see also SIMPSON, *supra* note 1, at 81-82 (discussing function of statute).

28. See SIMPSON, *supra* note 1, at 82 (discussing reversions).

29. *Id.* at 82-83.

30. See generally JOSEPH BIANCALANA, THE FEE TAIL AND THE COMMON RECOVERY IN MEDIEVAL ENGLAND, 1176-1502 (forthcoming, 2001).

31. See SIMPSON, *supra* note 1, at 84 (stating that interest "descended on a limited class of heirs *ad infinitum*").

32. See *id.* at 129-38 *passim* (discussing how collusive common recovery evolved to bar entails).

33. *Carter v. Tyler*, 5 Va. (1 Call) 165, 182 (1797) (English law gave only "fictitious" recompense for entailed property "in the form of the fine and recovery"); see also J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 235-36 (1979) (stating that neither issue nor remainderman were allowed to attack successful common recovery); SIMPSON, *supra* note 1, at 131-35 (same). The "fine" was another collusive action that permitted breaking an entail. See *id.* at 138 (noting that during Henry VIII's reign it was settled that fine would bar issue in tail).

34. See *Hethersal v. Mildmay*, 6 Eng. Rep 40, 41 (1605) (holding that right to common recovery in incident of fee tail). See generally BIANCALANA, *supra* note 30.

made.³⁵ Virginia courts were thus deprived of their common law power to cut off entails.

The Assembly proceeded to develop a distinctive procedure of its own that restored to fee tail estates the potentially perpetual, dynastic character that donors of fee tail estates typically would have desired. Tenants in tail could petition the Assembly to "dock" the entail of a particular parcel of entailed land, converting it to fee simple.³⁶ But obtaining such relief depended on substituting fee simple land purported to be of the same value in place of the entailed land. The substituted land had to be restricted according to the terms of the original will or deed. The substitution generally happened in one of two ways. Usually, certain other property the petitioning tenant in tail owned in fee simple (of "greater" or "equal" value) would be entailed in place of the original property.³⁷ Alternatively, the Assembly would appoint several trustees, directing them to sell the entailed land and use the proceeds to purchase other property.³⁸ Either way, the private fee tail acts effected "a change of the lands on which the estate tail was to operate," rather than "defeating that estate."³⁹ Compared to English law, Virginia's private acts gave "a real recompense" by replacing the entailed property, "instead of the fictitious one, in the form of the fine and recovery."⁴⁰ Parcels of entailed land worth £200 sterling or less were exempt from this legislative protection after 1734.⁴¹

35. Act of Oct. 1710, ch. XIII, 3 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 517, 518 (William Waller Hening ed., Philadelphia, Thomas DeSilver 1823) [hereinafter 3 LAWS OF VA.]. The same provision had appeared in an earlier act of much broader scope that was disallowed by the Crown. Act of Oct. 1705, ch. XXI, 3 LAWS OF VA., *supra*, at 304, 320.

36. *See, e.g.*, Act of Feb. 1745, ch. XXIX, 5 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 397, 399-400 (William Waller Hening ed., Richmond, Va., W.W. Gray 1819) [hereinafter 5 LAWS OF VA.] (docking entail of estate).

37. *See, e.g.*, Act of Nov. 1769, ch. LXXXII, 8 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 470, 472 (William Waller Hening ed., Richmond, Va., J. & G. Cochran 1821) [hereinafter 8 LAWS OF VA.] (substituting lands "of greater value"); Act of Nov. 1769, ch. LXXVII, 8 LAWS OF VA., *supra*, at 455, 456 (regarding substitution of property "of equal value").

38. *See, e.g.*, Act of Nov. 1769, ch. LXVIII, 8 LAWS OF VA., *supra* note 37, at 457, 459 (requiring trustees to sell portion of property).

39. *Carter v. Tyler*, 5 Va. (1 Call) 165, 182 (1797).

40. *Id.* at 182.

41. *See* Act of Aug. 1734, ch. VI, 4 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 397, 399-400 (William Waller Hening ed., Richmond, Va., W.W. Gray 1820) [hereinafter 4 LAWS OF VA.]. A tenant in tail could sell a parcel worth £200 or less by deed, employing "fine, or recovery, according to the laws of England." *Id.* at 400. This would bar "the right of the issue of the vender [sic], and of all other persons, in remainder or reversion." *Id.* This procedure required preliminary certification by a sheriff's jury that the parcel in question was indeed worth less than £200 sterling and that it had not been part of a larger entailed parcel. *Id.*

The resulting private acts recite or otherwise indicate that the derivative rights of the heir in tail, the grantor's heir, and any remaindermen were protected by this legislative substitution process.⁴² Were the Assembly's procedures effective in protecting these rights? There are good reasons to think so.

The Assembly's substitutions took place in a highly public setting. A petitioner had to give notice at the local church, three weeks running, of his intention to seek this relief.⁴³ After the petition seeking a private fee tail act was read in the House of Burgesses and a bill was drafted, a committee investigated it.⁴⁴ When a committee headed by the eminent lawyer Edmund Pendleton, for example, reported to the House that it "had [e]xamined the allegations of the Bill and found [them] to be true,"⁴⁵ Pendleton's own interest in protecting his reputation gives considerable reason to believe that the substituted property was indeed equal in value to the property being disentailed. Virginia's session laws published the full text of the private fee tail acts,⁴⁶ and the journal of the House of Burgesses also was published.⁴⁷ It would be unlikely to escape the notice of family or neighbors if the Assembly were to authorize dubious substitutions. Any doubts would have been all the more sensitive because many of the potential victims (heirs in tail, reversioners, and remaindermen) would be too young to safeguard their own interests. Other members of the Assembly making such reports on private fee tail bills would share this motivation to preserve their reputations intact, especially those most prominent in provincial affairs.

A similar inference reasonably can be drawn from the many private acts that appointed leading citizens as trustees to sell entailed land and reinvest the proceeds in new property, to be settled according to the original restrictions.⁴⁸ Acting in this fiduciary capacity, so open to view, these individuals presumably felt constrained to acquit themselves impeccably in the eyes of all concerned, rather than be suspected of participating in a fraud.

42. See, e.g., Act of Feb. 1772, ch. LXII, 8 LAWS OF VA., *supra* note 37, at 631, 632-33 ("[I]t will be greatly to the advantage of the [tenant in tail], and those claiming in remainder or reversion," to sell entailed land and reinvest proceeds).

43. See, e.g., *id.* at 633 (noting that tenant in tail had met these requirements).

44. See, e.g., JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA, 1770-1772, at 12 (John Pendleton Kennedy ed., 1906) [hereinafter JOURNALS OF THE HOUSE OF BURGESSES, 1770-1772] (ordering committee to investigate petition of tenant in tail).

45. *Id.* at 35; *id.* at 68; *id.* at 94 (using similar language to summarize work of Pendleton's committee on other occasions).

46. See, e.g., Acts of the General Assembly, 10 Geo. 3, at 53-57 (Williamsburg, William Rind 1770) (reprinting verbatim eight private fee tail acts).

47. See, e.g., JOURNALS OF THE HOUSE OF BURGESSES, 1770-1772, *supra* note 44, at 153-317.

48. See, e.g., Act of Feb. 1772, ch. LXVI, 8 LAWS OF VA., *supra* note 37, at 640 (appointing George Washington, John Augustine Washington, Richard Henry Lee, and Richard Lee trustees).

To obtain a private act allowing the docking of fee tail and substitution of property was by no means a sure thing; it depended on the substance of what the tenant in tail proposed. A fee tail petition, after being read, might be flatly rejected,⁴⁹ or it might be assigned for drafting, yet fail to resurface as a bill.⁵⁰ Once a bill was drafted and presented, it might be rejected in the House,⁵¹ or it might survive and then die in committee.⁵² Many bills passed in the House only after amendment.⁵³ A bill might pass in the House and be accepted by the Council only after amendment⁵⁴ (sometimes the subject of contention⁵⁵), or the Council might reject a bill without explanation.⁵⁶ Such incidents indicate that the Assembly did not credulously accept representations of comparative property values alleged by petitioning tenants in tail.

For the present purpose of understanding Virginia's law of fee tail on the eve of its abolition in 1776, what matters is that the process of substitution of property through private acts credibly appeared to protect the derivative interests of the heirs in tail, the reversioners, and any remaindermen from aggrandizement by the tenant in tail. The essential function of the colonial Assembly's docking process was to substitute assets rather than to redistribute wealth. The identity of the entailed property changed, but the entailed status of the wealth was protected.⁵⁷

II. *The Act of 1776: Substantive, Formal or Symbolic Change?*

The bill "to enable tenants in tail to convey their lands in fee simple" was taken up early in the first session of Virginia's state Assembly, which convened

49. See JOURNALS OF THE HOUSE OF BURGESSSES OF VIRGINIA, 1766-1769, at 32 (John Pendleton Kennedy ed., 1906) [hereinafter JOURNALS OF THE HOUSE OF BURGESSSES, 1766-1769] (rejecting petition of Robert Bristow).

