1977

Republicanism and the Law of Inheritance in the American Revolutionary Era

Stanley N. Katz
University of Chicago Law School

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Estates and Trusts Commons, and the Legal History Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mlr/vol76/iss1/2

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
REPUBLICANISM AND THE LAW OF INHERITANCE
IN THE AMERICAN REVOLUTIONARY ERA†

Stanley N. Katz*

Perspicuity and precision are the only things endeavoured at: the subject is incapable of ornament.


However great may be the advantage of enjoying a rich patrimony, handed down to us from father to son, in general, industry and knowing how to get on in the world are worth more to young men than inherited property.

Moral, Puss in Boots

This Article deals with the history of the law of inheritance during the era of the American Revolution, but its focus is actually more general, for it ultimately seeks to determine what sort of revolution we experienced. For the historian the problem is quite familiar, but a few observations seem pertinent. It is at least possible to argue that our colonial forefathers were not waging a revolution at all. Rather, one might say they were fighting what we should now call a colonial war of independence in which the overriding issue was “home rule.” On this hypothesis, the main slogan of the 1760's, “No taxation without representation,” captures the basic issue, and the Battle of Yorktown (and the Treaty of Paris) define an end point for “the Rebellion.” To most historians this seems an excessively narrow interpretation, but it ill-behooves those who have witnessed the violent progress of recent history to minimize the desire for national self-definition and self-government.

† This Article is based on the author's Thomas M. Cooley Lecture at The University of Michigan Law School, delivered on November 3, 1975.

I am grateful to Dean St. Antoine and his colleagues at The University of Michigan Law School for the opportunity to deliver one of the Thomas M. Cooley Lectures for 1975. In preparing and revising the lecture, I have been aided by my former research assistants, Professor Martha Fineman of the University of Wisconsin Law School and Professor Paul Finkelman of Washington University, St. Louis. I also wish to express gratitude to Gerhard Casper, Whitmore Gray, Thomas Green, and John Langbein for their helpful comments. For this Article, as for my other work, I am indebted to the critical colleagueship of Morton Horwitz and William Nelson.

* Professor of Legal History and Associate Dean, The University of Chicago Law School. A.B. 1955, M.A. 1959, Ph.D. 1961, Harvard University.—Ed.
It is possible, however, to construct a far more complex version of the "war for independence" theory, arguing that the need for independence grew not so much out of reaction to imperial distance and governmental excess as out of a radical transformation in America of ideas about politics. This view has the advantage of distinguishing our rebellion from those of the contemporary Third World, a distinction made necessary by the contrasting origins of the American colonists and the peoples of India, the Belgian Congo, or Algeria. Unlike these subjugated indigenous peoples, the Americans were natives to the culture of their imperial rulers, and the appeal of self-determination is probably too simplistic to explain why such people opted for the trauma of war and the uncertainties of independence.

There is a third hypothesis, suggested to historians by the Progressive politics of the early twentieth century, which posits that the struggle for home rule was accompanied by a contest over who should rule at home. It maintains that the internal revolution of American versus American caused the external revolution of Americans versus British. The theory has taken a good many different forms, but in general it insists that the Revolution represents the overturning of the quasi-aristocratic social and political order the imperial system had created and supported in America. The Revolution is thus seen as the product of an alliance consisting of the newly emergent merchant class, the mass of petty agrarians, and the urban workers, all of whom had been systematically excluded from access to power in colonial society. The corollary to this theory is that once the alliance produced a democratic revolution (expressed in the rhetoric of the Declaration), the monied classes staged a successful counterrevolution against their former allies in the late 1780's, resulting in the Constitution of 1787-1788.1

This is not the place to attempt an evaluation of these conflicting interpretations of the Revolution, but I trust they suggest both the wide range of possible views and, more important, the contemporary significance of which view we take. In rethinking the character of the Revolution, one of the most promising strategies involves an in-

quiry into the manner by which the institution of law affected the progress of the Revolution and was affected by it. The concept and institution of property are central to the inquiry, for, in any hypothesis of the causes of the Revolution, the character and control of property are central themes. Curiously, the subject of property has seldom been singled out for study by historians of the Revolution, although at the moment there seems to be a significant body of as yet unpublished writing on the problem. Rather than try to anticipate this important addition to the literature, this Article singles out for inspection one small aspect of the institution—the law of testate and intestate succession—in the hope that it will suggest the potential rewards of the larger inquiry.

Intuitively, the question of inheritance is central to the conception of property. Moreover, the law of inheritance represents a major intersection of public and private law. In the study of revolution, the law of inheritance may serve as a touchstone measuring the depth of revolutionary transformation in a society. When revolutionary ideals overreach deeply embedded sentiments on matters of importance to individuals, the ideology inevitably succumbs, as, in one famous example, the Bolsheviks discovered in their futile effort to abolish inheritance shortly after taking power.


Morton J. Horwitz and Harry N. Scheiber have also published essays dealing with aspects of the problem. See Horwitz, The Transformation in the Conception of Property in American Law, 1780-1860, 40 U. Chi. L. Rev. 248 (1973); Scheiber, The Road to Munn—Eminent Domain and the Concept of Public Purpose in the State Courts, 5 Perspectives Am. Hist. 329 (1971). See also W. Nelson, The Americanization of the Common Law (1975); F. McDonald, The Taking Issue: A Constitutional Perspective (Historical Background to 1791) (Unpublished Paper, October 1976). For the most comprehensive example of the significance of the study of inheritance in the fields of anthropology, history, and sociology, see FAMILY AND INHERITANCE: RURAL SOCIETY IN WESTERN EUROPE, 1200-1800 (J. Goody, J. Thirsk & E.P. Thompson eds. 1976), especially Cooper, Patterns of Inheritance and Settlement by Great Landowners from the Fifteenth to the Eighteenth Centuries, in id. at 192; Goody, Inheritance, Property and Women: Some Comparative Considerations, in id. at 10; Kiernan, Private Property in History, in id. at 361.

3. In 1918, the new Soviet government promulgated a law providing that all property would revert to the state upon the death of its owner. However, the lack of an adequate apparatus to enforce the law and subsequent "interpretations" that significantly limited its application quickly reduced the law to a mere "declaratory statement." See 1 V. Gsovski, SOVIET CIVIL LAW 624-25 (1948). Later efforts to restrict the descent of wealth by imposing a maximum allowable inheritable estate and by levying progressive estate taxes were equally ineffective. See id. at 627-28.
The American revolutionaries never proposed to pursue such a radical course; nevertheless, their rhetoric often seemed to call for thorough reform of the law of inheritance. After setting forth the historical and theoretical framework for discussion of inheritance in the late eighteenth century, this Article examines the course of legislative reform and the proposals advanced in America and Europe by leading spokesmen of republican ideals, the revolutionary ideology of the era. By comparing the ideological doctrine with the actual results obtained, this Article hopes to contribute to our understanding of the character of the American Revolution.

I. THE THEORETICAL FOUNDATION OF INHERITANCE

The context of the problem will perhaps be more apparent if we first examine the intellectual justifications for the concept of inheritance and then examine the Anglo-American legal tradition. Broadly speaking, two sorts of justification for the law of inheritance have been advanced: one is derived from the Romano-medieval natural rights tradition, and the other emerged out of modern—that is, eighteenth century—conceptions of popular sovereignty and legal positivism.

