

Confiscation Nation: Settler Postcolonialism and the Property Paradox

Daniel J. Hulsebosch*

Capitalist from the beginning. That is the emerging consensus about early America. Just a generation ago, many historians of law and economy sought instead to locate the moment of transition from community-based economies to market capitalism.¹ The “great transformation” was dated variously, but the American Revolution often provided a key to the shift.² Those scholars, in turn, were reacting against the consensus historians of the Cold War era, who tended to find broad agreement in the sources that politics, law, and society worked in tandem to generate economic growth.³ Now, a version of that consensus is returning. Historians today, however, find more conflict and exploitation in their sources. Perhaps the most striking departure from the old consensus is the prominent place of slavery in the new histories of capitalism.⁴ Another notable difference is the role of the Revolution—or its absence. Capitalism appears to have emerged almost fully formed in the colonial period, with changes to its legal structure representing functional adjustments to satisfy the needs or interests of market participants. But was early American politics just a pass-through device for wealth-maximizing private interests? Did politics and especially political ideas matter for the development of American economic institutions? And did the American Revolution have any effect on the structure of the market?

Clare Priest’s compelling legal history of eighteenth-century American

* Russell D. Niles Professor of Law, N.Y.U. School of Law

1. In legal history, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* (1977); WILLIAM NELSON, *THE AMERICANIZATION OF THE COMMON LAW* (1975); BRUCE MANN, *NEIGHBORS AND STRANGERS* (1986).

2. Compare HORWITZ, *supra* note 1, and NELSON, *supra* note 1, with MANN, *supra* note 1. Cf. KARL POLANYI, *THE GREAT TRANSFORMATION* (1944). For a useful overview of the field a generation ago, see Gordon S. Wood, *The Enemy is Us: Democratic Capitalism in the Early Republic*, 16 J. EARLY REPUBLIC 293 (1996).

3. See, e.g., J. WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM* (1956); OSCAR HANDLIN & MARY HANDLIN, *COMMONWEALTH* (1987); LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* (1955).

4. See especially, GAVIN WRIGHT, *SLAVERY AND ECONOMIC DEVELOPMENT* (2006). Priest does not appear to take a position on the question of whether slavery was necessary for the development of American Capitalism. For the latter claims, see EDWARD BAPTIST, *THE OTHER HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM* (2014).

property institutions offers new ways to understand these questions. *Credit Nation: Property Laws and Institutions in Early America* analyzes the close relationship between property law and the generation of credit. She makes two large claims about the early American economy. First, legal institutions mattered.⁵ Adding historical dimension to the New Institutional Economics (NIE), Priest argues that early Americans believed, or at least behaved as though they believed, that legal institutions mattered for the development of their economy.⁶ That behavior was evidenced in provincial and imperial legislation that redesigned debtor-creditor law in colonial America. Second, slavery also mattered, not only as source of labor but also as an institution of credit.⁷ A series of colonial and imperial statutes transformed enslaved bodies into property that could be leveraged for loans and auctioned to satisfy the claims of creditors. Here, Priest's argument aligns with a critical school of economic history that is uncovering the ways that slavery contributed to the development of early American capitalism.⁸ In addition, she makes one more important but largely implicit claim about the capital that is at the heart of the analysis.⁹ North America's prospective debtors lured overseas capital with the expectation of human effort, and suffering, applied to land. Capital came from afar. Value, however, arose at home.

In the process of weaving together NIE and the new history of capitalism, Priest uncovers some missing lessons of early American property law.¹⁰ These include, among others, an analysis of Parliament's Debt Recovery Act (1732), which empowered creditors of colonial debtors to execute debt judgments on real property in ways not permitted by the English common law; the same statute's requirement that slaves be similarly attachable for the recovery of all debts; the widespread availability of public recording of land transactions in the colonies, also in contrast to England; and the asset-partitioning function, in a volatile colonial economy, of the estate in fee tail. The first three institutions made colonial property rights more transparent and accessible to creditors, while the last allowed property holders to shield

5. CLAIRE PRIEST, *CREDIT NATION: PROPERTY LAWS AND INSTITUTIONS IN EARLY AMERICA* 1-2 (2021).

6. For an overview and a comparison between the "new" institutional economics of the last generation with the "old" institutional economics of a century or more ago, see MALCOLM RUTHERFORD, *THE OLD AND NEW INSTITUTIONAL ECONOMICS* (1996).

7. PRIEST, *supra* note 5, at 2.

8. *See especially*, WRIGHT, *supra* note 4.

9. Capital is curiously missing from many recent histories of capitalism. For an exception, see CHRISTINE DESAN, *MAKING MONEY* (2018).

10. *Cf.* HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL* 106 (2000) (describing the settling of unsettled property rights as one of the "missing lessons of U.S. history"). Priest finds that colonial America confirms the second of De Soto's twin "missing lessons": they "buil[t] institutions that confer clear title to property." PRIEST, *supra* note 5, at 157. The first of his missing lessons, on the ability of squatters to capitalize on poor record-keeping and under-policed boundaries to wrest property rights, fits less easily. *See* Thomas Jefferson, Bill to Enable Tenants in Fee Tail to Convey Their Lands in Fee Simple (Oct. 14, 1776), in 1 *THE PAPERS OF THOMAS JEFFERSON, 1760-1776*, at 560 (Julian P. Boyd ed., 1950) [hereinafter Jefferson, Bill to Enable Tenants].

some assets from creditors, though at a cost to transparency.

Priest's book is crisply written, refreshingly analytical, and disciplined. Her method is to analyze traditional sources of legal history, such as court cases, interest-group petitions, and especially statutes, and trace the property rules that affected the flow of credit to the empire's periphery. Similarly straightforward are her theoretical premises. These come largely from economics. Policies that forced clearer information and that incentivized the propertization of resources, but otherwise limited direct regulation of economic activity, are what Priest discovers in early American property law. Colonial America appears as a kind of laboratory, for eighteenth-century policymakers as well as modern scholars, in which to test the effects of liberalizing property and credit rules. For adherents of NIE, Priest's analysis provides grist for the mill. This institutionalist perspective emerged within the discipline of economics to counter the minimalist view of the state in neo-classical economics. There, the state's role is simply to provide, in the oft- and possibly misquoted words of Adam Smith, "peace, easy taxes, and a tolerable administration of justice."¹¹ For NIE, by contrast, the state is foundational to markets and helps determine their success by clarifying property rights, facilitating information flows, and lowering transaction costs.¹² In early America, Priest argues, policies fostering transparent information and extensive propertization "likely" contributed to economic growth.¹³ The "great divergence" in this story, however, was not between "the West and the Rest." It was instead between metropolitan England and its British American colonies.¹⁴ A creative welter of legislation facilitating credit, on one hand, and local policies shielding some assets from debt collection, on the other, constituted an elemental pattern of property law emblemizing Priest's claim that early Americans built a "credit nation."

Another of the book's theoretical assumptions is that politics mattered. The assumption is not fully developed. It is reflected most strongly in the thematic emphasis on statutory law. However, as in much NIE scholarship, politics and political ideas are not interrogated. Excepting a brief account of the passage of Parliament's Debt Recovery Act of 1732 and a transaction-costs interpretation of the Stamp Act crisis, the politics surrounding the development of colonial economic institutions are not analyzed. It gestures toward politics without connecting directly to the nascent literature on the

11. See Gavin Kennedy, *A "Night Watchman" State?*, in ADAM SMITH'S LOST LEGACY 215 (2005).

12. See Douglass C. North, *A Transaction Cost Theory of Exchange*, in INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 27, 27 (1990) ("My theory of institutions is constructed from a theory of human behavior combined with a theory of the costs of transacting.").

13. Although sometimes qualifying the argument, Priest claims that "the ease of access of credit that [legislators] created was key to the explosive growth of capitalism in nineteenth-century America." PRIEST, *supra* note 5, at 6.

14. *Id.* at 155-56. Cf. KENNETH POMERANZ, THE GREAT DIVERGENCE (2000).

legal history of American political economy.¹⁵ Instead, the book remains predominantly economic in its theoretical orientation.

Priest's disciplinary commitments deserve notice. *Credit Nation's* application of economic theory to history places it closer on the legal history spectrum to the social sciences than to the humanities. Although it tells a big story about economic development in colonial America, it contains few of the human-centered stories that characterize much recent work in legal history. The book's leading characters are instead institutions. "The central issue of economic history and of economic development," argued Douglass North, the Nobel Laureate often credited as the founder of NIE, "is to account for the evolution of political and economic institutions that create an economic environment that induces increasing productivity."¹⁶ Priest provides such an account. *Credit Nation* can be read as a historical test of the information theory of economics and offers support for it. Accordingly, the book exemplifies some of the many ways that legal history can continue to evolve as an interdisciplinary field.¹⁷

Elegant theories can, however, frame inquiries so neatly that they tend to confirm themselves and obscure competing interpretations. Likewise, the social science ideal of isolating causal variables applies uneasily to a tumultuous settler colonial society that launched a revolution—something Priest admits.¹⁸ The framing question this Comment poses, then, is how the American Revolution should fit into the legal history of early American property and credit. It argues that answering that question might require two intertwined methodological shifts away from NIE. One is toward taking a closer look at the revolutionaries' own ideas about commerce and credit. The other is toward exploring how state and local officials actually administered property during and just after the Revolution. Together these inquiries suggest that revolutionaries believed that they could use politics and state institutions to control and reshape property institutions, attract new sources of credit, and channel capital in new directions. Theirs was a revolution in favor of credit. But, not unlike in modern postcolonial nations, the goal was to attract credit while also setting firm limits on how foreign creditors could operate within American borders.

