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Entailing Aristocracy in Colonial Virginia: "Ancient Feudal Restraints" and Revolutionary Reform

Holly Brewer

IN October 1776, three months after drafting the Declaration of Independence, Thomas Jefferson began to amend Virginia's laws to conform with the principles of the Revolution. Above all, Jefferson proposed to abolish entail, a legal institution that, once invoked, enforced primogeniture and prevented all other transfers of designated land and slaves forever. Years later, he called this reform central to his effort to eradicate "every fibre . . . of ancient or future aristocracy" and to lay "a foundation . . . for a government truly republican." Jefferson was not alone in viewing entail as "feudal and unnatural distinctions" that were vital to the maintenance of aristocracy in colonial Virginia.[1] The noted English jurist William Blackstone likewise equated entail with feudalism: the complex of laws and procedures surrounding entail, he wrote, provided the main source of "antient feudal restraints" on land.[2] In 1803, St. George Tucker, then the foremost legal scholar in Virginia, referred to entail as "the offspring of feudal barbarism and prejudice." Tucker regarded the Revolution as a reaction against feudalism and aristocracy and saw entail as the chief source of these evils in colonial Virginia.

> When the Revolution took place, a different mode of thinking succeeded; it was found that entails would be the means of accumulating and preserving great estates in certain families, which would, not only introduce all the evils complained of in England,

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[1] Bills Reported by the Committee of Revisors, "A Bill Directing the Course of Descents" and "A Bill concerning Wills . . . ," in *The Papers of Thomas Jefferson,* ed. Julian P. Boyd et al. (Princeton, 1950–), 2:391–405; Jefferson, "Autobiography," in *The Writings of Thomas Jefferson,* ed. Andrew A. Lipscomb (Washington, D. C., 1903), 1:73.

[2] Blackstone, *Commentaries on the Laws of England* (London, 1765–1769), bk. II, chap. 7. Quotation is reproduced intact in St. George Tucker, *Blackstone's Commentaries: with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia,* vol. 2, "Of the Rights of Things" (Philadelphia, 1803), III. Tucker's comments are in the footnotes and appendixes, which are irregularly numbered in each volume.

> but be utterly incompatible with the genius and spirit of our constitution and government. At the first session, therefore, after the declaration of independence, an act passed, declaring tenants of lands, or slaves in tail, to hold the same in fee simple.[3]

Antebellum American and foreign observers generally agreed that entail was a relic of feudalism that had helped to create Virginia's hierarchical social structure. In 1848, Robert R. Howison wrote that by the rules of entail "the father was lord in his lifetime, and the son was lord in expectancy and legal right. Nothing can convey a more vivid idea of the strong aristocratic feeling pervading Virginia, than her course as to [entail]."[4] Alexis de Tocqueville credited the abolition of entail and primogeniture with "striking at the root of landed property, and dispersing rapidly both families and fortunes," a judgment in which politicians such as Henry Clay concurred.[5] Indeed, George Fitzhugh, an advocate of aristocracy and slavery, proposed in 1854 that entail be reinstated in order to stabilize the Virginian elite.[6]

The struggle against primogeniture—and its enforcement through entail—was central to the political conflicts of early modern England. The rules of primogeniture governed not only land transfers but also honorary titles and political offices, as with the king and the members of the House of Lords. The connections between property and power were strengthened by laws that made property a requirement for participation in government. Thus the debate over inheritance was not merely about the supremacy of one son over another or of fathers over children but over political sovereignty. Sir Robert Filmer, who laid out the principles of patriarchal political theory, argued that paternal authority was natural and that the rights of the father—even his authority over siblings—passed to the eldest son. Filmer, placing the origin of kingship in this combination of paternal authority and primogeniture, traced the sovereignty of English kings back to Adam's in the Garden of Eden. John Locke directed the first of his *Two Treatises of Government* to refuting Filmer's use of primogeniture. Philosophers from Locke to Algernon Sydney, James Harrington, and Thomas Paine argued that abolishing primogeniture was essential to establishing a republican form of government. "Virtue," Paine declared, "is not hereditary."[7] Why, then,

[3] Tucker, *Blackstone's Commentaries,* 2:119 n. 14.

[4] Howison, *A History of Virginia from its Discovery and Settlement by Europeans to the Present Time,* 2 vols. (Richmond, 1848), 2:200–01.

[5] Tocqueville, *Democracy in America,* 2 vols., trans. Henry Reeve, ed. Phillips Bradley (New York, 1945), 1:48–53, quotation on 50; Allan Nevins, *The American States during and after the Revolution, 1775–1789* (New York, 1924), 442.

[6] Fitzhugh, *Sociology for the South, or the Failure of Free Society* (Richmond, 1854), 189–93. Fitzhugh was careful to argue that primogeniture and entail would not promote an "idle" aristocracy but instead that such a group of owners of large, permanent estates would be strongly attached to government. He realized that he was writing in a climate somewhat unsympathetic to aristocracy but asserted that "we have the *things,* exclusive hereditary privileges and aristocracy, amongst us, in their utmost intensity; let us not be frightened at the *names*" (190–91).

[7] Paine, *Common Sense* (1776), in Michael Foot and Isaac Kramnick, eds., *Thomas Paine Reader* (London, 1987), 101.

should political power be inherited?[8] The assault on primogeniture and entail challenged both the central way that royalists justified authority and the role of inheritance in allocating political power. The challenge to primogeniture threatened the monarchy itself. After the Revolution, culminating the long debate, all American states that had enforced entail and primogeniture during the colonial period abolished them.[9]

Early twentieth-century historians such as J. Franklin Jameson used the abolition of entail as primary evidence for depicting the American Revolution not only as a "social movement" but as a social revolution. In the same year that Jameson offered this judgment, it came under sharp attack from a doctoral student who maintained, on the basis of quantitative evidence from Virginia wills, that the prevalence of entail had been overestimated. C. Ray Keim's "The Influence of Primogeniture and Entail in the Development of Virginia," although unnoticed at the time and never published in full, has had an enormous impact on interpretations of colonial Virginia and the impact of the Revolution.[10]

Historians have used Keim's conclusions to undergird revisionist interpretations of Virginia society and his evidence to argue against the radicalism of the Revolution. If one of the biggest changes that the Revolutionary generation claimed to have made was little or no change at all, then the Revolution's social consequences had been exaggerated. Keim's data thus helped to transform the Revolution into a conservative movement.[11] Keim's study was apparently first noted in print by Dumas Malone in 1948.[12] Malone's nuanced discussion of Keim's conclusions was simplified by Frederick B. Tolles in an influential 1954 article in the *American Historical Review* to the conclusion that "neither primogeniture nor entail operated to any important degree in Virginia." Given the weight that Tolles's article car-

[8] On royalist political philosophy see Gordon Schochet, *Patriarchalism in Political Thought: The Authoritarian Family and Political Speculation and Attitudes Especially in Seventeenth-Century England* (New York, 1975). On real political power and inheritance see especially Joan Thirsk, "The European Debate on Customs of Inheritance, 1500–1700," in Jack Goody, Thirsk, and E. P. Thompson, eds., *Family and Inheritance: Rural Society in Western Europe, 1200–1800* (Cambridge, 1976), 190.

[9] Richard B. Morris, "Primogeniture and Entailed Estates in America," *Columbia Law Review,* 27 (Jan. 1927), 24–51; George L. Haskins, "The Beginnings of Partible Inheritance in the American Colonies," *Yale Law Journal,* 51 (1941–1942), 1250–1315.

[10] Jameson, *The American Revolution Considered as a Social Movement* (Princeton, 1926), 56–59; Keim, "Influence of Primogeniture and Entail in the Development of Virginia" (Ph. D. diss., University of Chicago, 1926).

[11] Bailyn, "Politics and Social Structure in Virginia," in James Morton Smith, ed., *Seventeenth-Century America: Essays in Colonial History* (Williamsburg, Va., 1959); Bailyn, "Political Experience and Enlightenment Ideas in Eighteenth-Century America," *American Historical Review,* 67 (1962), 341, 345. This earlier work serves as the basis for conclusion, in *Ideological Origins of the American Revolution* (Cambridge, Mass., 1967), esp. 19–20, that the Revolution was in many ways conservative in its social consequences, even if radical ideologically. See also Frederick B. Tolles, "The American Revolution Considered as a Social Movement: A Re-Evaluation," *AHR,* 60 (1954), 7; Elisha P. Douglass, *Rebels and Democrats: The Struggle for Equal Political Rights and Majority Rule during the American Revolution* (Chapel Hill, 1955), 301–02; and Edmund S. Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* (New York, 1975), 171.

[12] Malone, *Jefferson the Virginian* (Boston, 1948), 252–57.

ried in revising the argument about the radicalism of the Revolution, it is surprising that he appeared not to have examined the dissertation itself; neither did Malone: both cited only the abstract.[13] Louis Hartz made this critique of the prevalence of entail central to an argument about the American character. Hartz argued that, whereas entail had long been regarded as the most important element of feudalism in America, if it was rare, feudalism, too, should be discounted. He concluded that America had always been "liberal" and that the Revolution had wrought no great changes.[14] In 1959, Bernard Bailyn assessed Keim's study in an often-reprinted essay, "Politics and Social Structure in Virginia,"[15] that reinforced Keim's findings. In a later article, Bailyn downplayed the social impact of the Revolution, using his examination of inheritance patterns in Virginia as key evidence: "primogeniture and entail had never taken deep roots in America, not even in tidewater Virginia. . . . The legal abolition of primogeniture and entail during and after the Revolution was of little material consequence. Their demise had been effectively decreed years before by the circumstances of life in a wilderness environment."[16] In 1964, Robert E. Brown and B. Katherine Brown used Keim's data to argue that the term "democracy" described colonial Virginia better than "aristocracy." Keim himself waited four decades to publish his data—and then only in one place—but his article on "Primogeniture and Entail in Colonial Virginia" became, for a generation and more, the final word on the subject.[17] No historian writing after the publication of Keim's article has disagreed with his conclusions.[18] They

[13] Tolles, "American Revolution Considered as a Social Movement," 7.

[14] Hartz argued that feudal legal relics in America had no power, in *The Liberal Tradition in America: An Interpretation of American Political Thought Since the Revolution* (New York, 1955), 71–72.

[15] Bailyn, "Politics and Social Structure in Virginia," 90–115.

[16] Bailyn, "Political Experience and Enlightenment Ideas," 341, 345.

[17] Brown and Brown, *Virginia, 1705–1786: Democracy or Aristocracy?* (East Lansing, Mich., 1964), chap. 4; Keim, "Primogeniture and Entail in Colonial Virginia," *William and Mary Quarterly,* 3d Ser., 25 (1968), 545–86. Two more recent studies of inheritance in Virginia disregard entail. See James Deen, "Patterns of Testation: Four Tidewater Counties in Colonial Virginia," *American Journal of Legal History,* 16 (1972), 154–76, and Lee J. Alston and Morton Owen Schapiro, "Inheritance Laws Across Colonies: Causes and Consequences," *Journal of Economic History,* 44 (1984), 277–87.

[18] Stanley Katz, "Republicanism and the Law of Inheritance in the American Revolutionary Era," *Michigan Law Review,* 76 (1977), 1–29; Bruce H. Mann, "Legal Reform and the Revolution," *The Blackwell Encyclopedia of the American Revolution,* ed. Jack P. Greene and J. R. Pole (Cambridge, Mass., 1991), 439; Carole Shammas, Marylynn Salmon, and Michel Dahlin, *Inheritance in America from Colonial Times to the Present* (New Brunswick, N. J., 1987), 35; Merrill D. Peterson, *Thomas Jefferson and the New Nation: A Biography* (New York, 1970), 113–16. Other books in turn cite these works. See, for example, Gordon S. Wood, *The Radicalism of the American Revolution* (New York, 1992), 400. Even textbooks summarize these conclusions (although without citations). "With few exceptions, colonial families did not adopt the English customs of entail and primogeniture"; Murrin et al., *Liberty, Equality, Power: A History of the American People* (Fort Worth, 1995), 122. The only essay that questions Keim's data is Rowland Berthoff and Murrin, "Feudalism, Communalism, and the Yeoman Freeholder: The American Revolution Considered as a Social Accident," in Stephen G. Kurtz and James H. Hutson, eds., *Essays on the American Revolution* (Chapel Hill, 1973), 256–88, esp. 283 n. 59.

relied on his numbers to reject the impressionistic conclusions of their predecessors and the opinions of the Revolutionaries themselves.

The allegiance historians have offered to the quantitative god is in this case dramatically misplaced—because Keim misread his data. Seen in the light of the laws governing entail, those data show that Jefferson was right when he claimed that abolishing entail and primogeniture undercut aristocracy in Virginia. The article suggests that entail and primogeniture were feudal institutions critical to the growth and perpetuation of aristocracy and slavery in the South. Close examination of Keim's study reveals that his data cannot bear the weight of the thesis Keim drew from them. Simply put, in calculating the effect of entail, Keim overlooked the fact that land, once entailed, remained entailed until the tail was broken. Consequently, his study is deeply, irredeemably flawed. When this cumulative effect is taken into account, Keim's data actually support the views of those who addressed this issue before him.[19] Eerily enough, the numerical conclusions reached in the following pages echo the rough estimates articulated, for example, by Jameson, who drew from an unidentified "highest authority" an estimate that "Mr. Jefferson's act of 1776 released from entail at least half, and possibly three-quarters, of the entire 'seated' area of Virginia."[20] The article outlines the law concerning primogeniture and entail, reexamines Keim's data, considers legal enforcement of entail, and raises new questions about the impact of entail on many facets of Virginia's—indeed, America's—history. Because historians have relied so heavily on Keim's flawed study to discount the social, economic, and political effects of entail, their understanding of colonial Virginia should now be reconsidered.[21]

Eighteenth-Century Land Law: A Primer

In order to follow the critique offered here, the reader must venture into the obscure and labyrinthine world of premodern English property law that formed the core of most general legal treatises used in America in the seven-

[19] These traditional views include Jameson, *American Revolution Considered as a Social Movement,* 56–59; Nevins, *American States during and after the Revolution,* 441–42; Charles A. Beard and Mary R. Beard, *The Rise of American Civilization,* 2 vols. (New York, 1927), 1:135; Claude G. Bowers, *Jefferson and Hamilton: The Struggle for Democracy in America* (Boston, 1925), 97; H. J. Eckenrode, *The Revolution in Virginia* (Boston, 1916), 170; John T. Morse, *Thomas Jefferson,* vol. 1, American Statesman Series (Boston and New York, 1899), 38; Howison, *History of Virginia from Its Discovery and Settlement,* 2:201; and George Tucker, *Life of Thomas Jefferson . . . ,* 2 vols. (Philadelphia, 1837), 1:92–94.

[20] Jameson, *American Revolution Considered as a Social Movement,* 58. Since Jameson provided no documentation, his reference to "highest authority" is obscure. See also Beard and Beard, who quote the same obscure authority, in *Rise of American Civilization,* 1:135, 293–94.

[21] Revisionists are reconsidering the social consequences of the Revolution. See particularly Joyce Appleby, *Capitalism and a New Social Order: The Republican Vision of the 1790s* (New York, 1984), and *Liberalism and Republicanism in the Historical Imagination* (Cambridge, Mass., 1992); Wood, *Radicalism of the American Revolution;* and Ronald Hoffman and Peter J. Albert, eds., *The Transforming Hand of Revolution: Reconsidering the American Revolution as a Social Movement* (Charlottesville, 1996).

teenth and eighteenth centuries. Much of the misunderstanding of the role of entail would have been avoided by familiarity with eighteenth-century land law, to which entail was central. Land law was powerful. It is no accident that land records are among the best kept in colonial Virginia. It is also a technically demanding subject. Robert "King" Carter possessed two books on the subject of wills and several others on land law generally.[22] Many of the finer points of law were not clearly agreed on and had to be resolved in the courts. The following summary of land law is based on the two most popular legal texts in eighteenth-century America, those of Edward Coke and Blackstone.[23] Many of the terms, though familiar to readers versed in modern property law, had specific meanings very different from our own. Indeed, the whole concept of property ownership was different in the eighteenth century.

Land possessed a status of its own in Britain and its colonies. It could be held in "fee simple" or "fee tail" (also spelled "taille"). "Fee" meant *feodum* or inheritance; "simple" meant basic—much as we own property today. "Tail" meant cut or limited.[24] What is most important to understand is that, although an owner could alter the status of land from fee simple to fee tail, once the owner used specific words in a will or deed, the status of the land could not revert out of fee tail by any subsequent bequest or deed.