Hugo Grotius is perhaps the best known of the post-medieval continental advocates of the natural rights position. In his great work *De jure belli ac pacis libri tres*, written in 1648, Grotius argued that the right to transmit property by will follows from the natural order of things. "Though in fact a will," Grotius wrote, "as other acts, can take a definite form in accordance with municipal law, nevertheless in its essential character it is related to ownership, and, if we grant that, it belongs to the law of nature." In his view, the rules of intestate succession obtain legitimacy by virtue of their correspondence with the presumed intention of decedents in a state of nature:

Aside from all positive law, intestate succession, as it is called, after ownership has been established, has its origin in natural inference as to the wishes of the deceased. Since the force of ownership was such that it could be transferred to another at the will of the owner, so also in case of retention of ownership at the time of death . . . if
any one had given no indication of his wishes, nevertheless, since it was not credible that his intention was to yield his property after his death to the first who would take it over, the inference is that his property is to belong to the person to whom it is especially probable that the dead man had wished that it should belong.5

But of course it was Locke who, in his First Treatise, written in 1689, gave the classic English account of the natural rights argument. According to Locke, "[i]f anyone had began, and made himself a Property in any particular thing," here referring to his labor theory of value, "that thing, that possession, if he dispos'd not otherwise of it by his positive Grant, descended Naturally to his Children, and they had a right to succeed to it, and possess it."6 Locke recognized that the right of children to take such property was not self-evident, especially as natural resources ("the Creatures" in Locke's term) used by a person should return, upon his death, to the common stock of society. He rejected the easy answer that "common consent hath disposed of it, to the Children" for although "Common Practice" does indeed so provide, nevertheless the common consent of Mankind . . . hath never been asked, nor actually given: and if common tacit Consent hath establish'd it, it would make it but a positive and not a Natural Right of Children to Inherit the Goods of their Parents: But where the Practice is Universal, tis reasonable to think the Cause is Natural.7 Locke found the true reason in the interlocking natural principles of self-preservation and procreation. Reproduction fulfills the human instincts to propagate the species and to achieve an immortality. But since children are incapable of maintaining themselves, their parents have an obligation, and an instinctual urge, to provide for their sustenance and comfort. To Locke, the principle of procreation "gives Children a Title, to share in the Property of their Parents, and a Right to Inherit their Possession."8 Locke even went so far as to say that children actually shared in the title to their parents' property:

Men are not Proprietors of what they have meerly for themselves, their Children have a Title to part of it, and have their Kind of Right joyn'd with their Parents, in the Possession which comes to be wholly theirs, when death having put an end to their Parents use of it, hath taken them from their Possessions, and this we call Inheritance.9

5. Id. at 269.
7. Id. § 88, at 224.
8. Id. § 88, at 224-25.
9. Id. § 88, at 225.
This natural rights justification for inheritance, with its deeply ingrained respect for private property rights and the familial organization of society, has always had an intuitive appeal in Anglo-American culture, and the theory has occasionally emerged in modern case law. The most famous example is doubtless the 1906 statement of the Wisconsin Supreme Court in *Nunnemacher v. State*, in which the court held an inheritance tax unconstitutional because it abridged the natural rights tradition as expressed in the Declaration of Independence and the Wisconsin constitution. The court declared that “there are inherent rights existing in the people prior to the making of any of our constitutions,” that such rights are not specifically defined “but are included under the very general terms of ‘life, liberty and the pursuit of happiness,’” and that the pursuit of happiness “[u]nquestionably” comprehends “the acquisition of private property.” By the court’s definition, the right to acquire property includes a subsidiary right to dispose of it at death: “[T]here is planted in the breast of every person the desire to possess something useful or something pleasing which will serve to render life enjoyable, which shall be his very own, and which he may dispose of as he chooses, or leave to his children or his dependents at his decease.” Such a natural right to effect one’s testamentary desires, the Wisconsin court thought, “has been the controlling idea of the race, the supposed goal of earthly happiness,” and “the right of the descendents, or some of them, to succeed to the ownership has been recognized from the dawn of human history.” The court had a little more difficulty in demonstrating the naturalness of the right to dispose of property by will, but it asserted the right in any case and warned that, in the absence of such a right, legislatures could abolish the right of inheritance, thereby turning “every fee-simple title into a mere estate for life, and thus, in effect, confiscate the property of the people once every generation.”

*Nunnemacher* is, however, an isolated moment in the history of American jurisprudence, for the mainstream of our tradition is clearly marked by the positivist spirit of Blackstone and the theorists of legislative sovereignty. Blackstone explained the basis of inheritance in the first chapter of the second book of his *Commentaries*

---

10. 129 Wis. 190, 108 N.W. 627 (1906).
11. 129 Wis. at 200, 108 N.W. at 629.
12. 129 Wis. at 200, 108 N.W. at 629.
13. 129 Wis. at 201, 108 N.W. at 629.
14. 129 Wis. at 202, 108 N.W. at 630.
on the Law of England\textsuperscript{15} and flatly denied the natural rights theory:

We are apt to conceive at first view that it has nature on it's side; yet we often mistake for nature what we find established by long and inveterate custom. It is certainly a wise and effectual, but clearly a political, establishment; since the permanent right of property, vested in the ancestor himself, was no natural, but merely a civil, right.\textsuperscript{16}

Blackstone argued that natural-law theory suggests that “on the death of the possessor the estate should again become common,”\textsuperscript{17} that it should revert to its natural state and thereby be available to the first occupant and user. But any such process would, in his view, lead to enormous discord in a perpetual rush to lay claim to the properties of the recently deceased, and it was therefore “for the sake of civil peace” that society began to order inheritance by legislation.

Thus

the universal law of almost every nation (which is a kind of secondary law of nature) has either given the dying person a power of continuing his property, by disposing of his possessions by will; or, in case he neglects to dispose of it, or is not permitted to make any disposition at all, the municipal law of the country then steps in, and declares who shall be the successor, representative or heir of the deceased; that is, who alone shall have a right to enter upon this vacant possession, in order to avoid that confusion which it’s becoming again common would occasion.\textsuperscript{18}

That the positivist tradition ran deep in America is suggested by the manner in which James Otis, no stranger to the siren song of natural rights, developed the positivist argument in defending primogeniture in a Massachusetts litigation of 1763. Otis asserted that “[t]he Manner of Succession, if traced to its Original, is merely arbitrary. . . . States have an undoubted Right to settle it as they please.”\textsuperscript{19} Although he expressly rejected the natural rights theory, he maintained that once a state had settled upon a particular pattern of descent, it should not repudiate it.\textsuperscript{20} Judge Ellsworth of Con-

\textsuperscript{16} Id. at 11.
\textsuperscript{17} Id. at 13.
\textsuperscript{18} Id. at 10-11.
\textsuperscript{19} Baker v. Mattocks (Super. Ct. 1763), in REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761 AND 1772, at 69 (J. Quincy, Jr. ed. 1865) [hereinafter cited as MASSACHUSETTS BAY REPORTS].
\textsuperscript{20} Baker v. Mattocks (Super. Ct. 1763), in id. at 69. See also J. SCURLOCK, RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND 90-105 (1953); McMurray, Liberty of Testation and Some Modern Limitations Thereon, 14 ILL. L. REV. 96 (1919) (an excellent but much neglected essay).
necticut expressed a similar view in another early case. After pointing out that property originally flowed from possession, Judge Ellsworth observed that in the state of nature the property of a decedent belongs to whomever first establishes possession. This system obviously promotes disorder:

