

## **Claire Priest**

Book Introduction/Proposal:

*Creating an American Property Law: The Colonial Transformation of Property and the Formation of an American Legal Order, 1650-1820*

Lawyers, development experts, and legal scholars have increasingly emphasized the importance of property law and institutions to global economic development. Many believe a state's formal recognition of property title over land and other natural resources is of crucial importance to the liberalization of credit markets necessary for economic prosperity in the developing world. The transplantation of Anglo-American property systems to stimulate economic development is a central global reform project of our era. Organizations such as the World Bank and economist Hernando de Soto's ILD (Instituto Libertad y Democracia) are working with governments around the world to grant formal title to individuals residing on land, to establish land title registries to record and publicize ownership, and to reform court systems in ways that will encourage lending. The ambition is to stimulate development from the ground up, by expanding access to credit through institutional and legal reform.

The book engages the debate over the property law reform project, not by examining the effectiveness of institutionalizing property regimes in the modern day, but by providing a historical account of the emergence of laws and institutions relating to property in early America, from the early colonial period through the early nineteenth century. Throughout its history, America has enjoyed the types of institutions currently advocated to boost developing economies: land title registries that function well at a low cost to the population, courts that operate relatively quickly to resolve title disputes and

to process foreclosure proceedings, and legal doctrines that encourage lending on the basis of multiple forms of collateral. These laws and institutions very likely contributed much to the pace of American economic development. The questions posed here are: What might American history tell us about why these laws and institutions emerged, and why do they, relative to other countries' experiences, function in a manner responsive to the welfare of the communities into which they are adopted? What features of American history are unique, suggesting that caution is necessary in substituting local customs and institutions for more formal property rights?

The property law and the institutions enforcing property rights in early America were developed within the unique circumstances of the British empire of the seventeenth and eighteenth centuries. Arriving in an undeveloped land, the colonists in the earliest years of settlement began transforming English law and English legal institutions to help spur productive uses of land and the extension of credit. Colonial legislatures adopted land title registration (which was not common in England) because the undeveloped nature of the land meant that systems of title relying on observable "possession" or cultivation were inadequate. In an environment with little wealth and without banks or other financial institutions, land was an essential store of wealth and marketability of land was an important underpinning of the economy. Moreover, the need for money to import labor—in particular by slave purchases, starting in the early eighteenth century—led to legal reforms further supporting the use of land and slaves as collateral in credit arrangements.

The initial source of property law for the American colonies was traditional English law. English law reflected a society in which political and social authority was

vested in a landed elite that perpetuated itself through the long-term ownership of land. Land and credit markets were highly important to England's economy, but traditional English law was based upon the conception of land as a family endowment: as the source of wealth of families that would persist through the generations. The English elite valued stability, and the English property system supported landowners' efforts to shield family land from economic fluctuations. Blackstone's *Commentaries* of the late eighteenth century, for example, describes inheritance as "the principal object of the laws of real property in England."<sup>1</sup>

Although each British colony had its own land policy and political, economic, and social culture, overall in the colonies, the English emphasis on protecting stable land ownership through the generations gave way to a more commercial view privileging the value of land as a monetary asset in credit agreements. The colonial legislatures pared-down and simplified the complex English institutional infrastructure of a multiplicity of courts and remedies. Throughout the colonies, the processes for debt-collection and foreclosure upon land were stream-lined. Many colonies chose to eliminate the traditional legal protections afforded land by defining land as a "chattel" commodity (an ordinary good) for purposes of credit. Slaves were also legally treated as "chattel" in credit agreements. The significance of the legal definition was to place the demand for credit over the primacy of inheritance and family wealth as a long-term endowment.

British imperial rule pushed colonial property law farther from the model of English landowning. According to the British mercantilist agenda, the role of the colonies was to promote the interests of England. From the vantage point of English authorities, colonial property laws and institutions were a central instrument of imperial

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<sup>1</sup> William Blackstone, *Commentaries on the Laws of England* (Oxford, 1765-1769), II, 201.

administration. First, English imperial policy often defined how land and resources in the colonies were initially distributed. With regard to the distribution of land, for example, the English colonial policy, in contrast to that of Spanish colonial policy, was to make immediate cultivation the primary goal. The official English policy was to distribute land in parcels small enough to be put into productive use as rapidly as possible. Those who wanted greater parcels were required to demonstrate that they commanded the labor needed to justify the grant. By prioritizing the immediate cultivation of land, the English imperial authorities, perhaps unwittingly, created widespread land distribution and a remarkably high percentage of land ownership.