Fee simple was not simple. For example, if A's will stated "I leave these 3,000 acres to my neighbor B," A was giving B only a "life interest" in the land that A held in fee simple. When B died, the land would revert to C, A's

[22] All of these were published in England and covered English law. On wills specifically see Henry Swinburne, *A Treatise of Testaments and Last Wills . . .* (London, 1590), and John Godolphin, *The Orphan's Legacy* (London, 1674). On land law see Edw[ard] Coke, *The First Part of the Institutes of the Lawes of England* (London, 1628) (vol. 1 is his commentary on Littleton's *Tenures*), the many books of reports, including those of the chancery courts, which dealt extensively with land and inheritance disputes, and those of Coke, covering cases from the early 17th century. See also Louis B. Wright, *The First Gentlemen of Virginia: Intellectual Qualities of the Early Colonial Ruling Class* (Charlottesville, 1940), 262–66.

[23] On the legal treatises that appeared in American libraries in the 18th century see particularly Herbert A. Johnson, *Imported Eighteenth-Century Law Treatises in American Libraries, 1700–1799* (Knoxville, 1978). The other basic bibliography of legal treatises lists publications in the colonies themselves; Eldon Revere Jones, "A List of Legal Treatises Printed in the British Colonies and the American States before 1801," *Harvard Legal Essays* (Cambridge, Mass., 1934), 159–212. Most legal books published in America before the mid-18th century were guides for justices of the peace or simplified versions of the law relating to criminal matters. Because little was published in the colonies during the 17th century (Virginia had no printing press) and English guides were recommended by the House of Burgesses, it is clear that the Virginians thought that they were following English law. The General Court decisions from the 1730s, discussed below, cite English cases as references. For an elaboration of usage practices of law books see Brewer, "Constructing Consent: How Children's Status in Political Theory Shaped Public Policy in Virginia, Pennsylvania, and Massachusetts before and after the American Revolution" (Ph. D. diss., University of California, Los Angeles, 1994), 489–97. The single most popular imported legal treatise during the 18th century was Coke, *Institutes of the Lawes of England.* Blackstone's *Commentaries on the Laws of England* appeared in every legal library examined by Johnson after its publication. It was republished in America (with an extensive subscriber list, including many Virginians) in 1772. His second volume is also devoted solely to land law.

[24] Coke, *Institutes of the Lawes of England,* 1: secs. 1, 13–15, 18.

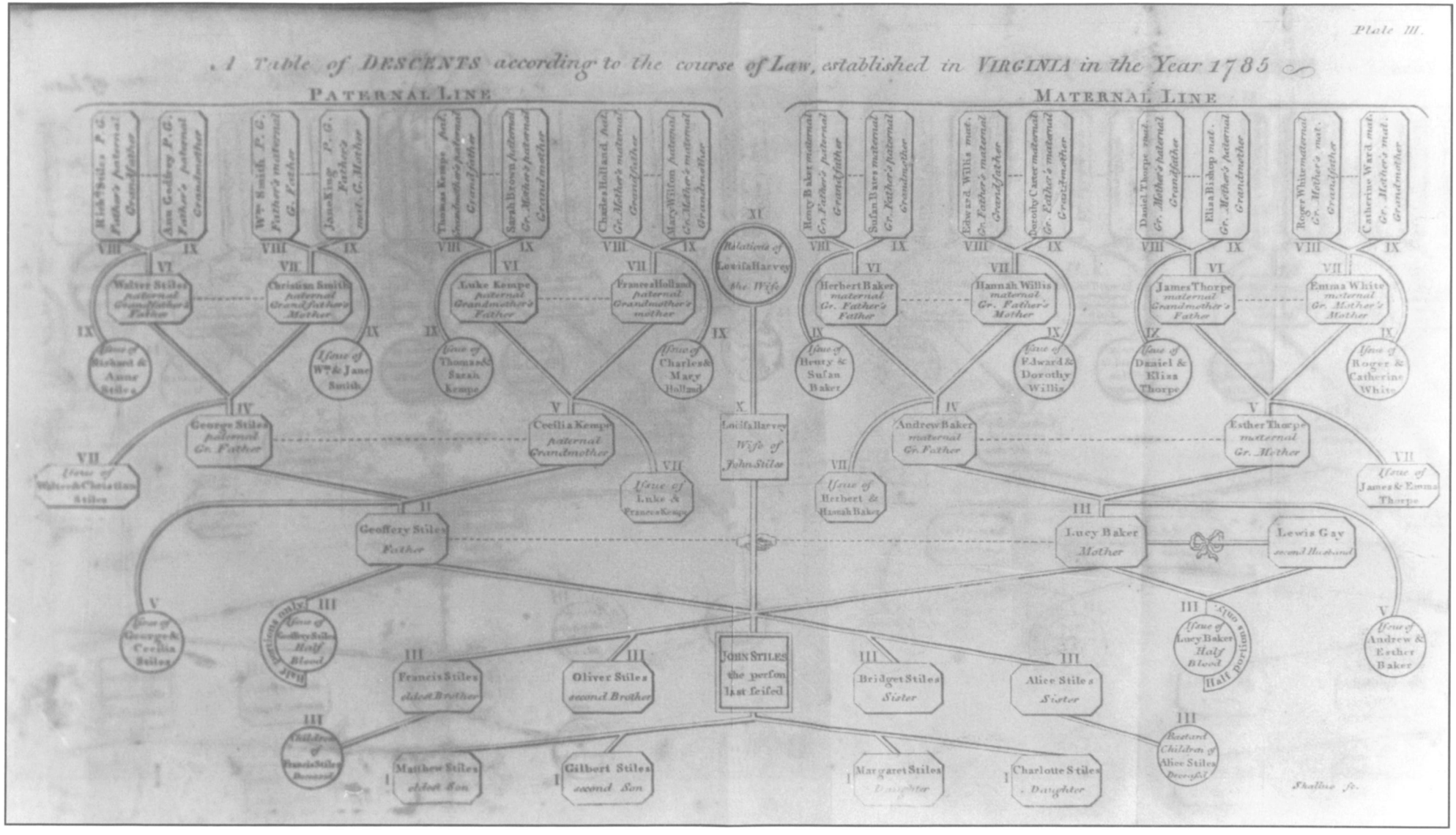


FIGURE II

"A Table of Descents . . . in Virginia," from St. George Tucker, *Blackstone's Commentaries,* vol. 2 on "The Rights of Things" (Philadelphia, 1803), plate 3. Courtesy of Manuscripts and Rare Books, Swem Library.

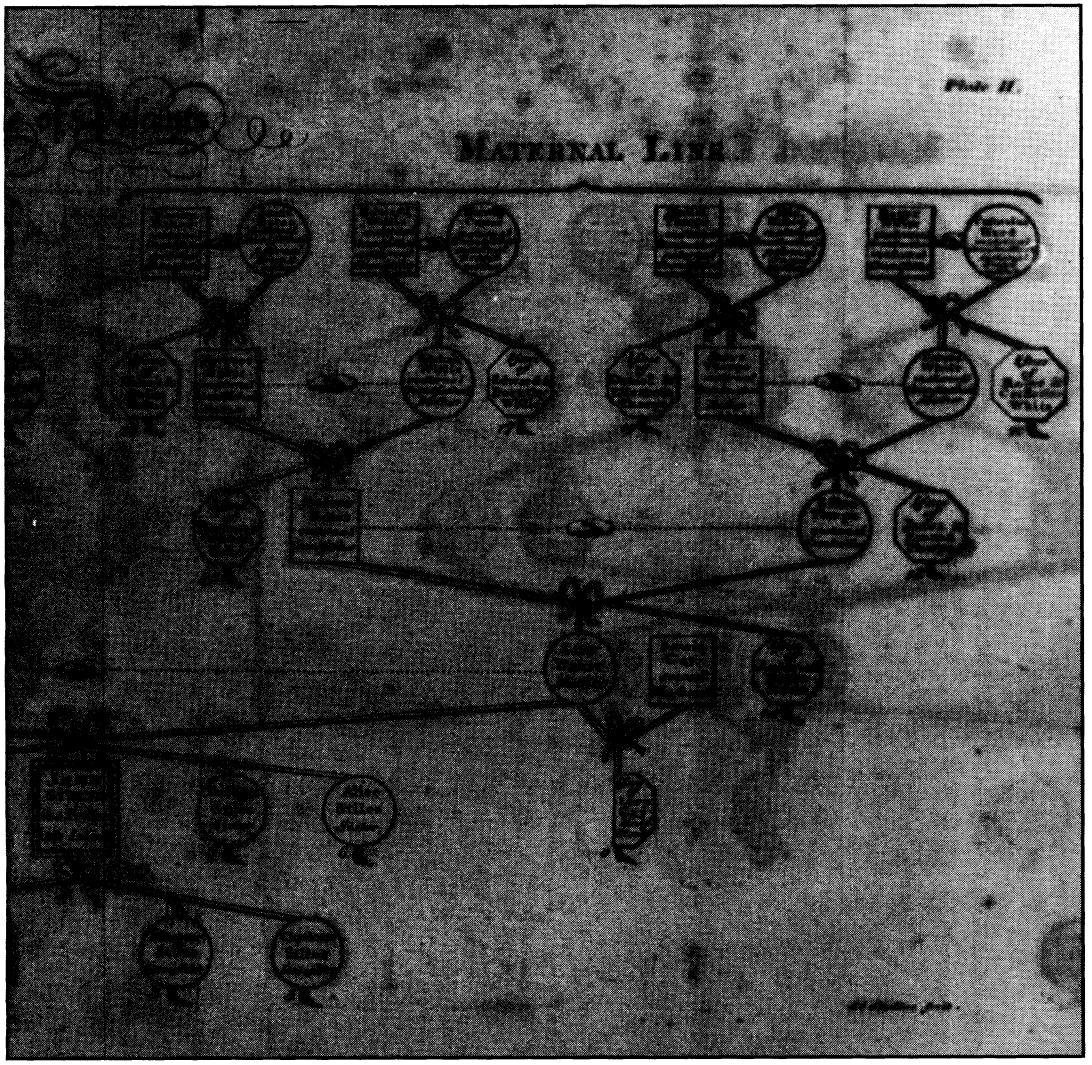


FIGURE I
one's *Commentaries on the Laws of England,* in St. George Tucker, *Blackstone's Commentaries,* vol. 2
order of inheritance. Courtesy of Manuscripts and Rare Books, Swem Library.

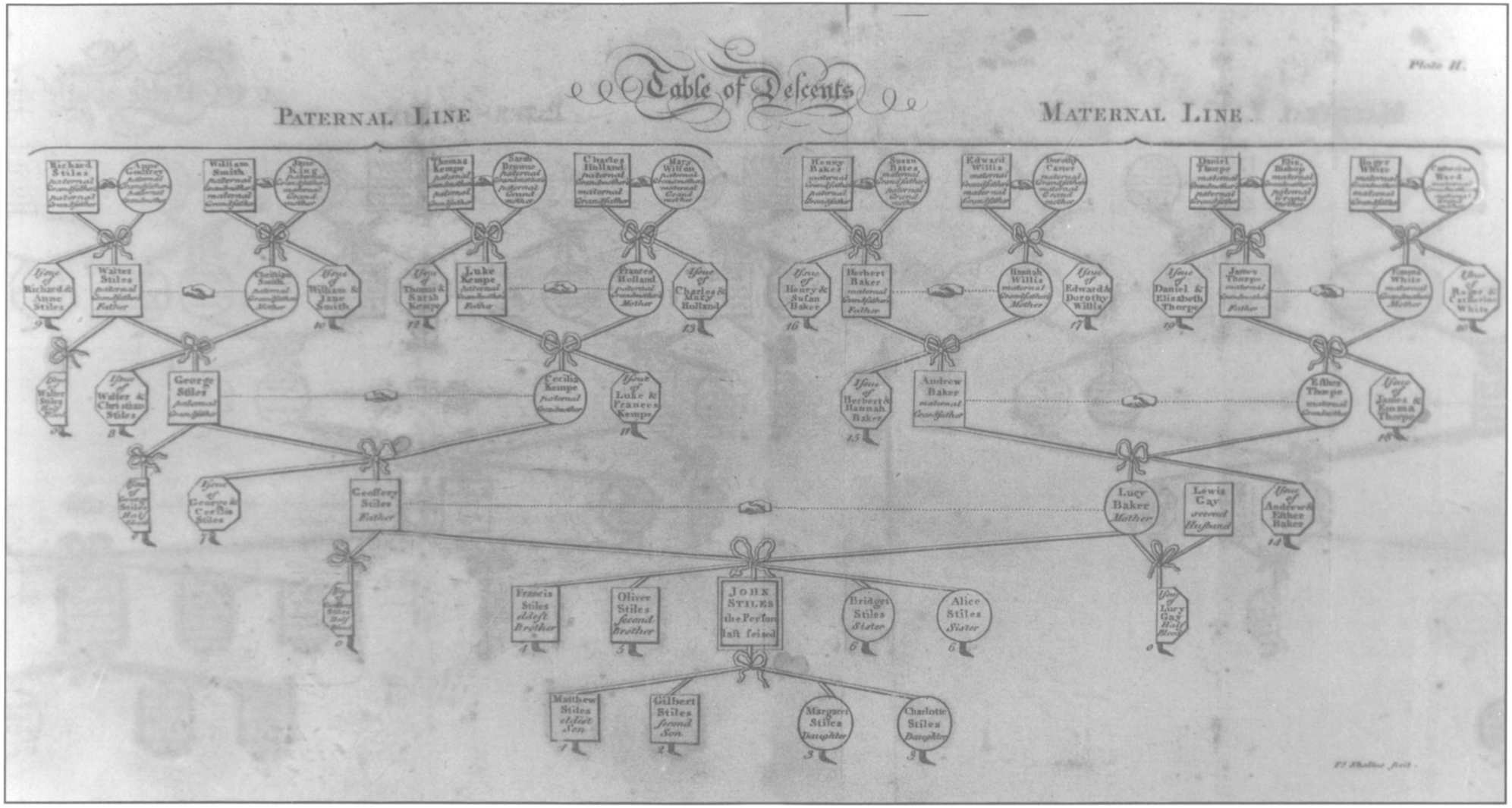
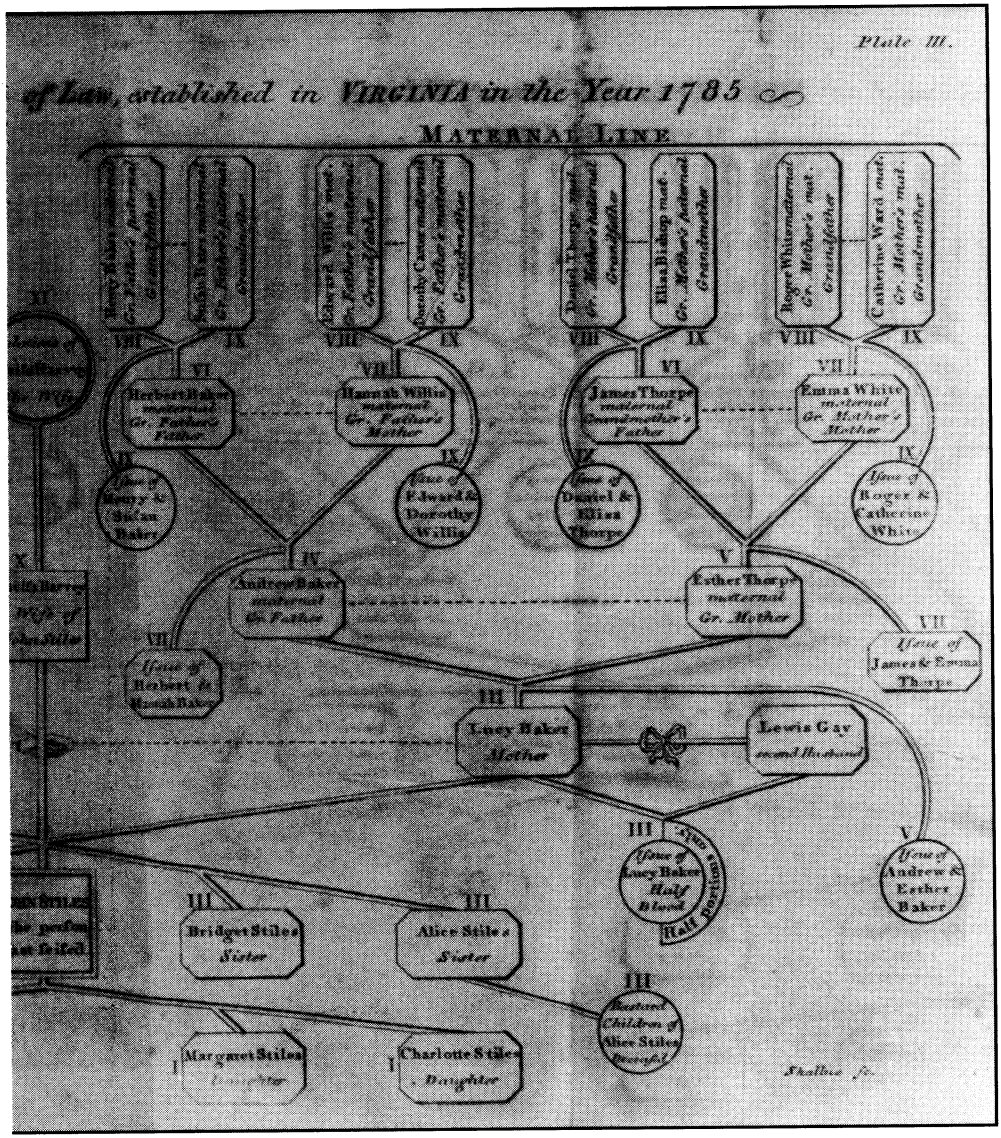


FIGURE I

"Table of Descents" under primogeniture and entail, according to William Blackstone's *Commentaries on the Laws of England,* in St. George Tucker, *Blackstone's Commentaries,* vol. 2 on "The Rights of Things" (Philadelphia, 1803), plate 2. The numerals indicate the order of inheritance. Courtesy of Manuscripts and Rare Books, Swem Library.