To prevent disputes, the laws of society point out a successor, and sometimes, from principles of policy still more refined, permit the last occupant to do it himself. The right to direct the succession of estates by will, is not a natural, but municipal right—a mere creature of law; as is holden by all modern civilians, and is well illustrated by Dr. Blackstone.21

American state and federal courts since the foundation of the new nation have been equally committed to the positivist argument. The United States Supreme Court's flat statement in United States v. Perkins22 stands for the prevailing doctrine: the right to dispose of property at death "has always been considered purely a creature of statute and within legislative control."23

Despite this judicial endorsement of the positivist theory and Bernard Bailyn's brilliant argument24 that Revolutionary American political thought emerged out of the radical Whig tradition in Anglo-America, we still must acknowledge that the natural rights tradition formed an exceedingly important part of the intellectual ferment of the American Revolution. After all, the Declaration of Independence justified colonial separation from Great Britain on the basis of "the Laws of Nature and of Nature's God," and, in a Lockeian vein, went on to hold that "all men . . . are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."25 Such natural rights thinking might have led in either of two directions with regard to the law of inheritance. On the one hand, it could simply have reinforced the right of inheritance and stood as an ultimate, constitutional guarantee against the legislative abolition of that right, in which case, as Nunnemacher suggests, it might also have provided an even greater freedom of testation than Americans currently enjoy. On the other,


22. 163 U.S. 625 (1895).

23. 163 U.S. at 627. For the most recent survey of the subject, see Chester, Inheritance and Wealth Taxation in a Just Society, 30 Rutgers L. Rev. 62 (1976).

24. B. Bailyn, supra note 1.

the natural rights philosophy of the Declaration might have stimulated a radical egalitarianism ("all men are created equal") condemning the traditional law of inheritance as paternalistic and non-egalitarian. Thus the natural rights component of the Revolution provided relevant but ambiguous guidelines for the study of inheritance. I hope to show that in the end it was the theory of the positivist Blackstone that was used to support the conclusions of Grotius and Locke, while the more radical egalitarian potential was only fleetingly articulated and never realized.

II. THE LAW OF INHERITANCE IN COLONIAL AMERICA

Before examining the idea of inheritance in Revolutionary America, I must sketch the general outlines of the legal institution as it existed in England and colonial America. The English law of inheritance as it came down to Blackstone in the middle of the eighteenth century was still largely a feudal product, and, as Maitland wrote, one of the most complicated and least satisfactory branches of English law:

It is in the province of inheritance that our medieval law made its worst mistakes. They were natural mistakes. There was much to be said for the simple plan of giving all the land to the eldest son. There was much to be said for allowing the courts of the church to assume a jurisdiction, even an exclusive jurisdiction, in testamentary causes. We can hardly blame our ancestors for their dread of intestacy without attacking their religious beliefs. But the consequences have been evil. We rue them at the present day, and shall rue them so long as there is talk of real and personal property. 26

Reduced to essentials, the law of inheritance in eighteenth-century England is described as follows. Upon an individual's death, the law provided for transmission of his property either to those he designated in his will (testamentary disposition) or, in the absence of a valid will, to his heirs according to a statutory scheme of distribution (intestate succession). Englishmen long enjoyed the power to devise personal property by will, but they did not obtain a similar power to dispose of real property until passage of the Statute of Wills in 1540. This Henrician legislation established substantial liberty of testation in England (and, significantly, also established substantial freedom for alienation of property before death), al-

26. 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 363 (2d ed. S. Milsom 1968). This passage touches upon several of the principal complexities and inequities of the English law: the distinction between real and personal property, the overlapping jurisdiction of common law and ecclesiastical courts over probate matters, and the doctrine of primogeniture.
though dower, curtesy, the Rule Against Perpetuities, and certain other doctrines impinged somewhat on the free will of the testator. As Maitland pointed out, however, carrying out the terms of a will was complicated by the division of jurisdiction between common-law courts, which administered the distribution of the decedent's real property, and ecclesiastical courts, which handled his personal property. One additional significant feature of the English law of inheritance was the doctrine of entail, which enabled a testator to restrict the power of the designated recipients of his real property to alienate the property during their own lifetimes. When a decedent died intestate, his lands descended to his eldest son (primogeniture) and his personal property descended in equal shares to his children, with a portion being reserved for his surviving spouse.

In sum, a man of property in eighteenth-century England could dispose more or less freely of his wherewithal by will, while at the same time the provision for intestate succession operated clearly in favor of his immediate family. The law controlling both testamentary and intestate succession was, to modern eyes, a frightfully complicated melange of half-modernized medievalisms. The institution of inheritance was even more complex because, in addition to the formal mechanisms of inheritance, there existed (especially among the wealthy classes) a highly developed system of contractual family settlements, trust creations, and similar nontestamentary arrangements. The result, incidentally, was a system of inheritance that could not operate without a large and sophisticated legal class.

The American colonists followed the general spirit of the English law of inheritance, which was transported to America with many of its complications and confusions, although statutory and judicial innovation occurred in every colony. The absence of ecclesiastical courts led either to the creation of secular probate courts, thereby anticipating a later English development, or to the extension of common law or equity jurisdiction to succession of personal property. Considerable divergence from the English rule of primogeniture occurred—especially in the New England colonies, which generally opted for partible inheritance of intestate estates, frequently reserv-

27. Id. This intricacy was not transmitted to the New World, where a system of ecclesiastical courts never took root.


ing a double portion for the eldest son. Entail, however, operated in all the colonies after the English fashion.

As this pattern of restrained innovation suggests, the colonists were not inclined to abandon the traditions to which they were accustomed. Their annoyance with the complexities of the English law of inheritance paralleled the complaints they leveled against property law generally. When reform occurred, the colonists did little more than tinker with the periphery of the institution.

III. THE LAW OF INHERITANCE IN REVOLUTIONARY AMERICA

For the Revolutionary generation, the law of inheritance took on a new, strategic importance, since it appeared to symbolize the aristocratic aspects of English government against which the Revolution increasingly directed itself. The absence of dramatic change in the law of inheritance during the colonial period should not distract attention from the disparities in the settings of inheritance in England and America. The socioeconomic impact of inheritance, particularly as to real property, was far less in North America than in England, where land was scarce. Moreover, the social and political structure of the American colonies was vastly less aristocratic than that of the Mother Country, and nowhere did this fact have more obvious and profound consequences than in the institution of inheritance, which, after all, furnished the principle that defined the succession to the Crown and the peerage, thereby determining the membership of the governing elite. Seen in this light, the contrast is a perfect example of Louis Hartz's thesis of the significance of America's lack of a feudal past.30

Theoretically, at least two courses should have been possible for the Revolutionary lawmakers. The first was repudiation of the traditional concept of inheritance. The second was reform of the law of inheritance by excision of what were regarded as its aristocratic excesses, namely primogeniture and entail. This section examines the reformist path. The proposals of the exponents of radical change are considered in the following section.