50. See JOURNALS OF THE HOUSE OF BURGESSSES, 1766-1769, *supra* note 49, at 36 (assigning petition of Augustine Claiborne for drafting).

51. See JOURNALS OF THE HOUSE OF BURGESSSES, 1770-1772, *supra* note 44, at 86 (rejecting private bill on behalf of James Roscow after first reading).

52. See JOURNALS OF THE HOUSE OF BURGESSSES, 1766-1769, *supra* note 49, at 33 (reporting assignment of private bill on behalf of John Willoughby to committee after being read second time in House; this bill not subsequently mentioned).

53. See JOURNALS OF THE HOUSE OF BURGESSSES, 1770-1772, *supra* note 44, at 41-42 (amending private bill on behalf of David and Sarah Meade); *id.* at 47 (amending private bill on behalf of Armistead Lightfoot); *id.* at 50 (amending private bill on behalf of Sarah Rootes).

54. See *id.* at 57-58 (amending private bill on behalf of Charles Carter).

55. See *id.* at 82, 84, 88, 93 (discussing proposed amendments of private bill on behalf of Sarah Rootes which were rejected but later accepted).

56. See *id.* at 56 (rejecting private bill on behalf of Daniel M'Carty).

57. See *supra* notes 37-48 and accompanying text (discussing substitution process and requirements).

in October 1776.⁵⁸ This bill, brought in by a committee that included Jefferson, gave tenants in tail power to destroy the related rights of the heir in tail, the reversioner, and any remaindermen, by conveying or devising the property.⁵⁹ An amendment was then proposed to transform all fee tail tenure into fee simple, effective immediately.⁶⁰ These alternatives were debated strenuously in the House of Delegates; Speaker of the House Edmund Pendleton argued for the permissive approach, while Jefferson pressed for outright abolition.⁶¹ Apparently no one argued for preserving intact Virginia's existing regime of enforcing fee tail but permitting substitution of entailed assets. Finally the House adopted the more drastic course, abolishing entail.⁶² The Senate concurred and the bill became law.⁶³

James Madison, later so prominent in articulating and securing constitutional protection for property rights,⁶⁴ served in the 1776 Assembly.⁶⁵ We do not know whether Madison voted with Jefferson in 1776 to abolish fee tail immediately, or with Pendleton merely to allow the option of disentailing. Both alternatives provided for destroying the property rights of heirs in tail, reversioners, and remaindermen. In 1785, Madison's support for outright abolition was manifested unmistakably, when he introduced a bill in the Assembly that extended the scope of the Act of 1776. The bill perfected the conversion of all remaining tenancies in tail into fee simple and comprehensively extinguished all derivative rights of inheritance, reversion, and remainder back to that date.⁶⁶ Madison's correspondence indicates that later in life he continued to endorse Virginia's abolition of fee tail.⁶⁷ Before using

58. JOURNAL OF THE HOUSE OF DELEGATES (Oct. 7-Dec. 21, 1776), *supra* note 4, at 13.

59. *See id.* at 23 (reporting passage of bill enabling tenants in tail to convey lands in fee simple).

60. *See* 1 THE PAPERS OF THOMAS JEFFERSON, *supra* note 4, at 560-62 (explaining change in character of bill from permissive power to convey in fee simple to abolition of fee tails).

61. *See id.* at 561 (discussing Pendleton's strong opposition to amendment favored by Jefferson's approach).

62. *See id.* at 560-61 ("Bill to Enable Tenants in Fee Tail to Convey Their Lands in Fee Simple").

63. Act of Oct. 1776, ch. XXVI, 9 LAWS OF VA., *supra* note 1, at 226-27.

64. *See supra* notes 11-13 and accompanying text.

65. *See* THE GENERAL ASSEMBLY OF VIRGINIA, JULY 30, 1619-JANUARY 11, 1978 - A BICENTENNIAL REGISTER OF MEMBERS 123 (Cynthia Miller Leonard ed., 1978) [hereinafter GENERAL ASSEMBLY REGISTER] (listing James Madison as Orange County representative).

66. *See* JOURNAL OF THE HOUSE OF DELEGATES (Oct. 17, 1785-Jan. 21, 1786), *supra* note 8, at 12-13 (recounting Madison's presentation of bills from committee for courts of justice, including bill "For regulating conveyances"); Act of Oct. 1785, ch. LXII, 12 LAWS OF VA., *supra* note 8, at 154, 156-57 ("An act for regulating conveyances").

67. *See* Letter from James Madison to Thomas Jefferson (Dec. 31, 1824), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra* note 8, at 477 (stating entails impose "suffering" on society); *infra* notes 150-54 and accompanying text.

Virginia's fee tail legislation to question the modern view of Madison and the framers of the Constitution as holding libertarian views on the subject of property rights,⁶⁸ however, we must consider modern scholarship that has questioned the practical significance of fee tail tenure in Virginia before 1776.

A. Merely a Formal Change?

Some modern scholars discount the practical significance of fee tail restrictions in colonial Virginia because they view the colonial Assembly's private act procedure as essentially a formality,⁶⁹ yielding the same substantive result – evasion of all fee tail restrictions – as using fine and common recovery in English courts of that era.⁷⁰ If indeed it was possible to circumvent restrictions so routinely in colonial Virginia, this would provide additional support for the thesis that the Act of 1776 abolishing fee tail had little practical significance.⁷¹ However, after 1710, fee tail restrictions had had considerably more bite in Virginia than in England.⁷² After 1710, the Assembly required substitution of property by the tenant in tail, according to the original restrictions, as a condition of obtaining a private act disentailing property.⁷³ Many tenants in tail who petitioned for private fee tail acts were unsuccessful.⁷⁴

Virginia's Act of 1776, therefore, in explicitly extinguishing the interests of "the issue in taille, and those in reversion and remainder" and giving the

68. See *infra* notes 141-63 and accompanying text.

69. See BOORSTIN, *supra* note 20, at 120 (describing routine powers entrusted in House of Burgesses, rather than to courts as in England); WOOD, *supra* note 20, at 182 (explaining that "docking" of entails was "very common in Virginia"); cf. Katz, *Republicanism and the Law of Inheritance*, *supra* note 1, at 13 (noting abolition of fee tail in Virginia and other states "largely formal and symbolic").

70. See *supra* notes 32-35 and accompanying text (explaining use of English common law proceedings to defeat entails).

71. See ALEXANDER, *supra* note 1, at 40 (stating Jefferson favored abolishing entail because of its symbolic associations); Katz, *Republicanism and the Law of Inheritance*, *supra* note 1, at 13 (abolition of entail in Virginia and other states was "largely formal and symbolic").

72. See Act of Oct. 1710, ch. XIII, 3 LAWS OF VA., *supra* note 35, at 518 (prohibiting courts from defeating fee tail in any way). The goal of the Act of 1710 was "preserving entails," instead of allowing tenants in tail to "defeat" the interests of the issue and remaindermen as in contemporary English law. *Carter v. Tyler*, 5 Va. (1 Call) 165, 182 (1797). The subsequent private fee tail acts effected "rather . . . a change of the lands on which the estate tail was to operate; than . . . defeating that estate." *Id.* Compared to English law, Virginia's private acts gave "a real recompense" by replacing the entailed property, "instead of the fictitious one, in the form of the fine and recovery." *Id.*; see also *supra* notes 32-35 and accompanying text (comparing law of colonial Virginia law with English law).

73. See *supra* notes 37-41 and accompanying text (discussing substitution procedures).

74. See *supra* notes 49-56 and accompanying text (giving examples).

tenant in tail a fee simple title,⁷⁵ did not merely simplify an existing formality. The Act of 1776 truly repudiated the substance of the Act of 1710.⁷⁶ By destroying previously valued and protected rights in property, the Act of 1776 produced utterly different outcomes and redistributed wealth.

B. Merely a Symbolic Change?

It has been asserted that the Virginia Assembly's abolition of the fee tail in 1776 was largely symbolic rather than practical in significance because fee tail tenure had not been employed widely in colonial Virginia.⁷⁷ If indeed the Act of 1776 abolishing entail were merely symbolic, its enactment would not imply that abolishing such property rights was perceived by the State Assembly as legitimate. But a statute abolishing a form of land tenure should not be regarded as practically meaningful only if that form of tenure was predominant or widespread at the time. That is too elevated a standard. Instead, we should ask whether the property interests being extinguished had been encountered sufficiently often by the legislators that they viewed the alteration as having a nontrivial economic impact for them or for an appreciable number of their constituents. If so, that should suffice as a criterion of practical significance. To say that abolishing fee tail held practical significance for contemporaries is not to deny that it held symbolic significance for them also.

