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## Introduction

In the United States today, there is a vast credit economy that almost anyone who owns property or who has a steady income can access by obtaining home mortgages and car loans, by financing a home business, or by running up credit card debt. On a larger scale, corporations rely on institutional credit markets to raise billions of dollars for investments every year. This world of credit, with its many advantages, but also with risks of over-leveraging, real estate bubbles, and widespread foreclosures, rests on a structure of laws and legal institutions that is often obscure in our day-to-day lives. At the most basic level, obtaining credit requires having property, and taking on debt implies the risk of losing that property. Two centuries of American economic prosperity have been based on the laws governing credit and property. We take access to credit for granted but, in fact, decisions made centuries ago set the stage for our modern economy. *Credit Nation* examines the early origins of property rights and the formal legal institutions serving as a foundation for the market economy and political system of the United States.

The legal origins of our credit economy were shaped in the British colonial era and the American founding period, from roughly the 1620s to the 1790s. The book describes how British laws relating to property and credit were imported to the colonies and adapted for the colonial context. Laws and legal institutions surrounding property were at the heart of the entire, slowly emerging colonial enterprise. It emphasizes how, in creating an “American” property law prior to Independence, the colonial legislatures, regulated by Parliament in England, were focused on matters relating to

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expanding collateral and credit. The expansion of slavery, a labor system based on property rights in human beings, coincided with the reform of legal institutions to encourage slaveholders to obtain credit on the basis of slaves as collateral. A second theme of the book asks how the legal history of credit relates to the political history of the United States. How were property laws shaped by the context of British colonial rule? How are property laws and institutions linked to representative government in American history? The book illustrates the central role of collateral and credit in the rule of Britain over the colonies, the American Revolution, and the reform of legal institutions in the founding era.

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At the Constitutional Convention in 1787, Alexander Hamilton described “the security of Property” as one of the “great obj[ects] of Gov[ernment].”<sup>1</sup> Despite gaining independence from Britain, the founding era was a period in which landed wealth still framed conceptions of the economic, social, and political order. At the time of the Revolution, every state but one required freehold land ownership for participation in the franchise, meaning that the voting public was a small minority of the population.<sup>2</sup> And yet, an idealized view emerged that the country was defined by its relative equality. To Thomas Paine (who immigrated from England to America in 1774), for example, a central difference between English and American society was that “[i]n America, almost every farmer lives on his own lands, and in England not one in a hundred does.”<sup>3</sup>

Whiggish commentators of the founding era and early nineteenth century created narratives of the American Revolution in which property served as a central connection linking the political system, the economy, and the society. Prominent legal treatises emphasized that, in the process of settling British America, the colonists built institutions and reformed the property laws of England in ways that reinforced the republican political and ideological revolution of the times. In his famous Plymouth Oration commemorating the two-hundred-year anniversary of the pilgrims’ arrival, Daniel Webster focused on the exceptional nature of property in America and its relation to republican government. He remarked that “[t]he history of other nations may teach us how favourable to public liberty is the division of the soil into small freeholds.”<sup>4</sup> He continued that “[A] multitude of small proprietors . . . constitute not only a formidable, but an invincible power.” It followed that, “In this country we have actually existing

systems of government, in the maintenance of which, it should seem, a great majority, . . . must see their interest.”<sup>5</sup> Many shared Webster’s belief that the widespread ownership of land across the American states was the linchpin of the republican political system.

Political leaders of the founding era defined the new American political world by its rejection of hereditary privilege, the core of the European aristocratic political order. In England, from the late medieval period through the modern era, ownership of landed estates was associated with political privileges ranging from, at the highest levels, membership in the House of Lords, to local political offices and social influence.<sup>6</sup> English law was characterized by a preference for maintaining the integrity and cohesiveness of estates over the generations, securing political power within families.<sup>7</sup> The English legal scholar William Blackstone’s *Commentaries on the Laws of England*, published in the years 1765–1769, for example, describes “the principal object of the laws of real property in England” as the law of inheritance.<sup>8</sup>