RE II

vol. 2 on "The Rights of Things" (Philadelphia, 1803), plate 3. Courtesy of Manuscripts

"natural" heir by "primogeniture," who then would own the land in fee simple.[25] The property would thus be as free for C's use as it had been for A's. The assumption was that a person would not choose to sell or give his or her property to anyone other than his or her heir by primogeniture unless he or she explicitly said as much. A could instead leave the property to neighbor "B and his heirs," in which case B would own it in fee simple and could dispose of it himself. C would no longer have a claim.[26] If A made no will, the property would belong to C as A's natural heir by primogeniture. The larger point is that even in cases of land held in fee simple, primogeniture had a presumptive claim that had to be explicitly avoided.

The claim of primogeniture could be made explicit and binding if A added the clause "of his body" or words to that effect to the will. Such an addition completely changed the status of the property and the ability of B and his heirs to dispose of it forever.[27] These words created an entail. For example, a bequest that created an entail might state, "I leave 3,000 acres to my son John and the heirs of his body lawfully begotten forever." The land then would belong to John and his descendants by the rules of primogeniture. John could not permanently dispose of the property (he would have only a life interest in it), and it would descend to his heirs in fee tail, who also could not alienate it but would possess it under the same conditions. A will made in Virginia in 1760 leaving land in tail to two sons specified the consequences: that it should belong to them "and their *ares* [heirs] not to be sold or made aw[a]y with but to fall from *are* to *are* forever."[28]

Once property was entailed, no heir could sell it or bequeath it in a will. The original will had laid down the rule that governed who would own the land from then onward. Thus, if one held land in fee tail, one did not own it in the same way we now understand ownership. An individual had the "use" of it during his (sometimes her) life.[29] This individual (the "tenant") could not sell, mortgage, or bequeath the property. He or she could build on it, farm it, and lease it (under certain conditions), but the land belonged to the "next heir" of the current tenant and so on "forever." The next heir (known as the "right heir" or "natural heir") was always determined by the rules of primogeniture. When a person possessed land in tail, the land was said to be "entailed on" him or her. This usage conveys an imagery of attachment, of a tail to a body, that captures the connection that entail made between the individual (part of a family) and the estate.

The general category of fee tail contained several subcategories. Entails could be restricted to fee tail male, where only male heirs could inherit, or to

[25] In other words, if the clause "and his heirs" were not there, the person only had the land temporarily and could not bequeath it or sell it, and, on his death, it would revert to the descendant by primogeniture of the original owner. Primogeniture refers to the English rules of succession that made inheritence by the eldest son the primary choice. Obviously, different rules operated when there was no son.

[26] Coke, *Institutes of the Lawes of England,* 1: sec. 1. The only circumstance in which C would have a claim would be if B did not sell it and died without a will and without an heir.

[27] Ibid., secs. 14, 15.

[28] Will of Riley Moore, proved July 1, 1760, "Frederick County Wills," 2:405.

[29] Use rights was a well-developed branch of land law.

fee tail female, where only female heirs could inherit.[30] Special entails could restrict inheritance in various ways. For example, an entail could be initially limited to children born to a particular married couple, in which case, if the wife died childless and the husband remarried and had issue, such issue could not claim the estate.[31] Fee tails could also be conditional in that they could be broken or forfeited if certain conditions were not met—for example, that the heir must live on the estate.

Three other terms regularly appear in the discussion that follows: heir in remainder, heir in reversion, and escheat. A will usually specified who would inherit each parcel should the line of heirs (as limited by the will) of the original beneficiary die out. These persons were called "heirs in remainder." An heir in remainder could inherit in either fee simple or fee tail, depending on what the will specified for each. If the line of heirs of the original beneficiary and of the heirs in remainder died out, the land would belong to the "heir in reversion," the natural descendant, by the rules of primogeniture, of the original testator. The heir in reversion would inherit the land in fee simple. If no legitimate blood relations of the original testator could be found, then the land would escheat to the king. Escheats also occurred when a person possessing land in fee simple was convicted of a felony or did not properly "seat" the land within three years after the initial claim.[32]

This summary only begins to do justice to the maze that was inheritance law in the seventeenth and eighteenth centuries. To make the complexity more manageable, every edition of Coke and Blackstone contained illustrated tables. Tucker's Virginia edition of Blackstone's *Commentaries* of 1803 reprinted Blackstone's "Table of Descents" (see Figure I).[33] This table describes inheritance in cases where primogeniture operated (such as when a propertyholder left no will or when the land was entailed). It reveals several aspects of primogeniture that too often are misunderstood: note that where there are no sons, daughters inherit jointly, and an estate is divided. Otherwise, only one person inherits. Tucker's table assumes that the land was inherited through the paternal line for many generations (thus the ordering of the numbers first on the father's side). Contrast this table, which Tucker designated the old rules, with his new table of rules of inheritance as they applied in Virginia after 1785 (Figure II). An estate was much more likely to be divided after 1785. These two tables thus capture the major transition in

[30] Coke, *Institutes of the Lawes of England,* 1: secs. 21–23.

[31] Ibid., sec. 25.

[32] Entailing land could be a way to avoid having one's land confiscated for felony, an important concern in England, where conviction of treason made one's fee simple lands forfeit to the king. In Virginia, the colonial government (or in the case of the Northern Neck, the proprietor) took over the escheated property. The requirements for seating the land were to build "one house of wood" at least 12' x 12' "and clearing, planting and tending at least one acre of land" for each patent (patents could cover as many as 4,000 acres); William Waller Hening, ed., *The Statutes at Large: Being a Collection of all the Laws of Virginia,* 13 vols. (New York and Philadelphia, 1819–1823), 3:313, 306. On escheat see ibid., 2:56–57.

[33] This table is identical to one that appeared in the first edition of Blackstone.

Virginia inheritance law, which occurred in two stages: fee tail was abolished in 1776; primogeniture was replaced by multigeniture, or equal division of land between all children (and the wife, if living) in cases of intestacy, in 1785.[34]

The Hand from the Grave

To determine the "general custom and attitude of the people in regard to transfer and tenure of lands," Keim measured the proportion of colonial Virginia wills with entail provisions. He found, for example, that "the wills of Culpeper [County] from 1749 to 1770 include 10 cases of entail of lands and 4 of Negroes, while there were 104 wills without entail provisions." From a variety of such samples, he concluded that "entail was not a general custom among the small holders in any section and that only in the Tidewater could it be said to have had a somewhat general use even among the great planter class."[35] As for primogeniture, Keim found that most fathers who left land in fee simple also left real or personal property to more than one child. They often gave the eldest son the home plantation and land elsewhere or money to the other children. Since neither fee tail wills nor intestacy were as common as fee simple wills and since fee simple wills often split property among children, Keim concluded that "primogeniture was not a prevailing custom . . . even among the aristocratic planter class" in pre-Revolutionary Virginia.[36] These assumptions are problematic, not least the question of whether land elsewhere or money was equal in value to the estate that many planters left to their eldest sons.

More problematic still is whether Keim accurately calculated the prevalence of entails. Wills appear to provide a simple and accurate measure of inheritance practices. Historians have tended to assume that they express the intent of the testator, neatly spelled out. The chief problem with these assumptions is that an entail, once made, did not need to appear in any subsequent deed or will. It disappeared from the historical record but continued to operate. One may think of it as the original "invisible hand." The ancestor who created an entail reached from the grave at each descendant's death to point its spectral finger toward the heir. Entailed lands were known as in "mortmain," literally "dead hand," in the "Law French" of the eighteenth century.[37] Accordingly, one original will could enact a fee tail that dictated how the land would be transferred "forever." If, for example, a father left equal amounts of land in fee tail to each of his three children, he might

[34] Hening, ed., *Statutes at Large,* 9:226-27, 12:138.

[35] Keim, "Primogeniture and Entail in Virginia," 560, 561.

[36] Ibid., 552. Intestacy was rare, according to Keim, "Influence of Primogeniture and Entail in the Development of Virginia." 43.

[37] As did Jefferson: "The repeal of the laws of entail would prevent the accumulation and perpetuation of wealth, in select families, and preserve the soil of the country from being daily more and more absorbed in mortmain"; Jefferson, "Autobiography," ed. Lipscomb, 73. Mortmain usually referred to land held in perpetuity by the church or a charity rather than by a family, but the concept was the same.

appear to be dealing equitably. But the equality obtained only for his own children. At their deaths, each had to pass the entailed land—without will or deed—to his or her oldest son by the rules of primogeniture. For the next generation, therefore, the distribution became inequitable, and it became more so for each generation afterward: with each death, the dead hand reached from the grave and pointed its finger. Keim failed to analyze the consequences of these many ghostly hands governing the transfer of property. Because comparisons of wills with and without entail do not capture the land that is already entailed, he undercounted the amount of entailed land.

Essentially, Keim created a static image of a dynamic situation. Although he realized that his comparison was problematic, he did not see any better approach: "a single piece of land held in fee simple," he wrote, "might appear in a half dozen or more successive wills and in as many deeds. Therefore, conclusions based on the number of times entail occurred in wills and deeds in proportion to the number of fee simple cases appearing in the same kind of instruments would hardly be valid." Keim did not realize how such correlations of numbers of wills with entail to those without distorted the real picture, nor did he attempt to construct a better method of comparison. Instead, he settled for a statement that his samples of the incidence of entail reflected a "general custom and attitude."[38]

To his credit, Keim understood that an entail removed land permanently from the total amount of land that could be designated by will or deed. "In estimating the prevalence of entail in any county it must be remembered that an entail created in the seventeenth century tied up a tract of land throughout the colonial period, unless docked by a special act or by writ of *ad quod damnum,*" which, Keim noted, was rare. He offered the case of John Pleasants, who in 1690 entailed 9,000 acres, divided among his two sons and a daughter. These lands never appeared afterward in any will during the colonial period.[39] Yet although Keim noted this perpetuity, he did not reckon with its consequences.

Using the same example, we can illustrate the magnitude of Keim's mistake. By 1780, the 9,000 acres entailed by John Pleasants in 1690 had appeared in only one will—the original. During those nine decades, the land had passed through some six generations but still belonged to only three people at any time.[40] Had Pleasants left the 9,000 acres in fee simple to his three children and they to three descendants in turn, and so on for four more generations, all in fee simple, it would have appeared in $1 + 3 + 3^2 + 3^3 + 3^4 + 3^5$, or 394 wills. Although fee simple transfer of land by will was hardly as regular as this second case assumes, the example illustrates the problem with Keim's methodology and suggests the magnitude of his error. Assume that these two examples of 9,000 acres represent two neighboring parcels, totaling 18,000 acres. A simple comparison between the incidence of each

[38] Keim, "Primogeniture and Entail in Virginia," 561.

[39] Ibid., n. 41.

[40] Realistically, owing to mortality and families without sons, the actual number of descendants may have varied from 2 to perhaps 5.

type of will leads to an estimate that only 1/394 of the total 18,000 acres was entailed because only one will contained an entail. In fact, however, the actual proportion of entailed land would be one-half of the total. Fee simple bequests needed to be made every generation *and* multiplied the possible number of persons obtaining property with each generation because they usually divided estates, in turn multiplying the possible number of people making wills in the next generation. An entailed bequest occurred only once for any piece of land and sharply limited the number of descendants who could own that land. Thus Keim's comparison of wills with entail provisions to those without is profoundly misleading.

Reevaluating the Implications of Keim's Data

In order to gauge the cumulative effect of entails precisely, Keim would have had to measure the actual amounts of land entailed in each generation. He identified several methodological problems that would hinder such work: missing or incomplete records for many counties; wills that entail land in other jurisdictions or define the land too vaguely for historians to locate it; county boundaries that changed. My own examination of wills underscores Keim's reservations. Most testators assumed extensive knowledge about the amount and location of their lands. Few left precise descriptions. A new study would need to track land transfers over long periods of time through such records as estate inventories, surveys, and deeds.[41] The records of many Virginia counties, for both wills and deeds, are fairly complete, so such an investigation seems possible.[42] But the task is made daunting by so much missing, incomplete, or disorganized data. Keim's decision to compare wills rather than to count acres is understandable.

Despite the absence of cumulative data on the amount of land entailed, a solution to the problem of assessing the prevalence of entail can be approximated from Keim's data, whose accuracy is not here under dispute. The following calculations try to weight an entailed will by when it was made. They estimate the accumulation of entailed land over time and compare that accumulation to the amount of land remaining in fee simple in a given generation. It is postulated—fairly accurately, though not literally—that the proportion of wills with entail provisions in a county is equal to the proportion of land entailed in that generation. Most land was conveyed by will at some point in time. The biggest concern is whether those entailing land were representative of landholders generally in terms of wealth distribution. Three factors indicate that entail was employed mostly by the wealthy. First, the practice was more common among "largeholders." Second, it was more popular in the tidewater

[41] Keim, "Influence of Primogeniture and Entail in the Development of Virginia," 61.

[42] The records of York, Westmoreland, Northampton, Accomack, Lancaster, Middlesex, Essex, Richmond, Henrico, and Surrey counties appear to be relatively complete. Other county records form part of city records (which are kept separately by Virginia archives); many others have been lost to fire or otherwise destroyed. See *A Preliminary Guide to Pre-1904 County Records in the Archives Branch of the Virginia State Library and Archives,* comp. Suzanne Smith Ray et al. (Richmond, 1985), as well as a companion volume on city records.

areas, where more wealth was concentrated.[43] Third, English gentry and nobility originated and used entail most extensively. Thus, if testators owning large estates tended to entail land more frequently than did small or middling holders, examining the percentage of wills containing entail provisions understates actual entailed acreage even in the short run.[44]

The equation $n = (1-.x)^g$ describes the cumulative effect of entail, where n = total percentage of land not entailed, x = the percentage of wills containing entail provisions over a period less than one generation, and g = number of generations.[45] This equation illustrates the multiplier effect of entail over time. The entails that Keim found in wills represent, of necessity, only a fraction of the land entailed at any given time, since they reflect only land newly placed in entail during that time. The cumulative effect of entail provisions appears in the following tables and graphs. Even a low, constant rate of 4 percent of wills with entail provisions, for example, would have resulted in 28 percent of the land in that area being entailed after eight generations. Since the amount of land left in fee simple is constantly shrinking, the amount added by entail in every generation shrinks.

$n = (1-.04)^8$

$n = (.96)^8$

$n = .72$

This would mean that one-fourth (.28) of the land would not be available for exchange: the owners could neither sell it nor designate the heir. Figure III estimates the cumulative amount of land entailed over eight generations given four options: Keim's numbers (elaborated below); 4 percent constant; 8 percent constant; and 20 percent constant. After several generations, the amount removed is many times the original percentage. These examples show that the land newly entailed in any limited period constitutes only a fraction of the total controlled by entail. While a constant rate of entailed wills would be unusual, none of these percentages is unrepresentative.

Table I displays all of Keim's data in chronological order. The average percentage of wills with entail provisions in all counties was 12.9. The greatest frequency occurred in the tidewater, although such provisions were not uncommon in the piedmont, especially before 1760. After about 1760, the frequency of entails in wills seems to have declined dramatically, as the data from Albemarle and Culpeper counties reveal most clearly. Taking only the

[43] Keim concluded that fairly equal numbers of "wealthy" and "small-holders" entailed land. As he rightly noted, this means that a higher percentage of all wealthy persons invoked entail, because the wealthy group was proportionally smaller; "Influence of Primogeniture and Entail in the Development of Virginia," 63.

[44] Some deeds also (made, perhaps, by a father to his son or daughter at the time of marriage) entailed land, and the additional cumulative effect of those is not weighed. On the negative side, not every will that Keim counted in the "entail" category entailed all the property it devised; Keim, "Influence of Primogeniture and Entail in the Development of Virginia," 71. Considering these countervailing pressures, it is reasonable to assume that the percentage of wills with entail provisions approximates the percentage of land entailed during that generation (at least until further research can focus on the percentage of land entailed instead of the percentage of wills).

[45] Keim, "Primogeniture and Entail in Virginia," 558.