The Assembly's abolition of the fee tail estate in 1776 should therefore be judged to lack practical significance only if fee tail had been encountered so rarely by those legislators that they would have perceived it as obsolete or vestigial, not a living part of Virginia land law. One approach to making this

75. Act of Oct. 1776, ch. XXVI, 9 LAWS OF VA., *supra* note 1, at 226 ("An Act declaring tenants of lands or slaves in tail to hold the same in fee simple").

76. See Act of Oct. 1710, ch. XIII, 3 LAWS OF VA., *supra* note 35, at 517-18; see also *supra* notes 36-41 and accompanying text (discussing legislative procedure for "docking" entails developed after Act of 1710).

77. See ALEXANDER, *supra* note 1, at 38 (concluding that in America, entail was significant for "symbolic role" rather than "functional effect"); Katz, *Republicanism and the Law of Inheritance*, *supra* note 1, at 13 (arguing that abolition of entail in Virginia and other states was "largely formal and symbolic"). The incidence and significance of fee tail tenure in colonial Virginia have been much debated among social and political historians. See ROBERT E. BROWN & B. KATHERINE BROWN, *VIRGINIA 1705-1786* at 87 (1964) (noting most land in colonial Virginia was held in fee simple, not fee tail); CAROLE SHAMMAS ET AL., *INHERITANCE IN AMERICA FROM COLONIAL TIMES TO THE PRESENT* 208 (1987) (observing that use of entail was "common" among "large tobacco planters"); Bailyn, *supra* note 20, at 154 ("Only a small minority of estates, even in the tidewater region, were ever entailed."); Holly Brewer, *Entailing Aristocracy in Colonial Virginia: 'Ancient Feudal Restraints' and Revolutionary Reform*, 54 WM. & MARY Q. 307, 311 (1997) (suggesting that at least half of the "seated" land in colonial Virginia was entailed by 1776); C. Ray Keim, *Primogeniture and Entail in Colonial Virginia*, 25 WM. & MARY Q. 545, 561 (1968) ("[O]nly in the Tidewater could [entail] be said to have had a somewhat general use even among the great planter class.").

historical determination would focus on the legislators' constituents and would begin with the wills and deeds (many of which no longer survive) that created fee tail estates. But I propose to focus instead on the members of the 1776 Assembly and their prior experiences with the private fee tail act procedure. Members of the 1776 Assembly who had themselves encountered Virginia's restrictive law of fee tail would not have perceived fee tail tenure as rare or vestigial and would have appreciated the practical, economic impact of the bill to abolish it. They would have understood that the Act of 1776 destroyed valuable property interests that had long been protected by the colonial Assembly and that belonged to hundreds of heirs in tail, reversioners, and remaindermen.⁷⁸

Some members of the 1776 Assembly intimately knew the details of colonial Virginia's legislatively administered law of substitution-based fee tail because they held property as tenants in tail and had previously used the private fee tail act procedure and appreciated its constraints themselves. Ten members of the 1776 Assembly holding property as tenants in tail had obtained private acts from the colonial Assembly authorizing them to substitute land or slaves owned in fee simple for their entailed property,⁷⁹ or to settle litigation regarding entailed property by such substitution.⁸⁰

Five members of the 1776 Assembly had petitioned unsuccessfully for private fee tail acts permitting such substitution in the Assembly sessions of 1774-1775 alone.⁸¹ Among these was Thomas Jefferson, proponent of fee tail

78. See *supra* notes 36-57 and accompanying text (describing legislative process required to defeat entails between 1710 and 1776).

79. See GENERAL ASSEMBLY REGISTER, *supra* note 65, at 122-24 (listing members of General Assembly for 1776 session); Act of Nov. 1753, ch. XXVI, 6 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 405-07 (William Waller Hening ed., Richmond, Va., W.W. Gray 1819) [hereinafter 6 LAWS OF VA.] (private act for John Armistead); Act of April 1757, ch. XXX, 7 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 159 (William Waller Hening ed., Richmond, Va. Franklin Press 1820) [hereinafter 7 LAWS OF VA.] (private act for Thomas Johnson); Act of March 1761, ch. XXVII, 7 LAWS OF VA., *supra*, at 440-44 (private act for Archibald Cary); Act of Nov. 1761, ch. X, 7 LAWS OF VA., *supra*, at 480-83 (private act for Mann Page, Jr.); Act of Oct. 1764, ch. XII, 8 LAWS OF VA., *supra* note 37, at 54 (private act for John Syme, in right of his wife); Act of Oct. 1765, ch. XLI, 8 LAWS OF VA., *supra* note 37, at 161-63 (private act for Thomas Mann Randolph); Act of Nov. 1766, ch. XXIII, 8 LAWS OF VA., *supra* note 37, at 222-23 (private act for Nathaniel Littleton Savage); Act of Nov. 1769, ch. LXXI, 8 LAWS OF VA., *supra* note 37, at 442 (private act for David Garland); Act of Nov. 1769, ch. LXXXI, 8 LAWS OF VA., *supra* note 37, at 468-70 (private act for Nathaniel Littleton Savage); Act of Nov. 1769, ch. LXXXIII, 8 LAWS OF VA., *supra* note 37, at 474 (private act for George Brooke).

80. See Act of Nov. 1766, ch. XXII, 8 LAWS OF VA., *supra* note 37, at 218-22 (private act for Charles Carter).

81. See GENERAL ASSEMBLY REGISTER, *supra* note 65, at 122-24 (listing members of General Assembly for 1776 session); JOURNALS OF THE HOUSE OF BURGESSES, 1773-1776, at

abolition in 1776, who had sought a private act permitting his wife and him to sell 2,400 acres of entailed land held in her right, upon settling fee simple land "of equal value" in place of the entailed land.⁸² Therefore, for Jefferson as for the others, his Act of 1776 to abolish fee tail certainly had a practical aspect.⁸³ It empowered Jefferson and his wife to sell 2,400 acres of land without substituting other property for it, without regard to the property rights previously held by the heir in tail and the reversioner. Another member of the 1776 Assembly had purchased land in fee simple from tenants in tail in connection with two private fee tail acts, which had required replacement of the entailed land.⁸⁴

Some members of the 1776 Assembly knew Virginia's substitution-based law of fee tail first-hand because they themselves had administered the substitution requirement as trustees appointed by the Assembly. Sixteen members of the 1776 Assembly had been named as trustees in one or more private fee tail acts of the colonial Assembly.⁸⁵ This duty required them to sell entailed

112, 116 (John Pendleton Kennedy ed., 1905) [hereinafter *JOURNALS OF THE HOUSE OF BURGESSES, 1773-1776*] (noting passage of private act for Thomas Jefferson); *id.* at 127, 266 (noting petition for private act by William Digges); *id.* at 218 (noting passage of private act for Nathaniel Littleton Savage); *id.* at 218, 229 (noting private act for Wilson Miles Cary); *id.* at 248, 269 (same for James Scott, Jr.).

82. See *JOURNALS OF THE HOUSE OF BURGESSES, 1773-1776*, *supra* note 81, at 83 (reporting petition for private act by Thomas Jefferson).

83. This is not to assert that Jefferson or other legislators who voted to abolish fee tail in 1776 were motivated by considerations of private rather than public benefit.

84. See Act of Oct. 1765, ch. XLI, 8 LAWS OF VA., *supra* note 37, at 161, 163 (vesting entailed property of Thomas Mann Randolph in Carter Braxton); Act of Feb. 1772, ch. LXVII, 8 LAWS OF VA., *supra* note 37, at 641-42 (vesting entailed property of James Blackwell in Carter Braxton).