Second, the colonial land title registries were, in the ideal, a central institution in imperial administration. They were used, with some success, to establish a system of quitrents (feudal-like dues). They were central to the government's compensation of its officials with titles to land. They were intended to advance the imperial policy of conditioning title ownership on landowners' abilities to put their land to productive use in a timely manner. They legitimated colonists' title to land vis-à-vis competing Native American claims.

Third, English imperial authorities prioritized the interests of the English *creditors* who lent extensively to the colonies over any interest in replicating English law and political society. Initially, each colony established its own body of courts, procedures, and remedies. Coinciding with increasing colonial reliance on slave imports—for which the colonists borrowed extensively from English creditors—English merchants began lobbying for increased imperial oversight to safeguard against colonial laws that might hurt their economic interests. In response to merchants' complaints over

collecting debts owed by slave plantation owners, in 1732 Parliament enacted a law that was highly protective of creditors and that applied in all of the British colonies, but not in England. The law required that slaves, land, and houses be legally treated like chattel (ordinary goods) in credit agreements and be processed as chattel, which often meant being subject to stream-lined court proceedings and sold at auction to pay debts.<sup>2</sup>

Alexander Hamilton later reflected that New York should never have “assented to” the 1732 Parliamentary act treating land like a chattel in the colonies. He remarked that “it was one of the Highest Acts of Legislature that one Country could exercise over another.”<sup>3</sup> Rigid debtor/creditor laws and stream-lined institutions were imperial instruments that were in their infancy in America and the West Indies, but were precursors to the more formal “land policy” used in the conquest and governance of Britain’s nineteenth century colonies.

The American colonial law provided a strong foundation for the extension of credit, economic development, and the expansion of slavery. The colonial courts and land title registries recorded interests, resolved title disputes, and processed creditors’ claims. The legal framework, however, was one in which landowners and their dependents were exposed to significant financial risks. The protection of family inheritance from the claims of creditors in England served as a means of buffering against risk when economic conditions were depressed. The removal of these legal protections and stream-lining of court procedures in the colonies meant that in hard economic times

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<sup>2</sup> An Act for the More Easy Recovery of Debts in His Majesty’s Plantations and Colonies in America, 5 Geo. 2, c. 7 (1732) (Eng.).

<sup>3</sup> Alexander Hamilton, Practical Proceedings in the Supreme Court of the State of New York (circa 1782), in 1 *The Law Practice of Alexander Hamilton* 55, 97 (Julius Goebel, Jr. ed., 1964).

all debtors in the colonies were potentially exposed to loss of their land and other property by process of law.

In America, colonists turned to their legislatures for relief from creditors during economic downturns. The American democratic sensibility, and indeed perhaps American democracy itself, emerged in association with popular demands for legislatures to intervene to protect ownership when economic recessions threatened stability. Colonial legislatures frequently enacted temporary stay laws, which prevented the final seizure of assets for some set of months or a year throughout the colony; legal tender laws, which allowed debts to be paid at a reduced rate or in goods; and issued bills of credit (paper money) to counter deflationary periods. In England, protection against financial risks came in the form of slow Chancery court processes and judicially-administered doctrines that protected family wealth. In contrast, in colonial America, colonists looked to their representatives to enact laws providing colony-wide relief for a temporary period.

What emerged was a truly *colonial* property law: a body of law and institutions developed to encourage economic productivity in the British colonies, which were societies with social, political, and economic structures entirely different from that of England. The colonial courts processed claims relatively quickly. The law commodified land and slaves, allowing each to be a primary form of collateral used to finance agricultural development. It privileged creditors' claims over those of family members and heirs. The system emerged within an imperial context, but a feature of the transformation that is particularly relevant to the globalization of property rights today is that, in contrast to England, through their constant oversight and modification of the laws,

the colonial legislatures initiated a process among white property-owners of *democratic involvement and input* into local institutions and laws relating to credit conditions that responded to local needs. Remarkably, as early as the seventeenth century, colonists adapted English institutions to create land title registries and courts that were largely under the control of local communities. And again, during periods of recession, the legislatures responded with policies that provided a check against the risks associated with a more commodified property system.