15. See, e.g., Jeremy Kessler, *The Political Economy of "Constitutional Political Economy"*, 94 TEX. L. REV. 1527 (2016).

16. Douglass C. North, *Institutions*, 5 J. ECON. PERSPECTIVES 97, 98 (1991).

17. Daniel J. Hulsebosch, *Constitution-Making in the Shadow of Empire*, 56 AM. J. LEG. HIST. 84, 87-88 (2016) (calling for more interdisciplinary communication in legal history, particularly engagement with institutional economics and political science).

18. Priest wrestles openly with causal questions in her final substantive chapter, "Property, Institutions, and Economic Growth in Colonial America." PRIEST, *supra* note 5, at 152. Cf. Ron Harris, *Spread of Legal Innovations Defining Private and Public Domains*, in THE CAMBRIDGE HISTORY OF CAPITALISM 127, 164 (Jeffrey G. Williamson ed., 2014) (expressing skepticism about the attempt to trace "causality flowing from law to economic development" and concluding that "law mattered and facilitated the rise of capitalism but we still don't know enough on the extent to which it mattered").

The revolutionaries' ideas and administration of property reveal a distinction between two kinds of property: between capital, on the one hand, and real and most other personal property, on the other. First, the revolutionaries execrated monopolies, especially the ones empires used to control trade with their colonies,¹⁹ and they sought extensive and almost unfettered access to foreign capital and trade with a bracing, at times naïve, optimism about how their plans would be received abroad and the effect they would have on American economic development. When it came to access to capital and trade, the revolutionary consensus was paleo-liberal. By contrast, the revolutionaries were intensely protective of the ownership, control, and administration of property located within their (purported) borders. Curiously for a book about the creation of American property law in the eighteenth century, *Credit Nation* mentions neither of the twin expropriation projects that were central to the revolutionary transformation of property and its law: the confiscation of loyalist property and the dispossession of Native American land.²⁰

The immediate expression of that jealousy over local property during the Revolution was a massive program of state expropriation that transferred millions of acres of land, thousands of enslaved people, and countless household and agricultural goods away from loyalists, who were excluded by law from membership in the revolutionary polity. Beyond their redistributive consequences, the forfeiture programs also affected the administration and transparency of landholding. Although many colonial statutes permitted recordation, and despite the economic theory suggesting the wisdom of recording, many land transactions in early America had never been recorded publicly. The forfeiture program, by contrast, demanded a fresh accounting. Government agencies created new land records primarily to serve the states' goals in taking, redistributing, tracking, and taxing property, rather than to benefit the private credit market. In sum, the revolutionaries generally sought indirect or portfolio investment rather than direct investment or foreign ownership of natural resources within the states.

Finally, the Comment returns to an old question in the history of American property that Priest places in new light: Why did some states abolish fee tail in the revolutionary era? It argues that confiscation is part of the answer. It agrees with Priest that republican ideology in the abstract

19. For an account of the Britain's internal trade monopoly, see OLIVER M. DICKERSON, *THE NAVIGATION ACTS AND THE AMERICAN REVOLUTION* (1951).

20. This essay analyzes the forfeiture of loyalist property and its relationship to Priest's analysis. For the revolutionary project of dispossessing Native American land, see, e.g., STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* 112-39 (2005); LINDSAY G. ROBERTSON, *CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLE OF THEIR LAND* (2005); Reginald Horsman, *Federal Indian Policy in the Old Northwest, 1783-1812*, 18 WM. & MARY Q. 35 (1961).

cannot fully explain why some states abolished fee tail, when, as she illuminates, others did not. The revolutionary animus against aristocracy, however, was not only abstract. The few states that abolished fee tail did so with specific mischiefs in mind: to perfect the forfeiture of massive estates held, in some instances, by actual aristocrats. Eliminating fee tail permitted those states to combine the symbolic politics of opposing aristocracy and monopoly with the practical politics of breaking up large, tenanted estates enjoyed by powerful loyalist families and redistributing that property to patriots.

Although *Credit Nation* contains the premise of *political* economy, most readers will emerge from the book with a tighter grasp on Priest's argument about the economic function of specific property institutions than on the politics of their development. Notably, the American Revolution as a political event is largely absent from the story. Although Priest argues that colonists and imperial lawmakers transformed colonial property law, relative to that in England, in the early eighteenth century, she implies continuity across the decade of political revolution.²¹ She might agree with Douglass North's argument that "post-revolutionary [U.S.] history is only intelligible in terms of the continuity of informal and formal institutional constraints carried over from before the Revolution and incrementally modified."²² Most provincial Americans sought clear propertization before and after the war. Indeed, Priest argues, interference with that goal sparked colonial resistance to imperial regulation.²³

Epitomizing this interpretation of colonial resistance is Priest's original interpretation of the Stamp Act crisis.²⁴ She argues that the colonists objected to the act because of the cost that stamped paper added to public recordation, court filings, and sheriffs' writs. Historians have been skeptical that the cost of the stamped paper, as with the economic cost of all the pre-revolutionary taxes, could alone have inspired resistance.²⁵ Priest, however,

21. See, e.g., PRIEST, *supra* note 5, at 150-51 (observing that "[t]he profound impact of the Debt Recovery Act on inheritance is clearly expressed in writings assessing the Act after the American Revolution"). For compatible analyses, see LAW IN THE AMERICAN REVOLUTION AND THE REVOLUTION IN AMERICAN LAW (Hendrik B. Hartog ed., 1981); Bruce Mann, *The Evolutionary Revolution in American Law*, 50 WM. & MARY Q. 168 (1993).

22. North, INSTITUTIONS, *supra* note 16, at 110. More generally, North maintained, institutions "evolve incrementally, connecting the past with the present and the future." *Id.* at 97.

23. PRIEST, *supra* note 5, at 116.

24. PRIEST, *supra* note 5, at 115. This chapter of *Credit Nation* draws on an earlier article. Justin duRivage & Claire Priest, *The Stamp Act and the Political Origins of American Legal and Economic Institutions*, 88 S. CAL. L. REV. 875 (2015).

25. Edmund Morgan and Bernard Bailyn argued long ago that the rhetoric of resistance was so out of proportion to the financial imposition that something else must have been at work: radical ideas of equality or radical republican ideology that framed small taxes as part of a large conspiracy against

takes the complaints seriously. Resistance centered on the courts, where most litigation involved debt collection and whose judges participated in the recordation of property conveyances. These related processes—land and credit deals—depended on the production of paper suddenly subject to the stamp tax. Priest quotes John Adams’s complaint that the tax threatened “the whole Course of our business and Subsistence” and invokes his complaint in *A Dissertation on the Canon and Feudal Law* that the tax would impose “embarrassments to Business in this infant Sparcely Settled Country so great that it would be totally impossible for the people to Subsist under it.”²⁶

Priest’s transaction-costs interpretation of the Stamp Act controversy is convincing as far as it goes. The title of Adams’s screed, however, as well as much of its substance, indicates that he believed that he had detected a conspiracy more sinister than a plan to levy Pigouvian taxes on colonial debt collection and land-granting. It was, in Adams’s mind, part of a scheme to foist a tax-supported aristocracy and royal church on the colonies. This new government would be dominated by officials sent from Britain and “arrayed in robes of scarlet or sable.”²⁷ Noting that the new tax applied to all manner of paper and reading material in addition to legal documents, Adams concluded that the Stamp Act revealed a

design . . . to strip us in a great measure of the means of knowledge, by loading the Press, the Colleges, and even an Almanack and a Newspaper, with restraints and duties; and to introduce the inequalities and dependances of the feudal system, by taking from the poorer sort of people all their little subsistence, and conferring it on a set of stamp officers, distributors and their deputies.²⁸

First came challenges to law and belief, and then the obstruction of independent sources of information, all while redistributing wealth upward from the poor to a new aristocracy. Adams did warn about threats to the colonial economy, but not ones remedied merely with lower transaction costs. His eyes were on the state, not the credit ledger. The larger plan, he concluded, was to displace provincial legal and religious institutions with imperial ones and administered by men wearing the red and the black. Accurate or not, fears about the imposition of a new aristocratic government

liberty. MORGAN, *THE STAMP ACT CRISIS 73-74* (1962); BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 102-07 (1967).

26. Adams, quoted in PRIEST, *supra* note 5, at 125. See also Andrew D. Edwards, *Grenville’s Silver Hammer: The Problem of Money in the Stamp Act Crisis*, *J. AM. HIST.* 337 (2017).

27. “There seems to be a direct and formal design on foot, to enslave all America,” Adams argued. “This however must be done by degrees. The first step that is intended seems to be an entire subversion of the whole system of our Fathers, by an introduction of the cannon and feudal law, into America.” John Adams, *Dissertation on Canon and Feudal Law*, in 1 *THE PAPERS OF JOHN ADAMS* 123, 127 (Robert J. Taylor ed., 1977).