Reform was naturally more appealing to the English society of America than was repudiation of traditional inheritance schemes. The subject of this reform was discussed at one time or another in

most of the Revolutionary colonies. In Massachusetts, James Otis argued that the impetus to abolish entail was long standing:

The Common Law and Policy of England have been, this 4 or 500 years, tired of these entailed estates; . . . Many have been the ill Effects felt both by State and Individuals, in Conveyance of these Estates; therefore so far from being favoured they have ever been discountenanced; and surely never was such an Estate as is here contended for, favoured.31

His argument, one might add, was as ill conceived as his defense of primogeniture two years earlier.32

The brightest example of the reform process is the revision of inheritance law in Virginia, where statutory reform, largely the work of Thomas Jefferson, was comprehensive. Throughout the seventeenth century, Virginia had followed rather closely the traditional English law. In 1705, however, the General Court passed an act forbidding the docking of entails except by special acts of the legislature, thereby foreclosing resort to the traditional and relatively painless English mode of terminating entails by fine and recovery. Subsequent legislation restored the right of docking for small estates and allowed the leasing of entailed land, but for the most part Virginia inheritance law prior to Jefferson's campaign to republicanize the state's legal system largely adhered to the English system.33

Jefferson's first success was the legislation of 14 October 1776 that abolished entails. The preamble to this act clearly stated its purpose:

Whereas the perpetuation of property in certain families by means of gifts made to them in fee-tail is contrary to good policy, tends to deceive fair traders who give a credit on the visible possession of such estates, discourages the holder thereof from taking care of and improving the same, and sometimes does injury to the morals of youth by rendering them independent of, and disobedient to, their parents; and whereas the former method of docking such estates tail by special act of assembly formed for every particular case employed very much of the time of the legislature, was burthensome to the public, and also to the individuals who made application for such acts.34

Three years later Jefferson prepared a "Statute of Descents" to abolish primogeniture and replace it with partible inheritance in equal shares to the children of a decedent. He desired, he said in

31. Banister v. Henderson (1765), in Massachusetts Bay Reports, supra note 19, at 140.
32. See text at notes 19-20 supra.
33. This account follows Keim, Primogeniture and Entail in Colonial Virginia, 25 WM. & MARY L.Q. 545 (1968); see also 1 D. MALONE, JEFFERSON AND HIS TIME 251-60 (1948); 3 W. BLACKSTONE, supra note 21, at app. 11-51.
34. 1 T. JEFFERSON, supra note 25, at 560.
his autobiography, "to abolish the law of primogeniture, and to make real estate descendible in parcnery to the next of kin, as personal property is by the statute of distribution." This statute was finally enacted in 1785, and thus, within two years after the end of the Revolutionary War, Virginia had done away with both entail and primogeniture. South Carolina and Delaware had abolished entail in 1776, and by the end of the eighteenth century virtually all of the new American states had eliminated both devices, although the several alternatives to primogeniture they enacted for the distribution of intestate estates varied considerably.

The state constitutions of 1776 provide additional evidence of the effort to reform the law of inheritance. The New Jersey constitution provided that the estates of suicides should not be forfeited "but shall descend in the same manner, as they would have done, had such persons died in the natural way." The Maryland constitution forbade the devise of lands for the support of "any minister, public teacher, or preacher of the gospel, as such, or any religious sect, order or denomination," although bequests of less than two acres of land for the actual construction of a house of worship were permitted. North Carolina proclaimed that "perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed." Pennsylvania and Georgia wrote regulation or abolition of entail into their Revolutionary constitutions. Several states forbade hereditary honors, and New Hampshire provided that "[n]o office or place whatsoever in government, shall be hereditary—the abilities and integrity requisite in all, not being transmissible to posterity or relations."

In fact, however, this legal and constitutional change was largely formal and symbolic. Primogeniture did not exist in many of the colonies, especially in New England, prior to the Revolution, and it is not clear that the use of either primogeniture or entail to restrict the distribution of property was widespread. Indeed, detailed stud-

---

35. 2 id. at 393n. Jefferson successfully opposed an attempt to include a provision for a double share to the eldest son.
37. Md. Const. of 1776, art. XXXIV, in 3 id. at 1690.
38. N.C. Const. of 1776, art. XXIII, in 5 id. at 2788.
39. Pa. Const. of 1776, art. 37, in 5 id. at 3090.
40. Ga. Const. of 1777, art. LI, in 2 id. at 784.
41. See Md. Const. of 1776, art. XL, in 3 id. at 1690; N.C. Const. of 1776, art. XXII, in 5 id. at 2788; S.C. Const. of 1790, art. IX, § 5, in 6 id. at 3264.
42. N.H. Const. of 1784, art. IX, in 4 id. at 2455.
ies of testamentary disposition in the colonial period suggest that the practice of testators was seldom to bestow all, or even the bulk, of their lands on the eldest son and that, aside from the usual preferential treatment of sons, testators generally partitioned their estates in nearly equal shares. If the changes were primarily formal, why then should Revolutionary Americans have paid so much attention and attributed so much significance to the reform of the law of inheritance?

IV. INHERITANCE LAW AND REPUBLICAN IDEOLOGY

The rhetoric of the preambles of the Revolutionary and post-Revolutionary acts governing inheritance offers a clue to why reform was so important. These declarations of legislative purpose reveal that the regulation of inheritance was viewed as a focal point of scattered, ineffectual statutory efforts to reform the economic structure of society in order to promote egalitarian ideals and to establish the foundation of a republican polity. For example, the preamble to the 1794 Delaware statute repealing an old law granting a double share to the eldest son declared that "it is the duty and policy of every republican government to preserve equality amongst its citizens, by maintaining the balance of property as far as it is consistent with the rights of individuals." North Carolina's comprehensive revision of inheritance law in 1784 resounds with the same egalitarian republican ideology:

WHEREAS it will tend to promote that equality of property which is of the spirit and principle of a genuine republic, that the real estates of persons dying intestate should undergo a more general and equal distribution than has hitherto prevailed in this state. . . .

And whereas it is almost peculiar to the law of Great-Britain, and founded in principles of the feudal system, which no longer apply in that government, and can never apply in this state, that the halfblood should be excluded from the inheritance. . . .

43. Dean, Patterns of Testations: Four Tidewater Counties in Colonial Virginia, 16 AM. J. LEGAL HIST. 154 (1972); Keim, supra note 33, at 551-57. See also D. FISHER, GROWING OLD IN AMERICA 97-98 (1977); Andrews, The Influence of Colonial Conditions as Illustrated in the Connecticut Intestacy Law, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 431 (1907); Smith, Parental Power and Marriage Patterns: An Analysis of Historical Trends in Hingham, Massachusetts, 35 J. MARR. & FAM. 419 (1973); Waters, Patrimony, Succession, and Social Stability: Guilford, Connecticut in the Eighteenth Century, 10 PERSPECTIVES AM. HIST. 129 (1976).

44. Of course, not all reform had such lofty ideals. Some revisions were instituted to remedy the disruption caused by the war. See, e.g., 1 Laws of the State of New York, ch. 59, § 1 (S. Jones & R. Varick ed. 1789) (giving remedies against executors who misappropriated estates during the British occupation).

And whereas entails of estates tend only to raise the wealth and importance of particular families and individuals, giving them an unequal and undue influence in a republic, and prove in manifold instances the source of great contention and injustice. . . .