The American experience can therefore be characterized by credit-friendly, stream-lined policies with institutional structures modified and improved, and financial risk kept in check, by democratic processes. This is a unique, historically-contingent balance that may be hard, if not impossible, to replicate in the context of the globalization of property law today.

Until this account, the history of law and institutions relating to the emergence of credit markets in America has not been explored in great detail. The American experience, as an ideal, however, has a special importance within the literature on economic development, and property plays a central role in the historiography of the American Revolution. With regard to the development literature, because the great economic growth of the United States in the nineteenth and twentieth centuries was likely related to its system of property rights and credit markets, the history of American laws and government is viewed as possibly holding the key for countries aspiring to achieve growth. Perhaps the best example of how the ideal of United States history is used to influence policy is Hernando de Soto's *The Mystery of Capital*, in which a chapter entitled "The Missing Lessons of U.S. History" presents a version of the American

experience as a guide for developing nations interested in reforming property law and institutions to promote economic development.<sup>4</sup>

The general argument of *The Mystery of Capital* is that a central barrier to economic development in many countries is the inability of individuals to realize the monetary value of the assets they possess through the marketplace. To de Soto, many countries are plagued by the problem of “dead capital,” where features of the legal and institutional structure prevent individuals from using the assets they hold as leverage to obtain funds that might be reinvested to generate greater wealth and to stimulate entrepreneurialism. To de Soto, the problem starts when a government has not granted individuals formal title to their property. One of de Soto’s proposals is therefore that countries institute programs to grant formal title to individuals in possession of property in order to “bring people who hold their assets by extralegal arrangements into the legal property system.”<sup>5</sup> He further advises that lawmakers generate confidence in land and credit markets by providing institutional mechanisms for publicizing title interests and by reforming institutions to streamline the process of enforcing property and contract rights when debtors default.

American history appears in *The Mystery of Capital* as a model for the legal reforms he proposes with regard to modern day developing societies. De Soto celebrates the fact that America, like other Western countries, successfully transitioned from the “dispersed, informal arrangements” of a developing society, to the “integrated legal property system” of the modern day.<sup>6</sup> De Soto, following the work of the legal historian

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<sup>4</sup> Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (2000), pages 105-151.

<sup>5</sup> *Id.* at 106.

<sup>6</sup> *Id.*



David Thomas Konig, emphasizes that the property system of early seventeenth century New England was characterized by an absence of a uniform surveying system, little precision in distribution or recording of titles, and uncertainty over ownership.<sup>7</sup> De Soto notes that this system became more formal over time. According to Konig, a more organized property system relying on an institutional framework of courts and land title registries was in place by the 1670s. In addition, de Soto's primary example from American history is that of the legal treatment of squatters who settled on public or uncultivated land in the late eighteenth and nineteenth centuries, and who lobbied for formal title rights. American state legislatures routinely legitimated the titles of squatters, and adopted a policy during public land sales of allowing settlers rights to the land that they had occupied. Rather than holding squatters' claims illegitimate, the American doctrine of preemption chose instead to bring extra-legal modes of holding property into the formal legal system through state recognition of settlers' claims.

De Soto's account of American history necessarily relies on the existing scholarship, and the scholarship in this area is regrettably thin. His two primary examples—colonial New England and nineteenth century squatters—each illustrate how extralegal claims to land were given legitimacy and brought within the formal legal system in America. The seventeenth century New England example also indicates that in the earliest years of colonization (before 1670), the colonial land system was characterized by a great deal of imprecision and informality. But this history is highly incomplete, particularly when viewed in contrast to the breadth of de Soto's claims about

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<sup>7</sup> *Id.* at 111-112. David Thomas Konig, *Community Custom and the Common Law: Social Change and the Development of Land Law in Seventeenth-Century Massachusetts*, 18 AM. J. LEG. HIST. 137, 138 (1974) (“[E]arly land use was characterized by inexactness in distribution, inattention to recording, and neglect of the most basic statutory requirements of occupancy and fencing.”)

how property laws and institutions might bring about economic development. Surely the legitimization of squatters' claims is not, standing alone, the foundation of American capitalism. It begs the question what are the origins of the formal system that was already in place to give the squatters legitimacy? In addition, the fact that the early New England colonists had functioning property doctrines, courts, and land title registries in place and operating well by 1670 is perhaps more significant than their absence in the earliest years of colonization. What are the origins of these institutions? Moreover, what is the history of the laws that allowed land to be mortgaged; the foreclosure policies that gave confidence to creditors; the treatment of family-based claims to land (whether children, the widowed, or extended family) that appear to have allowed land to be sold and mortgaged without restriction; and the policies dealing with potential landlessness and poverty during periods of economic recession when many debtors were likely to default?