28. *Id.*

inspired much of the revolutionary resistance.²⁹

Even those skeptical of an ideological interpretation of revolutionary resistance and drawn instead to economic explanations might wonder whether the cost of dispute resolution was at the heart of the matter. Historian Steven Pincus, for example, fits revolutionary ideology into a transatlantic vision of political economy that championed free trade, imperial investment in the colonies, a supply-side approach to taxes, and war against France and its statist approach to economic development. He finds evidence to support the claim by reverse engineering the commercial grievances of the Declaration of Independence. The restrictive Navigation Acts, policies favoring bound labor rather than free immigration, restrictions on currency emissions: these and other policies were the mirror image of Patriot liberalism.³⁰ Similarly, a more straightforward way to capture revolutionary political economy is to read the Model Commercial Treaty that John Adams and Benjamin Franklin penned, and the Continental Congress endorsed, at about the same time that the states declared independence.³¹ To gain independence, most revolutionaries believed that they needed overseas trading partners and foreign capital. To gain trade and credit, they would have to overcome the monopolies that restricted trade between European nations and their colonies. The Model Treaty provided for the mutual naturalization of merchants, cross-border migration, the elimination of foreign tariffs, and the endorsement of liberal trends in the laws of war that were supposed to discourage aggression.³² This revolutionary political economy was designed to convert streams of trade that under the British Navigation Acts constituted smuggling into commerce that was protected under international law.³³ It aimed to break what Adam Smith described as the great monopoly of monopolies: the international system of empires, and the laws of war that permitted empires to enforce imperial restrictions on commerce across much of the globe.³⁴

29. For the argument that late colonial administrators did indeed attempt to create a new “feudal” government, see Rowland Berthoff & John M. Murrin, *Feudalism, Communalism, and the Yeoman Freeholder: The American Revolution Considered as a Social Accident*, in *ESSAYS ON THE AMERICAN REVOLUTION* 256, 283 n.59 (James H. Hutson & Stephen G. Kurtz eds., 1973). For British imperial agents’ late-colonial plans to displace provincial administrators and perpetuate their families as royal officials, see DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664-1830*, at 59-63, 122-42 (2005).

30. STEVE PINCUS, *THE HEART OF THE DECLARATION* (2016).

31. See John Adams, *Plan of Treaties*, in 4 *THE PAPERS OF JOHN ADAMS*, *supra* note 27, at 265.

32. Daniel J. Hulsebosch, *The Fulfillment Revisited: Political Experience, Enlightenment Ideas, and the International Constitution*, 91 *NEW ENG. Q.* 209 (2018); Hulsebosch, *The Revolutionary Portfolio: Constitution-making and the Wider World in the American Revolution*, 47 *SUFF. L. REV.* 759 (2014).

33. For accounts of revolutionary political economy, see Cathy Matson, *The Vagaries of War and Depression*, in *MERCHANTS AND EMPIRE: TRADING IN COLONIAL NEW YORK* 265 (1997); Oliver M. Dickerson, *THE NAVIGATION ACTS AND THE AMERICAN REVOLUTION* (1951).

34. ADAM SMITH, *Of Colonies*, in 2 *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 58 (Cannon ed. 1776), <https://oll.libertyfund.org/title/smith-an-inquiry-into-the-nature->

To pursue this multi-stranded political economy, rather than only clarify property rights and reduce transaction costs, revolutionary Americans halted their commerce, risked treason prosecutions, and engaged in violence that cost thousands of lives.³⁵ Along the way many of them lost property to the British military, which impressed untallied amounts of agricultural produce, used innumerable patriot properties and buildings, and confiscated thousands of enslaved laborers who supported the colonists' credit-based economy.³⁶ The Americans waged, in short, a revolutionary civil war.

Afterward, they ratified a Treaty of Peace that endorsed key strands of their political economy. In two central articles, the treaty makers, at American insistence, distinguished real and most personal property from capital. Article IV of the Treaty provided that British creditors would encounter "no lawful impediments" to the collection of their prewar debts.³⁷ This guarantee to British creditors overlapped with and accelerated a trend in the law of nations toward shielding foreign creditors from wartime predations.³⁸ In the fifth article, however, Congress promised merely to recommend that the states return at least some confiscated property to loyalists. There was no guarantee that the states would return or provide restitution for land confiscated before the peace.³⁹ Capital originating overseas was special; other forms of property, sited locally, could by contrast be forfeited permanently.

and-causes-of-the-wealth-of-nations-cannan-ed-vol-2. In a foundational analysis of imperial political economy, Smith criticized the Navigation Acts for favoring one interest group even against its own long-term interests:

[T]he single advantage which the [imperial] monopoly procures to a single order of men is in many different ways hurtful to the general interest of the country. To found a great empire for the sole purpose of raising up a people of customers may at first sight appear a project fit only for a nation of shopkeepers. It is, however, a project altogether unfit for a nation of shopkeepers; but extremely fit for a nation whose government is influenced by shopkeepers. Such statesmen, and such statesmen only, are capable of fancying that they will find some advantage in employing the blood and treasure of their fellow-citizens to found and maintain such an empire.

Id. at 114-15. See generally PETER ONUF & NICHOLAS ONUF, *FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS, 1776-1814* (1993).

35. For the Revolution's effect on American trade, see RICHARD BUEL, *IN IRONS: BRITAIN'S NAVAL SUPREMACY AND THE AMERICAN REVOLUTIONARY ECONOMY* (1998). A standard account of the conflict is ROBERT MIDDLEKAUF, *THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763-1789* (1982).

36. On the British policy of emancipating enslaved persons who joined their military, see SYLVIA FREY, *WATER FROM THE ROCK* (1991); SIMON SCHAMA, *ROUGH CROSSING: BRITAIN, THE SLAVES AND THE AMERICAN REVOLUTION* 65-155 (2006). The number of enslaved people liberated by the British is contested. Cassandra Pybus concludes that the number of liberated people evacuated at the war's end with the British troops as "no less than eight thousand and no more than ten thousand—about 50 percent of those who defected to the British and about 80 percent of those who survived." Cassandra Pybus, *Jefferson's Faulty Math: The Question of Slave Defections in the American Revolution*, 62 *WM. & MARY Q.* 243, 263-64 (2005).

37. For an analysis of this distinction in the Treaty of Peace, see Daniel J. Hulsebosch, *Being Seen Like a State: How Americans (and Britons) Built the Constitutional Infrastructure of a Developing Nation*, 59 *WM. & MARY L. REV.* 1239, 1262-64 (2018).

38. *Definitive Treaty of Peace Between the United States and His Britannic Majesty, U.S.-Gr. Brit.*, art. IV, Sept. 3, 1783, 8 Stat. 80 [hereinafter *Treaty of Peace*].

39. *Id.* art. V, 8 Stat. at 82.

In the Treaty's sixth article, the States did pledge that they would engage in "no future Confiscations." This article drew a temporal line on confiscation: it was a power exercised only in wartime. In a related provision, Britain pledged that it would withdraw all its troops from U.S. territory and, while exiting, not "carry[] away any Negroes or other Property of the American Inhabitants."⁴⁰ The meaning of this last guarantee was famously contested. The British argued that the proscription did not apply to formerly enslaved people who had achieved emancipation under the terms of British military proclamations that promised freedom in exchange for wartime service. The official American position, articulated by George Washington in the spring of 1783 and maintained until the Jay Treaty (1794), was that the proscription covered all escaped people (including those from Washington's own plantation).⁴¹ According to Americans, enslaved property, like capital, was special.⁴² As Priest shows in her analysis of the mortgaging of enslaved bodies, the two forms of property had long been intertwined.⁴³ Post-revolutionary Americans continued to connect them. For several years after the war, the Virginia legislature, for example, refused to permit its state courts even to take jurisdiction over any claims of British creditors against Virginian debtors under Article IV of the treaty, protecting those debts, until Britain complied with Article VII's proscription on "carrying away" enslaved people.⁴⁴ Only with the establishment of federal courts under the new Constitution could British creditors begin, slowly, to collect those debts.⁴⁵

Over time, Americans had difficulty maintaining the line between capital and other forms of property since Americans' use of other property *as* credit muddied the formal distinction. Nonetheless, the distinction manifested itself repeatedly in state law. Just one example can be seen in the post-revolutionary re-adoption of the 1732 statute at the core of Priest's account. The new states' confirmation that land could be easily attached to satisfy ordinary debts appears at first glance as a signal example of continuity before and after the Revolution. However, the states also embraced the common law rule against alien landholding, with the corollary, made either in statute or judicial decision-making, that British creditors were in fact

40. *Id.* arts. VI-VII, 8 Stat. at 83-84.

41. See SCHAMA, *supra* note 36, at 148-49 (2006); CASSANDRA PYBUS, *EPIC JOURNEYS OF FREEDOM* 67 (2007).

42. Cf. JOHN F. WITT, *LINCOLN'S CODE* (2013) (tracing American arguments on the validity of confiscation of slaves under the laws of war).

43. PRIEST, *supra* note 5, at 165. See also THOMAS MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619-1860* (1996) (documenting extensive use of slaves as collateral for credit); ARIELA GROSS, *DOUBLE CHARACTER* (2000) (analyzing litigation brought by creditors against debtors who had harmed enslaved people held as collateral).

44. See Act of Dec. 12, 1787, 1787 Va. Acts 25 (repealing earlier statutes forbidding British subjects to sue in Virginia courts).

45. See Charles Hobson, *The Recovery of British Debts in the Federal Circuit Court of Virginia, 1790-1797*, 92 VA. MAG. HIST. & BIO. 176 (1984).

aliens. The exclusion of British creditors from the main benefit of the 1732 act meant that the ability to execute debts on land was worthless for those creditors. South Carolina went even farther: it gave the judgment debtor the option of tendering land to the creditor and provided that a local jury would determine the value of that land in sterling, which meant that British creditors ran the risk of being stuck with a form of satisfaction that erased the debt but provided no compensation.⁴⁶ Far from proof of continuity, the revolutionary disruption of common membership meant that the 1732 act would never again serve its original purpose of protecting creditors in Great Britain. In sum, the different treatment of capital reflected a common revolutionary belief that, although capital had no borders, the states held firm control over the disposition of property within their boundaries. The revolutionary animus against the monopoly of states had limits. Inside their territories, states should be sovereign over all their tangible property. That required controlling access to those resources by non-members.