In the American founding era, the prevalence of land ownership in the United States dispersed political power throughout the population. In Europe, one justification for the political power of a landed aristocracy was that it served as an essential counterweight to the tyranny posed by monarchy. In contrast, in a republican America, any political tyranny would be warded off by the masses of freehold property owners who participated in government. Landowners were celebrated as fiercely protective of their civil liberties. As Noah Webster stated in 1787, for example, “[a]n equality of property, with a necessity of alienation, constantly operating to destroy combinations of powerful families, is the very *soul of a republic*.”<sup>9</sup>

Widespread ownership of property was assumed to flow from easy circulation of land in the marketplace. The dominant ideological framework of the founding era equated large consolidated landholdings with aristocratic property law that privileged inheritance and inalienability. Aristocracies were believed to exist, in part, because property law protected land from the dynamism of the market. Land markets, in contrast, were predicted to break down aristocracy. To many legal thinkers, property laws allowing landowners to sell or devise land out of the family line, in property parlance, the *alienability* of land, was a defining feature of the American property system.

Security of title was the foundation upon which the purported political and economic virtues of landowning rested. In England, the legal technicalities of land conveyancing, such as buying, selling, and mortgaging land, and placing land in trusts, often took place in private homes and lawyers’ offices.<sup>10</sup> The transfer of an ownership interest in land was formalized in a

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public ceremony, but mortgages and other claims against the land were not generally publicized or required to be recorded by the local government or in the courts. Instead, the parties and their lawyers pored over documents relating to the status of title of a particular parcel. In a celebrated treatise in the 1830s, the legal authority James Kent attributes the “very limited” practice of recording deeds in England to “the general and natural disposition to withdraw settlements, and the domestic arrangements, from the idle curiosity of the public.”<sup>11</sup>

The private English system, however functional, privileged large landowners whose family reputations, political influence, and large income streams provided access to credit unavailable to those with smaller estates. Smaller landowners were excluded from the credit lines available to the elites because of the costs of title authentication under the private system. There were popular movements to introduce public registries in the seventeenth and eighteenth centuries in England to expand access to credit, but large landowners consistently opposed the proposals.<sup>12</sup>

Supreme Court Justice Joseph Story, explaining the sources of the American Revolution in his 1833 *Commentaries on the Constitution*, emphasized the role of property as an underpinning of the American political order. Story notes that in the United States, “few agricultural estates in the whole country have at any time been held on lease . . . The tenants and occupiers are almost universally the [owners] of the soil.” To Justice Story, the widespread ownership of land and the strength of colonial property rights had made citizens fiercely protective of their civil liberties. He stated, “The yeomanry are absolute owners of the soil, on which they tread; and their character has from this circumstance been marked by a more jealous watchfulness of their rights, and by a more steady spirit of resistance against every encroachment, than can be found among any other people.”<sup>13</sup> Perhaps surprisingly from the modern vantage point, Story continued by linking the property rights underlying landowners’ “jealous watchfulness of their rights” and “spirit of resistance” in the American Revolution with the history of legal institutions that clarified title and expanded land markets. In Story’s words, “Connected with this state of things, and, indeed, as a natural consequence flowing from it, is the simplicity of the system of conveyances, by which the titles to estates are passed, and the notoriety of the transfers made.”<sup>14</sup> After describing the system of land title recording, Story continued that “It is hardly possible to measure the beneficial influences upon our titles arising from this source, in point of security, facility of transfer, and marketable value.”<sup>15</sup> Story described how colonial laws had made land “a substitute for

money,” which he explained as “a natural result of the condition of the people in a new country, who possessed little monied capital; whose wants were numerous; and whose desire of credit was correspondingly great.” He added, “the growth of the respective colonies was in no small degree affected by” this legal transformation.<sup>16</sup>

Similarly, Zaphaniah Swift’s 1795 treatise celebrated that “our conveyancing can boast of a simplicity, conciseness, facility, and cheapness, superior to any other country.”<sup>17</sup> Webster’s Plymouth Oration emphasized as one of many important aspects of property in America that “[t]he establishment of public registries, and the simplicity of our forms of conveyance, have greatly facilitated the change of real estate, from one proprietor to another.”<sup>18</sup> James Kent’s 1830 treatise remarked in a section on conveyancing law that “In no other part of the civilized world is land made such an article of commerce, and of such incessant circulation.”<sup>19</sup>

The simplicity and relative inexpensiveness of American conveyancing allowed landowners to buy and sell property as a liquid asset, and supported the vast colonial credit system. Title registries were a quintessentially “republican” institution in the sense that, by publicizing titles and by prioritizing creditors’ claims at a low cost, they allowed smaller landowners and slaveholders access to credit. The institutional infrastructure developed in colonial America was the formal mechanism for protecting property rights, and essential foundation underlying the credit system and republican government.