This book provides a new framework for thinking about the United States as a historical example of property rights and development. The colonists arriving in the British colonies brought with them a strong tradition of cultural norms relating to respect for private property as well as a mentality in which land was viewed as both as a family endowment and as a marketable store of wealth. Throughout the British colonies in America and the West Indies, the colonial legislatures moved fairly quickly to establish courts and land title registries that publicized property interests in land and slaves. Even before land title recording was fully implemented, the common law courts invited litigation over title that led to recorded judgments in favor of a landowner. English doctrines and institutions known for costly and time-consuming procedures, in particular,

the English Court of Chancery, were not instituted in most colonies. During the American Revolutionary Era, the new state legislatures initiated a law reform effort aimed at further advancing the property system rooted in a low-cost ability to publicly transmit information about property assets and the priority of claims against those assets.

A full history of the American property system is not complete, however, without inquiry into policies related to the management of financial risk during economic recessions. History is replete with examples of times when a transition to more formal property rights and streamlined court processes has led to major political problems related to foreclosures and landlessness.<sup>8</sup> Yet De Soto's account lacks discussion of the issue. As mentioned, American colonial legislatures routinely stepped in with relief when recessions threatened landowners with foreclosure and eviction for non-payment on their mortgages. This aspect of the American history needs to be emphasized for the model of the United States property system to be fully appreciated.

With regard to the scholarship on American history, *property law* is understood to be centrally important to the origins of the American political and economic order, but historians have generally focused on the importance of property reform to the ideological revolution taking place during the Founding Era of the United States. In the eyes of the Founding generation, the survival of a republican society in a world dominated by Europe required abolishing the vestiges of aristocracy and the links between family, status, property, and political privilege. Reform of the traditional English inheritance law was widely viewed as the most important buffer against the creation of a local aristocracy. In

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<sup>8</sup> See, for example, KLAUS DEININGER, LAND POLICIES FOR GROWTH AND POVERTY REDUCTION 95-98 (World Bank Policy Research Report 2003); TIMOTHY MITCHELL, RULE OF EXPERTS: EGYPT, TECHNO-POLITICS, MODERNITY 74-79 (2002); Rachel E. Kranton & Anand V. Swamy, *The hazards of piecemeal reform: british civil courts and the credit market in Colonial India*, 58 J. DEV. ECON. 1 (1999).

the historical account, the rejection of English inheritance policies leaving all land to the eldest male heir and securing land within families, were the heart of what the American Revolution, defined in its broadest sense, was about. As Gordon S. Wood stated in his Pulitzer prize-winning work, *The Radicalism of the American Revolution*, referring not to the war but to the broad transitions over the Founding Era and early nineteenth century, “the entire Revolution could be summed up by the radical transformation Americans made in their understanding of property.”<sup>9</sup>

In contrast to the prevailing body of scholarship, this account traces the roots of the American property system, the “republican” property celebrated in the Founding, to the earliest years of colonization. In the seventeenth and early eighteenth centuries, the English desire for immediate cultivation and the eagerness to distribute land in small parcels laid the roots for republicanism as it emerged in the 1780s.

In the Founding, contemporaries described the reforms of that era not as altering existing property arrangements to advance republicanism, but as safeguarding existing conditions against the possibility that a future aristocracy might emerge and assume political control. Political leaders wanted to reinforce and build upon the legacy of the colonial era. In building the new “republican” property system, the existing scholarship has overlooked that Founding Era institutional reforms such as reducing court fees and increasing transparency of property rights were more widespread and more consequential than reform of inheritance law. Moreover, the current scholarship has not given enough emphasis to the lack of foresight in the founding generation’s ideological belief that “dynamic” or commodified property was a central underpinning of a republican society. The political leaders of the Founding looked backward at European aristocracy and

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<sup>9</sup> Gordon S. Wood, *The Radicalism of the American Revolution* 269 (1991).

reasoned that eliminating protections for inheritance was essential for a meritocracy to survive. They failed, however, to appreciate the value of social stability in a fluctuating economic environment and that commodifying land and other wealth might exacerbate inequality and influence, and potentially corrupt, republican politics.