85. See *GENERAL ASSEMBLY REGISTER*, *supra* note 65, at 122-24 (listing members of General Assembly for 1776 session); Act of Mar. 1761, ch. XXX, 7 LAWS OF VA., *supra* note 79, at 455-56 (appointing Archibald Cary as trustee); Act of Mar. 1761, ch. XXXI, 7 LAWS OF VA., *supra* note 79, at 458-60 (appointing Thomas Ludwell Lee as trustee); Act of Nov. 1761, ch. XI, 7 LAWS OF VA., *supra* note 79, at 483, 485 (appointing Carter Braxton and Edmund Pendleton as trustees); Act of Nov. 1761, ch. XIII, 7 LAWS OF VA., *supra* note 79, at 488-89 (appointing Carter Braxton as trustee); Act of Jan. 1764, ch. XIII, 8 LAWS OF VA., *supra* note 37, at 34, 35 (appointing Archibald Cary as trustee); Act of Oct. 1764, ch. XV, 8 LAWS OF VA., *supra* note 37, at 61, 62 (appointing Joseph Cabell and Archibald Cary as trustees); Act of Oct. 1764, ch. XVII, 8 LAWS OF VA., *supra* note 37, at 66-67 (appointing Richard Bland as trustee); Act of Nov. 1766, ch. XXII, 8 LAWS OF VA., *supra* note 37, at 218, 221 (appointing William Fitzhugh as trustee); Act of Nov. 1766, ch. LVI, 8 LAWS OF VA., *supra* note 37, at 283-84 (appointing Carter Braxton as trustee); Act of Mar. 1768, ch. VI, 8 LAWS OF VA., *supra* note 37, at 301-02 (appointing Wilson Miles Cary as trustee); Act of Nov. 1769, ch. LXXI, 8 LAWS OF VA., *supra* note 37, at 442, 444 (appointing Lodowick Farmer as trustee); Act of Nov. 1769, ch. LXXVII, 8 LAWS OF VA., *supra* note 37, at 455-56 (appointing William Lyne as trustee); Act of Nov. 1769, ch. LXXVIII, 8 LAWS OF VA., *supra* note 37, at 457, 459 (appointing Thomas Mann Randolph and John Woodson as trustees); Act of Feb. 1772, ch. LXII, 8 LAWS OF VA., *supra* note 37, at 631,

property and to reinvest the proceeds in other property to be substituted in its place, taking care to settle the new property according to the restrictive terms of the will or deed that had created the entail originally.⁸⁶ There would have been no reason for the Assembly to appoint trustees to fulfill these duties if not to implement the rule that the entail-related future interests of inheritance, remainder, and reversion must be protected.

Another source of direct personal experience with Virginia's law of fee tail, shared by many members of the 1776 Assembly, was prior legislative service. Almost half of the members of the 1776 Assembly (59 of 127) had served in the colonial House of Burgesses.⁸⁷ Jefferson, whose committee had introduced the fee tail bill in 1776, had served in the House of Burgesses from 1769 on,⁸⁸ during his time there, twenty-nine private fee tail acts were enacted.⁸⁹ During the cumulative experience of the Assembly of 1776, which stretched back to 1748,⁹⁰ the Assembly had enacted ninety private fee tail acts.⁹¹ Even members of the 1776 Assembly who had served only in the House of Burgesses session of 1774-1775, the last session to conduct business,⁹²

633 (appointing George Brooke and William Lyne as trustees); Act of Feb. 1772, ch. LXVI, 8 LAWS OF VA., *supra* note 37, at 640-41 (appointing John Augustine Washington as trustee); Act of Feb. 1772, ch. LXVIII, 8 LAWS OF VA., *supra* note 37, at 643, 645 (appointing Lodowick Farmer as trustee); Act of Mar. 1773, ch. XII, 8 LAWS OF VA., *supra* note 37, at 663-64 (appointing Francis Peyton as trustee); Act of Mar. 1773, ch. XIV, 8 LAWS OF VA., *supra* note 37, at 667, 669 (appointing Mann Page as trustee).

86. *See, e.g.*, Act of Feb. 1772, ch. LXVI, 8 LAWS OF VA., *supra* note 37, at 640-41 (explaining duties of trustees under private fee tail act).

87. *Compare* GENERAL ASSEMBLY REGISTER, *supra* note 65, at 122-24 (listing members of General Assembly 1776 session), *with id.* at 81-104 (listing members of the House of Burgesses from 1748 to 1774). I exclude from consideration members of the House of Delegates and the Senate of 1776 who were not admitted until after the vote on fee tail. I also exclude from consideration the abortive House of Burgesses session of 1775-1776, which barely met and transacted no business. *See id.* at 105 n.1 (summarizing history of last session of House of Burgesses).

88. *See* GENERAL ASSEMBLY REGISTER, *supra* note 65, at 97, 99, 102, 105 (listing Thomas Jefferson as member of House of Burgesses in 1769, 1769-1771, 1772-1774, and 1775-1776 sessions).

89. *See generally* 8 LAWS OF VA., *supra* note 37, *passim* (including all private fee tail acts passed during Jefferson's service in House of Burgesses).

90. Richard Bland, Archibald Cary, and William Harwood, members of the 1776 General Assembly, had served in the House of Burgesses session of 1748-1749. GENERAL ASSEMBLY REGISTER, *supra* note 65, at 81-82; 2 ENCYCLOPEDIA OF VIRGINIA BIOGRAPHY 4-5, 8 (Lyon Gardiner Tyler ed., 1915) [hereinafter ENCYCLOPEDIA OF VA. BIO.] (detailing legislative experience of Bland and Cary).

91. *See generally* 6 LAWS OF VA., *supra* note 79, *passim*; 7 LAWS OF VA., *supra* note 79, *passim*; 8 LAWS OF VA., *supra* note 37, *passim*.

92. *See* GENERAL ASSEMBLY REGISTER, *supra* note 65, at 105 n.1 (House of Burgesses had no quorum and conducted no business at meetings in 1776).

would have learned from that experience that petitions seeking a private act to dock and replace fee tail property were regular items of legislative business in Virginia. In that session alone, twenty petitions to obtain private fee tail acts were presented.⁹³

Considered together, half of the members of the 1776 Assembly (65 of 127) previously had encountered, in some private or public capacity, colonial Virginia's legislatively administered law of substitutable fee tail estates.⁹⁴ They therefore knew that Virginia's private fee tail acts had preserved the future interests of heirs in tail, reversioners, and remaindermen, while authorizing replacement of the underlying property,⁹⁵ and were not functionally equivalent to judicial procedures for breaking entails under the English common law.⁹⁶ All these legislators would have known that the Act of 1776 sharply reversed the substance of prior law because it explicitly "extinguished" these interests.⁹⁷

Even regarding members of the 1776 Assembly for whom there are no documented sources of direct experience with fee tail tenure, widespread familiarity with fee tail can reasonably be inferred. Some members of the 1776 Assembly would have known about Virginia's law of fee tail property because they were lawyers. After 1734, tenants in tail could bar the entail on a parcel worth £200 sterling or less by using "fine, or recovery, according to

93. See JOURNALS OF THE HOUSE OF BURGESSES, 1773-1776, *supra* note 81, at 83, 86-87, 94, 98, 106, 109, 117, 118-19, 124, 131, 179, 181, 195, 202, 208, 211, 216 (reporting presentation of various petitions). I am not counting petitions presented in 1775 that duplicated petitions from the previous year.

94. This number is the sum of the ten members of the 1776 Assembly who previously had obtained private fee tail acts for their own property, plus four other members who previously had petitioned unsuccessfully for one or more private fee tail acts (Wilson Miles Cary, William Digges, Thomas Jefferson, James Scott, Jr.), plus eleven other members who had been appointed as trustees under a private fee tail act (Richard Bland, Joseph Cabell, Lodowick Farmer, William Fitzhugh, Thomas Ludwell Lee, William Lyne, Mann Page, Edmund Pendleton, Francis Peyton, John Augustine Washington, and John Woodson), plus forty other members of the 1776 Assembly who previously had encountered private fee tail acts as members of the House of Burgesses. See *supra* notes 79, 81, 85, 87-93 and accompanying text. Many members of the 1776 Assembly fell into more than one of these categories.

95. See *supra* notes 37-41 and accompanying text (discussing procedures for substituting fee simple property in place of entailed property); *supra* notes 42-56 (discussing effectiveness of legislative substitution process in protecting derivative rights of other parties).

96. See *supra* notes 32-35 and accompanying text (discussing common law procedures of fine and common recovery used to evade fee tail restrictions). After 1734, this legislative system applied only to parcels of land worth over £200. See *supra* note 41 and accompanying text.

97. See Act of Oct. 1776, ch. XXVI, 9 LAWS OF VA., *supra* note 1, at 226-27 ("An Act declaring tenants of lands or slaves in taill to hold the same in fee simple"); *supra* notes 69-76 and accompanying text (discussing practical effects of Act of 1776).

the laws of England,⁹⁸ and thereby avoid the Assembly's property-replacement requirement. Virginia landowners invoking this procedure certainly would have consulted a lawyer, because "fine" and "recovery" were notoriously arcane fictions of common-law litigation.⁹⁹ Eight volumes of *ad quod damnum* writs were issued pursuant to the Act of 1734 and returned to the General Court between 1734 and 1775, so we know that fine and recovery were extensively used during this period.¹⁰⁰ It seems fair to infer that the twenty or so members of the 1776 Assembly who had practiced law¹⁰¹ would have been generally conversant with Virginia's law of fee tail.