## **Institutions**

In examining the legal history of colonial British America through the lens of credit, this book traces three themes. First, it examines colonial legal institutions relating to property and credit. Scholars define the term “institutions” in many different ways. The focus here is on the “ground-level” legal institutions, such as courts and title recording measures that protected property titles, supported mortgage markets, and processed debt claims. Colonists settling in America brought with them familiarity with British laws, customs, and legal institutions. Building a new society from the ground up, however, offered the opportunity for modifications of British legal traditions, which led sometimes, in aggregate, to dramatic changes. Already in the 1600s, colonial administrations began establishing county-level common law courts where debts could be litigated and enforced and where disputes over land titles could be resolved and publicized. Moreover, each of the colonies

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enacted laws instituting local title recording that often expressly promoted the security of mortgages. These recording offices or registries allowed for simple conveyances by deed, publicly accessible records, and the extension of credit on the basis of a multiplicity of assets.

One of the most novel and important features of American property law is centrally linked to American political history: property law and legal institutions were shaped by means of the statutory enactments of representative assemblies in collaboration with the crown-appointed governors. In the American colonies, the colonial administrations defined the problems to be addressed, shaped law, modified it, built institutions, controlled their costs, and regulated their operation in response to local conditions. The creation of property law and institutions by colonial statutes was quite in contrast to the property law of England, which reflected centuries of customary practice, political negotiation between kings and elites, and the legacy of feudalism, in addition to parliamentary and local law. In hindsight, founding era commentators recognized that the legislative creation of property law during the colonial era was a special phenomenon: the colonial legislatures had initiated a process of representative involvement and input into their institutions and laws that reflected a political transformation toward a republican form of government. One of the colonial lawmakers' tremendously important innovations was the use of local legal institutions in the colonial credit economy. The ease of access to credit that this created was key to the explosive growth of capitalism in nineteenth-century America.

A major complexity in interpreting the political conception of landownership in the founding era is that commentators avoided the topic of slavery and how their theories of republicanism accommodated property rights in slaves.<sup>20</sup> Slavery was a system of labor rooted in the starkest inequality one can imagine: where the laborers are owned as property and their owners capture any profits they generate. Moreover, in colonies relying on slave labor, there was often greater inequality within the free White population, compounding the obvious inequality between owners and slaves.<sup>21</sup> The liquidity of slave property and the institutional reforms to protect property rights directly promoted the expansion of slavery and the use of slaves as collateral in the credit economy.

Slaves were among the most valuable of the "assets" used as collateral in the colonial era and in the early republic. Slaves were valued highly as collateral because of their mobility.<sup>22</sup> Having both land and slaves serve as collateral expanded slavery because it expanded access to credit that could be used to finance the purchase of more slaves. It is estimated that by 1770,



467,000 Black people lived as slaves in the North American colonies.<sup>23</sup> Alice Hanson Jones's study of probate records reveals that, at the time of the American Revolution, in the South, slaves constituted 35.6% of total wealth.<sup>24</sup> The use of slaves as collateral for debts was one of the great evils of American slavery. Being sold or auctioned off to pay the slaveholders' debts tore slaves from their families and communities. The constant threat of such a sale in the context of highly liquid slave markets was coercive and cruel, even by the appalling standards of slavery itself.

Legal institutions played a central role in advancing this form of cruelty in slavery. Colonial legal institutions offered a centralized location to record mortgages with slaves as the collateral, to enforce debt judgments involving the seizure of slaves, and to administer slave auctions. Free colonists relied on these institutions while treating slaves as a central commodity and form of collateral in the economy.