This account also differs from the existing scholarship in its subject matter. No work to date has placed the desire of colonists to obtain credit at the center of an American history of property law and its supporting institutions. It details a process whereby colonists and the imperial authorities reformed the law to allow land and human slaves to be commodified in unprecedented ways to achieve economic ends. In the account provided here, the same economic impetus that led to the expansion of slavery across the southern states and to the west also brought about unprecedented societal achievements in the form of laws that flexibly defined and protected property rights and highly functional institutions that processed claims, cleared title, and that publicized information about property rights at a relatively low cost. These bodies of laws and institutions are a legacy that is observable today in the highly functioning court system of the United States, in our commercial system that allows borrowing on the basis of multiple forms of collateral, and in the flexibility with which the law clearly defines property rights in intangible goods such as intellectual property and environmental goods, like carbon credits.

The American history of property would not be complete, however, without an understanding of its federalist dimensions. In the colonial era, the two primary checks on local legislatures were imperial oversight, and the desire to compete favorably with other colonies for access to credit. The imperial authorities, however, were removed by the

Atlantic Ocean and the English technologies of empire (military, commercial or otherwise) were in a less developed state than in later centuries. From the earliest years of the colonial period, the property institutions and laws were modified by colonial legislatures in response to local demands.

After the American Revolution, without the check of the British imperial authorities, the Federalists perceived the potential for democratically-elected legislatures to deprive individuals of property (in the form of debt obligations) to be a powerful threat to property-owners and to the stability of the American economy. Article 1, Section 10 of the United States Constitution includes several provisions intended to protect property rights from state legislative activity: it prohibits state legislatures from passing legislation that would “impair the obligations of contracts,” from coining money, and from making anything but gold and silver legal tender. Despite these provisions, the subsequent relationship of the states to the federal government was one in which the states maintained local control over laws pertaining to property and credit, receiving only indirect forms of oversight from the newly-created federal courts and the Bank of the United States. Even under the current federal bankruptcy law, the federal government defers to states’ policies defining which bodies of assets are exempt from creditors’ claims. The American commitment to local control over the key policies defining levels of risk in credit markets has a central role in United States history. American property law, its related institutions, and supporting legislative responses form an elaborate system that must be viewed in total in considering the American historical example as a model in the developing world today.

What follows is a rough outline of chapters of the book (which will be modified substantially to conform more closely to above introduction.)

## **Chapter Summaries**

### **Chapter I: *Imperial Property***

Relying on colonial charters, royal instructions to the colonial governors, colonial laws and acts, and private correspondence, Chapter I examines the original “imperial” agenda with regard to land in the colonies. It provides an overview of the conditions under which colonists obtained tenure throughout the colonies and the early treatment of land as a primary form of colonial wealth. This chapter also sets the stage for later discussions of American federalism by describing the structure of imperial governance, and colonial legislatures’ initial authority over property and inheritance law, creditors’ remedies, and currency policy.

Chapter I then provides a novel discussion emphasizing the importance of the land title registries that were established in all of the British colonies in the seventeenth century (even though such registries were not adopted widely in England until the twentieth century). In contrast to the colonial experience, the English landed class shunned mandatory public title registration to protect their interest in privacy. Land and credit markets in England operated according to a deed system that allowed landowners to keep their title interests and obligations to creditors private. Outside of some local deed enrollment regimes, land title interests were publicly disclosed only through ceremonies performed at the time of transfer or during title contests and debt actions litigated in the courts. To obtain a large loan, a property owner might disclose the family’s assets and credit history to specific creditors. Reputation and visible wealth—

rather than public disclosure of assets—drove more informal credit markets.

Landowners' emphasis on privacy was originally a protection against exploitative government action that can be traced to the Domesday Book created after the Norman Conquest. By the early modern period, the aristocracy's emphasis on privacy was rooted in complex social perceptions and values. These English attitudes toward title recording are relatively unknown to historians.