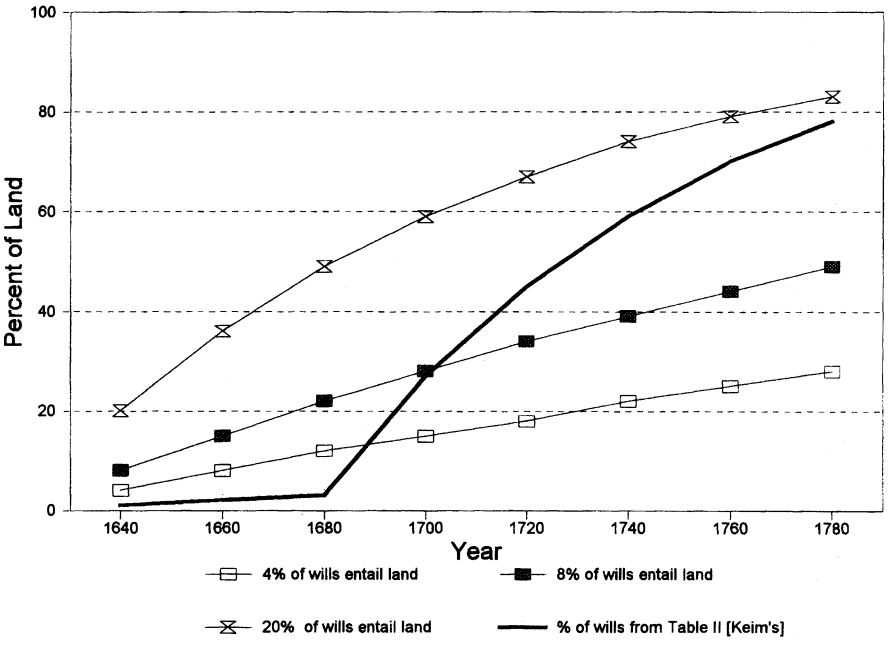


FIGURE III
Accumulation of Entailed Land in Colonial Virginia.

data that begin after 1690 and end in 1760 (the data from Albemarle, Middlesex, and Westmoreland, marked with asterisks in Table I), we find that the average rate of entail during each generation was 27.1 percent. Clearly, entail appeared most frequently during this middle period. At the end of the period, after three generations, 61 percent of the land available in 1690 could have become controlled by entail.[46]

Another example embodies the variations in Keim's observations while it applies the cumulative effect of entail over the whole period of his data. Keim computed the ratio of wills entailing land to those leaving land in fee simple for two tidewater counties for two periods each: Westmoreland for 1653–1672 and 1756–1761 and Middlesex for 1698–1703 and 1759–1772. He assumed that these counties experienced typical entail practices in the tide-

[46] Brown and Brown, *Virginia, 1705–1786,* 91, found a similar rate of entail in wills during this period. Of the wills they examined for tidewater Lancaster County, 1736–1750, 32% (32/101) contained at least some entail provisions, 17 gave all land in entail, and 15 gave part of the land in fee tail and part in fee simple.

TABLE I
KEIM'S DATA ON ENTAIL

Period	*Wills with Entail*	*Total Wills*	*Percent*	*County*	*Region*
1653–1672	1	72	1.4	Westmoreland	Tidewater
1677–1687	2	20	10.0	Henrico	Tidewater/ Piedmont
1698–1703*	16	65	24.6	Middlesex	Tidewater
1744–1754*	4	19	21.1	Albemarle	Piedmont
1749–1770	10	114	8.7	Culpeper	Piedmont
1749–1776	7	73	9.6	Chesterfield	Tidewater/ Piedmont**
1754–1777	5	131	3.8	Albemarle	Piedmont
1756–1761*	14	39	35.9	Westmoreland	Tidewater
1759–1772	7	48	14.6	Middlesex	Tidewater
1759–1776	9	77	11.7	Fauquier	Piedmont
1770–1776	0	50	0	Culpeper	Piedmont

* Data for these years are for Albemarle, Middlesex, and Westmoreland counties.
** Here Keim states that he looked only at the wills of "a group of well-known families in the county," in "Primogeniture and Entail in Colonial Virginia," *William and Mary Quarterly,* 3d Ser., 25 (1968), 559.

water. That same assumption of typicality means that by combining the data from these counties over time we can construct a composite run of forty-six years over a span of 160. Then, relying on demographic studies of the Chesapeake over two centuries to approximate "generations" as encompassing approximately twenty years, we can extrapolate Keim's data to form a composite generational table that displays the cumulative effect of the separate samples.[47] For the period 1720–1780, because Keim has overlapping

[47] In determining length between generations, the following approximation focuses on men because they usually inherited. Average age at marriage for men varied from 22 to 28 in Virginia during this period. Age at the birth of a first child varied from 23 to 29. Of course, a son might be a third child, so generations would be 30 or more years apart in some cases. In other cases, if a person had no children, the land would transfer laterally to a brother or sister of the same generation, in that case making the generation as little as 2–3 years apart (or even upward, if there were no child or sibling). Thus actual transfers would occur more frequently than every real generation. Arguably, those with secure entails may have married younger, because they could depend on inheriting money and land. This conclusion fits with Philip J. Greven, Jr.'s study of Andover, Mass., which indicates that young men sure of inheritances married earlier: *Four Generations: Population, Land and Family in Colonial Andover, Massachusetts* (Ithaca, 1970). Women sometimes possessed entailed land, and women married younger, especially elite women. Age 20 was thus chosen as an easy approximation that would capture these variations. On male age at first marriage see Allan Kulikoff, *Tobacco and Slaves: The Development of Southern Cultures in the Chesapeake, 1680–1800* (Chapel Hill, 1986), 51. Kulikoff includes data from Darrett B. Rutman and Anita H. Rutman, *A Place in Time: Explicatus* (New York, 1984), 65, from his research on Prince George's County, Md., and from Karla V. MacKesson, "Growth in a Frontier Society: Population Increase in the Northern Neck of Virginia" (M. A. thesis, College of William and Mary, 1976), 45.

TABLE II
THE CUMULATIVE IMPACT OF ENTAIL

A. Generation	*B. Actual Years of Data Collection*	*C. Actual % of Wills with Entail Provisions*	*D. Estimated % of Wills with Entail Provision*	*E. Estimated % of Land Entailed during This Generation*	*F. Cumulative % of Land Entailed**	*G. % of Land Not Entailed***
1 1620–1640	1653–1672	1.4	1	(1) (1) = 1	1	99
2 1640–1660	"	"	1	(1) (.99) = 1	1 + 1 = 2	98
3 1660–1680	"	"	1	(1) (.98) = 1	2 + 1 = 3	97
4 1680–1700	1698–1703	24.6	25	(25) (.97) = 24	3 + 24 = 27	73
5 1700–1720	"	"	25	(25) (.73) = 18	27 + 18 = 45	55
6 1720–1740	1756–1761	35.9 *and*	26	(26) (.55) = 14	45 + 14 = 59	41
7 1740–1760	1759–1772	14.6 (avg)	26	(26) (.41) = 11	59 + 11 = 70	30
8 1760–1780	"	"	26	(26) (.3) = 8	70 + 8 = 78	22

* Column F adds the result from column E to the previous result in column F.
** Column G (percent of land not entailed) goes back into the equation the next round in column E as the percent of land still available, since the new fraction of wills affects only the remaining land.

data, the figures 36 percent and 15 percent are averaged (26 percent). The cumulative effect of these percentages is displayed in column F of Table II.

Even the 1 percent figure for the first three generations has a cumulative effect, although it is not very significant. As column F shows, after sixty years, some 3 percent of the land would be entailed. The larger percentages have a much more dramatic cumulative result, especially initially. During the periods 1680–1700 and 1700–1720, or after two generations, a little less than one-half of all land would be permanently entailed. With each succeeding generation, the entail rate of 25 percent applies only to the remaining land, so that the percentage of total land under entail drops in each period. This is illustrated in column E and Figures III and IV. Figure III shows the above table graphically, and the point is clearest when Table II and Figure IV are examined together. While the amount of land newly subject to entail in each generation may decline, this decline occurs owing to the ever-growing amount of land already removed from circulation. The difference between Keim's numbers and the cumulative effect is most clear from Figure IV (compare columns D and F). The table and figure show the difference between Keim's numbers, which depict different moments in time, and the effect of his numbers over time as part of a cumulative process. Examining entail through time and using a selection of Keim's numbers for two "typical" tidewater counties thus leads to the estimate that a very high percentage of land—-a full 78 percent—would have been held in entail after eight generations.

These calculations hide a deeper problem with Keim's data. Keim examined the wills recorded in only a few county courts. Wills could also be recorded in the General Court, and the law of 1705 required those who owned parcels in several counties—the largest landowners—to record their

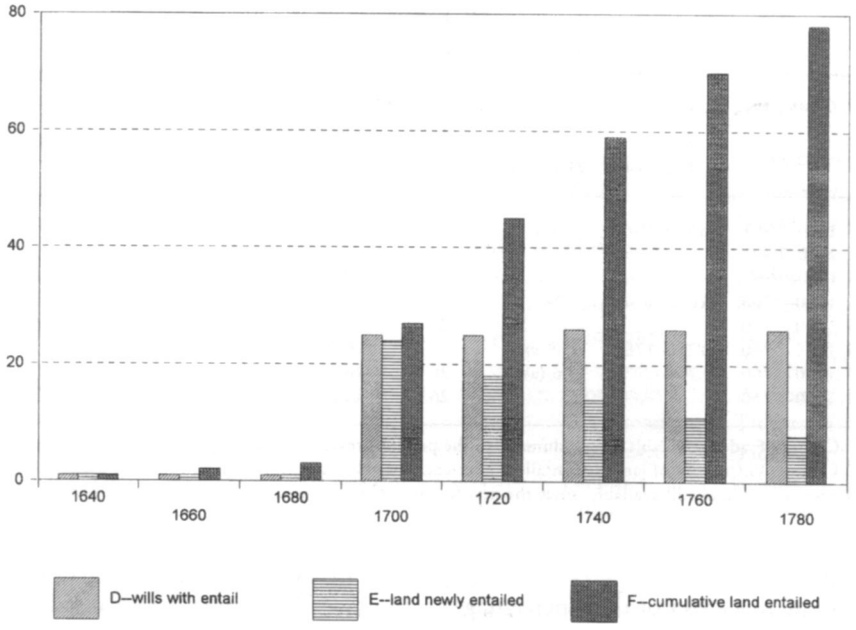


FIGURE IV
Cumulative Effect of Entail in Colonial Virginia.

wills there instead of in a county court.[48] Mann Page and "King" Carter, members of the Virginia Council, for example, recorded their wills only in the General Court, and they left almost all of their real property in tail. Page left all his lands and slaves in tail general, with his eldest son Ralph getting most of his estate. With his death in 1732, Carter, "by every person yielded to be the richest man in Virginia," left virtually all of his real property in tail male—including more than 300,000 acres (about 500 square miles) and about 500 slaves. Although the General Court records burned during the Civil War, many of these wills were so important that copies have survived among private papers.[49] Keim thus ignored the most important wills govern-

[48] All wills to "be made by writing, indented, sealed and recorded in the records of the general court of this colony, or in the records of that county court where the land mentioned to be granted or passed shall lye"; Hening, ed., *Statutes at Large*, (1705), 3:319.

[49] Carter's will is reprinted in full in "Carter Papers," *VMHB*, 5 (1898), 408–28, 6 (1898), 1–22. Page's will is reprinted in "Virginia Council Journals," ibid., 32 (1924), 39–42. Both wills bear the notation that they were proved and recorded in the General Court (in 1731 and 1732, respectively). The quotation about Carter is in Francis Hume to Ninian Hume, Apr. 15, 1717, in "A Colonial Scottish Jacobite Family," pt. 2, ibid., 38 (1930), 106.

ing the largest estates. Carter's will locked in tail 1/80 of the land in present-day Virginia (about 40,000 square miles). The land "seated" by Virginians in 1732 was only about two-thirds of Virginia's present size. Thus Carter entailed roughly 2 percent of the total real property in Virginia in 1732. Other members of the council entailed nearly all of their land as well. In addition to Page, William Fitzhugh entailed nearly 50,000 acres on his five sons, with the largest acreage to the two eldest, William and George (18,713 acres and 17,598 acres respectively).[50] That the wealthiest men invoked entail so extensively fits with Keim's observation that largeholders were most likely to entail property. Among the wills deposited with the General Court, the rate of entails was probably much higher, in any generation, than that Keim found in any county. Because these wills also governed more land, the implications are devastating for Keim's conclusions. In sum, on combining the evidence from county courts and General Court, it appears that most of Virginia's real estate was entailed by the time of the Revolution, not only in the tidewater but also in the piedmont and even along the frontier. Carter's will, for example, entailed property in counties all over Virginia from the tidewater to the emerging backcountry.[51]

Enforcement of Entails

Analysis of the long-term effects of wills that entailed land is meaningless if these wills were not enforced. In addition to relying on Keim's misleading interpretation of data, historians have made his conclusions stronger

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"King" Carter owned about 333,000 acres, of which about 18,000 had already been entailed by his father on his brother John, who died without a male heir, and on him in remainder (mostly "Corotoman," mentioned "Carter Papers," *VMHB,* 6:9, because slaves were entailed to that parcel). He did not originate the entail on these acres. For estimates of King Carter's total property size see Louis Morton, *Robert Carter of Nomini Hall: A Virginia Tobacco Planter of the Eighteenth Century* (Williamsburg, Va., 1941), 7, 15.

He also kept 3 other parcels in fee simple, in each case because he wanted some further decision made about that parcel. For example, he changed his mind about entailing one 10,000-acre section in order to provide for two of his grandsons. He left the decision open to his eldest son, John; "Carter Papers," *VMHB,* 6:6. He also left John in fee simple an estate escheated from Thomas Glascock occasioned by Glascock's murder conviction. Carter left open the possibility that John might want to give some of the property back to Glascock's children. He also gave his son Robert one 6,000-acre tract in fee simple. The remainder of the estate he entailed on his 5 sons, with smaller plots entailed on a few of his grandsons (mostly second sons of his daughters christened "Carter") such as Carter Burwell. Not only did he explicitly and repeatedly emphasize that he meant every plot to be entailed, but he designated several heirs in remainder for each tract, all in tail male as well.

Some of Page's estate went to his third son, Mann Page, and a small plot to his fourth son, John. His second son, Carter Page, was provided for by Robert Carter. Page directed that his two youngest sons, Matthew and Robert, should be given some money and "be put in the Army or Navy of England so soon as they shall be capable of it, and that their Education be such as is proper to qualify them for those services"; "Virginia Council Journals," 41.

[50] His will is reprinted in full in Fitzhugh, *William Fitzhugh and His Chesapeake World, 1676–1701,* ed. Richard Beale Davis (Chapel Hill, 1963), 373–85. Fitzhugh did record his will in Stafford County Will Book, Liber Z, 1699–1709, 92–102, but in 1701, before the 1705 law.

[51] On King Carter's role in surveying and claiming the valley of Virginia see Charles E. Kemper, ed., "The Early Westward Movement of Virginia, 1722–1734," *VMHB,* 13 (1905), 116, and Kemper, ed., "The Settlement of the Valley," ibid., 30 (1922), 174–75.

by claiming that entails were easier to evade than he averred. Keim noted that after 1705 evading entails was "a much more difficult and expensive process," because it required a legislative act and even such acts did not "result in a considerable decrease of the amount of land held in fee tail." Later scholars argued that entail was easy to bypass.[52] "More tidewater estates were docked of entails than were newly entailed," concluded Bailyn.[53] "Entails could be docked almost at will," asserted the Browns.[54] The question has focused on four topics: legal stratagems to bypass entails; legislative acts to dock entails; legal docking of small estates in Virginia after 1734; and the possibility that entails were ignored because of poor record keeping in a frontier economy. All four topics will be considered here as well as two additional means of breaking entails by default: "failure of heirs" and escheat. I argue that procedures for voiding or avoiding entails had so many constraints that, rather than indicating the weakness of the institution, they reveal its strength.

Two legal stratagems to bypass entails were well known in England: "fine" and "common recovery." Both were voided by a Virginia act of 1705, but they demonstrate the nature of the law of entail. Keim viewed these stratagems as the institution's main weakness in Virginia before 1705. He asserted that they operated as in England, where "entailed estates could be docked with relative ease by court action—by common recovery and fine. In effect, then, for the most part primogeniture and its helpful companion, entail, existed from this time forward as a custom rather than a law, as most landholders could defeat either or both if they so desired."[55] Other scholars contend that both were expensive, required skilled lawyers, and, although fines were legally easier, only a portion of the value of the estate could be recovered.[56] Recoveries were more difficult and riskier because they were a technically illegal way to accomplish a transfer.[57] Both procedures required the consent of the next heir in addition to that of the current tenant in tail.

[52] Keim, "Primogeniture and Entail in Virginia," 546, 578.

[53] Bailyn, "Politics and Social Structure," 109–10.

[54] Brown and Brown, *Virginia, 1705–1786,* 90.

[55] Keim, "Primogeniture and Entail in Virginia," 545.