## **Commodification**

A second major development involved the scope and process relating to creditors' remedies. Traditional English laws and procedures stabilized the society by shielding landed estates against creditors' claims. Land markets were active in England, but land was primarily treated by the law as a source of wealth that, like an endowment, would persist through the generations. Notably, prior to 1732, the British colonial regime operated under principles of federalism with regard to debtor/creditor and property law: the legal definition of property and the scope of creditors' remedies were within the discretion of each colonial administration to repeal or amend. Although each colony had its own policies and culture, the British emphasis on protecting stable landownership gave way to a more commercial view: one where, more often, land served as a monetary asset in credit agreements.

The New England colonial governments initiated the transformation of the legal definition of land. Starting in the seventeenth century, the New England colonies redefined land to be a "chattel" or commodity when it came to creditors' claims. When the New England colonies legally defined land as a chattel, even unsecured creditors (for example, merchants who gave goods to shopkeepers on credit, or shopkeepers recording debts of farmers in book accounts) could have courts order that debtors' land be taken to satisfy their debts if the debtors' other property was insufficient. In contrast to New England, the colonies in the South initially were more likely to retain English law and protect land against unsecured creditors' claims. Initially,

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colonies adopted a variety of policies regarding slaves: they defined slaves either as “land” (protected from unsecured creditors under English law) or as “chattel” (available to satisfy the claims of creditors).

### THE DEBT RECOVERY ACT

In 1732, Parliament acted to push colonial property law farther from the model of English landowning. In 1731, British merchants who had extended credit to planters in the colonies lobbied aggressively for Parliament to pass sweeping legislation regulating the status of colonial property rights. In August 1731, a group of thirty-two merchants in London submitted a petition to the Board of Trade complaining that they had no “Remedy for the recovery of their just Debts” in some of the colonies due to the laws in place, to court processes, and to currency manipulation.<sup>25</sup> Their attention at that moment was focused on Jamaica, where the legislature had passed a law holding that unsecured creditors could not use legal process to seize their debtors’ land.

In 1732, Parliament responded by enacting the sweeping Debt Recovery Act, which required that, throughout all of the British colonies in America, all land, houses, and slaves were assets available to satisfy creditors’ claims against debtors.<sup>26</sup> The Debt Recovery Act was a landmark: English society had long privileged land as a unique form of property that warranted shielding from creditors. Land conferred on its owners political and social status. Legal protections on land from creditors’ claims reduced widespread financial risk, promoted social stability through the inheritance of estates, and stabilized the political system. In contrast, Parliament’s Debt Recovery Act mandated that throughout the British colonies in America and the West Indies, property held in landed estates—as well as slaves—would be mere chattels, or things, when creditors pursued their claims.

Parliament’s Debt Recovery Act was a law for the colonies only, starkly differentiating the colonial property regime from that of the mother country. Why a separate law for the colonies? According to the Whig agenda of Sir Robert Walpole, the role of the colonies was to benefit the British economy. British authorities prioritized the interests of the English and Scottish creditors who lent extensively to the colonies over any interest in replicating English law and political society. As Joseph Story later described, this law made colonial “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>27</sup> Although not mentioned by Story, in reality slaves, even more so than land, were the primary collateral and liquid asset in many areas.

Slaves had been used as collateral and had been sold in judicially supervised auctions long before Parliament enacted the Debt Recovery Act. The Act, however, transformed local practice, determined colony by colony, into a parliamentary mandate. The Debt Recovery Act's enforcement of slave auctions was recognized by the early nineteenth-century abolitionists in Britain. In 1806, in the first known pamphlet on slave auctions, Bryan Edwards, a Member of the House of Commons, describes the practice of auctioning slaves to satisfy the slaveholder's secured and unsecured debts as a grievance "so remorseless and tyrannical in its principle, and so dreadful in its effects," which, "though not originally created, is now upheld and confirmed by a British act of parliament."<sup>28</sup> Edwards says of the Debt Recovery Act: "It was an act procured by, and passed for the benefit of British creditors; and I blush to add, that its motive and origin have sanctioned the measure, even in the opinion of men who are among the loudest of the declaimers against slavery and the slave trade."<sup>29</sup> After describing the horrors of the slave auction and the fact that the practice of selling slaves at auction to satisfy debts "unhappily . . . occurs every day," Edwards states: "Let this statute then be totally repealed. It is injurious to the national character; it is disgraceful to humanity."<sup>30</sup> In 1797, Parliament repealed the Debt Recovery Act with respect to slaves in the remaining British colonies.<sup>31</sup> In the United States, slaves would continue to be used as collateral until emancipation sixty-five years later.