Chapter I also describes colonists' efforts to gain credit on the basis of land. In colonies that lacked a staple crop that could serve as the basis of credit, colonists were more likely to modify the legal regime to promote the use of land as a commodity. In colonies that produced profitable staple crops, in contrast, planters typically borrowed on the basis of annual crop yields, not on the underlying title to the land. The laws in these colonies were more likely to follow the English model by protecting land and inheritance from creditors. In general, colonial property law became immediately diversified, though with imperial oversight, given the context, as the common determining force.

## **Chapter II: *The Atlantic Economy and Parliament's Transformation of Colonial Law Relating to Land and Slaves***

Chapter II begins with original research describing how the English laws exempting land from debts were applied in each of the American and West Indian colonies. The picture is one of remarkable diversity based upon the specific context of wealth creation in individual colonies. Initially, most of the colonial courts and legislatures administered the English body of laws that exempted land from the claims of creditors in life and in inheritance proceedings. In the late seventeenth century, however,



a number of colonial legislatures in New England and the legislature of Barbados attempted to expand the extent of credit offered within their colonies by rejecting English protections to land from creditors. Then, during a recession in the early 1730s, a group of English creditors concerned about debt collection in Jamaica and Virginia—each of which had relied on English credit to expand slave labor forces—petitioned Parliament to enact a law that would ensure that colonial subjects could not use traditional English real property exemptions to protect their land and slaves from English creditors.

In 1732, Parliament enacted a sweeping statute entitled the *Act for the More Easy Recovery of Debts in his Majesty's Plantations and Colonies in America* (“Debt Recovery Act”), which applied to all of the North American and West Indian British colonies. The Act required the colonies to transform both the substance and procedure of creditor remedies, imposing a uniform regime throughout the British colonies. Substantively, the Act abolished the legal distinctions between land and chattel property in relation to the claims of creditors. Moreover, it required colonial courts to treat slaves as chattel in debt proceedings, rather than as a form of real property attached to the land. Defining land and slaves as chattel with regard to debts had two important implications. First, land and slaves could be seized and sold to satisfy any type of debt, including many widely-used forms of unsecured debt. Equally important, unsecured creditors gained priority to land and slaves over heirs when a debtor died. The Act therefore diminished the status of landed inheritance from a “birthright” to a highly contingent event: An heir inherited land only when the deceased’s debts could be satisfied from the deceased’s chattel property. As Joseph Story later described in his *Commentaries*, the effect of this legal transformation was to “make land, in some degree, a substitute for money, by

giving it all the facilities of transfer, and all the prompt applicability of personal property.”<sup>10</sup>

The Act also required colonial courts to extend to land and slaves the local processes in place for seizing and selling debtors' chattel property in satisfaction of debts. Those processes typically consisted of auctions and, at times, of in-kind transfers to creditors. The Act therefore provided parliamentary authority for the legal institutionalization of judicially supervised auctions of land, a remedy not available to creditors under English law. Moreover, as recognized by later English abolitionists, Parliament's Debt Recovery Act required that many colonial courts engage in one of the most abhorrent features of slavery: the administration of slave auctions to satisfy judgments based on debts.

The Chapter traces the legacy of the Debt Recovery Act in each of the colonies. The transformation toward less restrictive credit policies likely led to greater treatment of land and slaves as commodities, and expanded markets for land and slaves. Streamlining the procedures associated with the sale of land by execution made it easier and less costly for both unsecured and secured creditors to seize land. The Act likely increased the instances in which debtors sold their land to settle with their creditors in advance of an execution sale.

This account also ties the greater commodification of land to the expansion of slavery. The legislative history reveals that Parliament enacted the Debt Recovery Act to protect the interests of English merchants who lent money to planters for the purchase of slaves. The English exemptions of land from debt were most threatening to English creditors when slaves were present: when wealth held in the form of slaves might be

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<sup>10</sup>Joseph Story, *Commentaries on the Constitution of the United States* (Boston, 1833), I, 168, §182.

converted into landed wealth (and thereby made exempt), or when a colonial legislature might enact a law defining slaves as “real estate” and therefore as exempt from creditors’ claims. The Act promoted the slave trade by ensuring that English merchants who lent money for slave imports would be protected from strategic behavior on the part of planters to avoid paying their debts and from colonial debt relief legislation. This account is the first to show the deep connections between creditors’ remedies and procedures relating to land and those relating to slaves. Chapter II also describes the Act within the broader context of mercantilist regulations and discusses its importance as a precedent in the Stamp Act crisis in the 1760s.