The revolutionary approach to property therefore appears paradoxical. On one hand, it was a revolution in favor of liberalism. More access to credit, and the trade it facilitated, was a central goal. The revolutionaries' domestic policies as well as their foreign policy, institutionalized in treaties, were designed to attract international capital and trade to the new states.⁴⁷ This commitment to liberal credit also triggered local backlash, and much national policy was designed both to address what Federalists diagnosed as the source of that resistance—money shortages—and provide federal remedies.⁴⁸ These push-and-pull stories of debtor-credit relations after the war could fit comfortably alongside the colonial ones told in *Credit Nation*.

On the other hand, along with the revolutionaries' liberal pursuit of foreign capital and trade came intense jealousy over the ownership of property at home. The striking manifestation of this jealousy was the expropriation of property held by those whom the revolutionaries redefined as non-members. Modern developing nations are often protective of their natural resources, but that protectionism is in tension with the tenets of modern economic liberalism. A local monopoly over land was, however, common in the municipal regimes in the eighteenth century.⁴⁹ Similarly, preserving national territorial integrity was a defining feature of early modern statehood under the law of nations.⁵⁰ Finally, the aggressive

46. Hulsebosch, *supra* note 37, at 1252.

47. U.S. CONST. art. I, § 10.

48. See, e.g., WOODY HOLTON, UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION (2007); MAX EDLING, A REVOLUTION IN FAVOR OF GOVERNMENT (2003).

49. For restrictions on alien landholding in the early United States, see Polly Price, *Alien Land Restrictions in the American Common Law: Exploring the Relative Autonomy Paradigm*, 43 AM. J. LEG. HIST. 152 (1999).

50. See, e.g., EMER DE Vattel, THE LAW OF NATIONS 308 (Bela Kapossy & Richard Whatmore eds., 2008) (asserting that “the least encroachment on the territory of another [nation] is an act of injustice”). For an analysis of this ideal and the reality of fragmented authority in the early modern

forfeiture of property was temporally limited to wartime, in theory, at least, and somewhat in practice.⁵¹

The paradox might be resolved in at least a couple of ways. First, the revolutionary property regime was political and contested, so that there was no single approach among the states, or even within each state across time. Second, there was nonetheless a rough consensus that different legal rules applied to capital, as opposed to most other forms of property. Formal, and largely real, liberality toward foreign creditors coexisted with intense local control over the control of natural resources. This distinction was fragile in an economy where the lines between land and money, as Priest shows, functionally blurred and land served as a source of credit.⁵² Nonetheless, legally, the revolutionaries sought to maintain it.

The instrument used to draw that line was political membership. Citizenship was the key to landholding and other civil and political rights in the early modern world. The revolutionaries attributed citizenship to some who did not want it, denied it to others who did, and stripped it from those deemed to have violated its duties.⁵³ The doctrine supporting the last move was forfeiture. The citizen's allegiance was the complement of the state's protection of life, liberty, and property.⁵⁴

When citizens "adhered to the enemies" of the self-declared American states, as those states claimed of the British loyalists, they forfeited the state's protection of their property rights. The states then redistributed those rights to patriotic citizens. This process occurred in every one of the thirteen revolutionary states, as well as the breakaway state of Vermont, and the land confiscated totaled, by conservative estimates, two million acres, while the real amount was likely upwards of six million.⁵⁵ Revolutionary forfeiture

empires, see LAUREN BENTON, *A SEARCH FOR SOVEREIGNTY* (2010).

51. On the uncertain temporal boundaries of wartime, see MARY DUDZIAK, *WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES* (2013).

52. PRIEST, *supra* note 5, at 4-5 (quoting Joseph Story "on how colonial laws had made land 'a substitute for money'"). Gregory Ablavsky and Michael Blaakman detail the ways that paper rights to land title circulated like currency in the early Republic. GREGORY ABLAVSKY, *The Rise of Federal Title, in FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. TERRITORIES* 79 (2021); Michael Blaakman, *Preemptive Property: Native Power, Unceded Land, and Speculation in the Early Republic* (Sept. 28, 2021) (unpublished manuscript) (on file with Michael Blaakman).

53. A classic account is JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870* (1978).

54. The formulation best known to revolutionary lawyers issued from Sir Edward Coke in Calvin's Case (1608) 77 Eng. Rep. 377; 7 Co. Rep. 1a. See also KETTNER, *supra* note 53; Polly Price, *Natural Law and Birthright Citizenship in Calvin's Case (1608)*, 9 YALE J.L. & HUMAN. 73 (1997). On the allegiance-protection dyad in English municipal and international law, see Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823; Lauren Benton & Adam Clulow, *Introduction: The Long, Strange History of Protection, in PROTECTION AND EMPIRE: A GLOBAL HISTORY 1* (Lauren Benton et al. eds., 2018).

55. These rough estimates derive from triangulating numbers gleaned from secondary sources on state forfeiture; calculating American Claims Commission reports of claims made and proven; and estimating Loyalist claims dismissed on the grounds that such land was not forfeited, even when it effectively was so. The uncompensated Fairfax claim, which falls into the last category, is the main addition contributing to the larger estimate.

does not fit comfortably within the framework of NIE, which emphasizes instead the building of institutions that protect against confiscation.⁵⁶ Some revolutionaries, too, thought forfeiture was illiberal. Nonetheless, even they defended forfeiture as legal under Anglo-American legal principles and the law of nations. John Jay, for example, criticized New York's legislature for enacting a statute of attainder in 1779. However, he defended the states' forfeiture laws as a member of the Peace Commission that negotiated the Treaty of Peace in Paris, and then continued to defend their legality throughout the 1780s as the Confederation's foreign minister.⁵⁷

Although local groups of patriots and some states began attaching and selling loyalist property early in the war, the catalyst for broad-scale confiscation came from the top down.⁵⁸ In late 1777, Congress recommended, as part of a package of measures to stabilize continental finances, that the states strip land from disloyal citizens, resell it to patriots, and use the revenue to sink inflationary paper emissions and meet congressional requisitions.⁵⁹ By that time, local committees in some of the states had already begun to sequester personal property in programs of temporary confiscation.⁶⁰ The congressional committee that generated the recommendations included three southern delegates. Southern planters had already experienced confiscation by the British: the confiscation of enslaved men, who had fled to British service in exchange for a promise of eventual emancipation.⁶¹ The committee's recommendation, which Congress endorsed and circulated to the states, moved beyond even the most radical local gambits. The floodgates were open for permanent

56. See, e.g., Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803 (1989) (arguing that parliamentary representation of state creditors reduced expropriation of sovereign debt and fostered investment in the state); Douglass C. North, *The Paradox of the West*, in ECONOMIC HISTORY 7, 15 (1993) (contrasting "confiscation or debt repudiation on the one hand [with] the trading of property rights and their enforcement for revenue on the other," and declaring that "[c]onfiscation killed the goose that laid the golden egg.").

57. For his criticism of the New York statute of attainder, see Letter from John Jay to George Clinton (May 6, 1780), in 2 THE PAPERS OF ALEXANDER HAMILTON, 1779-1781, 325 (Harold C. Syrett ed., 1961). For his defense of municipal forfeitures under the law of nations, see RICHARD B. MORRIS, THE PEACEMAKERS: THE GREAT POWERS AND AMERICAN INDEPENDENCE 344, 366-69 (1983); John Jay, Report to Congress (Oct. 13, 1786), in 31 JOURNALS OF THE CONTINENTAL CONGRESS 781, 802-03 (John C. Fitzpatrick ed., 1934) (contrasting the states' power to "confiscate the property of their own proper Citizens" because of disloyalty with the confiscation of the property of enemy aliens).

58. Cf. Staughton Lynd, *Who Should Rule at Home?: Dutchess County, New York, in the American Revolution*, 18 WM. & MARY Q. 330 (1961) (arguing that the momentum for confiscation came from below, from tenants and a rising middling class).

59. Congress, Resolution on Property Confiscation (Nov. 27, 1777), in 5 THE PAPERS OF JOHN ADAMS, *supra* note 27, at 337.

60. For a good analysis of revolutionary sequestration that emphasizes its function as a political instrument, see HOWARD PASHMAN, BUILDING A REVOLUTIONARY STATE: THE LEGAL TRANSFORMATION OF NEW YORK, 1776-1783 (2018). Most states eventually converted these sequestrations into confiscations. Pashman does not, however, analyze the sequestration or confiscation of enslaved persons.

61. FREY, *supra* note 36; SCHAMA, *supra* note 36.

expropriation.

Taking, accounting for, and selling forfeited property was a large government project, financed substantially by state-issued credit.⁶² The policy had especially profound consequences in the states that had either the largest number of loyalist property holders or in which the revolution was acutely experienced as a civil war. New York featured both. As in almost every state but on a larger scale, New York established an administrative commission empowered to indict residents for disloyalty; a court system that convicted most of them in *ex parte* proceedings; and another commission charged with identifying property forfeited upon conviction and then distributing that property to patriotic citizens. The buyers most often paid for the property with state-generated bills of credit that had been tendered to soldiers, state officials, and public contractors, including farmers who had supplied goods and crops for the war effort.⁶³

In addition to taking the land and creating the currency that would pay for it, the states also extended credit for many of those purchases. This was a remarkable innovation in credit during the Revolution. New York, for example, offered state-financed mortgages to enable purchasers deemed deserving, primarily tenants on forfeited estates, to purchase forfeited property on credit and pay down their debt over time. There was once a lively historiographical debate about whether revolutionary forfeiture democratized landholding, with the consensus that on balance it did—though the catalyzing justification in Congress had been to bolster state finances, not to redistribute property on an egalitarian basis. Leaving aside for now this curiously forgotten question,⁶⁴ the bottom line is that the states brokered transfers of millions of acres from thousands of loyalists to many more thousands of buyers, most of whom paid for the land in deflated currency that the states had manufactured, and some of whom received, as additional support, state-financed mortgages. The consequences for American property were, literally, revolutionary.