What emerged as a result of these wholesale changes to English law was a truly colonial property law: a body of law and institutions developed to encourage liquid markets and the extension of credit on the basis of land and slaves in the British colonies, societies with social, political, and economic structures entirely different from that of the mother country. For the remainder of the eighteenth century in Europe, land might still secure the political, economic, and social status of nobility and other elites. In contrast, in the British colonies and later in the United States, the legal structure made land more liquid, more extendable as collateral, and more readily available as a source of investment capital. This legal shift fundamentally transformed the economic, political, and social structure of the colonies.

## COLONIAL MEASURES TO RESPOND TO ECONOMIC RISK

Extending property as collateral for a loan means that there is a risk of losing the property. The contradictory desires for available credit and security of property led to a range of solutions that varied between the colonies and over time. A legal regime that prioritized the claims of creditors and expanded

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access to credit infused the economy with greater financial risk. In times of economic downturn, creditors sued for repayment of debts, increasing the threat to debtors of losing their property in the courts.

Within this context of expanding collateral and credit, in some colonies, most notably Virginia, property owners made use of an aspect of English property law to shelter their assets from creditors' claims. Like in England, colonists drafted wills that stated that one or more of their children would inherit property in a form called the "fee tail." Fee tail property passed directly to the named devisee and could not be seized by creditors. The fee tail came to be seen after Independence as a hallmark of aristocracy. Aristocracies were rooted in illiquid estates in land that passed through generations and were linked to positions of political power. The use of the fee tail in the colonial era has been treated by historians as a grasp for aristocracy overturned by the American Revolution. The abolition of the practice in Virginia in 1776, coinciding with the Independence movement, was celebrated as the centerpiece of the transformation to a republican form of government.

This book diverges from the focus on aristocracy by examining the fee tail through an economic lens. It suggests that colonists used the fee tail strategically to protect their assets from financial risk. Today, the wealthy often shelter assets in trusts, and many states offer homestead protections exempting a certain amount of money invested in the family's primary residence from creditors' claims. The fee tail was the colonial analogue. The Debt Recovery Act of 1732 imposed a law on the colonies requiring that land and slaves be available to be seized by creditors, but did not ban the practice of fee tail. Virginians who put their land in the form of fee tail created protected islands of wealth within a broader world where the traditional English protections for land had been repealed by the Debt Recovery Act (again, under English law, debtors' title to land could be taken when they mortgaged property but not for unsecured debts). Fee tail played a special, countervailing role in a context where the legal regime expanded access to credit and collateral, and where property was defined as a commodity in credit markets.

### **Colonial Rule**

Third, this book focuses on the central role of laws and legal institutions related to credit in the history of British rule and the tensions leading to the American Revolution. Colonial legislatures' responsibility for crafting property law and local economic policy empowered them to become powerful forces within the British governing structure. In the 1760s, after the Seven

Years' War, British authorities expanded oversight of colonial laws and institutions. One pivotal moment was Parliament's Stamp Act of 1765—which many historians view as the act that triggered the American Revolution. This book highlights the fact that colonists objected to the Stamp Act because it imposed taxes on the legal institutions that were central to the colonial credit economy: the Stamp Act taxed legal documents involved in obtaining title deeds and mortgages, and securing and enforcing credit agreements.