To implement these views, the North Carolina legislature replaced primogeniture with partible inheritance among sons, eliminated the discrimination against brothers and sisters of the half blood, and converted all holdings in fee tail to fee simple. 47

The most eloquent and thoroughgoing exponent of this doctrine was Thomas Jefferson. Jefferson’s first great public project was the reform of Virginia’s law, and the revision of the law of inheritance was the first item on his agenda. 48 Reflecting on this episode in his autobiography, Jefferson explained the strategic significance of this portion of the law:

I considered 4 of these bills . . . as forming a system by which every fibre would be eradicated of antient [sic] or future aristocracy; and a foundation laid for a government truly republican. 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 & more absorbed in Mortmain. The abolition of primogeniture, and equal partition of inheritances removed the feudal and unnatural distinctions which made one member of every family rich, and all the rest poor, substituting equal partition, the best of all Agrarian laws. 49

Jefferson stressed the ease with which this portion of the aristocratic legal establishment could be altered: “To effect it no violence was necessary, no deprivation of natural right, but rather an enlargement of it by a repeal of the law.” 50

At this early stage in the development of Jefferson’s social thought, he stressed that the creation and maintenance of a republic required not just barriers to aristocratic accumulation of property, but also a scheme to distribute at least small parcels of land to all members of the society. This view was reflected in a bill drafted by Jefferson in January 1778 in which he proposed that every freeborn Virginian who marries and resides in the state for one year receive

47. Id.
48. See text at note 34 supra.
50. T. JEFFERSON, supra note 49, at 58. For a similar expression of opinion by
“seventy five Acres of waste or unappropriated Land.” The purpose of this measure, Jefferson explained, was to promote “the more equal Distribution of Lands, and to encourage Marriage and population.”

Jefferson’s belief that the yeoman farmer constituted the backbone of a republican society is well known. Less widely recognized, however, is that his schemes for republicanizing the property law and for distributing unused land proceeded from his revisionist view of the history of English land law. Jefferson believed in the theory of “the Norman Yoke”—that feudalism was a French import, imposed by William the Conqueror upon the democratic Saxons of the British Isles—and he fervently advocated restoration of the aboriginal political order as he perceived it. “Are we not the better,” he asked Edmund Pendleton in August 1776,

for what we have hitherto abolished of the feudal system? Has not every restitution of the antient [sic] Saxon laws had happy effects? Is it not better now that we return at once into that happy system of our ancestors, the wisest and most perfect ever yet devised by the wit of man, as it stood before the 8th century?

Obviously he thought that it was, and it confirmed him in his view that land tenures in Virginia were “allodial,” or nonfeudal, and, therefore, that the best policy would be to parcel out the land in small quantities to the inhabitants of Virginia. Thus, Jefferson’s interest in the property system was twofold. First, he sought to identify and extirpate the feudal-aristocratic character of the land law, especially those particularly egregious vestiges that permitted previous generations to fetter the use of property in the present. Second, he proposed to dispose of the territory thus disencumbered by distributing it broadly among the populace.

These were Jefferson’s views at the beginning of the Revolution; his thinking, provoked by his experiences in France, developed further in the 1780s. Observing firsthand the stark contrast in Europe between the immense wealth of the landed elite and the destitution of the landless, he was convinced that only drastic redistribution of property would alleviate poverty. He attributed the widespread unemployment of able and willing workers, amid great

James Wilson at the Philadelphia Constitutional Convention, see the debate of June 7, 1787, in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 159 (M. Farrand ed. 1911).

51. 2 T. JEFFERSON, supra note 25, at 139-40. This portion of the bill was not enacted, however. Id. at 147 n.12.
52. Id. at 492.
reserves of uncultivated land, to the high concentration of land ownership. Because of their great wealth, the proprietors paid no attention to expanding production. Jefferson recognized "that an equal division of property is impracticable." "But," he told James Madison in a famous letter written at Fountainbleu in October 1785, "the consequences of this enormous inequality producing so much misery to the bulk of mankind, legislators cannot invent too many devices for subdividing property, only taking care to let their subdivisions go hand in hand with the natural affections of the human mind." Specifically, Jefferson recommended that the rules of inheritance require wide distribution of a decedent's estate among his relations and that the state levy progressive estate taxes on large estates.

In this and in a second letter to Madison, written in September 1789, Jefferson set forth his philosophical approach to the law of inheritance. In 1785 he had concluded that

[w]henever there is in any country, uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right. The earth is given as a common stock for man to labour and live on [and] . . . [i]f, for the encouragement of industry we allow it to be appropriated, we must take care that other employment be furnished to those excluded from the appropriation. If we do not the fundamental right to labour the earth returns to the unemployed.

Jefferson returned, with greater confidence, to the same theme in his remarkable letter of 1789, which represents the culmination of his thinking on the problem of the intergenerational transmission of wealth. In this letter he proposed to Madison the "self evident" proposition "that the earth belongs in usufruct to the living": that the dead have neither powers nor rights over it." The critical passage is worth quoting in full:

The portion occupied by an individual ceases to be his when himself ceases to be, and reverts to the society. If the society has formed no rules for the appropriation of it's lands in severality, it will be taken by the first occupants. These will generally be the wife and children of the decedent. If they have formed rules of appropriation, those rules may give it to the wife and children, or to some one of them, or to the legatee of the deceased. So they may give it to his creditor. But the child, the legatee, or creditor takes it, not by any

54. 8 T. JEFFERSON, supra note 25, at 682.
55. Id.
natural right, but by a law of the society of which they are members, and to which they are subject. Then no man can, by natural right, oblige the lands he occupied, or the persons who succeed him in that occupation, to the payment [sic] of debts contracted by him. For if he could, he might, during his own life, eat up the usufruct of the lands for several generations to come, and then the lands would belong to the dead, and not to the living, which would be the reverse of our principle.56

We are thus confronted with the fascinating spectacle of a natural rights thinker escaping from a natural rights tradition. Jefferson was perfectly aware that inheritance had generally been considered a natural right, but of course his own conclusions are precisely those of Blackstone and the positivists. He therefore favored legislation prescribing a just distribution of intestate property. Yet, the real logic of his self-evident proposition might well have led him to advocate the total abolition of inheritance. If the earth truly belongs to the living, the right of the dead to stipulate by will the disposition of their property is not easily justified, and the legitimacy of intestate succession seems insecure as well. Of course, by 1789 Jefferson was both geographically and politically far removed from the affairs of state government, and he never again concerned himself with inheritance legislation. Nevertheless, it is significant that at least one influential Revolutionary American perceived that the logic of republican revolution pointed toward radical reevaluation of the law of inheritance.

Admittedly, Jefferson stood alone among his American compatriots in espousing such radical views. In the broader context of contemporaneous European thought, however, Jefferson represented a main current of “radical” Enlightenment doctrine. To appreciate the intellectual environment in which Jefferson, and Americans generally, developed their views toward inheritance, one needs to consider proposals for the programmatic reform of inheritance law that circulated in England and France—the European societies with the strongest political and intellectual affinity with America. Examination of radical thought on inheritance in Europe is valuable in other respects as well. Comparing the American attitudes toward inheritance with those expressed in Europe helps identify critical features of the republican critique of inheritance and, ultimately, such a comparison aids in the interpretation of the character of the American Revolution.

The foremost English contemporary who shared Jefferson’s radi-

56. 15 id. at 392-93 (emphasis original).
cal perspective was Thomas Paine. Paine’s thoughts on inheritance are contained in two works published in the 1790s: the second part of the Rights of Man, the manifesto that earned Paine conviction for seditious libel, and Agrarian Justice, his last great pamphlet. Like Jefferson, Paine regarded poverty as a symptom of the maldistribution of property maintained by the aristocratic pattern of inheritance. But, where Jefferson advocated statutory revision of the rules of succession, Paine’s chosen instrument of reform was the estate tax.