62. It was always controversial among the revolutionaries. John Jay, for example, believed it was a bad policy from the beginning. As a diplomat, however, he defended the lawful forfeiture of property as a legitimate power of a sovereign state.

63. See, e.g., HARRY YOSHPE, *THE DISPOSITION OF LOYALIST ESTATES IN THE SOUTHERN DISTRICT OF NEW YORK* (1939); Lynd, *supra* note 58; Beatrice G. Reubens, *Preemptive Rights in the Disposition of a Confiscated Estate: The Case of Philipsburgh Manor, New York*, 22 WM. & MARY Q. 435 (1965); Catherine Snell Cray, *Forfeited Loyalist Lands in the Western District of New York—Albany and Tryon Counties*, 35 N.Y. Hist. Q. 239 (1954); John T. Reilly, *The Confiscation and Sale of the Loyalist Estates and Its Effect Upon the Democratization of Landholding in New York State, 1799-1800* (1974) (unpublished Ph.D. dissertation, Fordham University). The identification of disloyal citizens was left largely to local committees and the court system. For a useful analysis of the legal aspects of that process, see HOWARD PASHMAN, *BUILDING A REVOLUTIONARY STATE: THE LEGAL TRANSFORMATION OF NEW YORK, 1776-1783* (2018); Matthew Steilen, *Bills of Attainder*, 53 HOUS. L. REV. 767, 831-57 (2016).

64. There is no mention of the revolutionary forfeiture project in a recent analysis of the “anti-oligarchy” dimensions of the American constitutional system and its history. See JOSEPH R. FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY* (2022).

Forfeiture's innovations, however, went beyond the state-subsidized redistribution of property. Relevant to Priest's focus on land records, forfeiture also generated the production of public land records on an unprecedented scale. As Priest notes, the colonies made available but did not require the recording of land deeds.⁶⁵ Neither did the new states. Despite the option of recording title transfers at the county or in some cases the provincial level, many buyers and sellers of land never did so in either place, though the fraction is impossible to calculate because of the missing denominator. This seems to have been especially true of many large and unsettled grants held for long-term or speculative purposes. A main reason for avoiding the public transparency championed by NIE in such instances was tax avoidance, again especially for large parcels that did not presently yield sales or rents.⁶⁶ Although provincial landholders occasionally opposed colonial land taxes, the most feared tax was the royal, permanent quitrent. That tax was established outside the colonies' representative institutions, might be increased over time, and could be used to support an imperial civil service not answerable to provincial legislators.⁶⁷ Many lawyers and interested observers in the 1780s testified that many land transactions had never been recorded.⁶⁸ Even creditors who could have recorded their mortgage interests—a primary purpose of colonial recordation—did not. This incompleteness of public land records complicated the administration of revolutionary forfeiture. State administrators struggled to identify which

65. PRIEST, *supra* note 5, at 56.

66. For a colonial manor lord's defense of those large landholdings, and in opposition to taxation, see Beverly McAnear, *Mr. Robert R. Livingston's Reasons Against a Land Tax*, 48 J. POL. ECON. 63 (1940).

67. *Id.* at 87-88 (criticizing the quitrent for supplying "Revenue to the Crown as [could] have perpetuated the Evil [of drawing specie out of the colony], and besides have destroyed our Liberties by rendring [sic] our House of Representatives useless"). On colonial opposition to the quitrent, see HULSEBOSCH, *supra* note 29, at 60-62. See also BEVERLY BOND, *THE QUIT-RENT SYSTEM IN THE AMERICAN COLONIES* (1913).

68. John Anstey, Report to the American Claims Commission ff.12-13, 39-40 (1786) (on file with The National Archives, United Kingdom [hereinafter TNA], AO 12/94) (reporting that most titles were not recorded except out of caution, and when recorded with a county clerk only evidence of title in that county, unless recorded with the secretary of state; therefore, "the only way of ascertaining the Title, in the only Point of View in which it becomes considerable: namely, as Title to confiscated property, is from the Commissioners of Forfeiture who have travelled that Ground [i.e., to ascertain valid title] before me, and have canvassed the Title with a View to the Seizure" and that mortgages recorded on public records are both over- and under-inclusive of encumbrances); William Smith Esq., Testimony to the American Claims Commission f.101 (Mar. 14, 1786) (on file with TNA, AO 12/21) (testifying that recordation "was not necessary and never done but for Security in the case of Accident as the Laws of the Province made the registered Copy equal Evidence in a Court of Law with the Original in case the Original should be lost"); John Tabor Kempe, Testimony to the American Claims Commission f.101 (Mar. 18, 1786) (on file with TNA, AO 12/21) (testifying that "there was no occasion for Deeds passing out & out to be registered, but in the Case of Mortgages the Mortgagee first registered had the priority of Payment"). The foundational statute authorizing the sale of confiscated property in New York, for example, provided a summary process for proving mortgages on such land "by competent witnesses to the satisfaction of the chancellor or any of the justices of the supreme court that the said assignment was duly executed in due form of law," which would not have been necessary if all mortgages had been publicly and reliably recorded. Act of May 12, 1784, 1784 N.Y. Laws 736.

parcels the loyalists had owned and how much of it had been pledged to creditors. Years afterward, some states even offered benefits to the families of loyalists themselves if they helped “discover” parcels once owned by their attainted relatives and that had been, formally, forfeited to the state but never identified or sold.⁶⁹

The new states were not the only jurisdictions that struggled with spotty colonial land records. When Parliament established the American Claims Commission to compensate loyalist landholders who had suffered confiscation, one of the main challenges it faced was verifying the claims of landownership in legal systems where deeds often went unrecorded. Historians of the loyalists have observed that the exiles testified reciprocally, on each other’s behalf, so that sessions of the American Claims Commission must have had the feel of community reunions.⁷⁰ The main facts to which neighbors attested were, first, loyalty, and second, the ownership of property and its forfeiture. The answer to the first question was more easily proven by paper records—official commissions, military records, legal records of attain, etc.—than the second. Testimony about the extent and value of loyalist property holdings, therefore, bulk largest in the enormous files of the American Claims Commission.⁷¹ The Commission was, historian Maya Jasanoff rightly observes, “unprecedented in scale” as an experiment in welfare provision.⁷² It should be seen as the immediate ancestor of the nineteenth-century commission movement, which itself influenced the rise of administrative agencies.⁷³ For decades, however, no other commission was so large and wide-ranging or spent so much public money (over three million pounds).⁷⁴ The Parliamentary oversight demanded voluminous record-keeping. Therefore, the Commission was also unprecedented in providing an account of colonial landholding and its economic functions.

Unlike most of the rest of the Western world today, there remains no complete land registration system in the United States.⁷⁵ After the grant of

69. See, e.g., Act of May 1, 1786, 1786 N.Y. Laws 307.

70. See, e.g., MARY BETH NORTON, *THE BRITISH AMERICANS* (1974); WALLACE BROWN, *THE KING’S FRIENDS* 287-88 (1965).

71. These are mostly though not entirely housed in Audit Office Records 12 (146 volumes) and 13 (141 bundles) (on file with TNA).

72. JASANOFF, *LIBERTY’S EXILES: AMERICAN LOYALISTS IN THE REVOLUTIONARY WORLD* 121-22 (2012). See also Julian Hoppit, *Compensating Imperial Loyalty, 1700-1800*, in *MAKING THE BRITISH EMPIRE, 1660-1800*, at 142 (Jason Peacey ed., 2020).

73. Legislatively appointed commissions, like the American Claims Commission, represent the intermediate institutional step between the processing of legislative petitions within legislatures, see Maggie McKinley, *Petitions and the Making of the Administrative State*, 127 *YALE L. J.* 1538 (2018), and the establishment of permanent administrative agencies, the first of which were usually called commissions.

74. JOHN EARDLEY-WILMOT, *HISTORICAL VIEW OF THE COMMISSION FOR ENQUIRING INTO THE LOSSES, SERVICES, AND CLAIMS, OF THE AMERICAN LOYALISTS* (1815).

75. Even now, the United States does not have a fully transparent land registration system but instead a patchwork of local title recording that, consequently, engenders a robust private market for

royal patents, the chains of title tended to become, from the government's eye, obscure. Even some of those original patents, which were recorded, raised issues of authenticity and effect. In addition, there were many disputes over locations of what was variously called “unappropriated” or “waste” land, but that often involved uncertain or overlapping patents of land in areas inhabited by indigenous people, complexities that fed into the other large expropriation project, against Native America. The fact that early American land titles were so uncertain, and that efforts to clarify them were mostly local and incomplete, raises the suspicion that powerful colonial interests never intended to clarify land titles—not too much at least. Despite the economic orthodoxy that clear rights promote wealth-maximizing outcomes, the highly politicized evolution of American property rules seems to better fit alternative theories of creative destruction.⁷⁶ Poor record-keeping was, in fact, the legal setting that permitted the creative destruction known as squatting: creative from the perspective of victorious squatters-cum-owners; destructive to some land speculators' rights, though beneficial for others because of the value of surrounding improvements; and part of a series of destructive formal and informal aggressions against Native American nations.⁷⁷

Looking back at the process of clarifying and publicizing property ownership in the United States, the transatlantic burst of record-keeping triggered by revolutionary forfeiture stands out. Forfeiture required state officials to identify land that had been forfeited, parcel it out to buyers, keep track of complicated credit allowances and currency conversions, account for the proceeds to state auditors, defend warranty titles in court, and justify the entire process in diplomatic investigations. In sum, revolutionary forfeiture was a public project that engendered new state capacities: administrative agencies, public records, decades of litigation, and long-running international controversies with ramifications for the development of land tenure, government records, and not least, the administrative state.