During the Stamp Act crisis, British officials thought that the economic benefits of the Debt Recovery Act's property regime would keep colonists aligned with the Crown. William Knox, who served as British undersecretary of state from 1770 to 1782, was a central strategist in policy-making relating to the American colonies throughout the Revolutionary Era. In reaction to the Stamp Act protests, Knox vehemently defended parliamentary authority over the colonies. To Knox, the primary advantage the British colonies held over other European colonies was the "superior credit given to the planters by the English merchants." And, "if we inquire into the cause of this unbounded confidence and credit given by the English merchants to the Colonies, from which the Colonies have reaped so great advantage," it was "*the security which they have for their property by the operation of the laws of England in the Colonies.*" There were countries where the English merchants might have found "greater profit" than the British colonies, "but in foreign countries they cannot be certain of a legal security for their property, or a fair and effectual means of recovering it; whereas in the British Colonies they know the laws of England follow their property, and secures it for them in the deepest recesses of the woods."<sup>32</sup> Later Knox emphasized the importance of the Debt Recovery Act in particular, which he describes as "subjecting lands and negroes in the Colonies to the payment of English book debts." To Knox, it "may truly be called the Palladium of Colony credit, and the English merchants' grand security." If they gained Independence, the colonial legislatures would likely enact laws that brought an "end of their confidence" and that would check "the prosperity of the Colonies."<sup>33</sup> To Knox, parliamentary authority was best defended by its legal regulations that expanded colonists' access to credit. Yet, to colonists convinced that legal institutions were central to their economic life, the Stamp Act's taxes reflected the Crown's hostility to colonial legislatures' authority over policies relating to commerce.

After Independence, the property laws and legal institutions developed in the colonial era to promote the expansion of credit were maintained and reformed. In the founding era, many state legislatures extended the Debt

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Recovery Act and reformed ground-level legal institutions to bring greater transparency to property titles, further advancing credit markets. A profoundly important colonial legacy was a deep commitment to the institutions that would inexpensively publicize property interests for the purpose of market exchanges and credit markets.

This is not to say there was not opposition to the property regime of expanded collateral and credit. For example, Thomas Jefferson's writings show his opposition to the policy of taking land to satisfy debts. Virginia failed to extend the Debt Recovery Act and returned to the English law protecting land from unsecured creditors. More dramatically, Shays's Rebellion in the 1780s involved hundreds of mostly former soldiers shutting down courthouses in Western Massachusetts, where their debts were being foreclosed upon and where they felt saddled with court fees. Starting in the 1820s, and increasing after the economic crisis of 1837, states enacted laws that protected debtors by allowing individuals to shield property from creditors and by introducing procedural hurdles to foreclosure.

The fact that it was the British Parliament that imposed the Debt Recovery Act on the colonies weighed on the issue of federal oversight of state law in the new republic. Alexander Hamilton reflected in the 1780s that the Debt Recovery Act "Admitted more then our Legislature ought to have assented to; it was one of the Highest Acts of Legislature that one Country could exercise over another."<sup>34</sup> But, however reluctantly, many in the founding era recognized the value of federal oversight of local economic policies relating to collateral and credit. The framers of the US Constitution inserted parliamentary-style control in its text by prohibiting 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. The states maintained local control over laws pertaining to property and credit, receiving only indirect forms of oversight from the federal government.

Despite the wide variation between the states on the laws regulating debt, access to credit underlies the modern US economy and its culture of entrepreneurialism. Today, virtually any sort of property can be used as collateral for a loan. Many countries still do not recognize chattel mortgages and have far more limited credit markets.<sup>35</sup> In the United States, over-leveraging in housing markets and putting too many assets in financial risk is often a greater concern than a lack of credit. The complex legacy of the colonial laws and institutions expanding collateral and credit is still with us.

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At one time leading historians characterized the colonial era as a pre-market world of small, largely self-reliant communities, described as “peaceable kingdoms” insulated from today’s economic culture.<sup>36</sup> Their assumption fed into the field of legal history, where scholars emphasized that the legal transformations associated with the market revolution of nineteenth century reflected a dramatic departure from the values and the society of the colonial era.<sup>37</sup> Over subsequent decades, however, colonial historians and legal historians advanced the understanding by showing, in contrast, how colonial communities evolved and interacted with labor markets, production for profit, and legal institutions.<sup>38</sup>