In the second part of the Rights of Man, he proposed a steeply progressive estate tax, reaching a one hundred per cent marginal rate for very large estates. He maintained that a large estate is a “luxury” and should be taxed accordingly, although he recognized that policy militated against imposing a ceiling on the size of an estate “acquired by industry.”57 One purpose served by the tax, in Paine’s mind, was to shift the tax burden to those persons best capable of bearing it, but his tax proposal obviously had deeper implications. In Paine’s words:

[T]he chief object of this progressive tax (besides the justice of rendering taxes more equal than they are) is . . . to extirpate the overgrown influence arising from the unnatural law of primogeniture, and which is one of the principle sources of corruption at elections.58

In short, Paine’s proposed tax would apply pecuniary pressures to achieve the same results as statutory abolition of primogeniture: the fragmentation of large estates and a more even distribution of property in society.59

Paine returned to the subject of inheritance in Agrarian Justice, where he developed more explicitly the relationship between his proposed reforms and his theory of political economy. In Paine’s view, each individual is entitled to exclusive possession of the product of his labor, but the earth’s natural resources—such as land—

57. 1 T. Paine, The Rights of Man, in The Complete Writings of Thomas Paine 241, 434 (P. Foner ed. 1945). As noted before, see text at note 54 supra, Jefferson had also advocated progressive estate taxation as a means of accomplishing redistribution of property. In a 1795 letter to Madison, he wrote: “Another means of silently lessening the inequality of property is to exempt all from taxation below a certain point, and to tax the higher portions of property in geometrical progression as they rise.” 8 T. Jefferson, supra note 25, at 682. However, Jefferson repudiated progressive taxation toward the end of his life. In 1816 he wrote: “If the overgrown wealth of an individual be deemed dangerous to the state, the best corrective is the law of equal inheritance to all in equal degree; and the better, as this enforces a law of nature, while extra-taxation violates it.” R. Schlater, Private Property: The History of an Idea 197 (1951) (quoting Jefferson).

58. 1 T. Paine, The Rights of Man, supra note 57, at 437.

59. Paine noted specifically that the operation of the tax would “supersede the aristocratical law of primogeniture.” Id. at 434.
belong to all, because "natural property . . . comes to us from the Creator." Private possession of land came about, Paine reasoned, when tillage replaced gathering and hunting as the source of society's food supply—the seminal event making possible the transition of society from a "natural" to a "civilized" state. Cultivation fostered private ownership of land since the improvement of the land, which rightfully belongs to the cultivator, was inseparable from the land itself. Thus, poverty originated as an incident of civilization, for the appropriation of the land by some denied others their share of mankind's "natural inheritance."

Cultivation is at least one of the greatest natural improvements ever made by human invention. It has given to created earth a tenfold value. But the landed monopoly that began with it has produced the greatest evil. It has dispossessed more than half the inhabitants of every nation of their natural inheritance . . . and has thereby created a species of poverty and wretchedness that did not exist before.

Paine advanced a simple solution to restore the "natural" order without disturbing private ownership of property. His plan called for the collection of a "ground-rent" from each proprietor, representing the use value of the appropriated "natural property," and for the distribution of the proceeds to all members of society, who collectively own this property. More specifically, he proposed the establishment of a fund, maintained by a moderate estate tax, from which each citizen would receive a lump sum on his twenty-first birthday and a pension upon reaching the age of fifty.

Although Paine emphasized that adoption of his plan would immediately benefit society by meliorating the condition of the masses, he was plainly inspired by more than altruism. Paine envisioned a transformation of society. "The present state of civilization," he stated, "is as odious as it is unjust. It is absolutely the opposite of what it should be, and it is necessary that a revolution should be made in it." Far from being merely a social welfare

---

60. 1 T. Paine, Agrarian Justice, in id. at 606.
61. Id. at 611-12.
62. Id. at 612.
63. Under Paine's plan, a flat ten per cent tax rate would be levied on the portion of the estate inherited by the decedent's issue, with a surtax rising to ten per cent levied on that portion transmitted to others, the rate increasing according to the remoteness of the transferee. Id. at 615-16. The tax applied to both real and personal property because, as Paine argued, no individual could acquire personal property without the aid of society, therefore, "he owes on every principle of justice, of gratitude, and of civilization, a part of that accumulation back again to society from whence the whole came." Id. at 620.
64. Id. at 617.
measure, Paine conceived the estate tax as the linchpin in the realization of this vision.65

The occasion for recasting inheritance law did not arise in eighteenth-century England, where the republican answer to the question of inheritance, as on other questions, subsisted for the moment only in doctrine. To find a legislative counterpoint to the revision of inheritance law in America, attention must turn to France. A glance at the doctrines espoused by the French revolutionaries in regard to inheritance confirms our earlier observation that the constitution of the law of inheritance has a capital strategic importance to the framers of a republican order. Moreover, the republicanization of the institution of inheritance in France evinces the confrontation between the natural rights and the positivist theories of property law. As with Jefferson, the French proponents of reform were compelled to overcome their original natural rights orientation to justify the measures they advanced.

By 1791 republicanism was the official creed of the French Revolution, and the revolutionaries recognized that the Romano-feudal system of inheritance by which the Old Regime had operated was part and parcel of the system of inherited privilege and entrenched wealth against which the Revolution initially aimed. As the Comte de Mirabeau pointed out to the Constituent Assembly in the midst of its debate on intestate succession: “You have begun by destroying feudalism, you pursue today its effects.”66

65. The ideological inspiration underlying the proposals of Paine and Jefferson differentiates them from other proponents of reform, such as Jeremy Bentham, who were motivated primarily by pragmatic fiscal concerns. Bentham, for example, denounced the natural rights thesis about inheritance while proposing in a crudely written pamphlet published in 1795 that the entire estate escheat to the state if the decedent lacked “near relations” and that the power to devise property by will apply only to one-half of such a decedent’s estate, the remainder going to the state. J. BENTHAM, Supply Without Burthen; or Escheat Vice Taxation, in JEREMY BENTHAM’S ECONOMIC WRITINGS 279, 283-84, 310 (W. Stark ed. 1952). Despite the revolutionary tenor of this proposal, Bentham disclaimed radical political goals. He exempted the peerage from the plan, conceding the desirability of preserving the aristocracy. Id. at 328. Bentham’s aims, not surprisingly, were utilitarian. He believed that most taxation aroused hostility because it deprived people of what they had expected to enjoy. Id. at 292. Similarly, in Bentham’s view, the intricacies and uncertainties of the traditional system of inheritance worked hardship on many by denying an expected legacy. Id. at 319. Therefore, under Bentham’s plan, no property would be taken from one who expected to enjoy it, since the law would make clear the limited expectations for inheritance. Id. at 292-93. In short, Bentham regarded his scheme as the least disruptive mode of taxation. He explained that “[t]he characteristic of this measure, is to shew more tenderness to [the] feelings [of individuals], than can be shewn by the taxes to which it is proposed to substitute it.” Id. at 305 (emphasis original).