A broad-scale public project, rather than the demands of the private credit market, initiated the most systematic record-keeping of land transactions that North Americans had yet seen. Collected from both sides of the Atlantic, these records of revolutionary expropriation generate as close as there ever will be to what Bernard Bailyn once imagined as “a Domesday for the periphery”: “not only a record of land tenures but also a social

title insurance. On the development of land registration elsewhere, see Harris, *Legal Innovations*, supra note 18, at 136-37, 153-56.

76. See Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988) (detailing alternations toward and away from clarity in property rules, including in the recordation of land titles).

77. De Soto celebrates this tradition in *The Mystery of Capital*. DE SOTO, supra note 10. See also EDUARDO PENALVER & SONIA KATYAL, *PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP* (2010).

description of North America.”⁷⁸

The most striking example of Priest’s emphasis on continuity across the Revolution comes in her discussion of the half-forgotten form of common law landholding known as the estate in fee tail.⁷⁹ Her original analysis of fee tail before and after the Revolution departs substantially from the conventional interpretation. Classically, Thomas Jefferson’s bill abolishing fee tail features prominently in a story about the republican reform of inheritance laws and property tenures to promote more democratic landholding and political power.⁸⁰ At least since Richard B. Morris’s *Studies in the History of American Law*,⁸¹ written almost a century ago, legal historians have followed Jefferson’s autobiographical notes to interpret his bill abolishing fee tail, along with a companion bill eliminating primogeniture, according to their explicitly republican preambles. They also extend that interpretation to other states.⁸² The stakes were not, as once assumed, merely symbolic.⁸³ Two decades ago, historian Holly Brewer reexamined the incidence of fee tail in Virginia, found it more widespread than previously believed, and concluded that the abolition of what Jefferson called a “feudal” restraint on the transfer of property was more than political symbolism: a common form of landholding was suddenly eliminated.⁸⁴

78. BERNARD BAILYN, *THE PEOPLING OF NORTH AMERICA* 89 (1986).

79. Priest’s chapter on fee tail draws on an earlier article. Claire Priest, *The End of Entail: Information, Institutions, and Slavery in the American Revolutionary Period*, 33 *L. & HIST. REV.* 278 (2015).

80. Act of May 7, 1776, ch. XXVI, 1776 Va. Laws 45 (declaring that “the perpetuation of property in certain families, by means of gifts made to them in fee taillie, is contrary to good policy, tends to deceive fair traders, who give a credit on the visible possession of such estates, discourages the holder thereof from taking care and improving the same, and sometimes does injury to the morals of youth, by rendering them independent of and disobedient to their parents . . .”). For Jefferson’s draft, see Jefferson, *Bill to Enable Tenants*, *supra* note 10, at 560. Jefferson later placed this bill high on his short list of public accomplishments. Thomas Jefferson, *Summary of Public Service* (Sept. 1800), in 32 *THE PAPERS OF THOMAS JEFFERSON, 1 JUNE 1800–16 FEBRUARY 1801*, at 122 (Barbara B. Oberg ed., 2005) [hereinafter *Jefferson, Summary of Public Service*].

81. RICHARD B. MORRIS, *STUDIES IN THE HISTORY OF AMERICAN LAW* (1930). See also Stanley N. Katz, *Republicanism and the Law of Inheritance in the Revolutionary Era*, 76 *U. MICH. L. REV.* 1 (1978). Holly Brewer noted that Virginia’s statute abolishing fee tail identified entail’s interference with credit arrangements. Holly Brewer, *Entailing Aristocracy in Virginia: “Ancient Feudal Restraints” and Revolutionary Reform*, 54 *WM. & MARY Q.* 307, 343 (1998) (speculating that the end of entail might have increased the fluidity of capital flow).

82. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 239-40 (rev. ed. 2010) (noting that “[n]ot every state” abolished fee tail and some states “fee tail survived in weak and fossilized form; any attempt to create a fee tail was treated automatically as a life estate followed by a plain fee simple”).

83. C. Ray Keim, *Primogeniture and Entail in Virginia*, 25 *WM. & MARY Q.* 545 (1968) (concluding from a study of wills that “[w]hen the Revolutionary War era swept away the last vestiges of the old feudal type of tenure, it affected, of course, the small proportion of land still held in entail, but it did not fundamentally alter the land system of Virginia”).

84. Brewer, *supra* note 81, at 307. See also Berthoff & Murrin, *supra* note 29, at 283 n.59 (noting that “[b]ecause descent by fee tail was automatic, such an estate would not appear in a will after the

Priest subtly challenges both aspects of the conventional wisdom, the reasons for abolition and its extent. In her telling, Virginia's abolition of fee tail must be placed in the context of decades of economic practice in which planters large and small, men and women, placed their property in that form of tenure to segregate some assets from others, and thereby shield the ownership (if not use) of that property from their creditors.⁸⁵ Economic strategy and prudence, not the aspiration to dynasty, motivated some landholders to select fee tail. Because the parliamentary statute of 1732 empowered creditors to execute judgments on real property as easily as on personal property, the selection of fee tail was a rational choice to protect some land. It functioned especially well for small holders of property, including many women who held approximately 23% of the estates in fee tail. Small holders could easily take land out of fee tail or put it in and enjoy protection from creditors.⁸⁶ Fee tail worked. Colonists in most other provinces seemed to agree. Every colony except South Carolina⁸⁷ permitted fee tail, although, as Priest details, the process of creating and, especially, terminating the entail varied across them. Rules that permitted entailed estates to be more easily docked, or terminated, fostered credit, she argues, because they made land more liquid as collateral.

As Priest recognizes, her account of the strategic use of fee tail as a debt-shielding device raises the question why some revolutionary states abolished that form of estate at all. She observes that only four of the original thirteen states—Virginia, New York, Georgia, and North Carolina—abolished fee tail.⁸⁸ Most other states preserved a reformed version of it, and a couple seem to have left it alone. What unites these legislative reforms was not, or not only, republican ideology in the abstract. It was instead, she argues, concern for exposing hidden restraints on alienation that tended to increase the cost of credit.⁸⁹ Indeed, Virginia's statute abolishing the estate noted that fee tail "tends to deceive fair traders who give a credit on the visible possession of such estates."⁹⁰ Regulating fee tail was part of an evolution in favor of credit.

Why, then, did Jefferson's Virginia go so far as to eliminate, rather than simply reform, the fee tail? Priest suggests one powerful answer relating to

first-generation testament that created it").

85. Keim also observed that many users of fee tail applied it to only a fraction of their holdings. Keim, *supra* 83, at 565-66.

86. PRIEST, *supra* note 5, at 93-111.

87. Curiously, South Carolina claimed not to recognize the Statute De Donis Conditionalibus (1215), the legislation that legitimated fee tail, even though it pre-dated the establishment of the colony, which was the benchmark for the applicability of Parliamentary statutes used in most American colonies. It instead recognized the more flexible conditional fee, which permitted the grantee to alienate the land freely upon the birth of issue, though the land would revert to the grantor if the grantee had no issue.

88. PRIEST, *supra* note 5, at 138.

89. PRIEST, *supra* note 5, at 141-43.

90. Act of May 7, 1776, ch. XXVI, 1776 Va. Laws 45; Jefferson, Bill to Enable Tenants, *supra* note 10 (Jefferson's original draft).

Virginia's tobacco culture. Tobacco cultivation exhausted soil quickly, which incentivized planters to rotate their crops or simply relocate tobacco production periodically to new, rich soil in the west. That in turn created pressure to sell the old farms or at least to relocate the enslaved labor force from the old to the new. Fee tail hampered that strategy because it disabled the planter from selling the fee simple of his old farm or possibly relocating the labor force. For most of the eighteenth century, Virginia law classified enslaved persons as real property for purposes of inheritance, including fee tail, while classifying them as personal property attachable for creditors for purposes of debt collection.⁹¹ Within a couple of decades, Virginians, particularly wealthy landholders with multiple plantations, realized that yoking together land and labor hampered the relocation of farming that the soil of the upper South demanded. The colonial legislature passed a bill to destroy fee tail for slaves, but the Privy Council in London disallowed that act. Virginians finally got the freedom to eliminate fee tail for slaves in independence.⁹² The conflict between the desire for stability and security, on the one hand, and the quest to exploit fresh lands with enslaved labor, on the other, epitomized the tension between the asset-shielding and anti-developmental dimensions of fee tail. This is a powerful explanation for eliminating fee tail as applied to enslaved captives, though less so for land.

Legislatures are collective bodies whose members do not always agree on a single reason to pass any statute. There also remained, as Priest says elsewhere, much variation across the states.⁹³ She recognizes that the republican explanation retains some persuasiveness. At least, Jefferson and some legislators in a few of the states invoked the republican hostility to aristocratic landholding patterns as a central justification.⁹⁴

The timing of those abolitions suggests another reason that is related to the republican antagonism toward dynastic landholding, at least in Virginia, New York, and North Carolina. Some of the largest, richest, most well-known, and most tempting loyalist and British lands in those states were held in fee tail. These included Philipse Manor in New York, which stretched across more than 50,000 acres in Westchester County and was held by the prominent loyalist Frederick Philipse; the enormous Fairfax proprietary estate in northern Virginia, enjoyed by the 6th Lord Fairfax, a man generally liked in Virginia but who, at the time of independence, was eighty and childless, and whose heirs expectant, in England, were soon declared aliens in Virginia; and the Carteret residual interest in the Carolina

91. Priest relates that Virginia made enslaved persons attachable for debt five years before Parliament's Debt Recovery Act but did so in the same statute that provided or confirmed that Virginians could place slaves as well as land in fee tail. PRIEST, *supra* note 5, at 76.