[56] Only the "base fee" could be recovered. A base fee was an amount offered by an individual who weighed the risks of the direct descendants of the individual selling the property dying out. It was an option because all deeds and wills had to be witnessed and the person who witnessed or "warranted" the deed or will could not claim title to the land. The obligation to warrant (to swear to the accuracy of the deed or will) descended to the heir of the warrantor by the rules of primogeniture. Thus the eldest son of the man who sold the entailed property could not claim title to the land because he inherited the obligation to warrant the deed that his father had witnessed. If, however, the direct descendants of the man who sold the entailed property died, his next eldest brother (or his brother's descendants) would inherit the claim to the entailed property. They would not, however, inherit the obligation to warrant. Therefore, they could claim title to the property.

[57] Essentially, a middleman would illegally buy the property and then disappear. While the courts were looking for him, he would sell the property to the real buyer. Not until the middleman was located could the second buyer be prosecuted. Because the prosecutor for most crimes was normally the victim (in this case the seller), the middleman did not necessarily have to hide very well (except when the seller died, in which case the heir had a claim). This procedure left room for fraud by its very nature, because violations of the agreement could not be legally amended. See A.W.B. Simpson, *An Introduction to the History of the Land Law* (Oxford, 1961).

The leading scholar of English land law concludes that, in England, "to bar an entail a tenant must go through a fantastic rigmarole, which even judges thought it better not to investigate too closely."[58] In Maryland, where such methods remained legal during the eighteenth century, the 1782 law that defanged entail noted that common recovery led to "heavy expense and great inconvenience."[59] Although it was possible to evade an entail by these two means in England, the ease with which an entail could be broken even there needs to be examined closely, particularly with respect to costs over time.[60] In the late eighteenth century, entails exercised enough power in England to feature prominently in novels. In *Pride and Prejudice,* for example, Mr. Bennet can give none of his land to his five progeny—all daughters—because he held it in a tail male that he could not break. At his death his estate would pass to a distant cousin, and his daughters would receive only meager dowries.[61]

After Virginia abolished fines and recoveries, a private act of the legislature remained the only legal means to break an entail.[62] In arguing that entail was easy to evade, the Browns and Bailyn emphasized this method. According to Keim, the legislature passed 125 such acts between 1705 and 1774, more, as Bailyn noted, than the number of wills that Keim counted containing entail provisions.[63] The Browns viewed these acts as "providing

[58] Ibid., 217.

[59] Keim, "Influence of Primogeniture and Entail in the Development of Virginia," 37.

[60] In addition to Simpson, *Introduction to the History of the Land Law,* a hefty literature has deliberated over the impact of what English scholars have called the "strict settlement." In essence, it was a way of preventing an heir from using fines and common recoveries to defeat an entail by consistently renewing the entail agreement each generation. The debate over the legal power of this practice began with H. J. Habakkuk, "English Landownership, 1680–1740," *Economic History Review,* 1st Ser., 10 (1940), 2–17. For more recent discussion see Christopher Clay, "Marriage, Inheritance, and the Rise of Large Estates in England, 1660–1815," ibid., 2d Ser., 21 (1968), 503–17, and Lawrence Stone and Jeanne C. Fawtier Stone, *An Open Elite? England, 1540–1880* (Oxford, 1984). Eileen Spring, *Law, Land, and Family: Aristocratic Inheritance in England, 1300 to 1800* (Chapel Hill, 1993), 27–30, 69–72, reinterprets some of the Stones' data to concentrate on the issue of the disinheritance of daughters by strict settlements. She addresses entails by themselves (rather than as part of a strict settlement) only briefly. That entails could be docked under certain conditions has been widely accepted. The costs and terms involved could be better explored. Whether the strict settlement ever appeared in early American wills has never been investigated. Since strict settlements were intended to shore up entails in the face of attempts to bar them, they would have been less likely to appear in Virginia, where entails were already difficult to evade.

[61] "Mr. Bennet's property consisted almost entirely in an estate of two thousand a year, which, unfortunately for his daughters, was entailed in default of heirs male, on a distant relation." As is made clear later in the novel, Mr. Bennet had to obtain the consent of the next heir, Mr. Collins, in order to break the entail, which Mr. Collins would not give. If he had had a son, this son would have been the "next heir" and might have consented to break the entail; Jane Austen, *Pride and Prejudice,* ed. Frank Bradbrook (London, 1970), 23. Austen finished the novel in 1797, but it was not published until 1813.

[62] Keim, "Primogeniture and Entail in Virginia," 546.

[63] I have counted at least 3 more. Compare Keim's appendix 3 (where he lists all such acts) with Hening, ed., *Statutes at Large,* 4:29, 5:285. Carter Burwell's act of 1748, discussed below, is also missed by Keim. This appendix is confusing, because his list mixes the names of petitioners with the people they hoped to sell to, which is clear on a careful reading of Hening, as cross-referenced with volumes for 1742–1747 and 1748–1749 of H. R. McIlwaine, ed., *Journals of the House of Burgesses of Virginia* (Richmond, 1909–1912).

easier methods for breaking entails," whereas Keim stated unequivocally that the 1705 law significantly restricted evasion. That the legislature passed so many acts surely reveals the soft underbelly of entail, although the total of 125 does seem small when seen over time. Only about two private acts passed per year during the sixty-nine years from 1705 to 1774, over half of these (sixty-five) between 1761 and 1774.[64] And Bailyn's comparison to Keim's count of entailed wills ignores the facts that Keim collected only samples of entailed wills from only a few counties during only a few years and that each will often created several entailed plots. Still, these acts seem a powerful tool.

Yet the simple number, 125, ignores conditions that were attached to the acts. We need to ask what, exactly, these acts accomplished and at what price. The procedure for obtaining them became more complex over time. The following summary captures it in its well-developed form in the 1740s. To dock an entail, a person needed first to proclaim his (or her, or their, if husband and wife) intention to do so at the local parish church on three successive Sundays (like declaring the banns for a marriage) as well as (sometimes) in the newspaper, so that anyone who had a claim on the estate, including heirs in reversion and remainder, could protest before the bill reached the burgesses. The consent of any such heir was necessary for the sale to commence, a significant restriction because that heir usually had a strong interest in preserving the value of the entail. Next, the tenant in tail offered a petition to present a bill to the burgesses. If the offer was accepted, the petitioner presented the bill, which was then investigated and could be amended by the burgesses and then read on three separate dates to allow for due consideration and possible protest. Although most problems were resolved by the time the bill reached the floor of the house, this was not always the case. In May 1732, for example, Simon Miller tried to obtain an act to disentail and sell 200 acres in exchange for "settling other Lands and Negros of greater Value." Jane Hoard, the next heir in reversion, and her husband, Thomas, protested to the burgesses in full session that Miller's substitution was inadequate. As a result, the bill did not pass, and Miller had to try again, begging the burgesses to reconsider if he offered "one Negro Woman more."[65]

A successful bill was forwarded to the council, which often amended it. When amendments were approved by the petitioner(s) and next heir(s) and by the house, the bill went to the governor. Once signed by him, it went to the commissioners of the Board of Trade. Approved by them, it went to the king (or queen in the case of Anne) in consultation with the Privy Council for final approval.[66] All of these authorizations were required for the bill to

[64] Brown and Brown, *Virginia, 1705–1786,* 84; Keim, "Influence of Primogeniture and Entail in the Development of Virginia," 109.

[65] Entries for May 29, June 2, 3, 7, 1732, in McIlwaine, ed., *Journals of the Burgesses . . . [for] 1727–1734, 1736–1740,* 128, 132–33, 135, 138.

[66] Although most of these records are now missing from Virginia's records (burned along with those of the General Court), Queen Anne's permission, along with that of the 18 members of her Privy Council, to an act docking the entail on some acres owned by Frances Custis and her husband John, still exists. "Her Majesty was graciously pleased with the advice of her Privy Council to declare her approbation of the said law." Most acts also contained special requests

take effect. Each stage involved fees: to a lawyer to draw up the bill,[67] to the burgesses for bringing a private act, to the commissioners of the Board of Trade and other officials in order to gain the monarch's approval. The fees to officials in England alone ran about £33 by 1772.[68] Other fees, harder to trace, may have existed as well: bribes might have to be paid to members of the council or investigators for the burgesses.

Ninety percent of these 125 private acts (all but twelve) required that other land or slaves or both of a total greater value than the released plot had to be entailed in exchange.[69] In 1723, for example, Sarah Brechin broke the entail on 200 acres and in exchange entailed five slaves to the rest of the estate under the same conditions.[70] Profits of sales, at the least, were to be used to buy other land or slaves that would be entailed in exchange. If such purchase had not already been made, the legislature released the entailed plot not to the owner but to a trust of men who would manage its sale and ensure that the profits went for the stated purpose (such as buying slaves who would be attached to the land or buying other land to be entailed under the same conditions). In 1740, George Turberville, who persuaded the legislature to dock an entail on 420 acres only by entailing a separate 1,000 acres under the same conditions, complained that it "occaisioned me a very considerable expense and trouble."[71]

Even with the requirement that other property replace the docked parcel, the legislature usually allowed only a portion of an estate to be docked and only under particular circumstances, most notably when the tracts lay many miles from the main estate or had passed from the family name. These two circumstances occurred together when, for example, an heiress married a wealthy landowner from another locality.[72] Martha and Thomas Jefferson of Albemarle County were one such couple. Martha Wayles Jefferson owned 1,200 Cumberland County acres entailed on her by her grandfather. In 1774, in order to gain the burgesses' consent to dock the entail, the Jeffersons

directed to the king or queen, begging for royal approval; Colonial Papers, folder 24, item 6, reel 610, Virginia State Archives, Richmond.

[67] Most planters hired lawyers to draw up the bills. Landon Carter, while a burgess in 1752, commented that as "most of them [private bills] came from Lawyers I am of Opinion they were paid for drawing them." Carter's diary covers his service as a member of the House of Burgesses, Mar. 14, 1752; Jack P. Greene, ed., *The Diary of Colonel Landon Carter of Sabine Hall, 1752–1778* (Charlottesville, 1965), 1:85.

[68] In 1772, Richard Henry Lee asked William Lee to pay "the accustomed fees" in England to ensure that his friend's bill to dock an entail passed there. Since only the king's signature was required, this must mean that fees had to be paid to the king's ministers (not uncommon in 18th-century England); Lee to Lee, Aug. 4, 1772, Lee-Ludwell Papers, Virginia Historical Society, cited in Brown and Brown, *Virginia, 1705–1786,* 89.

[69] Forty-seven entailed other land, 47 entailed a combination of land and slaves, and 25 entailed slaves alone; Keim, "Primogeniture and Entail in Virginia," 578.

[70] Hening, ed., *Statutes at Large,* 4:142; entries for May 29, June 1, 3, 7, 1723, in McIlwaine, ed. *Journals of the Burgesses . . . [for] 1712–1714, 1715, 1720, 1722, 1723–1726,* 378, 381, 384, 395.

[71] Keim, "Influence of Primogeniture and Entail in the Development of Virginia," 79; Brown and Brown, *Virginia, 1705–1786,* 80–95.

[72] Keim, "Influence of Primogeniture and Entail in the Development of Virginia," 110.

argued that the land was too far from Thomas's estate, and they agreed to entail other property in Goochland County under the same conditions. Even so, Governor Dunmore would not sign the docking act, leaving the Jeffersons unable to sell the land. This was one of twenty-seven docking acts passed by the legislature between 1774 and 1776 but not signed into law by the governor.[73] The experience undoubtedly stimulated Jefferson's interest in abolishing entail. Although such failures to pass an act were more common in those three years, they were not unique.[74]

The 10 percent of acts that did not require the entailing of other land or slaves "of greater value" appear to provide evidence that entails could be voided at will (no pun intended). These acts were approved only when the testator who created the entail left debts and bequests that exceeded the value of his or her whole estate or an event rendered the directions of the will inconsistent with the intent of the testator. A few such acts allowed large dockings without adequate replacement. The logic in these cases is clear: these acts tried to balance the original intent of the testator to allow for an equitable fulfillment of all bequests and the payment of just debts. In permitting such dockings, the legislature was recognizing that the will of the original testator should operate only over what it was capable of operating.[75]

Tracking the more than 300,000 acres entailed by King Carter in 1732 on his five sons (John, Robert Jr., Charles, Landon, and George) and several grandsons (his daughters' second sons christened "Carter") provides a context for the legislative acts. Carter's descendants initiated several acts docking entails, the first act in behalf of Robert Carter III in 1734. The Browns assert that the legislature docked his entail in order better to provide for his mother and sister. While the act did confirm the dowry right that his mother should have received, the entail was not actually removed. King Carter's son Robert Jr. died shortly before his father in 1732. Because Robert Jr. predeceased his father, the entail on him and his heirs male went not to his son Robert III but to his younger brother Charles, next heir in remainder by King Carter's will, as dictated by eighteenth-century law. The 1734 act, brought by Charles and John, Robert III's uncles, and Priscilla, his mother,

[73] Ibid., 123, 251. Lord Dunmore did not ratify any private acts related to entail after he dissolved the House of Burgesses in 1774. His lack of action appears to be related to the increasing tensions in the colonies.

[74] Keim, "Influence of Primogeniture and Entail in the Development of Virginia," 111; Brown and Brown, *Virginia, 1705–1786,* 90. Between 1754 and 1773, the council rejected 3 bills out of 67. In 1760, the king refused to sign 3 bills. In 1766, the burgesses rejected a bill. Neither Keim nor the Browns appear to have examined records prior to 1754. Other bills may also have been rejected at various stages, even after 1754. And the constraints imposed by the docking acts were presumably well enough known that those with bills unlikely to pass would either not propose them or have the bill refined in committee before presentation to the whole house.

[75] Brown and Brown, *Virginia: 1705–1786,* 89; Hening, ed., *Statutes at Large,* 7:323–31, 8:27–33, 6:405. Two of the largest docked entails fall into this category: about 19,000 acres of over 100,000 acres originally entailed by Alexander Spotswood were docked in order to pay his debts and legacies to his daughters; Mann Page docked 30,787 acres of an entail created by his father, replacing them with an inadequate number of entailed slaves attached to the remaining lands, in order to satisfy the father's debts and bequests.

simply fixed the problem as King Carter had stated he wished to do on his deathbed, settling the estate as if Robert had not predeceased his father. No portion of the entail was actually removed. This fact is proved conclusively by a careful reading of the act itself and by Robert Carter III's ("of Nomini Hall") action many years later to dock the entail on a small portion of the estate he inherited from his grandfather (Hawkins estate, 526 acres in Westmoreland County) in exchange for entailing more than 1,500 acres of the only plot he inherited from him in fee simple (Bull Run in Prince William County).[76] The two acts to dock entails initiated by Robert therefore actually resulted in net greater property (1,000 acres more) entailed on him than enumerated in his grandfather's will. The portion docked by Robert III represented only a sliver of the tens of thousands of acres he inherited from the entail created by his grandfather.

What happened to King Carter's other benefices? The estates of George and Landon, his youngest sons, remained intact until the Revolution. George died without issue, and his estate went to Landon, the next heir in remainder, in tail. Landon Carter's son did not inherit these estates until 1778. Carter's third son, Charles Carter of Cleve, acknowledged that the bulk of his estate would go in turn to his eldest son, Charles Jr., as dictated by his entail; Charles left all the property he had acquired since his father's death to his two other sons, John and Landon, in tail male along with 130 slaves each. To each of his ten daughters he left £1,000 and two slaves. His will contained a signed agreement from Charles Jr. to try to secure a legislative act to dock the entail on 310 acres at Norman's Ford in exchange for which Charles Sr. would pay all of Charles Jr.'s debts and give him a 700-acre tract in Richland in tail male and an additional 500 acres in fee simple. To give one of his younger sons a 310-acre parcel, Charles Sr. thus had to bargain extensively with his eldest son. Charles Sr., despite his ability to acquire other land during his life, clearly felt constrained by his father's will: while he created entails (in tail male) on his two youngest sons, he specified in writing that they could break up to one-third of the male tail he was creating in order to provide for their second sons under the same conditions.[77] In 1764, Charles Jr. carried out his agreement with his father and docked the 310 acres at Norman's Ford.

The next year, Charles Carter, Jr., sued the executors of his father's will, claiming that most of the 260 slaves that Charles Sr. willed to his two younger sons belonged rightfully to him, as eldest, by virtue of the entail created on them by his grandfather. In 1766, Charles Jr. brought a second act to dock the land he held in tail. In it, he agreed to drop the suit against his brothers' slaves and to pay more than his share (£5,000) of his father's consid-

[76] Brown and Brown, *Virginia, 1705–1776,* 89; Hening, ed., *Statutes at Large,* 4:454–57 (1734), 7:478–80 (1761). That the estates mentioned derive from the will of his grandfather is clear by cross-reference with his will ("Carter Papers," *VMHB,* 5:413) and to the earlier act (cited by the latter as creating the entail).