In April 1791 the Constituent Assembly made a first effort to extirpate the ancien regime with the adoption of a "Decree Relative to the Distribution of Intestate Successions." The decree announced:

All inequality formerly resulting, among heirs ab intestat, from qualities of age or of youth, from sex distinctions or from customary exclusions, whether in direct line or in the collateral line, is abolished.\(^6^7\)

The debates in the Assembly, however, reveal that republican ideology in France was not satisfied with equality in intestate succession. The powerful egalitarian thrust of French republicanism insisted on equality in testate succession as well. For example, the Jacobin delegate Pétion demanded in the 1791 debates that the Assembly "destroy for the future all of the inequalities of distribution resulting from the arbitrary will of the family head."\(^6^8\)

The Comte de Mirabeau, himself a disinherited son, prepared the principal speech of the debate. This address, delivered by Talleyrand as its author was on his death bed, expands Pétion's theme:

Here is the fundamental question which presents itself: Should the law admit among us the free disposition of wealth in the direct line, that is to say, should a father or a mother, a grandfather or a grandmother, have the right to dispose at their wish of their fortune by contract or by testament, and to establish thereby inequality in the possession of domestic goods?\(^6^9\)

One turns to Robespierre, just as one turned to Jefferson, for exposition of the revolutionary republican doctrine by its most renowned advocate. Robespierre praised the delegates for having abolished preferences in intestate succession, but, urging them to strike deeper, he inveighed against the right of testation as enabling an individual to defeat the egalitarian policy embodied in the new regime for intestate succession. "You have decreed," he intoned, "that equality shall be the basis of [intestate] succession. Will you permit this law to be violated by the private will of man?"\(^7^0\) Like Jefferson and Paine, Robespierre regarded revision of the law of inheritance as critical to the establishment of the material substructure of a republican polity. He maintained that free testation is necessarily inimical to the ideal social order, in which equality prevails:

---

\(^{67}\) Decret relatif au partage des successions ab intestat, in 2 Collection complète des lois, décrets, ordonnances, règlements, et avis du conseil—d'état 348 (J. Duvergier ed. 1824) (Decree of April 15, 1791).

\(^{68}\) 9 P. Buchez & P. Roux, supra note 66, at 284.

\(^{69}\) Id. at 286.

\(^{70}\) Id. at 299.
"The too great inequality of fortunes is the source of political inequality [and] of the destruction of liberty." Robespierre went so far as to suggest that the power to dispose of property by will should be abolished altogether. "Can a man dispose of that land he has tilled," he asked, "at the moment he is reduced to dust? No, the property of a man after his death ought to return to the public domain of society." Nevertheless, Robespierre opposed complete abolition of testation. He favored allowing an individual to direct the disposition of part of his estate so long as the testator divided the property equally among his heirs.

The Constituent Assembly did not embrace Robespierre's recommendation. In March 1793, however, the Assembly's successor, the National Convention, did enact legislation abolishing the power to make inter vivos or testamentary transfers of property to descendents, thereby subjecting all estates to the egalitarian distribution imposed by the law of intestate succession. This legislation did not abolish inheritance; rather, it demonstrated that the French revolutionaries were prepared to go to relatively extreme lengths to achieve the vision of formal legal equality among all citizens.

The revolutionaries never seriously threatened to abolish private property. Even Robespierre was a moderate on the question of property rights, and there is little evidence of agitation for radical

71. Id.
72. Id. at 300.
73. Id. at 300-01.
74. As George Lefebvre observed, "[The Constituent Assembly] closely joined equality to liberty, and by bringing the resounding collapse of privileges and feudalism the popular revolution highlighted equality as the Anglo-Saxons had not done. The revolutionaries and even the bourgeoisie valued the attainment of equality above all else." G. LEFEBVRE, THE FRENCH REVOLUTION FROM ITS ORIGINS TO 1793, at 146 (1962).


75. 2 J. THOMPSON, ROBESPIERRE 39-40 (1935). Robespierre may have been concerned more with the image than the actual achievement of equality. In 1793 he wrote: "Personally, I think equality of wealth even less necessary for private than for public happiness. It is much more necessary to make poverty respected than to ban millionaires (proscrire l'opulence)." Id. at 40.
reform of the French institution of property. Nevertheless, the debates on inheritance did expose certain ambiguities in the fundamental attitudes of the revolutionaries toward property. The Declaration of the Rights of Man and Citizen, promulgated 27 August 1789, reflected a pronounced commitment to the natural rights theory of property. Article Two, for example, announced that "[t]he aim of every political association is the preservation of the natural and inalienable rights of man," among which was the right of property. Article Seventeen stated the natural rights position even more emphatically: "Since property is a sacred and inviolable right, no one may be deprived thereof unless a legally established public necessity obviously requires it, and upon condition of a just and previous indemnity."

The proponents of radical revision of the laws of inheritance, however, contended that property is a social creation, properly subject to the limitations imposed by society in order to achieve its broader ideals. In his address to the Constituent Assembly in 1781, Mirabeau asserted that

"[a]s property is based on the social structure [l'état social], it is subjected, like the other benefits over which society is arbiter, to laws [and] to conditions; thus we see everywhere the right of property subjected to certain rules, and restricted, according to the case, to limits more or less narrow. . . .

Society is thus entitled to refuse its members, in this or that case, the capacity to dispose arbitrarily of their fortune."

Robespierre pursued a similar theme in his speech to the Assembly. Stating that the property of a decedent returns to the public domain, he contended that "it is only for the public interest that [society] transmits this wealth to the issue of the . . . owner; but, the public interest is in equality. Thus, it is necessary that in every case equality be established in the succession."

Robespierre criticized the Declaration of Rights for failing to define necessary limits on the freedom of the use of property. In his view, the document was "not so much a declaration of the rights of men, as a declaration of the rights of capitalists [riches], profiteers, speculators, and tyrants." To remedy this dangerous omission,

76. See R. PALMER, TWELVE WHO RULED 280-304 (1941).
78. Id. at 115.
79. 9 P. Buchez & P. Roux, supra note 66, at 288.
80. Id. at 300.
81. 2 J. THOMPSON, supra note 75, at 40.
Robespierre proposed a slate of amended articles to make clear that the state may curb an individual's property rights in order to protect the rights of others. He suggested, for example, that Article Two read: "The right of property is limited, like every other right, by the duty of respecting the rights of others." 82

Clearly the French Revolution occasioned a more sweeping revision of the law of inheritance than did the American Revolution. Like Jefferson and Paine, 83 the French revolutionaries did not question the fundamental concept of private property, but an ardent desire for equality inspired the French to rewrite in bold strokes the rules governing succession to property. The legislation amending inheritance in Revolutionary America was, in comparison, quite tame. Yet, notwithstanding the striking contrast in the substance of the changes wrought, the significance of the French and American statutory programs to their respective authors was comparable. The proponents of revision conceived of reform as one important means to achieve, or at least to express, related ideological ends. The reforms in America had smaller compass than those in France, commensurate with the more moderate stance of American republicanism.

In addition, the reform process everywhere manifested a philosophical reorientation with respect to the concept of property rights. The remaining presupposition—that the power of testamentary disposition, like other capacities to use and transfer property, is a "natural right" upon which the state cannot rightly infringe—was permanently displaced by the doctrine that an individual's rights in property subsist by grace of society. Under this view, the state justifiably limits property rights where their exercise would contravene higher social values. It is important to realize that this development did not represent an abandonment of the belief in a "natural order" in favor of a complete relativism: the proponents of reform—Paine is an obvious example—continued to speak in terms of natural "rights." Rather, they ascribed a new content to these preordained rights, and they accorded to the right of inheritance a much lower priority than they did to the more general right to property.