Some members of the 1776 Assembly would have known about Virginia's distinctive law of fee tail through familiarity with Virginia's very active land market. Many Virginia legislators, like the Virginia gentry generally, actively bought and sold land for investment purposes.¹⁰² Buyers in this market would have encountered fee tail tenure as an incumbrance on title that had to be dealt with in the Assembly or in the General Court, depending on whether the parcel exceeded £200 sterling in value.¹⁰³ Thus, a letter from George Washington refers to a friend who "having purchasd an Entaild Estate . . . Procurd a Act of General Assembly for Docking the said Entail (other lands of equal value being settled in lieu thereof)[,] but till such time as the Royal assent is obtaind he cannot enter into quiet possession."¹⁰⁴ Parcels of entailed land were advertised

98. See Act of Oct. 1734, ch. VI, 4 LAWS OF VA., *supra* note 41, at 400 (allowing conveyance of land in fee simple to purchaser).

99. See, e.g., 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 116-18 (1809) (describing common recovery and Statute of Fines).

100. MINUTES OF THE COUNCIL AND GENERAL COURT OF COLONIAL VIRGINIA 540 (H.R. McIlwaine ed., 2d ed. 1979) (noting existence of volumes A to H of such writs). These records do not survive. *Id.*

101. See 1 ANTON-HERMANN CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA 288-89 (1965) (listing Edmund Pendleton, George Mason, and Thomas Jefferson as prominent Virginia lawyers); *id.* at 292 n.281 (naming John Bannister, Richard Bland, Paul Carrington, James Holt, Joseph Jones, Henry Lee, James Mercer, Robert Carter Nicholas, and Bolling Starke as lawyers); 2 ENCYCLOPEDIA OF VA. BIO., *supra* note 90, at 9 (discussing William Fleming); *id.* at 12 (discussing John Harvie); *id.* at 12 (discussing James Henry); *id.* at 22 (discussing Thomas Ludwell Lee); *id.* at 31 (discussing Joseph Prentiss); *id.* at 34 (discussing Henry Tazewell); *id.* at 61 (citing appointment of Richard Cary and William Roscoe Wilson Curle as appellate judges in 1779, which suggests that they were lawyers); CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 47 (1913) (indicating that Richard Henry Lee studied law but never actively practiced).

102. See LUCILLE GRIFFITH, THE VIRGINIA HOUSE OF BURGESSSES 1750-1774, at 129 (rev. ed. 1970) (explaining large number of legislators were actively involved in land speculation).

103. See *supra* notes 36-41 and accompanying text (describing Virginia legislative process permitting replacement of entailed property; Act of 1734 exempted entailed parcels worth £200 or less).

104. Letter from George Washington to Robert Cary & Co. (Nov. 5, 1760), in 2 THE WRITINGS OF GEORGE WASHINGTON 354-55 (John C. Fitzpatrick ed., 1931) (original spelling).

for sale in newspapers, either by trustees already authorized by a private act to sell¹⁰⁵ or by tenants in tail, contingent upon obtaining a private act.¹⁰⁶

Family ties would have given some members of the 1776 Assembly additional familiarity with Virginia's law of fee tail. To give a prominent example, eight members of the 1776 Assembly were descended from Robert "King" Carter,¹⁰⁷ whose will had created massive estates in fee tail for each of three sons.¹⁰⁸ These members of the 1776 Assembly, whether or not they themselves were then tenants in tail or held associated rights of inheritance, reversion, or remainder, would have been quite familiar with the operation of fee tail as a matter of family knowledge.

Thus, half of the members of the 1776 Assembly had direct experience of Virginia's distinctive, substitution-based law of fee tail (as petitioners for private acts, trustees, or Burgesses), and many others are likely to have been familiar with fee tail based on practicing law, awareness of the land market, or family ties. For the Virginia legislators who voted on abolishing fee tail in 1776, then, the issue would have appeared as an eminently practical one, whatever its symbolic aspect. Because the practical effect of abolishing fee tail in 1776 was to extinguish the inheritance, reversion, and remainder interests and to transfer their value to the tenant in tail,¹⁰⁹ legislators would have known that the Act of 1776 took real-world property rights of fellow Virginians that the Assembly had long protected.¹¹⁰

III. President Madison and Territorial Statutes Abolishing Fee Tail

Given that the Fifth Amendment was not meant to apply to the states,¹¹¹ modern scholars have concluded that the laws of the early republic offer no

105. See, e.g., VA. GAZETTE, May 9, 1771, at 4 (listing property to be sold through trustees by Act of Assembly).

106. See, e.g., VA. GAZETTE, Feb. 14, 1771, at 3 (offering to sell land pursuant to private act to be procured).

107. See GENERAL ASSEMBLY REGISTER, *supra* note 65, at 122-24 (listing members of General Assembly for 1776 session); CLIFFORD DOWDEY, THE VIRGINIA DYNASTIES: THE EMERGENCE OF "KING" CARTER AND THE GOLDEN AGE 219, 309, 423-24 (1969) (discussing various heirs of Carter, including son Charles Carter and grandsons Lewis Burwell, Benjamin Harrison, Robert Carter Nicholas, Mann Page, and great grandson Mann Page, Jr.); 2 ENCYCLOPEDIA OF VA. BIO., *supra* note 90, at 5-6 (grandson Carter Braxton); *id.* at 9 (grandson William Fitzhugh); *id.* at 11 (Benjamin Harrison); *id.* at 29 (Robert Carter Nicholas); *id.* at 30 (Mann Page).

108. See DOWDEY, *supra* note 107, at 379-95 (reprinting selections from Carter's will).

109. See *supra* notes 2-3 and accompanying text (describing terms of Act of 1776); *supra* notes 69-76 (discussing practical effects of Act of 1776).

110. See *supra* notes 36-57 and accompanying text (discussing restrictions on disentailing property between 1710 and 1776).

111. See *Barron v. Mayor of Balt.*, 32 U.S. (7 Pet.) 243, 247, 250-51 (1833) (holding that Fifth Amendment applied only to federal government, not to states).

examples by which to test the original understanding of the Takings Clause.¹¹² This conclusion is mistaken, in that it overlooks the early laws of the territories. The fee tail issue itself, as addressed in territorial laws, usefully exemplifies the original understanding of the Takings and Due Process Clauses of the Fifth Amendment.

The territories were appendages of the federal government, subject to its supervision and control until they became states. The Constitution gave Congress "Power to . . . make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."¹¹³ Congress, in turn, delegated legislative power to territorial lawmakers in the various organic acts, subject to review by the United States. Originally, territorial governments submitted laws to Congress for review.¹¹⁴ After 1789, however, the President, not Congress, assumed the function of reviewing territorial laws.¹¹⁵

The Northwest Ordinance, which Congress enacted under the Articles of Confederation, contained its own statement of inhabitants' rights – anticipating the Due Process and Takings Clauses of the Fifth Amendment – to which the territory's laws had to conform.¹¹⁶ Later organic acts, too, promised to protect territorial inhabitants' property, either incorporating by reference rights recited in the federal Constitution¹¹⁷ or in an earlier organic act such as the Northwest Ordinance,¹¹⁸ or explicitly reiterating terms protecting such property.¹¹⁹ Behind the organic acts stood the Constitution, operating by its own force on territorial laws, and several treaties.¹²⁰

112. See, e.g., Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211, 1213 (1996).

113. U.S. CONST. art. IV, § 3, cl. 2.

114. See Ordinance of July 13, 1787, art II, 1 Stat. 51, 52 (1845) (requiring government of Northwest Territory to submit copies of all laws and proceedings to Congress).

115. Act of Aug. 7, 1789, ch. VIII, 1 Stat. 50, 52-53 (1848); see also, e.g., Act of June 4, 1812, ch. XCV, 2 Stat. 743, 744 (1850) (requiring laws of Missouri Territory to be submitted to President).

116. See art. II, 1 Stat. at 52 (delineating rights of territory inhabitants).

117. See *id.* at 287 (requiring that laws adopted by District of Louisiana government be consistent with Constitution); Act of June 4, 1812, ch. XCV, 2 Stat. 743, 744 (1845) (requiring laws passed by Missouri Territory be consistent with Constitution); Act of Mar. 26, 1804, ch. XXXVIII, 2 Stat. 283, 284 (1850) (requiring that laws adopted by Orleans Territory government be consistent with Constitution).