[77] Carter, "The Will of Charles Carter of Cleve," annot. Fairfax Harrison, in *VMHB,* 31 (1923), 31–69. Charles Carter, Jr., followed through on the request to dock the entail on 310 acres at "Norman's Ford"; Hening, ed., *Statutes at Large,* 8:25 (1764). The two eldest received £2,000 according to their marriage contracts; the 8 youngest were to receive £1,000, if possible, from the income of the estate and bakery and the sale of some designated slaves.

erable debts and legacies in exchange for legislative permission to sell 25,496 acres, some held in fee simple but most entailed by his grandfather Carter. The act noted that Charles Jr.'s slaves, even though entailed, were still subject to his debts (though lands were not). To pay his father's debts, many of the slaves would have to be sold.

The legislature permitted the docking in order to allow Charles Jr.'s two younger brothers, John and Landon, to keep the slaves their father had willed to them (Charles Jr. relinquished claim, but these slaves were still subject to the younger brothers' portion of their father's debt) and also to prevent the sale of so many of Charles Jr.'s slaves to satisfy the debts and to prevent him from being forced to "sell and dispose of the timber on his entailed lands, and make such leases thereof as will be most for his present benefit, whereby the value thereof must diminish daily, to the great detriment of the heirs in tail male or reversion." Charles Jr. was to receive the remaining profit from the sale of the 25,000 acres, which may have netted him as much as £20,000 after paying his share of his father's debts. This acreage probably represented about a third of the lands he inherited in tail from his grandfather. It was a significant sale, by any reckoning, and one of the most generous dockings.[78] Why such leniency? This was one of twelve acts docking entails passed in 1766, when the legislature was becoming more permissive. The Carters represented a major force in the House of Burgesses, and family members may have formed a voting bloc.[79] Whatever the explanation, the act preserved family harmony, paid the debts and legacies to the daughters of Charles Carter of Cleve, and preserved some estate for his younger sons. Effectively, it redistributed some of the entailed land and slaves that belonged to Charles Jr. to his twelve siblings. In exchange, he was allowed to sell some of the land he held in tail and keep the profits. By far the majority of the estate—in land and profits from the sale of land—remained with him.

Three years later, Charles Jr.'s cousin of the same name—eldest son of John Carter, King Carter's eldest son, docked the entail on some of his acreage, replacing 11,000 docked acres with 4,000, in order to provide better for his younger children. As the eldest son of the eldest son of King Carter, Charles Carter "of Corotoman" possessed very extensive holdings in tail from his great-grandfather, grandfather, and father. Out of about 120,000 acres, he disentailed a net 7,000 to provide for his younger children. His eldest son, the heir of the rest of the entailed property, would gain the vast majority. Clearly, the legislature, which passed sixteen other acts in the same year—1769—more than any other year—was increasingly permissive. The land entailed in exchange, although in a slightly better location, did not match the value of the acres disentailed.

Two of King Carter's other grandsons—through his daughters—also docked portions of their estates. Carter Henry Harrison had land entailed on him by both his maternal grandfather King Carter and his father Benjamin

[78] Hening, ed., *Statutes at Large,* 8:218–22.

[79] Fairfax Harrison regards their numbers in the burgesses and council as evidence that they were "bred in the tradition of the office holding and public life." Their extensive landholdings may have played a role in their elections; "Will of Charles Carter of Cleve," 43.

Harrison.[80] In 1761, Harrison obtained an act to dock one parcel (1,210 acres known as Scotland Neck) of the entail left him by his grandfather Carter. The proceeds of the sale (£1,000) went into a trust to purchase land more convenient to his other estates, with that new land entailed under the same conditions and with the slaves that King Carter had entailed to Scotland Neck to be attached instead to the new parcel of land.[81] Harrison was therefore unable to withdraw money from his inheritance even with the act.

Carter Burwell sought to dock the entail (in tail male) on 1,400 acres of land known as Carter's Grove on April 18, 1749. Between 1740 and 1749, Burwell had six daughters—Lucy, Elizabeth, Judith, Alice, Sarah, and Mary—and no son. The petition he presented to the burgesses twelve days after Mary's birth sought to dock the entail "the better to enable him to make a Provision for his daughters." Had he died in that year with the entail in force, Carter's Grove would have gone to his brother Robert, the first heir in remainder in King Carter's will. The act passed, yet Burwell could not completely evade his grandfather's wishes. The act entailed 2,000 acres on Bull Run in exchange "under the same conditions," meaning that his daughters could lay no claim to that estate. One year later, in April 1750, Burwell's wife gave birth to a son, Nathaniel, and when Burwell died in 1756, he willed Carter's Grove intact to the boy, to whom it would have descended had he not docked the entail. Nathaniel thus inherited both Carter's Grove in fee simple and the lands at Bull Run in fee tail. Burwell entailed other land (in fee tail general) on his second son, Carter, showing that he did not oppose entail on principle. He also asked Nathaniel to try to dock the entail on the lands at Bull Run in order to entail them on Carter, and he provided incentive by offering Nathaniel other land in exchange. Finally, Burwell provided marriage portions of £500 each for his daughters although without leaving sufficient funds. Nathaniel might well have had to request that Carter's Grove be entailed in exchange for Bull Run had he not been liberated from his father's request by the repeal of entail as an institution in 1776. In 1777, he sold the Bull Run lands.[82] That the sale occurred so soon after the act (it was preceded by a year of dispute over

[80] Benjamin Harrison's will (1745) is in "Harrison of James River," *VMHB,* 32 (1924), 97–99.

[81] Hening, ed., *Statutes at Large,* 7:455–57.

[82] Dates of birth from entries in the family Bible begun by Carter Burwell, in Mary A. Stephenson, *Carter's Grove Plantation: A History* (Williamsburg, Va., 1964), 255, 257. For the original petition see entry for Apr. 18, 1749, in McIlwaine, ed., *Journals of the . . . Burgesses, 1742–1747, 1748–1749,* 367. It reads in part: "That the Petitioner is seised, in Tail-Male, of and in a certain Tract of Land, containing 1400 Acres, or thereabouts, known by the Name of *Carter's Grove,* situated in the Parish of *York-Hampton,* and Counties of *James-City* and *York:* That the better to enable him to make a Provision for his Daughters, he is willing and desirous of docking the Intail of the said Land . . . and that 2000 Acres of Land, lying upon *Bull-Run,* in the County of *Prince-William,* of which the Petitioner is seised, in Fee-Simple, may be settled, in Lieu thereof, to the same Uses." For a copy of Carter Burwell's will see Stephenson, *Carter's Grove Plantation,* 259–64. He deposited it with the General Court. Jefferson's comments on what portion of the sold lands the daughters (or the husbands of the deceased daughters) were entitled to are ibid., 265–68. Carter Burwell, Jr., had already died.

Hening mislabels the passage of the law as Oct. 1748, in *Statutes at Large,* 6:212, and the act does not appear in his index. Apparently as a consequence, the act was not counted by Keim in "Influence of Primogeniture and Entail in the Development of Virginia," 248–50.

how Burwell's will intended the profits to be divided), in the midst of war, suggests that the entail effectively prevented sale before that time.

The history of King Carter's will and real estate and the fates of his descendants reveal that those who docked particular entails were not necessarily opposed to entail on principle and that rechanneling the stream of the entail proved difficult without the abolition of entail as an institution. Burwell's hands were not tied behind his back by his grandfather's will, but they were tied tightly to his sides. Tied too were the hands of his cousins Carter Henry Harrison and Robert Carter III of Nomini Hall and his uncle Charles Carter of Cleve. Some shifting was allowed by the legislature, but the major beneficiaries designated by King Carter's will as heirs and "next heirs" received the bulk of the estates they were entitled to, despite attempts to alter his allocations: the vast majority of the acreage King Carter originally entailed in 1732 remained so in 1776; the few parcels removed by some descendants were usually replaced by other acreage; and the terms of the will were respected, acknowledged, and binding.

Another means of evading entail to which the Browns, especially, gave great weight was introduced by a 1734 law that made exemptions from entail available to the less prosperous. It allowed lands valued at under £200 to be docked by a writ of *ad quod damnum* (made by the secretary of the colony) without a special act of the legislature. The law's stated purpose was to help "poor people seised in fee tail of small and inconsiderable parcels of land, often times ignorant, or not designed to be devised in tail by their ancestors" and "poor people and their families, who, without it, must be confined to labour upon such small parcels of land, when, by selling them, they might be enabled to purchase slaves, or other lands more improveable."[83] The phrase "not designed to be devised in tail" indicates that some Virginians—not surprisingly—had trouble understanding the legal rules for devising estates. The Browns argued that this law made entail very easy to evade because the exemption of £200 covered many estates. They also suggest that the wealthy may have circumvented the £200 limitation. "In all probability those [estates] docked by writ of *ad quod damnum* were by far . . . more numerous" than those docked by legislation.[84]

In making these assertions, the Browns did not examine land prices, nor did they explore the approval process for the necessary writ. £200 would have bought only an average of seven acres of urban and rural land in tidewater York County during the 1730s. Prices for land outside Williamsburg, Yorktown, and other towns (excluding developed properties such as shops, smiths, and mills) were substantially lower. A £200 estate might have contained 358 rural, unimproved acres in York County on average in the 1730s. The average rural price in York County for the period between 1720 and 1775 was £1.4d./acre, so the £200 limit would have allowed an average of 197 unimproved, rural, entailed acres to be sold—if a discrete plot—during the whole period. By the 1760s, average rural land prices had climbed to the

[83] Hening, ed., *Statutes at Large,* 4:399–400.
[84] Brown and Brown, *Virginia, 1705–1786,* 88.

point where the £200 limit would have allowed fewer than 153 acres to be docked.[85] While a few entailed estates were as small as 200 acres, the majority seem to have consisted of several thousand; tracts of 5,000 or even 14,000 acres were not uncommon. The law would thus not have allowed the docking of most estates, even in the 1730s.[86] Conceivably, some owners of entailed property worth more than £200 may have been able to persuade three "good and lawful men" and the sheriff of their county to lie under oath to the secretary of the colony (who was also supposed to conduct his own investigation) and then to the General Court about the value of the property and thus circumvent the law. The owner also had to persuade the next heir (or the heir in remainder or reversion) to agree to the sale. This could be quite difficult since the next heir would have to renounce his or her right to the property (undoubtedly for compensation in some other form). If the writ were easy to obtain, why would those who had estates of only several hundred acres take the trouble to seek a private act after 1734—as did Charles Carter of Cleve? Indeed, it can even be argued that this law reinforced the power of the elite by applying entail only to middling or large estates and allowing smallholders to sell their land to—who else?—the wealthier. Thus the law provides an example of how the leaders of Virginia applied the law of entail in a manner that emphasized its aggrandizing effects.

Entailed parcels of land were occasionally "sold" without being docked—but only at the buyer's peril, because such a sale was legally void. Most such sales appear to have occurred before 1705, when the status of lands seems to have been less carefully monitored by the courts. Suits challenging these sales could be filed generations later, as seen in the few remaining records of the General Court.[87] In *Allen* v. *Stafford,* for example, a seventy-year-old entail provided the grounds for disputing a sixty-five-year-old sale. In 1664, Amy Beasly left her land in tail to her cousin Humphrey Stafford, who sold it in 1669 to one Townsend in fee simple. In 1730, Stafford's great-grandson sued to recover the land on the ground that it had

[85] I thank Lorena Walsh for providing me with the annual calculations of land prices for York County.

[86] For the sizes of entailed plots see Keim's summary of wills in his appendixes, "Influence of Primogeniture and Entail in the Development of Virginia," 202–47.

[87] R. T. Barton, ed., *Virginia Colonial Decisions: The Reports by Sir John Randolph and by Edward Barradall of Decisions of the General Court of Virginia, 1728–1741,* 2 vols. (Boston, 1909). These, along with reports of past cases made by Jefferson, constitute the only records that remain from the Virginia General Court for the 18th century. The original documents were destroyed during the Civil War.

Cases concerning entail raised several issues. Disputes over wording seem to have been most common. Some words that could distinguish a bequest made in fee simple from one made in fee tail were "to her and the heirs of her body forever" (or the male equivalent) or "if he [or she] die without issue." Sometimes a testator might use some part of these words but indicate elsewhere a phrase that seemed to say that he or she wanted to make the bequest in fee simple. Other types of entail cases include entailed property that had been sold or leased and not reclaimed for a long period of time, the rules of descent by primogeniture (which could be very complicated if there was no immediate family), and disputes over the meaning and application of the various land laws, especially those of 1662 and 1705.

been entailed. As heir by primogeniture, he won his case and got the land.[88] In another case, Thomas Meekins left an entailed estate to each of his three sons on the condition that if any of the three died without issue, his land should go to the remaining brother(s) in tail. In 1682, after William died, brother Thomas sold William's land. In 1731, fifty years later, Thomas's grandson claimed that, owing to the entail, the land belonged rightfully to him and won.[89] Another case heard in 1731 centered on an entail dating from 1619. Here, an ancestor was found to have violated a conditional entail, and the judges allowed the entail to be broken.[90]

That wills made as much as 100 years earlier were disputed shows the long-term power of entail. Even if a person purchased entailed land and the courts did not enforce the entail in the short term, the threat of retroactive enforcement made buying an entailed property risky. An heir by descent or in remainder or reversion could make a claim simply by requesting a writ *formedon in descender, formedon in remainder,* or *formedon in reverter.*[91] It is unclear, in such cases, whether the purchasers' descendants recovered any money paid for the property, but even if they did, inflation of land prices would have meant a substantial loss in real value. Additionally, any improvement made to the property, such as a house, would belong to the rightful owner. Thus, when tenants in tail wanted to break an entail in order to divide property among children, pay debts, or purchase goods or land, they would have had difficulty finding buyers, especially after 1705, unless they could secure a legislative act.[92]

Entails could be broken in the few cases where they were conditional, but such cases were rare. More commonly, they could be broken for "failure of heirs," when land was entailed on a person who had no legitimate children. In that case, the land belonged to the next heir in remainder. If the

[88] Ibid., 1:R48–49.

[89] Ibid., R92–97.

[90] *Goodright Lesse of Dan'l Middleton* v. *Ann Batson* (1731), ibid., R65–R67. In this case, the father had left property to each of his two daughters in tail as long as each, or her heirs, lived on that parcel. One daughter, Ellen, refused to live there and sold the parcel to her sister's husband, John Batson, in 1680. Ellen's descendant Daniel Middleton sought to have the sale revoked 49 years later. The court ruled that because the father made the entail conditional (in order for the entail to be valid, she had to live on the land), it could be revoked and *was* revoked by Ellen's failure to live on the parcel. Thus her descendant's plea was not valid. Conditional entails are explained above.

[91] The 1705 law imposed a statute of limitations of 20 years (beginning after 1705) on such heirs for bringing suit. However, persons under age 21 were exempted, and the exemption could be cumulative (if the estate fell from minor to minor, no portion of the 20 years would elapse, and suit could be brought 40 years or more afterward); Hening, ed., *Statutes at Large,* 3:323–24. An heir had up to 30 years (with the same exemption for minority) to bring a related writ called "mort dancestor cosinage ail writ of entry upon disseizen."

[92] A few acts to dock entails originated with buyers who had purchased a property only to discover that the property was entailed. See, for example, Hening, ed., *Statutes at Large,* 5:114–16. Nicholas Johnson sold lands to Richard Chapman that were entailed by Nicholas's grandfather, "supposing he had an estate in fee simple in the same." Chapman soon realized his error: "the said Richard Chapman is apprehensive that the lands . . . are entailed . . . and that the said Nicholas Johnson hath only an estate tail therein." In response, "the said Nicholas Johnson being willing and desirous to make and secure a good and absolute title to the said Richard Chapman," Johnson agreed to the docking act and settled other lands and slaves in exchange.

original will stipulated that the heir in remainder should inherit in fee simple, the land would be freed of entail. If the will named no heir in remainder, the property would revert to the heir in reversion, or the next natural heir of the testator by the rules of primogeniture. If there were no heir in reversion (that is, no living legitimate blood relative of any degree who could be traced), the land would escheat to the king. Failure of heirs was statistically more likely in cases where the entail was limited to, for example, fee tail male, because the chances of a male child surviving to adulthood and reproducing a male child were lower than having any child who reproduced successfully. Failure of heirs became less likely as generations passed. The longer entailed land belonged to an individual and his or her descendants, the more alternatives there were in case a particular heir had no children. Even if the entail were limited to fee tail male, uncles or great-uncles could inherit as well as sons (see Figure I). High mortality rates in seventeenth-century Virginia undoubtedly made both reversions to heirs in remainder and escheats more likely than during the eighteenth century. Most testators who created an initial entail specified that the remainder-man would also inherit in tail, as in the case of Thomas Meekins, discussed above, and King Carter, who designated at least three heirs in remainder in tail for each parcel of land.[93] Given these factors, the number of entails canceled for failure of heirs or escheated would have been small.[94]

Keim, Bailyn, and the Browns offer other examples to argue that primogeniture was not the norm and that entail did not control much land. The Browns cite two cases of daughters jointly inheriting entailed estates as evidence that entail did not enforce primogeniture. As Coke's *Institutes of the Lawes of England* and other English legal texts of the period explained, however, if the owner had no son, the land was divided among the daughters as "coparceners."[95] The usage of coparceners in the cases cited by the Browns shows that courts and individuals were employing strictly the legal language of primogeniture, indicating close familiarity with English legal procedures.[96] The Browns are accurate in noting that when the owner of an entailed estate had daughters and no sons, the estate would be partitioned unless the land was in tail male. If sufficiently small to begin with, an entailed parcel thus partitioned might be eligible to be broken by *ad quod damnum.* Because such daughters were likely to marry someone of their own station (who perhaps also had an entailed estate), inheriting could also lead to the agglomeration

[93] The bulk of Carter's lands went to "my said son John and to the heirs male issue of his Body, and for want of such unto my son Robert and to the heirs male issue of his Body, and for want of such unto my son Charles and to the heirs male of his Body, and for want of such unto my own right heirs forever"; "Carter Papers," 410.