92. PRIEST, *supra* note 5, at 137-41.

93. PRIEST, *supra* note 5, at 128-45.

94. See the curator's notes to Jefferson, Bill to Enable Tenants, *supra* note 10 (Jefferson's justification for abolishing entail).

proprietary land in North Carolina, a property interest enjoyed by the absentee Lord Granville of perpetual rights to quit rents that many farmers despised. Each of these estates was in large part held in fee tail, which was well known to revolutionary legislators.⁹⁵

Stripping these men of their family lands was no easy task. Historically, fee tail was not only, or even primarily, a shield against ordinary creditors. It had for centuries been favored by aristocratic landholders because it offered protection against forfeiture to the government. In medieval England, the ultimate creditor, as it were, was the crown, and entailing land offered some insurance against the political risk of royal confiscation amidst political unrest. Unlike fee simple absolute, which was founded in common law, fee tail was a creature of a statute, *De Donis*, that was interpreted as permitting the crown, like other creditors, access only to the life interest of the target, not the future interests of the target's issue.⁹⁶ With few other legal protections or (at least as yet) "credible commitments" that the crown would not confiscate property, fee tail offered a safe harbor for family property. Sir William Blackstone, for example, noted that because "estates-tail were not liable to forfeiture, longer than for the tenant's life," the aristocracy was "always fond of this statute, because it preserved their family estates from forfeiture."⁹⁷

Some kings, notably Henry VIII, tried to pierce that protection in specific treason statutes. These attempts were so notorious that Blackstone, in the history of the common law that served as the conclusion to his *Commentaries on the Law of England*, observed that Henry's "attacks . . . upon the immunity of estates-tail . . . reduced them to little more than conditional fees at common law, before the passing of the statute *de donis*."⁹⁸ Blackstone was referring, however, only to conviction for high treason, not for lesser crimes.⁹⁹ Still, legal commentators throughout the eighteenth century debated the extent of the protection that fee tail offered against forfeiture, and the analysis often turned on the interpretation of particular statutes detailing specific crimes.¹⁰⁰

95. Jefferson had assisted George Wythe in protecting Fairfax's proprietary claim just before the Revolution, for example, and Lord Fairfax had employed Jefferson's father as a surveyor of those lands. THOMAS JEFFERSON, Entry for Oct. 13, 1768, in 1 JEFFERSON'S MEMORANDUM BOOKS 63 (James A. Bear Jr. & Lucia C. Stanton eds., 1997); *Editorial Note*, in 1 THE DIARIES OF GEORGE WASHINGTON, 11 MARCH 1748–13 NOVEMBER 1765, at 1 (Donald Jackson ed., 1976).

96. See, e.g., SIR EDWARD COKE, 3 INSTITUTES OF THE LAWS OF ENGLAND 19, 126, 211 (London, E. & R. Brooke, 1797) (observing that under two treason statutes of Edward III that "tenant in tail shall forfeit only for the term of his life, for that was all he could lawfully forfeit at the making of this statute, either in case of treason or felony"; but conviction under a high treason statute of Henry VIII resulted in "the forfeiture of all his manors, lands, tenements, and hereditaments in fee-simple, or fee-tail of whomever they be holden").

97. 2 WILLIAM BLACKSTONE, COMMENTARIES *116.

98. 4 WILLIAM BLACKSTONE, COMMENTARIES *431; see also 2 WILLIAM BLACKSTONE, COMMENTARIES *117-19.

99. 4 WILLIAM BLACKSTONE, COMMENTARIES *374.

100. The most recent debate had flourished around the time of the Jacobite Rebellions of 1745. For

Lawyers in revolutionary America were quite familiar with the eighteenth-century English debates over the extent of fee tail's protection against forfeiture in early modern England. The answers were hardly clear, but the relevant point is that this legal knowledge likely affected the timing and drafting of the revolutionary-era fee tail statutes. The problem for revolutionary legislators was that if their state were to confiscate land held in fee tail, or at least if it did so without convicting the holder of high treason, it would arguably only obtain the life estate of that present holder—the loyalist target. The state would not logically be able to confiscate the remainder in tail held by the loyalist's issue because such issue might not be yet living.¹⁰¹ To effect full confiscation of the entire fee simple—the present possessory interest as well as all remainders in tail—required either conviction for high treason or the conversion of the present estate into fee simple. For a variety of reasons—ideological, procedural, and prudential reasons—few states sought to convict loyalists of high treason. Instead, most were attainted or convicted under specially drafted statutes that defined the crime of disloyalty or the requirements for allegiance, and these statutes often specified that the offences did not amount to treason.¹⁰² Consequently, entailed land forfeited under those disloyalty statutes arguably gave the state only an interest in the land for the life of the loyalist. The abolition of fee tail in those states, then, converted the states' present possessory interest into fee simple absolute.

This confiscatory explanation of the abolition of fee tail is not just a logical possibility. It is the interpretation that some well-placed observers attached to the abolition of fee tail at the time. When the New York legislature attainted Frederick Philipse by statute in late 1779, for example, it also named his son, Frederick Philipse Jr., to capture the son's expectant interest in his father's estate.¹⁰³ That, however, might only guarantee two successive life estates to the state. Three years later, as victory became more

example, Charles Yorke, the son of Lord Hardwicke, published a treatise defending an anti-Jacobite treason statute, supporting the corruption of blood, and arguing that because the tenant in tail could remove the restriction on alienation, the crown was able to likewise obtain the full estate upon forfeiture. CHARLES YORKE, *SOME CONSIDERATIONS ON THE LAW OF FORFEITURE FOR HIGH TREASON* (n.p., 1745). Yorke's argument connecting the ease of docking entails in England with full forfeiture suggests a possible reason why Virginia, with its Cavalier tradition, made the removal of entail on large estates so difficult: to bolster the integrity of the estate in times of unrest. Yorke added an appendix three years later to counter the argument that fee tail was stricter in Scotland and thus entailed estates there were not forfeitable. CHARLES YORKE, *SOME CONSIDERATIONS ON THE LAW OF FORFEITURE FOR HIGH TREASON* 152-54 (3d. ed. n.p. 1748).

101. The alternative was to attribute the corruption of blood to the forfeiting crime, a penalty roundly criticized throughout the early modern period and endorsed by no revolutionary state, as far as I know. The New York State Constitution of 1777, for example, permitted acts of attainder for the period of the Revolution only, but it qualified that legislative power by providing that "such acts shall not work a corruption of blood." N.Y. CONST. of 1777, art. XLI.

102. See Steilen, *supra* note 63, at 827-28; Daniel J. Hulsebosch, *Exile, Choice, Loyalty: Taking and Restoring Dignity in the American Revolution*, 41 L. & SOC. INQUIRY 846-47 (2016).

103. Act of Oct. 22, 1779, 1779 N.Y. Laws 173.

likely, the legislature abolished fee tail, declaring that all present estates in fee tail were, instantly, converted into fee simple.¹⁰⁴ The leading interpretation of this reform was that the state now held the forfeited Philipse estate free and clear. This was the claim of a key legislator, well-placed lawyers in New York, the Philipse family itself, and an English barrister that the American Claims Commission in London sent to the American states to investigate the facts beneath the loyalists' petitions, including those of the Philipse family.¹⁰⁵ The barrister, for example, talked to most of the leading lawyers in New York, including John Jay, who had been the state's first chief justice and then a member of the Congressional Peace Commission that negotiated the Treaty of Peace. Based on his fact-finding, the agent reported back to the Claims Commission in London that the abolition of fee tail was "overtly pointed in order to aid [the forfeiture] Laws, and protect the State against suits by the Tenant in Fee in Remainder."¹⁰⁶

For his part, young Frederick Philipse Jr. originally claimed compensation only for the expected value of his life interest in his father's fee tail estate, not for a fee simple. However, he learned sometime after his first petition that the state had abolished fee tail and that the probable effect was to convert its interest in his father's estate into a fee simple.

[U]nder and by virtue of this Law," read his second petition, "and the Act by w^{ch} the person of your Memorialist was attainted, the said State of New York have seized upon, not only the right of your Memorialist in the said Tracts of Land, but the Interest of all others who might be entitled to take after him under the Will of his Grandfather, and have advertized the same to be sold in fee simple for the use of the State.¹⁰⁷

The abolition of fee tail, combined with the initial forfeiture to strip his family of the manor forever, led to a revised, higher estimate of Philipse Jr.'s losses.

The American Claims Commission, however, refused to recognize the loss of Philipse Jr.'s reversion. It did the same with other claims of compensation for fee simple where the claimant held only fee tail. The

104. Act of July 12, 1782, 1782 N.Y. Laws 501.

105. LAWS OF THE LEGISLATURE OF THE STATE OF NEW YORK IN FORCE AGAINST THE LOYALISTS 91-94 (London 1786) (reprinting the statute abolishing entail as one of the statutes "against the loyalists" and noting that "The Manor of Philipsburgh,[sic] by far one of the most valuable in the Province of New-York, was held by Frederick Philips [sic] for Life, with a Remainder to his Son Frederick, in Tail"); The Memorial of Frederick Philipse Jr. f. 221 (December 1784) (on file with TNA, AO 12/19); Anstey, *supra* note 68, at f.17.

106. Anstey, *supra* note 68. He continued that "it certainly affects the forfeited Estates of the sons of all such who are Tenants in Tail in possession, and who are not as well as their Fathers attainted by name in the Act of 1779, and I imagine extends the Cases of the Sons of persons convicted by Indictment." *Id.*

107. The Memorial of Frederick Philipse Jr., *supra* note 105, at f.223. His original petition is in the same file. *Id.* at f.221.