118. See Act of April 7, 1798, ch. XXVIII, 1 Stat. 549, 550 (1848) (granting inhabitants of Mississippi Territory privileges outlined in Northwest Ordinance); Act of May 26, 1790, ch. XIV, 1 Stat. 123, 123 (1848) (granting inhabitants "south of the river Ohio" privileges outlined in Northwest Ordinance).

119. See Act of June 4, 1812, ch. XCV, 2 Stat. 743, 747 (1850) (outlining rights of Missouri Territory inhabitants).

120. See *Munn v. Ill.*, 94 U.S. 113, 125 (1877) (noting history of state and territorial regulation coexisting with Constitutional due process rights); *Scott v. Sandford*, 60 U.S. (19

In 1812, the Mississippi Territory enacted a law stating that "every estate in lands, or slaves, *which now is* or shall hereafter be an estate in fee-tail, shall from henceforth be created an estate in fee-simple, and the same shall be discharged of the conditions annexed thereto by the Common Law."¹²¹ Passage of this legislation extinguished existing property rights of heirs in tail, reversioners, and remaindermen and effectively transferred their value to current tenants in tail. President Madison raised no objection to this law.

In 1816, the Missouri Territory enacted a law declaring that "[t]he doctrine of entails shall never be allowed, and in all cases where any real estate shall be entailed, the whole of the right and interest of, in and to the same, shall vest in fee simple in the person having the first reversion or remainder in said estate, after the life estate is determined in said estate."¹²² Because the operation of this law extended to entails created both before and after its enactment, it effectively extinguished the future interests of the heir's heir, any remaindermen, and the reversioner, deriving from entails already existing. The law transferred the value of these property rights to the heir of the current (or first) tenant in tail. President Madison raised no objection to this law.

Thus, while Madison was president, the issue of the constitutionality of territorial statutes abolishing fee tail arose on two occasions. Both times, Madison acquiesced. Because Madison was so familiar with the issue of abolishing fee tail,¹²³ so sensitive to legislation affecting property rights, and so familiar with the Fifth Amendment to the United States Constitution (based on his central role in its drafting),¹²⁴ his acquiescence in territorial laws abolishing fee

How.) 393, 450 (1857) (holding that Constitution applies in territories as well as elsewhere in the United States). American treaties with Great Britain and France guaranteed protection of inhabitants' "property" in various territories. *See* Treaty with France, Apr. 30, 1803, U.S.-Fr., art. III, 8 Stat. 200, 202 (1846) (guaranteeing property rights of inhabitants of Louisiana Territory); Treaty with Great Britain, Nov. 19, 1794, U.S.-Gr. Brit., art. II, 8 Stat. 116, 117 (guaranteeing property rights of British settlers in United States); Definitive Treaty with Great Britain, Sept. 3, 1783, U.S.-Gr. Brit., art. VI, 8 Stat. 80, 83 (requiring post-war protection of property rights). *See generally* John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099 (2000) (articulating late eighteenth century view of difference between regulation and taking of land).

121. Act of Dec. 22, 1812, ACTS PASSED AT THE SECOND SESSION OF THE SEVENTH GENERAL ASSEMBLY OF THE MISSISSIPPI TERRITORY 84, 87 (Natchez, P. Isler 1812) (emphasis added).

122. Act of Jan. 19, 1816, ACTS PASSED BY THE GENERAL ASSEMBLY OF THE TERRITORY OF MISSOURI 32, 33 (St. Louis, Joseph Charless 1816).

123. *See supra* notes 64-66 and accompanying text (describing Madison's experience with abolishing fee tail in Virginia Assembly).

124. Madison prepared the initial version of the federal Bill of Rights in 1789. He drafted the Takings Clause of the Fifth Amendment on his own, not in response to a request from one of the state conventions that had ratified the Constitution. *See supra* notes 12-13 and accompanying text.

tail tenure concretely expressed his understanding that these laws did not violate the Fifth Amendment. Madison's position on applying the Fifth Amendment to territorial laws abolishing fee tail is consistent with his previously and subsequently expressed endorsement of Virginia's abolition of fee tail.¹²⁵

IV. Madison, Fee Tail, and Property Rights

The foregoing discussion establishes several historical facts regarding James Madison and the law of fee tail in Virginia, which in turn support other propositions by inference. By 1785, Madison explicitly supported the Virginia statutes that abolished certain property rights deriving from the fee tail estate tenure.¹²⁶ Madison, like other members of the state Assembly, knew that Virginia's abolition of fee tail was not merely a symbolic gesture. The existing rights of "the issue in taille, and those in reversion and remainder" that the Acts of 1776 and 1785 explicitly extinguished¹²⁷ were rights whose value the colonial Assembly had protected.¹²⁸ Madison therefore must have believed that the Virginia Assembly's comprehensive abolition of these existing property rights did not violate the "inherent right" of "acquiring and possessing property" asserted in Virginia's recent Declaration of Rights.¹²⁹

In late 1785, when Madison introduced the legislation that perfected the abolition of fee tail tenure in Virginia, he was already expressing opposition

125. See *infra* notes 130-34, 143-56 and accompanying text.

126. Act of Oct. 1776, ch. XXVI, 9 LAWS OF VA., *supra* note 1, at 226; Act of Oct. 1785, ch. LXII, 12 LAWS OF VA., *supra* note 8, at 154, 156-57. It is conceivable that in 1776 Madison might have preferred Pendleton's relatively moderate approach (making fee tail convertible to fee simple by devise or conveyance at the option of the tenant in tail) to Jefferson's plan of immediately abolishing all fee tail tenure by legislative fiat, the course adopted by the Assembly. But Pendleton's plan shared with Jefferson's the principle that it was legitimate to extinguish the derivative rights of heirs in tail, reversioners, and remaindermen. See *supra* notes 58-63 and accompanying text. In 1785, however, Madison himself introduced the legislation that expanded the scope of the Act of 1776 so as to achieve its original objectives, completely eradicating fee tail tenure in Virginia. See JOURNAL OF THE HOUSE OF DELEGATES (Oct. 17, 1785-Jan. 21, 1786), *supra* note 8, at 13 (introducing bill "For regulating conveyances"); Act of Oct. 1785, ch. LXII, 12 LAWS OF VA., *supra* note 8, at 154, 156-57 (regarding regulation of conveyances).

127. Act of Oct. 1776, ch. XXVI, 9 LAWS OF VA., *supra* note 1, at 226; Act of Oct. 1785, ch. LXII, 12 LAWS OF VA., *supra* note 8, at 154, 156-57.

128. See *supra* notes 36-57 and accompanying text (describing colonial Assembly's protection of interests of heirs in tail, reversioners, and remaindermen prior between 1710 and 1776).

129. See Va. Declaration of Rights § 1 (1776), 9 LAWS OF VA., *supra* note 1, at 109. Again, there is uncertainty regarding Madison's vote on fee tail in 1776. See *supra* note 127 and accompanying text. But even Pendleton's more moderate proposal, permitting tenants in tail to extinguish the future interests that Jefferson's plan proposed to abolish immediately, was in principle (and potentially in application) just as destructive of existing property rights. See *supra* notes 58-63 and accompanying text.

to state legislation for interfering with property rights.¹³⁰ Interference with property rights by state law was one of the chief reasons Madison cited for amending or replacing the Articles of Confederation.¹³¹ It is scarcely conceivable that Madison himself would introduce legislation extending the abolition of fee tail, if he felt that it, too, unjustly interfered with property rights.

As president of the United States, Madison acquiesced in the enactment of two similar territorial statutes abolishing fee tail, which applied to existing as well as to future entails.¹³² Madison's acquiescence indicates that he did not believe this legislation unjustly deprived territorial inhabitants of property, in violation of the Fifth Amendment or any analogous provision in applicable treaties or federal statutes.¹³³ Madison's later approving references to Virginia's abolition of fee tail in his private writings indicate that he continued to see this issue of property rights in the same light.¹³⁴

Madison's support for abolishing fee tail in Virginia and his acquiescence in the abolition of fee tail in the territories do not fit the modern interpretation of Madison as a libertarian liberal, categorically opposed to all government actions that would diminish existing property rights.¹³⁵ Laws abolishing fee tail completely extinguished existing property rights of inheritance, reversion, and remainder.¹³⁶ In contrast, Madison vehemently opposed contemporary debtor relief measures that merely reduced the value of creditors' rights.¹³⁷

Given Madison's well-known devotion to protecting property rights from state legislatures, what could justify his support for extinguishing the rights of heirs in tail, reversioners, and remaindermen, and transferring their value to others? One can best answer this question not by referring to the seemingly comprehensive principles of property rights suggested by some of Madison's

130. See Letter from James Madison to Caleb Wallace (Aug. 23, 1785), in 8 THE PAPERS OF JAMES MADISON 351 (Robert A. Rutland et al. eds., 1973) (recommending that state constitutions prohibit legislature from "seizing private property for public use without paying its full valu[e]"); Letter from James Madison to James Madison, Sr. (Nov. 18, 1785), *id.* at 422 (reporting on status of paper money proposal in Virginia Assembly).