Property laws feature centrally in scholarship on the American Revolution: historians have long emphasized that the founding generation of political leaders placed property law at the heart of the ideology they advanced in the new nation. With regard to theories of the American Revolution itself, the path-breaking work of Bernard Bailyn and Gordon S. Wood established the central ideological origins of colonists’ movement for independence.<sup>39</sup> One of the great symbols of early republicanism in the dominant historiography is the rejection of the English inheritance policies of primogeniture and the fee tail that kept estates intact over the generations.<sup>40</sup> As Gordon S. Wood has described, the English landed elite based its political authority on the stable rental income gained from owning large estates. The reform of inheritance laws in the founding era came to symbolize the dominance of new ideological principles and the rejection of aristocracy.<sup>41</sup> This account adds to the existing narrative by emphasizing the extent to which a “commercial republican” ideology in the founding era celebrated land as a marketable commodity, with titles that could be transferred easily, and that was a foundation for a world of credit, collateral, and capitalism.<sup>42</sup>

This book differs from those that center exclusively on the American Revolution as the time period when colonial society rejected English property law and its emphasis on inheritance. It asserts that by the 1730s, colonial and parliamentary law had substantially dismantled the English inheritance system by permitting unsecured creditors to use legal process to take title to land and priority over heirs in inheritance proceedings. The founding era was a time of ideological revolution, of course; however, this book shows that both local colonial legislation and Parliament’s Debt Recovery Act laid the underpinnings of this revolution decades earlier.

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The British American colonial credit economy must be understood as part of the broader financial revolution of the seventeenth and eighteenth centuries. In this period, governments and banks adopted novel ways to expand liquidity and credit, such as debt instruments and currencies. The landmark event of the creation of the Bank of England in 1694 revolutionized public finance. The Bank of England held the government's reserves and issued stock—creating an early financial market—as well as issuing notes based on government debt.<sup>43</sup> Fully understanding the financial revolution of the seventeenth and eighteenth centuries, however, requires understanding the direct relationship between “top-down” measures by governments to legally authorize debt and currencies for government finance and the “bottom-up” efforts by individuals to mortgage their land and slaves to gain access to credit described here. Building legal institutions that supported property rights and creditors' claims led to vastly expanded liquidity as governments also created financial instruments to expand the society's moveable wealth.

Slavery was an integral feature of the colonial credit economy and the origins of capitalism. Edmund S. Morgan long ago described the deep connections between slavery and republicanism: as White southerners united around the ideology of equality, they simultaneously subjugated Native Americans and Black people.<sup>44</sup> The “commercial republican” mentality of the founding era continued on in the Southern states with the expansion of slavery in the late eighteenth and nineteenth centuries. In 1944, Eric Williams published *Capitalism and Slavery*, a groundbreaking history of slavery in the British Empire and its direct connection to the rise of British capitalism.<sup>45</sup> Williams focused on the profits from slavery, the production of crops like sugar, international trade flows, and how they lead to riches in Europe. Emphasizing the use of slaves as collateral, as this book does, provides a different, internal link to capitalism. The funds that were used to expand slavery and plantation agriculture were gained by adopting laws that defined slaves as chattel property and by institutions that processed legal claims against slaveholding debtors. That funds for economic expansion were raised on the basis of slaves as collateral reveals new dimensions of the atrocities of slavery and its relation to the emergence of capitalism. Slaves' vulnerability to their slaveholders went beyond violence and rape: as collateral, slaves could be seized and sold depending on markets for crops, weather conditions, and their masters' bookkeeping and finances.

Recent scholarship on the nineteenth-century history of capitalism, such as Sven Beckert's *Empire of Cotton* and Walter Johnson's *River of Dark Dreams: Slavery and Empire in the Cotton Kingdom*, examine the emergence



of capitalism through the lens of power politics and forms of coercion deriving from efforts to expand production and access to markets. The history of capitalism literature suggests that ground-level institutions often played a minimal role within the broader context of domestic cultural and ideological claims on power and authority and the broader context of the politics of empire.<sup>46</sup> In contrast, this book emphasizes that laws and institutions did have a major impact on the emergence of capitalism.