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

Chapter III discusses the profound impact of the Debt Recovery Act on American economic and political life after the Revolution. In the founding era, many contemporaries viewed the alienability of land as a legal precondition of a republic.<sup>11</sup> The Debt Recovery Act was credited with diminishing the role of landed inheritance in the society. In *D’Urphye v. Nelson* (1803), for example, a judge on the Constitutional Court of Appeals of South Carolina, referred to the Debt Recovery Act as an explanation for why “the extreme anxiety observable in the common law of England to preserve the rights, and favor the claims, of the heir at law, *has been entirely dismissed from our law.*” Historians have overlooked this strain of republicanism: It reflected an early transformation toward a truly “colonial” law, a law developed in an imperial constitutional framework and suited to meet the ends of empire.

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<sup>11</sup> In 1787, Noah Webster, for example, wrote that “[a]n equality of property, with a necessity of alienation, constantly operating to destroy combinations of powerful families, is the very *soul of a republic.*”

An understanding of the colonial history of creditors' remedies, however, reveals a profound difference in the world views of the emerging Federalist and Jeffersonian-Republican political parties. Federalists tended to champion the use of land as a commodity, as a central means of ensuring favorable credit conditions and liquidity. They viewed rapid circulation of land as necessary to the creation of a true meritocracy. The Jeffersonian-Republicans tended to represent the interests of agriculturalists who viewed land as the basis of family wealth and who valued social stability over the generations. They defended protections to land and inheritance from creditors as necessary to the creation of a truly "independent" population qualified to participate fully in a democracy. Scholars have peripherally noted these tensions, without recognizing the colonial legal transformation that gave rise to the debates.

After the Revolution, some states, such as Virginia, reverted to the traditional English body of creditors' remedies until the mid-nineteenth century. Thomas Jefferson's statements on debt show that he opposed the regime enacted under the Debt Recovery Act. The book provides a novel interpretation of Jefferson's famous statement in his 1789 letter to Madison that it is self-evident that "*the earth belongs in usufruct to the living.*" A few lines down, he explains the comment by stating that:

[N]o man can, by *natural right*, oblige the lands he occupied, or the persons who succeed him in that occupation, to the payment of debts contracted by him. For, if he could, he might, during his own life, eat up the usufruct of the lands for several generations to come, and then the lands would belong to the dead, and not to the living, which would be the reverse of our principle.

The theory of property expressed in Jefferson's comment reveals his assumption that land, at least according to "natural right," involved not simply an individual's fee simple interest, but also the claims of family members, the traditional English conception. It is

particularly striking that Jefferson chose to use the term “usufruct” (a right to use property, and to transmit it to the next possessor in substantially the same state) in the course of describing an individual’s relation to his land. Americans in the Founding Era typically viewed American republicanism as rooted in the country’s unique attribute of having widespread freehold ownership. Usufructuary rights have more in common with the traditional English approach toward landed estates, in which the dominant mode of ownership was a life tenancy (an interest lasting only for the duration of life).

Differing state policies relating to creditors’ claims to land were a central source of tension underlying American federalism in the founding era. Many contemporaries similarly viewed the regulation of property as beyond the proper scope of federal government power. Moreover, when debtors experienced the full impact of the Debt Recovery Act during recessions — the possible loss of freehold land and disenfranchisement — state legislatures responded with temporary debt relief legislation that conflicted with the principles of the Act’s regime. Fear of such democratically-enacted policies was a principal reason for inclusion in the United States Constitution of the Contracts Clause, which was a means by which federal courts could regulate state legislatures’ debt relief measures.

In England, exemptions of land from creditors’ claims led to a categorical division between landholders, whose wealth was protected from much financial risk, and “merchants” and “traders,” who by legal definition were people whose assets were subjected to greater financial risk. In America, such categorical differences never emerged: American colonies neither had discrete classes of “merchants” and “traders,” nor a discrete landed class. During the colonial period, all forms of wealth were subject

to commercial risks. After the American Revolution, the vast differences in local preferences on the issue of creditors' remedies were expressed, not through legislation specific to particular occupations ("farmer" versus "trader/merchant"), but instead through inter-state variation and hostility toward federal government policies that might have imposed a uniform regime reminiscent of the Debt Recovery Act. American federalism replaced English occupational categorization as a legal device to differentiate the extent to which individuals would be protected from financial risk.