131. See 9 THE PAPERS OF JAMES MADISON, *supra* note 9, at 354-57; THE FEDERALIST NO. 10 (Madison), in 10 THE PAPERS OF JAMES MADISON, *supra* note 11, at 263, 265 (declaring that protecting property interests is "first object of government" and "the principle task of modern legislation").

132. See *supra* notes 123-24 and accompanying text.

133. See *supra* notes 116-22 and accompanying text (citing treaties and statutes with property rights provisions analogous to those of Fifth Amendment).

134. See *infra* notes 139-63 and accompanying text.

135. See *supra* notes 9-13 and accompanying text (describing prevailing view that Madison opposed all government interference with individual property rights).

136. Act of Oct. 1776, ch. XXVI, 9 LAWS OF VA., *supra* note 1, at 226.

137. See 9 THE PAPERS OF JAMES MADISON, *supra* note 9, at 349 (arguing that state laws granting any form of debtor relief unfairly infringed on rights of creditors in other states).

better-known texts,¹³⁸ but by referring to Madison's more concrete remarks regarding abolition of fee tail and related measures.

Madison viewed abolishing fee tail as part of enacting a broader social and economic legislative agenda of instituting "the republican laws of descent and distribution."¹³⁹ This agenda also included substituting partible inheritance for primogeniture as the rule of intestate succession to real property¹⁴⁰ and abolishing the doctrine of survivorship in joint tenancy.¹⁴¹ In this context, at least, Madison's use of the term "republican" conforms to the modern historians' sense of the eighteenth century political principle holding that property rights "could and should be subordinated to the welfare of the polity."¹⁴²

The justification Madison gave for abolishing fee tail lay in the perceived side-effects of fee tail on the moral virtue of the citizenry. This "suffering" visited on society by "entails"¹⁴³ explained why entails were "contrary to good

138. See THE FEDERALIST NO.10 (Madison), in 10 THE PAPERS OF JAMES MADISON, *supra* note 11, at 263, 265-66; *Property*, NAT'L GAZETTE, March 27, 1792, in 14 THE PAPERS OF JAMES MADISON 266 (Robert A. Rutland et al. eds., 1983).

139. See 4 MADISON, *Notes on Suffrage*, *supra* note 8, at 30 (describing goal of "republican laws of descent and distribution" as gradually "equalizing the property of the citizens"). In the narrowest sense, "descent and distribution" refer to intestate succession only. But these terms also can refer to succession generally. Madison uses the term "descent" to include "entail." See Letter from James Madison to Thomas Jefferson (Dec. 31, 1824), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra* note 8, at 477 (referring to "entails or other fetters attached to the descent of property by legal acts of its owners"). This association of entail with descent was common because in practice entail typically incorporated the rules of primogeniture, by itself a rule of intestate succession.

140. See Act of Oct. 1785, ch. LX, 12 LAWS OF VA., *supra* note 8, at 138 (adopting partible inheritance for intestate succession to real property); Thomas Jefferson, *A Bill Directing the Course of Descents*, in 2 THE PAPERS OF THOMAS JEFFERSON 391, 391-93 (Julian P. Boyd ed., 1950) (same). Changing the rule of intestate distribution did not infringe on property rights; before death a decedent might have made a will that disinherited any person who might otherwise have taken by intestacy. See *id.* at 361 (specifically limiting bill's application to property owners who die intestate).

141. Act of Oct. 1786, ch. LX, 12 LAWS OF VA., *supra* note 8, at 349-50. As in the case of abolishing fee tail, private property rights were extinguished: the abolition applied to existing as well as prospective joint tenancies, "whether they be such as might have been compelled to make partition, or not." Act of Oct. 1786, ch. LX, 12 LAWS OF VA., *supra* note 8, at 350. Madison introduced this legislation in the October 1785 session of the Assembly. See JOURNAL OF THE HOUSE OF DELEGATES (Oct. 17, 1785-Jan. 21, 1786), *supra* note 8, at 14 (introducing bill "[c]oncerning partitions and joint rights and obligations"). The shared function of abolishing fee tail, abolishing primogeniture, and abolishing the doctrine of survivorship in joint tenancy was to favor "subdivision of property" among family members and thereby over time "equaliz[e] the property of the citizens." See Letter from James Madison to Thomas Jefferson (June 19, 1786), in 9 THE PAPERS OF JAMES MADISON, *supra* note 9, at 76; 4 MADISON, *Notes on Suffrage*, *supra* note 8, at 30 (asserting that fee tail imposes "suffering" on society).

142. ALEXANDER, *supra* note 1, at 29.

143. 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra* note 8, at 477.

policy"¹⁴⁴ and why existing entails could not simply be left in place. Virginia's Declaration of Rights expressed this sense of urgency; "temperance, frugality, and virtue" were essential if "liberty" itself were to survive.¹⁴⁵ Of course, a certain degree of governmental concern for morality can coexist with libertarian principles of property law.¹⁴⁶ But what was characteristically republican about Madison's perspective was his extremely heightened sensitivity about moral virtue and his perception that the extravagance of private individuals greatly harmed the public.

Thus, Madison believed that one of the principal "causes, tainting the habits and manners of the people under the Colonial Government" had been the "too unequal distribution of property, favored by laws derived from the British code, which generated examples in the opulent class inauspicious to the habits of the other classes."¹⁴⁷ Madison was implicitly referring to the common law devices of fee tail, primogeniture and survivorship in joint tenancy. In contrast, Virginia's reformed law of succession (including the abolition of fee tail) meant that although "great wealth" might still come to "individuals" "for a certain time," "the opportunities may be diminished and the permanency defeated by the equalizing tendency of the laws."¹⁴⁸

Consequently, Madison hoped, "the wealthy . . . must cease to be idlers and become laborers," with a reduced "capacity to purchase the costly and ornamental articles consumed by the wealthy alone."¹⁴⁹ Madison predicted that "[f]rom a more equal partition of property, must result a greater simplicity of manners, consequently a less consumption of manufactured superfluities,

144. See Act of Oct. 1776, ch. XXVI, 9 LAWS OF VA., *supra* note 1, at 226 (declaring "gifts" of property in fee tail to be "contrary to good policy").

145. See Va. Declaration of Rights (1776), 9 LAWS OF VA., *supra* note 1, at 111; see also JAMES MADISON, *Fashion*, NAT'L GAZETTE, Mar. 20, 1792, reprinted in 14 THE PAPERS OF JAMES MADISON 257, 258 (Robert A. Rutland et al. eds., 1983) (arguing that "those [occupations] are the least desirable in a free state which produce the most servile dependence of one class upon another," that such dependence "must increase as the *mutuality* of wants is diminished").

146. See *Mugler v. Kan.*, 123 U.S. 623, 669 (1887) (upholding state law closing breweries against Fourteenth Amendment challenge). The Fourteenth Amendment, the Court found, did not restrain states from protecting the "safety, morals or health of the community." *Id.*

147. Letter from James Madison to Robert Walsh (March 2, 1819), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra* note 8, at 122.

148. See 4 MADISON, *Notes on Suffrage*, *supra* note 8, at 24 (emphasis added). Dictating "permanency" of land ownership within bloodline was the function of fee tail tenure. Abolishing fee tail would tend to promote partible inheritance of land. Abolishing fee tail also would enable the current generation — especially those who proved to be "idlers" rather than "laborers" — to sell or mortgage inherited land.

149. *Id.*; 14 MADISON, *Fashion*, *supra* note 145, at 258 ("The condition of those who receive employment and bread from the precarious source of fashion and superfluity, is a lesson to nations.").

and a less proportion of idle proprietors and domestics.¹⁵⁰ The issue of fee tail shows that inculcating virtue in the citizenry could even justify taking away property rights. Although "the first object of government" might be to protect "different and unequal faculties of acquiring property" generally,¹⁵¹ inheriting entailed property was such a socially undesirable way of acquiring property that it was appropriate for the legislature to abolish this form of land tenure.