[94] Escheats fill the records of 17th-century Virginia, although they rarely concerned entail. Escheats occurred—most commonly—if a claimant did not properly "seat" the land within a set period or if an owner was convicted of a felony.

[95] Coke, *Institutes of the Lawes of England,* esp. secs. 259–61 on coparceners, a category in Coke's discussion of fee tail.

[96] "Sometimes we get the erroneous impression that entailed land descended intact and that it all went to the eldest son, but we must remember that women also inherited entailed estates and that these estates were frequently divided just as fee simple property was." "Primogeniture was not a necessary ingredient of entail"; Brown and Brown, *Virginia, 1705–1786,* 85–86, 83.

of estates. As evidence that not all land was entailed and that entails could be evaded, Keim and the Browns also give examples of land advertised for sale in tidewater Virginia. Their examples, however, include statements that the owner is seeking passage of an act to dock the entail, so these ads provide no more evidence than the acts themselves.[97]

Bailyn sees the ability to rent entailed property—a capacity confirmed by law in 1765—as evidence that entail had been abandoned: "the legal rigors of entailment were permanently relaxed by a law permitting the leasing of entailed land for up to three lives," "life" meaning the period during which each heir owned the land or twenty-one years, whichever was shorter.[98] It provided increased flexibility in the use of entailed acreage, yet because the rent belonged to the tenant in tail, such leases did not undermine, but rather ratified, the long-term hold of a family over the land. The law specifically prohibited the use of a lease to create an effective mortgage: leases were void (and lessees heavily fined) if any person other than the tenant in tail had a claim on the income, and leases had to be for a fair amount, as determined by the General Court.[99] Leases with the same term limits had long been allowed for entailed land under English law.

In summary, to all appearances, English practice, language, and procedure with regard to entails were followed closely in Virginia, except that entails were harder to evade. The courts enforced entails rigorously, and although smaller estates could be docked after 1734, the procedure for docking medium or large estates—a legislative act—was available only under limited conditions, costly, and required the compensatory entailing of other lands and slaves of "greater value" under "the same conditions." Although the legislature became more lenient by the late 1760s, restrictions on such acts were still largely maintained. Indeed, the very fact that Virginians sought such legislative acts indicates that they had few other means permanently to free themselves from the dead hands that created their estates. At the same time, elite Virginians continued to bind their descendants by creating entails of their own.

Problems and Questions

This article began with the analogy between entail and feudalism drawn by Jefferson, Tucker, and Blackstone. Did the middling and wealthy landowners who devised entails consciously intend to invoke and perpetuate a feudal order? Their wills are silent on the question of ideology, yet it is clear that testators realized the consequences of their actions in practical terms: Carter Burwell, for example, knew the implications of entailing land on his second son because he had struggled with them himself. King Carter, who entailed so much acreage, had once been a younger son. His father, John "of Corotoman," entailed about 18,000 acres (including Corotoman

[97] Ibid., 90. "William Peachy advertised to sell his 600 acre home plantation in Richmond County. The land was entailed, he said, but his eldest son was of age and would join him in a petition to the Assembly to dock the entail." Note that the next heir's agreement was important to the passage of the act.

[98] Bailyn, "Politics and Social Structure," 111 n. 47.

[99] Hening, ed., *Statutes at Large,* 8:182–84 (1765).

itself) on his elder son, John Jr., and left Robert a mere 1,000 acres. Only because John Jr. died in 1691 without a male heir did the man who became known as "King" Carter gain significant property and political office. In that same year, he was first elected to the burgesses, filling his brother's place.[100] An entail assured that the descendants by primogeniture of the entailer would permanently hold the same estate as the first beneficiary, thus perpetuating the status of the family.[101] The preface to the 1727 act that supplemented the 1705 act strengthening entail reads: "Whereas the Act made [in 1705] hath been found by Experience very beneficial for the Preservation and Improvement of the Estates in this Colony." In creating an entail, a colonist followed the tradition of the English aristocracy in order to establish an ancestral estate in Virginia.[102] The process created hierarchies. In combination with the initial headright system and continuing patronage practices by kings and governors, entail and primogeniture formed and sustained divisions between rich and poor.

Why accumulate such restrictions? Bailyn denied that entails were necessary in Virginia: "the economic necessity that had prompted the widespread adoption of [entails] in England was absent in the colonies. Land was cheap and easily available. . . . There was no need to deprive the younger sons or even daughters of landed inheritances."[103] Was land really so "cheap and easily available"? Colonists who wished to own "new" land first had to win it from the Native Americans, and they did so only gradually and painfully, as many recent studies have shown.[104] Individuals could not purchase land directly from Indians. If a freed servant could not gain land of his own—clearly one cause of Bacon's Rebellion in 1676 and a problem that did not go away—the choice left for those without a trade was to lease property. In doing so, both tenants and property owners would be following the English model. For the owners of large estates, leasing allowed them to generate an income from the plantation. Obviously, estates of several thousand acres could not be farmed solely by the individual or family that owned them. Leases formed the basis of aristocratic income in England.[105] Economic historians have shown that tenant farming was common in Virginia during the eighteenth century, a puzzling phenomenon if land was truly inexpensive and available.[106] Patents were closely regulated and far from equitably distrib-

[100] Morton, *Robert Carter of Nomini Hall,* 7–8.

[101] Lewis B. Namier, *England in the Age of the American Revolution,* 2d ed. (London, 1961), 20.

[102] Ibid., 22–23; Hening, ed., *Statutes at Large,* 4:222.

[103] Bailyn, "Politics and Social Structure," 108.

[104] Among others, see James H. Merrell, *The Indians' New World: Catawbas and Their Neighbors from European Contact through the Era of Removal* (Chapel Hill, 1989).

[105] Namier, *England in the Age of the American Revolution,* 15. Keim discussed leases only briefly in "Influence of Primogeniture and Entail in the Development of Virginia," 105. See also Brown and Brown, *Virginia, 1705–1786,* 85. The same policy (3 lives or 21 years) was followed in England. See Coke, *Institutes of the Lawes of England,* 1: sec. 58. This lease law, when originally moved in 1762, failed to pass. The allowance of leases (esp. extended leases) is very important because yearly income from leases was the usual measure of the wealth of the landed aristocracy in England. In plays of the period, for example, it was often said that a person was worth so many pounds a year. See also G. E. Mingay, *English Landed Society in the Eighteenth Century* (London, 1963), 51.

[106] Summarizing various scholars' work on landholding practices in early Virginia and

uted. Squatters had no rights. Members of the council, particularly in the early eighteenth century, grabbed huge tracts for themselves. Councilors were chosen at least in part for their possession of great estates. In short, neither aristocracy nor tenancy melted away under the influence of the frontier.

Slavery provided another solution to the problem of cultivating large estates. Entail contributed to the demand for slaves, and appreciation of its feudal origins and full impact lends support to Winthrop D. Jordan's suggestion that slave law originated in the feudal law of villenage that remained encoded in the English common law in the seventeenth century.[107] In 1803, Tucker claimed that before the Revolution all slaves had the status of villeins, implying that colonial Virginians invoked feudal personal law in articulating a common law precedent for their rules about slavery.[108] This perception of slavery as part of a feudal order persisted into the early nineteenth century. In 1848, Henry Augustine Washington blamed entail, which he regarded as feudal land law, for the creation of slavery, which he considered a form of feudal personal law. Despite the abolition of entail, slavery remained as "a fragment of the feudal system floating about here on the bosom of the nineteenth century."[109]

The fact that testators could entail slaves directly with a parcel of land recreated a kind of feudal relation between villein and lord.[110] The 1705 laws not only strengthened the grip of entails on land and allowed the entailing of slaves but limited the right to patent more than 500 acres of land to those who owned more than five slaves or servants. For each additional slave or servant, a master could patent 200 additional acres—up to a total of

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Maryland, John J. McCusker and Russell R. Menard write: "Yeoman planters remained important throughout the colonial period, but in the eighteenth century tenant farms and large plantations worked by slaves dominated production," in *The Economy of British America, 1607–1789* (Chapel Hill, 1985), 124.

[107] Jordan, *White over Black: American Attitudes toward the Negro, 1550–1812* (Chapel Hill, 1969), 50. "Thus while villenage was actually extinct [in England], it lay unmistakably fossilized in the common law. . . . Villenage was not the forerunner of slavery, but its survival in the law books meant that a possibility which might have been foreclosed was not." Labor historians writing since Jordan have argued that important elements of feudal personal law regulated all labor relations in 17th-century England and the colonies, including indentured servants; Karen Orrin, *Belated Feudalism: Labor, the Law, and Liberal Development in the United States* (Cambridge, 1991); Christopher L. Tomlins, *Law, Labor, and Ideology in the Early American Republic* (New York, 1993); Robert J. Steinfeld, *The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350–1870* (Chapel Hill, 1991).

[108] Tucker, *Blackstone's Commentaries,* 2:17 n. 1.

[109] Washington went on to lay the origins of this aristocratic system, with its reliance on slave and earlier indentured servant labor, at the feet of two policies, the headright system of initial land distribution and primogeniture as fostered through entail, in "The Social System of Virginia," *Southern Literary Messenger,* 14 (Feb. 1848), 65–81, reprinted in Michael O'Brien, ed., *All Clever Men, Who Make Their Way: Critical Discourse in the Old South* (Fayetteville, Ark., 1992), 228–62, esp. 238 (quotation), 242–47.

[110] Slaves could be entailed in a way that tied them to a particular parcel of land (that was also entailed) only in Virginia, according to Keim, "Influence of Primogeniture and Entail in the Development of Virginia," 41. Most entailed slaves were attached to large estates; ibid., 86. See also Salmon, *Women and the Law of Property in Early America* (Chapel Hill, 1986), 153–55.

4,000.[111] Thus, in more than one way, these acts connected the ownership of large estates with slavery. The 1727 act went even further by allowing slaves to be entailed to the land of an individual rather than to that person directly. King Carter, who wrote his will in 1726, revised it in 1728 in response to this law.

> Whereas I have entailed upon my three eldest Sons, John, Robert & Charles, all my Slaves belonging to my several plantations in Virginia . . . which under the former Law I had power to do. . . . I do hereby utterly revoak all those gifts to my said three Sons, John, Robert, & Charles, hereby declaring it is my full intent & meaning that no property shall be vested in any of my three Sons to any of my Said Slaves. And I do hereby declare that it is my intent & meaning that my Said three Sons shall have only the use and profits of my said Slaves & their increase for during and continuing their respective natural lives, the said Slaves and their increase . . . to be annexed to my respective Lands & plantations.[112]

In other words, Carter chose not to entail the slaves on his sons but to attach the slaves and their descendants to the plantations he entailed on those sons. The act that enabled this shift thus allowed more completely a kind of feudalism: villeins (slaves) attached to a manor (estate), the manor owned by a lord (landlord, planter, squire, colonel, burgess, councilor) to whom the serfs (slaves) owed various obligations, all to descend in perpetuity, forever and ever, intact, via entail.

Comparing the attachment of slaves to entailed land to eighteenth-century understandings of feudal order suggests that the Virginia legislators consciously sought to introduce into Virginia a type of feudalism. Leaving aside the question of whether pure feudalism ever existed in England, it was discovered as part of England's history by political theorists and historians of the seventeenth century, who wove it into the debate over absolutism and republicanism. Various elements of the common law began to be defined as "feudal" in origin and therefore Norman, sharing as they did many similarities to continental law. Feudalism was also considered part of an ideology justifying monarchical authority: "in virtue of his position as feudal suzerain the king stood in a seigneurial relation to the whole of society and was entitled to homage and loyalty from the proprietor of every piece of land." The serf owed similar obligations to the lord, according to feudal theory as formed during the seventeenth century.[113] Even had the Virginians been unaware of the political and legal debates in England, it is clear that elements of what came during the eighteenth century to be called "feudal" law—in regard to both laborers and land—were adopted by eighteenth-century Virginians. Did not Virginia, therefore, have a feudal past?[114] Was it only tobacco culture

[111] Hening, ed., *Statutes at Large,* 3:304–06 (1705).

[112] Carter, "Carter Papers," 6:9. Keim implies that slaves could not be entailed until 1727, in "Primogeniture and Entail in Virginia," 546. In "Influence of Primogeniture and Entail in the Development of Virginia," 22, he quotes the 1705 act that made slaves real property in Virginia.

[113] On 17th-century understandings of feudalism see especially J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century: A Reissue with Retrospect* (Cambridge, 1987) esp. 64–66, 68, 74, 82, 119–23, 243, quotation on 122–23. On "pure" feudalism in the Middle Ages see Susan Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted* (Oxford, 1994), esp. chaps. 1, 8.

[114] Hartz argued that America had a fundamentally different political identity and social

that created the plantation system and not, at least in part, a combination of the extensive headrights given in Virginia in the seventeenth century with strict application of the legal rules of entail during the seventeenth and eighteenth centuries?[115] It could even perhaps be argued that feudalism redeveloped in a new form in Virginia.

The annexing of slaves to land probably ameliorated slavery: if slaves could not be separated from an estate, they need not fear what many considered the worst part of slavery—sale. In imposing constraints on their owners, this part of entail may have been most vulnerable to pressures of the market, placing restraints on borrowing, raising capital, and buying goods on credit. As a result, this was the first part of the law of entail to be attacked. In 1748, a bill to declare all slaves personal estate and thus not subject to entail passed the burgesses and council only to be vetoed by the king. During the debate in council, Thomas Lee formally "desired leave to enter his protest." He argued that without slaves, entailed estates would be more vulnerable. "Because our lands are of little value without negroes, the power of annexing and intailing them is the best Method that can be devised to keep estates in families." The layers of assumptions embodied in Lee's argument are articulated in his elaboration: "Because the law that is now pass'd will make the Land a Burden to the Heir, and instead of being able as the Head of the Family to pretect and help his younger Brethren, will be obliged to sell his patrimony to pay the younger Children the Value of the Negros, or to buy others to work the Remainder of his lands."[116] In other words, if slaves were personal property, they would be divided among the children if a will did not dictate otherwise. The heir then would have to pay his younger siblings for their value instead of being able to protect and help them while retaining both land and slaves as rightful head of the family. For Lee, an explicit part of the justification of entail—of both slaves and land—was the assumption that the elder son was head over his siblings. Slaves remained subject to entail until 1796, twenty years after the legislature voided the entailing of lands.[117]

The members of the burgesses and council in 1705, familiar with entail, chose to strengthen it by requiring a legislative act in order to break one and

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experience than Europe because America had no feudal past, in *Liberal Tradition in America.* Historians since Hartz have challenged the heavy role that he gave to Locke in defining American political philosophy but have left his statements about the legal situation of America, as without a feudal past, largely intact. A few exceptions exist. About 20 years ago, Murrin and Berthoff suggested that the 18th century—prior to the Revolution—was a period of "feudal revival." Old claims—to quitrents and to charters—were revived. By the eve of the Revolution, the "largest proprietors . . . were receiving colonial revenues [in quitrents] comparable to the incomes of the greatest English noblemen and larger than those of the richest London merchants." John Carteret, Earl Granville, claimed title to lands occupied by 2/3 of the population of North Carolina in 1745. Lord Baltimore's income from Maryland surpassed £30,000 per year, an amount equal to roughly 18% of the colony's exports. Berthoff and Murrin, "Feudalism, Communalism, and the Yeoman Freeholder," 266–68.

[115] Books that give tobacco a central role in the creation of Virginia social order and ideology include Kulikoff, *Tobacco and Slaves;* T. H. Breen, *Tobacco Culture: The Mentality of the Great Tidewater Planters on the Eve of the Revolution* (Princeton, 1985); and Arthur Pierce Middleton, *Tobacco Coast: A Maritime History of Chesapeake Bay in the Colonial Era* (Newport News, Va., 1953).

[116] McIlwaine, ed., *Legislative Journals of the Council of Colonial Virginia* (Richmond, 1918–1919), 2:1046.