82. Id.
83. Paine's commitment to private property is reflected in his comment that a system of compensating individuals dispossessed of their "natural inheritance," thereby eliminating indigency, "is necessary as well for the protection of property as for the sake of justice and humanity." 1 T. PAINE, Agrarian Justice, supra note 57, at 620. To Paine, the virtue of his plan was that it restored social justice, yet strengthened rather than disturbed the economic system of private property that made civilization possible. Id. at 620-21.
V. CONCLUSION

It has been said that the contrast between the French and American revolutions is that between social and political revolution.\textsuperscript{84} Even if one neither underestimates the turbulence and resulting dislocations during the period of the American Revolution nor overestimates the discontinuity between French society before and after the Revolution of 1789, it seems clear that the society that emerged after 1776 was the logical and evolutionary successor to colonial America in a manner totally unlike the considerably more profound transformation in France. One might more accurately describe the American experience as a "reform movement" than as an "internal revolution."

Ultimately, inheritance is not a conclusive test for the character of the American Revolution, for it was an epiphenomenon of the larger social process. The changes instituted in the law of inheritance were not trivial\textsuperscript{85} or startling. Neither primogeniture nor entail, the principal targets of statutory revision, were widely practiced before the Revolution—in several colonies they had never existed—so that in some sense the Revolution cannot even be credited with truly reforming the law of inheritance. Yet, insofar as the Revolution ratified rather than inspired this reform, its impact on the institution of inheritance typifies the significance of the Revolution to many areas of American society. As Bernard Bailyn has observed, the Revolution confirmed developments that had been taking place in the colonies and had been transforming them, unknowingly, into a new society and nation:

In behalf of Enlightenment liberalism the revolutionary leaders undertook to complete, formalize, systematize and symbolize what previously had been only partially realized, confused, and disputed matters of fact. Enlightenment ideas were not instruments of a particular social group, nor did they destroy a social order. They did not create new social and political forces in America. They released

\textsuperscript{84} See H. ARENDT, ON REVOLUTION 87 (1963).

\textsuperscript{85} Alexis de Tocqueville carried the argument to its furthest extreme, contending that "the law of inheritance was the last step to equality." 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 47 (P. Bradley ed. 1945). He believed that "the law of equal division exercises its influence not merely upon the property itself, but it affects the minds of the heirs and brings their passions into play. These indirect consequences tend powerfully to the destruction of large fortunes, and especially of large domains." Id. at 48-49. For this reason, "[w]hen the legislator has once regulated the law of inheritance, he may rest from his labor." Id. at 48. De Tocqueville here overestimates both the theoretical and actual impact of republican laws of inheritance upon nineteenth-century American society.
those that had long existed, and vastly increased their power.\textsuperscript{86} Political and economic liberalism were at the core of these emergent American social forces, and the search for a theoretical justification for what the Americans regarded as their essential task—separation from Britain and formation of a new nation—progressively drew them to republican models of social organization. The paternalism and aristocratic bias inherent in the traditional Anglo-American system of inheritance were increasingly perceived to be incompatible with republican attitudes toward economics and politics. The traditional system represented an economic order in which a property elite preserved monopolistic control over a critical resource and protected large fortunes from the rigors of individual enterprise.

But in fact the Americans were most sensitive to the political connotations of the traditional laws of inheritance. Primogeniture and entail preserved and transmitted political as well as economic fortunes. The Americans rejected categorically the notion that political office is a private possession transmittable by the laws of succession. As George Mason declared in the Virginia Declaration of Rights:

\begin{quote}
no Man, or Set of Men are entitled to exclusive or separate Emoluments or Privileges from the Community, but in Consideration of public Services; which not being descendible, or hereditary, the Ideal of a Man born a Magistrate, a Legislator, or a Judge is unnatural and absurd.\textsuperscript{87}
\end{quote}

The same precept is reflected in the rhetoric of the North Carolina statutes repealing the traditional inheritance laws and in the words of the lawyer who in 1788 sought to convince the Delaware Court of Errors and Appeals that his client's inheritance was in fee simple: "estates in fee tail are no favourites of the law, and particularly ought not to be so, under republican forms of government, so that if there be any doubt in this case, determination should incline rather towards the appellants."\textsuperscript{88} The fundamental notion was that, in a republic, careers should be based upon talent rather than status.\textsuperscript{89}

In evaluating the significance of the reform in inheritance law,


\textsuperscript{88} Robinson v. Lessee of Adams, 4 Dall. xii, xiv (Del. 1788).

\textsuperscript{89} For an unusually perceptive account of the problem of inherited authority in English political theory, see P. Lucas, \textit{supra} note 2, at 195-264.
it is essential to keep in mind what the reform effort in America did not do. The Americans did not attempt to legislate equality. After all, the debate about revision of the law of intestate succession was only about the necessity for equalizing the claims of children (or at least male children) to the estates of their parents. In France, as we have seen, equality was the primary objective of reform in the law of inheritance. The French revolutionaries went so far as to subordinate a property owner's testamentary desires to the policy of egalitarianism. In this country, however, the objective was more to destroy primogeniture and entail than to achieve equality among children. Designed to limit concentrations of landed property and to end the political dominance of a landed elite, American statutory reform removed devices of compulsory inequality, but stopped short of requiring equality. Egalitarianism was not the animus of the American Revolution, as indeed it could not have been in a society whose leadership included many proprietors of slave labor.

The reform of inheritance law thus carried a symbolic importance disproportionate to the significance of its substantive implications. The attitudes toward inheritance delineate in a small way certain fundamental contours of American Revolutionary ideology. In the case of inheritance, Revolutionary theory encountered theoretical difficulties that it did not find elsewhere because the natural rights tradition, which formed so large a part of the theory, so forthrightly proclaimed the right of inheritance. As long as the Revolution went no further than reform, conceptual dissonance was avoided. But in altering the traditional practice of inheritance, Americans were increasingly drawn to the positivistic explications of the right (as, to be sure, their English and French contemporaries were). This positivism, combined with rigorous and logical republicanism, led Jefferson, Paine, and the French revolutionaries to more radical conclusions, but the moderation of the mainstream of thought in early America becomes apparent when contrasted with Jefferson's most ambitious proposals. The logic of revolution in America would sustain neither an agrarian law nor the abolition of inheritance, although obviously either would theoretically have helped create a purer republic.

In 1775 Patrick Henry wrote: "I have but one lamp by which my feet are planted, and that is the lamp of experience. I know of no way of judging the future but by the past." The American

---

Revolutionary leaders were insistent upon the practical wisdom of history (of which the common law was an important part), for it demonstrated to them the virtues and true principles of republicanism. At the same time, they were pragmatists of the most remarkable sort, who believed that they held their destiny in their own hands. History showed that primogeniture and entail were feudal remains that had no place in a republican scheme of things and that represented the dead hand of an aristocratic corporatism they rejected. They were believers in a scientific history—the study of the past to develop principles for present policy—but opponents of the tyranny of the past. For such men the anachronism of the law of inheritance was an appropriate and symbolically fortuitous focus for their efforts. But they also drew from history a fear of violent change and a real concern for continuity, and they were reluctant to move too far and too quickly. In reforming inheritance, they excised the most egregious anachronisms without altering those fundamental principles that seemed suitable and even central to a society that on the whole they thoroughly admired.