When an English ship carrying trade goods arrived in a colonial Virginia port, the ship captain might have unloaded his cargo knowing that the goods would not be paid for until the following year. Did the legal institutions matter? When a Pennsylvania farmer bought seed from a store that he would pay for with his next harvest, did institutions matter? This account suggests that laws and legal institutions informed these transactions in the sense that (1) public recording of debt judgments, mortgages, and titles provided transparency and encouraged creditors to trust that the system would recognize their priority over subsequent creditors; (2) the background laws set the ground rules that applied when things went wrong. When a debtor had taken on too much debt, or during times of economic recession, it mattered greatly whether land and slaves were available to be seized as assets to satisfy debts. The background laws provided constant leverage for creditors seeking repayment, even if they never exercised the legal option of seizing the debtors' assets. To understand the importance of colonial laws and institutions, one need only see how litigation on debts dominated the dockets in court records of any county in the colonial era. Though most economic actors did not sue each other when commercial relations were going well, the dominance of actions based on debts and mortgages in the colonial court records shows that colonial institutions served as an essential backdrop to the entire commercial system.

There were many facets to the eighteenth-century economy: from the politics of empire, to the revolution in government finance, to the Atlantic slave trade, to legal reforms related to land. This book suggests that the legal commodification of land and slaves as collateral and the creation of legal institutions for recording property titles and foreclosing on mortgages and debts were important underpinnings of the future capitalist society.

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Chapter 1 provides context by describing the general structure of trade and credit and Parliament's legal regulation of commerce in British America. It

examines how colonial land policy, a central crown prerogative, emphasized cultivation and distributing land in relatively small parcels. In the founding era, political commentators stressed that the nation enjoyed widespread land ownership. The same policy, however, encouraged the importation of slaves. Chapter 2 describes the basic colonial legal institutions such as common pleas courts and title recording devices that served as a foundation for credit.

Chapter 3 shifts its focus away from institutions to the legal doctrines relating to credit markets and commodification, looking at the issue of assets the legal system protected from the claims of creditors. It describes how colonial legislatures reformed English law to expand the scope of creditors' remedies against land and slaves. The chapter examines the way that, prior to 1732, colonial legislatures used debtor-creditor law strategically to advance local interests vis-à-vis English creditors. Colonial legislatures were also responsible for creating the law of slavery, a foreign concept to English law. Laws were enacted throughout the colonial era defining slaves variously as "real estate" or "chattel" to achieve alternate ends.

Chapter 4 examines how parliamentary law pushed colonial property law farther from the model of English landowning through the Debt Recovery Act of 1732. In England, the property law shielded land and protected inheritance from unsecured creditors. In the colonies, creditors' claims trumped the interests of landowners and heirs and made slaves highly vulnerable to being sold when their owners faced financial distress.

Chapter 5 examines the fee tail, or entail, the principal private means by which individuals could shield wealth from creditors. This practice had particular importance in Virginia, where the current historiography suggests that a significant amount of land was entailed at the time of the American Revolution, and thus shielded from English creditors and removed from market exchanges.

Chapters 6 and 7 examine the legacy of colonial property law and the reform of laws and institutions in the Revolution and founding era. Chapter 6 begins by describing how colonial legislatures assumed authority over establishing the level of fees imposed by the county-level institutions. Moving to the Stamp Act crisis, it examines how colonial protestors found the Stamp Act taxes offensive because, in addition to usurping colonial legislatures' power over taxation, they targeted official legal documents in the course of services offered by colonial institutions, like land transfers, mortgages, and court procedures. The opposition to the Stamp Act was, in part, rooted in a profound hostility to raising the fees and costs of the institutional infrastructure that was foundational to the day-to-day workings of the colonial

economy. The legislative reforms of the founding era reveal that a lasting legacy of the colonial era was an opposition to using institutional services as a source of government revenue.

Chapter 7 discusses the founding era laws relating to creditors' rights. It discusses the aftermath of Parliament's Debt Recovery Act in state law both relating to creditors' claims and in the law of slavery. Although English abolitionists mounted an attack against the commodification of slaves in the Debt Recovery Act, American Southern states moved closer to full chattel slavery, retaining slaves' liquid features with respect to creditors' claims to promote Southern labor and credit markets. The chapter discusses the reform of legal institutions toward greater transparency by state legislatures in the 1780s. It also analyzes the abolition of the fee tail estate in land through the lens of debtor/creditor relations. Chapter 8 discusses the federal structure of debtor/creditor law in the founding era. Chapter 9 places this historical work in the context of scholarship in economic history.

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