Commission's lawyers maintained that the Treaty of Peace expressly protected future interests, such as future interests following fee tails. In addition, they argued, the Treaty's prohibition on confiscations after the peace meant that the American states could not invoke the common law prohibition on alien landholding to prevent British landholders from holding land. Because Philipse Jr. would inherit his life estate in his father's land sometime after the peace, the Treaty preserved his interest. This soon became the official British diplomatic position.¹⁰⁸

The southern states generally followed a different strategy for effecting property forfeitures. Jefferson again appears to have been the lead strategist. He eschewed outright confiscation and preferred, instead, to declare holders of land who adhered to the enemy to be non-citizens.¹⁰⁹ Aliens were not, according to the traditional common law, entitled to hold land, or at least not capable of passing it to heirs and devisees.¹¹⁰ More to the point for the Fairfax estate, alien heirs could not inherit land, even land descending from citizens. Thomas Fairfax, the aging 6th Lord Fairfax, maintained a quiet neutrality during the war until he died in 1781. His heirs, though, lived in England and were, under a statute that Jefferson drafted during the same period that he wrote the bills abolishing fee tail and primogeniture, disqualified from citizenship. According to the dominant interpretation within Virginia, that disqualification turned such people into aliens. Thus, they were disabled from inheriting land.¹¹¹ If the Fairfax proprietary estate was properly escheated—a subject of controversy for the next forty years—then all the land was in the hands of Virginia. In addition to over four million acres of ungranted land, the Fairfax proprietary rights included the right to collect quit rents on hundreds of thousands of acres granted over the previous century. These, too, Virginia claimed to appropriate.

The American Claims Commission repeatedly denied the Fairfax family's petition for full compensation.¹¹² Instead, its legal advisors argued

108. Several opinions of counsels and American Claims Commissions decisions bearing on this question can be found in 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 505-08. *See also* R.P. Arden, Mr. Attorney General's Opinion on the Case of Mr. & Mrs. [Roger] Morris (Mar. 31, 1787) (on file with The Papers of John Jay, <https://dlc.library.columbia.edu/jay/ldpd:29996>) (opining in the case of claim for a remainder interest in forfeited land that "I cannot advise the Commissioners to consider this remainder in Fee as absolutely lost until an attempt has been made to obtain that Justice in America who which they are entitled and refusal of which will in my opinion be a direct Violation of the Treaty").

109. Thomas Jefferson, Bill concerning Escheats and Forfeitures from British Subjects (June 4, 1779), in 2 THE PAPERS OF THOMAS JEFFERSON, 1777-18 JUNE 1779, at 279 (Julian P. Boyd ed., 1950).

110. On the prohibition against alien landholding, see ELLEN HOLMES PEARSON, REMAKING CUSTOM: LAW AND IDENTITY IN THE EARLY AMERICAN REPUBLIC 82-87 (2011).

111. *See* Hunter v. Martin, 18 Va. (4. Munf.) 1 (1815).

112. American Claims Commission, Report on the Claim of the Right Honourable Robert Lord Fairfax, 1806-7, 62 HC Jour. 956 (concluding that Virginia tried to confiscate at least some of the property but did so after the Treaty of Peace and therefore with no effect); Mr. Wilmot's Report on the Memorial of Gen. Martin, 1806-7, 62 HC Jour. 957 (a commissioner concluding that the Fairfax heirs "are, entitled to the property after the death of Lord Fairfax [and] have a just claim for the value thereof from the United States of America, by virtue of the Fifth Article of the Treaty of Peace").

that Virginia had never confiscated the estate during the war, and it could not do so, under the Treaty of Peace, afterward.¹¹³ The fate of the Fairfax estate became the subject of litigation in the state and federal courts, culminating in two landmark Supreme Court decisions.¹¹⁴ The most important substantive issue before the Court was whether the prohibition against “future confiscations” in Article VI of the Treaty of Peace applied to the common law prohibition on the inheritance of property by non-citizens. Spencer Roane and a majority of the Virginia Supreme Court held that it did not. Technically, they argued, the common law rule that aliens had no heritable blood was a disability that prevented inheritance from the outset rather than a confiscation of property already enjoyed. The Supreme Court, exercising a contested power to review final judgments in state courts on matters of federal law, held that the rule’s effect was nonetheless, confiscatory. Despite the holding that the common law rule could not bar inheritance by a British subject, Virginia, under the terms of a legislatively approved settlement, did take ownership of vast bulk of the Fairfax estate. The legislative abolition of fee tail facilitated the process.¹¹⁵

North Carolina followed a similar strategy. Its revolutionary legislature possibly copied Virginia’s alien land laws when it sought to confiscate land from the heirs succeeding to the massive, entailed estate of Lord Carteret, the Earl Granville. This land claim stretched across millions of acres of yet ungranted land, and the family’s property also included, as in the case of Fairfax, the claim for perpetual quit rents on 300,000 acres of land previously granted to settlers.¹¹⁶

Express confiscation and implicit expropriation by declaring British loyalists to be aliens, when combined with the abolition of fee tail, were not the only recourses for states seeking to perfect their title to land held in fee tail. Lawyers in Massachusetts, who had always had an ambivalent relationship to common law ways,¹¹⁷ developed another mechanism for

113. Members of the family continued petitioning the House of Commons for compensation for many years afterward. *See, e.g.*, Report from the Committee to whom the Petition of Philip Martin, a Lieutenant General in his Majesty’s Army, was referred, 1806-7, 62 HC Jour. 956-58.

114. *Fairfax’s Devisee v. Hunter’s Lessee*, 11 U.S. 603 (1813); *Hunter v. Martin’s Lessee*, 14 U.S. 304 (1816). The best treatment is Hobson, *infra* note 118.

115. The Fairfax heirs famously sold their claim to a Virginia syndicate headed by two brothers, John Marshall and James Marshall. The former soon became chief justice of the Supreme Court and recused himself from the Fairfax litigation in federal courts. That did not stop him, however, from helping to draft briefs in those causes. The best treatment is Charles F. Hobson, *John Marshall and the Fairfax Litigation: The Background of Martin v. Hunter’s Lessee*, 2 J. SUP. CT. HIST. 36 (1996). For a critical view of Marshall’s behavior, see G.E. White, *Reassessing John Marshall*, 58 WM. & MARY Q. 673 (2001).

116. An old but useful treatment is Henry G. Connor, *The Granville Estate and North Carolina*, 62 UNIV. PENN. L. REV. 671, 674, 678 (1914). Georgia’s abolition of fee tail might fit the pattern as well. During the Revolution some people believed, falsely as it turned out, that the first British governor of the province still held some land in the province in fee tail. Thomas Jefferson, *Jefferson’s Amplification of Subjects Discussed with Vergennes*, [ca. Dec. 20, 1785], in 9 THE PAPERS OF THOMAS JEFFERSON, NOVEMBER 1785 – JUNE 1786, at 107-10 (Julian P. Boyd ed., 1954).

117. On the adaptive tradition in early Massachusetts law, see GEORGE L. HASKINS, LAW AND

extinguishing future interests enjoyed in estates held in fee tail. During the Revolution, Massachusetts had confiscated the massive eastern lands of Sir William Pepperell, in what is now Maine, and which Pepperell held in fee tail. To overcome the claim that the state had only confiscated Pepperell's life interest, or even the interest of his lineal successors, state lawyers aggressively construed the forfeiture statute as including, in its terms, all future interests, of whatever variety.¹¹⁸ For lawyers in the more traditional common law jurisdictions of New York and Virginia, that was likely too radical a possibility. But it worked in Massachusetts.

These examples of revolutionary confiscation of massive landholdings held in fee tail reveal that the traditional republican explanation of its abolition, at least in a few states, has more to it than symbolism. There were members of the British nobility, along with power members of the colonial oligarchy, who held estates in fee tail. They were some of the primary targets for forfeiture. Whether or not the revolution was, as some social historians have argued, a reaction against a "feudal revival" in eighteenth-century North America,¹¹⁹ this branch of the revolutionaries' expropriation project was designed at least to contribute to inoculation of American society against such a revival.

This essay points toward a different framing for the history of property and credit in early America, one compatible with many of Priest's findings but that trades off the theoretical elegance of NIE in favor of wider historical context. It places the destabilization of property, including confiscation, at the center of the creation of American property law. Consequently, it focuses on the *revolutionary* struggle for property: a struggle over how property was supposed to function politically; who was entitled to own it; and where to resolve conflicting claims to it. Although much American property law remained the same after as before the Revolution, the changes were significant. The Treaty of Peace memorialized the largest changes by including substantial guarantees to British creditors and confirming a trend in the law of nations toward shielding foreign debt from wartime predations.¹²⁰ That same treaty, however, contained no guarantee that the states would return or provide restitution for the massive confiscation of property from American loyalists and absentee Britons.¹²¹ The resulting

AUTHORITY IN EARLY MASSACHUSETTS: A STUDY IN TRADITION AND DESIGN (1960).

118. Theophilus Parsons, *Opinion on the Will of Sir William Pepperell* (Oct. 9, 1788), in 13 AM. JURIST 36, 40-43 (1835) (opining that the Massachusetts forfeiture statute expropriated all present interests and remainders held by loyalists).

119. See Berthoff & Murrin, *supra* note 29, at 264.

120. Treaty of Peace, art. IV, 8 Stat. at 82.

121. *Id.*, art. V, 8 Stat. at 82-83.

compound of the new American property included well-advertised solicitude toward foreign creditors; public subsidies of patriotic debtors; and the expropriation of property from those excluded from political membership. Each of these elements—the quest for distant credit, subsidy of local debtors, and dispossession of outsiders—persisted through the nineteenth century. The American version of settler postcolonialism generated truly innovative rules of property and credit with lasting effects at home and abroad.