The "more equal partition" of family property that Madison favored¹⁵² suggested comparison with natural law as well as the social vision of an agrarian yeomanry of owner-cultivators. Madison anticipated approvingly that as the land gradually became "subdivided," more land would be "actually cultivated by the owner."¹⁵³ This trend would bring ownership rights into closer congruence with what Madison called "the principle of natural law, which vests in individuals an exclusive right to the portions of ground with which they have incorporated their labor and improvements."¹⁵⁴

Thus Madison's own remarks on the subject of abolishing fee tail do not reflect a categorical predisposition to secure or sanctify property rights generally, as would follow from a hands-off, libertarian principle of property. Madison's remarks instead reflect the premise, at the time still traditional, that property ownership consisted of "a right of stewardship that the public entrusted to an individual, for both private and public benefit," not "an absolute right that exempted the individual from corporate oversight."¹⁵⁵ Entailing land was not tortious,¹⁵⁶ of course, but Madison found it to be sufficiently contrary to the public good that it merited nullification.

150. Letter from James Madison to Thomas Jefferson (June 19, 1786), in 9 THE PAPERS OF JAMES MADISON, *supra* note 9, at 77. The social change Madison envisioned would take time. The immediate consequence of extinguishing rights of inheritance, reversion and remainder was to transfer their value to the tenant in tail, thus temporarily increasing the concentration of ownership to that which Madison objected.

151. THE FEDERALIST NO. 10 (Madison), in 10 THE PAPERS OF JAMES MADISON, *supra* note 11, at 265.

152. See Letter from James Madison to Thomas Jefferson (June 19, 1786), in 9 THE PAPERS OF JAMES MADISON, *supra* note 9, at 77.

153. See 4 MADISON, *Notes on Suffrage*, *supra* note 8, at 24.

154. See *id.*; cf. THOMAS JEFFERSON, *Autobiography*, *supra* note 5, at 69 (asserting that abolishing fee tail did not violate "a single natural right of any one individual citizen").

155. See ALEXANDER, *supra* note 1, at 29 ("The core of American republican thought during the eighteenth century was the idea that private 'interests' could and should be subordinated to the common welfare of the polity."); SHAIN, *supra* note 14, at 183 (describing eighteenth century view of property ownership).

156. Cf. *Lucas v. S.C. Coastal Comm'n*, 505 U.S. 1003, 1029 (1992) (declaring that "confiscatory regulations" cannot be newly legislated or decreed without compensation, but must "inhere in . . . the State's law of property and nuisance"); *Mugler v. Kan.*, 123 U.S. 623, 667 (1887) (stating "[the] fundamental principle that every one shall use his own [property] as

Madison's continuing endorsement of abolishing fee tail shows that he did not believe that justice required constitutionalizing the status quo of private rights. Plainly, he did not believe that common law property rights enforceable yesterday as between private citizens were always constitutionally protected against legislation today. To the contrary, Madison argued:

If it be understood that the common law is established by the constitution, it follows that no part of the law can be altered by the legislature . . . and the whole code with all its incongruities, barbarisms and bloody maxims would be inviolably saddled on the good people of the United States.¹⁵⁷

Fee tail tenure was an example of "established" law as to which society now withheld its "tacit consent."¹⁵⁸

Madison's belief that a state might validly redistribute property was not confined to abolishing fee tail and survivorship among joint tenants, both of which primarily affected transmission of property within the family. Longevity of property rights might threaten the public good outside the family context also. During the controversy over whether to relocate the College of William and Mary from Williamsburg to Richmond, Madison declared:

[T]he time surely cannot be distant when it must be seen by all that what is granted by the public authority for the public good, not for that of individuals, may be withdrawn and otherwise applied when the public good so requires; with an equitable saving or indemnity only in behalf of the individuals actually enjoying vested emoluments.¹⁵⁹

Madison highly valued stability of property rights,¹⁶⁰ and he was in that sense "conservative," but only up to a point. The case of fee tail marks such a point.

Indeed, for Madison the abolition of fee tail was an example that would support by analogy the validity of legislation imposing public control on ecclesiastical property, even where such property had not originated in a public grant.

not to wrong and injure another" embodied the regulatory power that "belonged to the States when the Federal Constitution was adopted" (quoting *Fertilizing Co. v. Hyde Park*, 97 U.S. 659, 667 (1878)) (internal quotation marks omitted).

157. JAMES MADISON, *The Report of 1800*, reprinted in 17 THE PAPERS OF JAMES MADISON 307, 331-32 (David B. Mattern et al. eds., 1991).

158. Letter from James Madison to Thomas Jefferson (Feb. 4, 1790), in 13 THE PAPERS OF JAMES MADISON 18, 20 (Charles F. Hobson & Robert A. Rutland eds., 1981).

159. Letter from James Madison to Thomas Jefferson (Dec. 31, 1824), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra* note 8, at 477; cf. *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 650 (1819) (holding that college's charter of incorporation was constitutionally protected from state interference). This statement indicates that Madison did not limit the scope of his principle to real property.

160. See 9 THE PAPERS OF JAMES MADISON, *supra* note 9, at 353-54 (condemning "mutability of the laws of the states").

Nor can it long be believed that, although the owner of property cannot secure its descent but for a short period, even to those who inherit his blood, he may entail it irrevocably and forever on those succeeding to his creed, however absurd or contrary to that of a more enlightened age.¹⁶¹

Madison referred approvingly to "the Great Reformation of Ecclesiastical abuses in the 16th century,"¹⁶² which in England had included legislative confiscation of the property of monasteries and abbeys.¹⁶³ Plainly, Madison did not view the abolition of fee tail as a uniquely appropriate occasion for legislatively altering property rights.

Conclusion

James Madison actively supported Virginia's abolition of fee tail in 1785,¹⁶⁴ and he never receded from that position.¹⁶⁵ Yet abolishing fee tail meant "extinguishing" property rights of "the issue in taile, and those in reversion and remainder"¹⁶⁶ that the Virginia Assembly had long protected.¹⁶⁷ Madison's endorsement of abolishing fee tail therefore provides an important counterexample to the view that Madison and the framers of the Constitution categorically favored protecting all rights of private property from legislative interference.

The reasons Madison gave for supporting abolition of fee tail, moreover, center on a perception of public harm that is quite at odds with libertarian concepts of property rights. Madison's support for abolishing fee tail was ultimately a matter of seeking to promote a better, more virtuous republic. Substantial inherited wealth itself threatened trouble. Citizens of "the opulent class" were "idlers"¹⁶⁸ whose example had tainted "the habits and manners of the people."¹⁶⁹ Abolishing fee tail tenure offered the prospect of diminishing

161. Letter from James Madison to Thomas Jefferson (Dec. 31, 1824), *supra* note 159, at 477. This statement indicates that Madison did not limit the scope of his principle to real property.

162. *Id.*

163. See 31 Hen. 8, c. 13 (1539), in 3 THE STATUTES OF THE REALM 733 (photo. reprint 1993) (1817).

164. See *supra* note 66 and accompanying text (detailing Madison's introduction of bill for complete abolition of fee tail tenure).

165. See *supra* notes 134-63 and accompanying text, *passim*.

166. Act of Oct. 1776, ch. XXVI, 9 LAWS OF VA., *supra* note 1, at 226.

167. See *supra* notes 36-56 and accompanying text (describing Virginia Assembly's protection).

168. See 4 MADISON, *Notes on Suffrage*, *supra* note 8, at 30.

169. See Letter from James Madison to Robert Walsh (March 2, 1819), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra* note 8, at 122 (arguing English property law "generated examples in the opulent class inauspicious" to other classes).

"the opportunities" of inheriting "great wealth" and its "permanency,"¹⁷⁰ as part of instituting of "republican laws of descent and distribution."¹⁷¹ For Madison, the social objective of promoting "a greater simplicity of manners, consequently a less consumption of manufactured superfluities, and a less proportion of idle proprietors and domestics"¹⁷² justified extinguishing the existing private property rights of heirs in tail, reversioners, and remaindermen.¹⁷³ Madison's position on fee tail thus fundamentally qualifies his famous articulation of the libertarian principle of individual autonomy, that "the first object of government" is to protect "different and unequal faculties of acquiring property."¹⁷⁴

170. See 4 MADISON, *Notes on Suffrage*, *supra* note 8, at 24 (predicting that abolition of fee tail would provide more even distribution of wealth).

171. See *id.* at 30 (describing goal of "equalizing the property of the citizens").

172. Letter from James Madison to Thomas Jefferson (June 19, 1786), in 9 THE PAPERS OF JAMES MADISON, *supra* note 9, at 77.

173. See Act of Oct. 1776, ch. XXVI, 9 LAWS OF VA., *supra* note 1, at 226 (abolishing fee tail estate).

174. THE FEDERALIST No. 10 (Madison), in 10 THE PAPERS OF JAMES MADISON, *supra* note 11, at 265.