[117] Tucker, *Blackstone's Commentaries,* 2:112 n. 8.

by allowing the entailing of slaves. They sought to do what the reform actually accomplished—to increase their ability to create ancestral estates—a result on which many of the same legislators reflected happily in the preface to the 1727 bill that further strengthened entail. As a member of the council, King Carter supported the 1705 and 1727 laws. He was also a member of the General Court that heard the cases that upheld entails. In addition to the legal works he owned, his library contained political treatises by Sydney and Filmer, opposing political theorists for whom the question of primogeniture was central.[118] Carter surely realized that he was supporting a high Tory perspective on monarchy and aristocracy and helping to create a social order that upheld the values enshrined in the royalist position of the 1640s and 1680s.

The extent to which Virginia slavery was connected to an aristocratic—rather than a democratic—ideology also raises questions about the central paradox in Edmund S. Morgan's *American Slavery, American Freedom.* "This is not to say that a belief in republican equality had to rest on slavery, but only that in Virginia . . . it did." The system of land allocation and land preservation embodied in headrights and entail, however, encouraged the use of white tenants as well as black slaves. Inasmuch as the Virginia elite used the existence of slavery to allow more freedom and equality to white men after the Revolution, was not this just a comparative equality, one tightly hobbled by the existing social system? Estates only gradually broke up after the abolition of entail. Those who argued in favor of slavery, such as George Fitzhugh, defended aristocracy and entail. Those who argued against slavery—including Jefferson and Tucker—argued against aristocracy and entail as well.[119]

The question becomes why did the Revolutionary elite abolish entail? This reform was not a movement from the ground up: no one wrote petitions. The lack of public protest may be attributed to the fact that entail affected those of middling and elite status most directly. Why did those whose families might lose status as a result support abolition? The answer, it appears, is that the liberation of land from entail freed landowners from the dead hand of their ancestors. As seen in the Carters' case, the restrictions imposed by entails were felt keenly by later generations. Even so, abolition passed only after a struggle.[120] The opposition, led by Edmund Pendleton, proposed amending the abolition bill to require the consent of both the current tenant in tail and the next heir to dock an entail—a provision that would have left the institution intact and still powerful, given the natural self-interest of the next heir. Pendleton's amendment almost passed.[121] In a letter to George Washington, Landon Carter expressed his horror at the bill, and he sought to rally opposition in the senate. He regarded Jefferson's introduction of the "cursed bill" as evidence that he must be a "midday drunkard."[122]

[118] Wright, *First Gentlemen of Virginia,* 268.

[119] Morgan, *American Slavery, American Freedom,* esp. chap. 18, quotation on 381. Although historians have debated the extent of Jefferson's hypocrisy regarding slavery, there is no doubt that he argued against it more forcefully than most of his Virginia contemporaries. See several essays in Peter S. Onuf, ed., *Jeffersonian Legacies* (Charlottesville, 1993).

[120] Tucker, *Life of Thomas Jefferson,* 1:93.

[121] Malone, *Jefferson the Virginian,* 254, citing Jefferson, "Autobiography," ed. Lipscomb, 1:49–50, 2:103–05.

[122] Landon Carter, quoted in Malone, *Jefferson the Virginian,* 255.

Many elite Virginians of the antebellum era seem to have resented abolition—and Jefferson—as its effects became felt. After corresponding with many Virginians, Henry S. Randall wrote in 1858: "The day that Mr. Jefferson brought his bill to abolish entails into the House of Delegates, he banded for the first time against himself a numerous and very influential body of enemies—a body of enemies who never forgave him, or lost a good opportunity to wreak their bitter hate on him."[123] This passage suggests the ideological divisions that existed in the state at the time of the Revolution. It also suggests a persistent antipathy toward the Revolutionary settlement among a significant portion of the Virginia elite.

The evidence about entail supports the argument that the Revolution—and the social changes that followed in its ideological wake—challenged the South more deeply because it had followed more closely the model of England and was more deeply steeped in monarchical and patriarchal institutions.[124] Did Puritan opposition to entail and primogeniture hinder the development of slavery in New England by restricting the growth of large estates?[125] Those who gave ground to Jefferson on the question of entail retrenched and united against his proposals to weaken slavery and to initiate public education on the primary level. While scholars have recently, and justifiably, criticized Jefferson for not going far enough on the question of slavery, the extent of his radicalism only becomes clear when set in this larger context that includes land reform. The systematic partition of Virginia estates after the Revolution slowly affected the whole structure of Virginia society, creating a more egalitarian system and decreasing the need for slaves.

The current consensus on legal reform during the Revolution has been that most changes in the legal system evolved during the eighteenth century and should not be attributed to the Revolution.[126] Was opposition to entail linked only to political ideologies accompanying the Revolution? If so, why did the shift begin in 1760? Many more legislative acts allowed dockings of entail after 1760: over four per year compared to fewer than one per year for the preceding fifty-five years. The acts also seem to have been more lenient. The two years following Lord Dunmore's suspension of the House of Burgesses in 1774 witnessed a flood of such acts: no fewer than twenty-seven passed the lower house (although with a few repetitions). Also, as Keim's data make clear, after 1760 the use of entail in wills fell sharply. Did the

[123] Randall, *The Life of Thomas Jefferson,* 3 vols. (New York, 1858), 1:201–02. See also Charles Ramsdell Lingley, *The Transition in Virginia from Colony to Commonwealth* (New York, 1910), 181.

[124] Most Puritans favored partible inheritance over primogeniture. John Winthrop held primogeniture "against all equity"; the Massachusetts General Court adopted a policy of partible inheritance in cases of intestacy. Quoted in Thirsk, "European Debate on Customs of Inheritance," 189.

[125] Massachusetts had a more negative position on entail and from the beginning partitioned intestates instead of following primogeniture, the norm in most of England as well as those colonies outside New England. Before 1692, Massachusetts apparently made entail difficult. After 1692, the General Court usually upheld entails that enforced primogeniture, but a great deal of controversy surrounded the subject. Insofar as entails did exist, they seem to have been fairly rare. Morris, "Primogeniture and Entailed Estates in America"; Haskins, "Beginnings of Partible Inheritance." Many books since have examined inheritance in Massachusetts. I have found none that consider entail. See esp. Greven, *Four Generations,* and Salmon, *Women and the Law of Property.*

[126] Mann, "Legal Reform and the Revolution."

Revolution itself change attitudes toward entail? Was the Revolution part of a broader shift in attitudes toward aristocracy? Or did it just hasten a shift that was already beginning to happen, owing, perhaps, to the pressures of capitalism? While some legal changes evolved and entails might fall partly into that pattern, the major changes happened immediately with the Revolution. If we see the Revolution as encompassing the controversies leading up to the fighting, the connection of the reform of entail to the Revolution is made even tighter. This interpretation supports Gordon S. Wood's contention that the Revolution created a new world and extends his argument specifically to legal changes.[127] In so doing, it characterizes more clearly some elements of the transition from monarchical to republican society.

For example, entails seem to have imposed sharp restraints on the free flow of capital as well as land, an observation that confirms earlier arguments that the republican reforms of the Revolution aided the growth of market exchange.[128] Jefferson wrote in his preface to the abolition bill that entail created problems for both lenders and borrowers. "The perpetuation of property in certain families, by means of gifts made to them in fee taille, is contrary to good policy, tends to deceive fair traders, who give a credit on the visible possession of such estates." In other words, borrowers with entailed property could not forfeit that property to their creditors even if they set that property expressly as collateral. One would assume that persons owning entailed property, especially with the provisions on leases that prevented lenders from having any claim on the income, had difficulty borrowing money or gaining liquidity based on the value of their estates. Keim traced an increased fluidity in land exchanges—especially in the tidewater—after the Revolution.[129] To what extent was this fluidity due to the release of entailed property? Did such a situation occur with capital as well?

The Revolutionary reforms may also have adversely affected the status and wealth of elite women. Entails were often granted to women and not only when families lacked sons, as Keim notes: "A surprisingly large part of the bequests in fee tail were made to daughters instead of to sons." Why did entails originate so often with daughters? If a father left his daughter property in fee simple, it became the property of her husband once she married. If a father instead entailed his lands on his daughter, her husband could not gain control of them—the equivalent of a prenuptial agreement—and they would descend to her eldest son after her death. This explanation of why so many fathers entailed property on their daughters is satisfactory, but the impact of entailment on women's ability to control property, both as wives and as widows, needs further study.[130] Furthermore, because the rules of pri-

[127] Wood, *Radicalism of the American Revolution,* 6, 183, 189–90; Hening, ed., *Statutes at Large,* 9:226–27.

[128] Appleby, *Capitalism and a New Social Order.*

[129] He attributed this to a shift from tobacco to wheat as a major cash crop and to the economic impact of the Revolution. Historians before him linked the greater availability of land after the Revolution to the abolition of entail. Keim dismissed entail as a cause. Because Keim's estimate was inaccurate, the greater rate of land transfer may well have resulted, at least in part, from abolishing entail. Keim, "Influence of Primogeniture and Entail in the Development of Virginia," 190–91.

[130] Ibid., 64–65; Keim, "Primogeniture and Entail in Virginia," 556 n. 25. Salmon does not address this issue in *Women and the Law of Property.*

mogeniture did not preclude women's inheriting unless the entail was specified as "tail male," many brotherless women in Virginia possessed entailed property. If all entails were general, then daughters would inherit in approximately 16–20 percent of cases (assuming Virginians were similar to English). Since a significant number of entails were in male tail, the actual percentages of daughters inheriting would have been lower.[131] The issue of an heiress's ability to pass on the family name also needs to be explored in more detail. Obviously, the fact that the daughter still carried the blood of the family was considered important. Also, heiresses during the medieval period passed on their family name to their children, and this convention was only slowly challenged during the seventeenth century in England. In nineteenth-century Scotland, "the husbands of heirs female, are obliged when they happen to be of a different surname from the entailer, to assume and use his surname."[132] In England today, a similar situation among the wealthy often prompts a hyphenated name. While it is evident that surnaming practices were moving toward the simple acceptance of the male name during the seventeenth and eighteenth centuries, the pattern and process of this change pose questions that are related to this shift in patterns of inheritance. Perhaps some elite women had more power and wealth under the patriarchal system than the early republican.

Entailment also relates intimately to questions of fatherly authority and patriarchal political theory. It was a commonplace that, where estates were entailed and a father therefore had no control over who would inherit his property, he had less control over his children. Jefferson's abolition bill argued that this limitation on a father's power "sometimes does injury to the morals of youth, by rendering them independent of and disobedient to their parents."[133] An unsuccessful bill to abolish entails in England in 1598 asserted that they "engender discorde in all families where they light and drawe the whole kindred into faction, but doe also make Children disobedient and parents unnatural."[134] Francis Bacon's sixteenth-century legal treatise

[131] The 16–20% figure is based on human population statistics and actual figures from Britain during the same period. See Spring, *Law, Land, and Family,* 16–20. Indeed, the strict settlement, if it operated in Virginia, may have further restricted daughters' inheriting. See note 20 above.

[132] Barbara A. Hanawalt, *The Ties That Bound: Peasant Families in Medieval England* (New York, 1986), 175. "Surnames became common in England by the end of the thirteenth century, but it was not until the middle of the fourteenth century that a child would be expected to adopt the surname of its parent. The child might be identified by either the father's or the mother's surname, so that matronymics were not uncommon. The use of the mother's name was not reserved for illegitimate children, but, on the contrary, was common when the mother was chief inheritor of her family's land." Thus Littleton, on whose works Coke based the initial volume of his *Institutes of the Lawes of England,* inherited his last name through his mother, "she beeing faire and of a noble spirit, and having large possessions and inheritance from her Ancestors *de Littleton,* and from her Mother the daughter & heire of *Richard de Quatermains* . . . resolved to continue the honor of her name (as did the daughter and heire of *Charleton* with one of the sonnes of *Knightley,* and divers others) And therefore prudently, whilest it was in her owne power, provided by *Westcotes* assent before marriage, that her issue inheritable should be called by the name of *de Littleton*"; ibid., A3. See also Spring, *Law, Land, and Family,* 23–24, and David Wemyss, *Letter . . . upon the present State of the Scotch Law of Entail* (Edinburgh, 1822), 4.

[133] Hening, ed., *Statutes at Large,* 9:226–27.

[134] Quoted in J. P. Cooper, "Patterns of Inheritance and Settlement by Great Landowners from the Fifteenth to the Eighteenth Centuries," in Goody et al., eds., *Family and Inheritance,* 206.

made much the same allegation: "the land being so sure tied upon the heir as his father could not put it from him, it made the son to be disobedient, negligent, and wasteful, often marrying without the father's consent, and to grow insolent in vice knowing there could be no check of disherison over him."[135] As discussions of political theory were so linked to questions of paternal authority, acknowledgment of norms under entail—the patriarchal system of inheritance—should yield new insight into the character of patriarchal theories of government. It might also encourage further comparisons of child-rearing in northern and southern colonies during the eighteenth century. Philip J. Greven, Jr., found that fathers in the New England town of Andover used control over inheritance to exert their authority. How might the legal rules of inheritance shape such personal issues as parental discipline?[136] For example, when historians highlight Landon Carter's disobedient offspring as a case of Revolutionary rebellion of sons against fathers, they are missing some key evidence. The diary entries predate the Revolution. Landon's two most disobedient progeny were his eldest son, Robert Wormeley, and Robert's eldest son, Landon. Yet this son and this grandson were to inherit in turn his entire estate tail—a guaranteed legacy.[137] The problem of paternal authority thus belongs not only to republicanism, which opposed entail, but to patriarchalism, to which entail was ideologically central.

Conclusion

This study, by reinterpreting Ray Keim's data in a manner that accounts for accumulation, suggests that entail controlled three-fourths of the land in tidewater Virginia by the time of the Revolution. Further, although the most extensive calculations relate to tidewater counties and entails had longer to accumulate there, every indicator points to the prevalence of entail elsewhere as well. Indeed, considering that many piedmont plots were entailed by powerful men such as King Carter, entail may well have controlled a majority of the land even in the western counties of Virginia by the time of the Revolution. With the restraints it imposed—and the example it prescribed—the institution of entail must have strongly affected the entire social structure and economy of Virginia. The bitterness of the controversy over its abolition underscores the power of this institution.

This re-analysis of the prevalence of these feudal remnants does not provide definitive resolution of their influence. This article is at its base a call for more research into the roles entail and primogeniture played in the development of the South; every state other than Virginia remains virtually unexamined on this question. Even for Virginia, rich and illuminating research remains to be done. But given the destruction of the General Court

[135] Bacon, quoted in Simpson, *Introduction to the History of the Land Law,* 196 n. 1.

[136] Greven, *Four Generations.* See also Jan Lewis, *The Pursuit of Happiness: Family and Values in Jefferson's Virginia* (New York, 1983); Brewer, "Constructing Consent," chap. 2; Schochet, *Patriarchalism in Political Thought;* and Jay Fliegelman, *Prodigals and Pilgrims: The American Revolution against Patriarchal Authority, 1750–1800* (Cambridge, 1982).

[137] Wood, *Radicalism of the Revolution,* 152–53; Fliegelman, *Prodigals and Pilgrims.* The estate was entailed by Robert "King" Carter; see his will, esp. the addenda, in *VMHB,* 6 (1898), 1–22.

records, wherein were recorded the major wills, controversies over particular entails, and petitions for *ad quod damnum,* a definitive resolution for Virginia is not possible.[138] At this point, however, the weight of evidence, dare I say, entails the conclusion that the dead hands of ancestors did control a majority of the land in Virginia by 1776. Thomas Jefferson and other legislators throughout the southern and middle states, who thought they were taking a significant step when they eliminated entail and primogeniture, were indeed radical. This transformation in inheritance law was much more than the ritual abolition of an obsolete institution that most recent scholars have believed it to be. Some of the great families and houses began to split apart along with their wealth. John Randolph of Roanoke complained: "The old families of Virginia will form connections with low people, and sink into the mass of overseers' sons and daughters; and this is the legitimate, nay, inevitable conclusion to which Mr. Jefferson and his levelling system has brought us."[139] Since Virginia has been a test case for inheritance patterns in the South, this article should encourage a reconsideration of southern aristocracy and the ways in which legal rules fostered its development.

[138] The counties that Keim studied may be unrepresentative; his data, like his conclusions, may be flawed; owners may have dodged entail in ways—corruption in the granting of *ad quod damnum,* for example—that court decisions do not indicate; entails may be overcounted in that they may be mentioned in wills when already operating (unnecessary but possible); Keim's impression that most entails were made by holders of large and medium estates may be inaccurate. Several different word combinations relating to "body" could create an entail (noticeable in the few surviving General Court records); therefore Keim may have miscounted. Keim did not mention that a statute of limitations could apply in some cases.

[139] Hugh A. Garland, *The Life of John Randolph of Roanoke,* 2 vols. (New York, 1860), 1:18–19. As Garland commented about Randolph: "His attachment to the soil, the old English law of inheritance, and a landed aristocracy (we have no other word to express our meaning), constituted the most remarkable trait in his character. The Virginia law of descents . . . never found favor in his eyes."