#### **Chapter IV: *Reshaping Credit in the Early Republic***

Chapter IV presents a new interpretation of the abolition of primogeniture and the entail by state legislatures after the American Revolution. Existing historical scholarship describes the abolition of primogeniture and the entail as strong evidence of republicanism—the desire to eliminate traditional English practices that might lead to rule by an American landed aristocracy. Indeed, the legal event has been part of the standard narrative of republicanism and the emergence of democracy since the 1780s (in the writings of Jefferson) and the 1820s and 1830s (in the writings of Alexis de Toqueville, James Kent, Joseph Story, Daniel Webster, and others).

Abolishing the entail, however, at base involved credit markets. When land was entailed in a will, the heir inherited only a life interest and the land would descend through the generations in perpetuity (unless a court or legislature authorized the barring of the entail). Entailed land was protected from seizure for debt satisfaction by creditors because creditors could not take an interest greater than the life interest actually owned

by the debtor. With regard to entailed land, creditors could take a temporary possessory interest in land, but the ultimate title interest remained in the family line.

This account is the first to emphasize the close relationship between the practice of entailing land and the default body of creditors' remedies that applied when land was not entailed. When land was protected from the claims of creditors, entailing was not necessary to protect against basic financial risk. After the Debt Recovery Act required that all land and slaves be available to satisfy unsecured debts, however, the practice of entailing became the primary device available to protect assets from creditors. Under the Act, entailed lands became islands removed from commerce in a world that otherwise treated land like other forms of chattel. The abolition of primogeniture and the entail in all states by 1800 was therefore a highly important event in ways historians have not fully appreciated. In the absence of the entail, the law provided for close to no protections of land from creditors.

The event was also significant because of the early colonial turn toward public recording of title and mortgages. The entail was a private means of protecting wealth from creditors: assets were entailed by means of wills that did not have to be disclosed in advance. Many in the founding era, however, viewed *public* recording of mortgages and the abolition of the entail as important features of a republic that distinguished Americans from English aristocrats who cheated creditors by failing to publicly disclose their assets and liabilities. The abolition of the entail thus reflected a more fundamental rejection of an older mode of credit markets—credit based on family reputation and private disclosure—and the corresponding acceptance of public disclosure of assets and

liabilities as important “American” values. This insight has not before been introduced in the literature.

Chapter IV also discusses the legal framework relating to the use of slaves as collateral after the Revolution. The abolition of the entail with regard to slaves had a republican component: abolishing the entailing of slaves prevented wealth held in slaves to be tied to particular families through the generations. For the slaves, however, it meant that they were more likely to be sold to satisfy debts. In England, the impact of the Debt Recovery Act on slaves was a focal point of the early English abolitionist movement. Indeed, in response to abolitionist protest, in 1797 Parliament repealed the Debt Recovery Act with respect to slaves in all of the remaining British colonies. The Parliamentary act repealing the Debt Recovery Act with respect to slaves, like the Act itself, has received little recognition in histories of British slavery and abolition. In contrast, after the American Revolution, America moved to a regime of pure “chattel” slavery in which the majority of slave auctions were held under court order.

#### **Chapter V: *A Second Transformation: Property, Homesteads, and Slaves***

For over a century, from the Debt Recovery Act in 1732 through the 1840s, America experienced a unique period in which the desire for more extensive credit led to laws that provided relatively few protections from creditors’ claims. Chapter V describes the nation-wide emergence by the 1840s of a consensus toward greater exemptions for land from the claims of creditors. States enacted homestead exemption legislation that allowed debtors to protect the family homestead from creditors’ claims. Almost every state enacted a law allowing married women to hold and register property in their own



names—property that would be immune from the claims of their husbands' creditors. States also expanded the procedural protections extended to mortgagors. These laws were a partial return to the family-based conception of society of early modern England, but with an important modification. Following from the colonial heritage, they required disclosure in public title registries of the nature of the assets that would be exempt from creditors. To obtain a homestead exemption, one had to register the family homestead as exempt prior to obtaining credit. Land or homes owned by women would be registered in their names.

### **Conclusion**

The Conclusion will describe the ways in which the history of colonial institutions and creditors' remedies had a lasting legacy through their influence on American economic, social, and political developments.