

Property and Credit: A Legal and Economic History

A conversation with Claire Priest's *Credit Nation: Property Laws and Institutions in Early America*

Ron Harris*

INTRODUCTION

Many legal historians engage in various forms of critique of capitalism and Western colonialism. Very few actually study capitalism from the inside, addressing questions related to capital accumulation, financial institutions, entrepreneurs, or business corporations. Fewer still scrutinize, from the inside, the connections between capitalism and colonialism, by studying global trade, capital flows, the City of London, or multinationals. Some of the historians who *have* been attracted to these internal issues in recent years and identify themselves as new historians of capitalism avoid economic history and economic theory, it would seem, due to ideological hostility, ignorance, or a lack of the specific competencies required in these realms.¹ Few of these historians pay attention to law.² But the group of scholars who are involved in what I term legal-economic history—historians who are willing to tackle the details of legal doctrines and institutions, on the one hand, and draw on economic history literature and insights from economic theory, on the other—is markedly small. I can think of fewer than a dozen such active legal-economic historians.³ Claire Priest is one of these exceptional few. She does legal-economic history of the kind I appreciate and aim to do myself. In *Credit Nation*, she employs economic history literature and engages with economic historians.⁴ The clearest

* The Kalman Lubowsky Chair of Law and History, Tel Aviv University School of Law.

1. Eric Hilt, *Economic History, Historical Analysis, and the "New History of Capitalism"*, 77 J. ECON. HIST. 511 (2017).

2. Notable exceptions are: CHRISTINE DESAN, *MAKING MONEY: COIN, CURRENCY, AND THE COMING OF CAPITALISM* (2014); and ROY KREITNER, *CALCULATING PROMISES: THE EMERGENCE OF MODERN AMERICAN CONTRACT DOCTRINE* (2006).

3. For a summary of the field, see Daniel M. Klerman, *Economics of Legal History*, in 3 *THE OXFORD HANDBOOK OF LAW AND ECONOMICS* 409 (Francesco Parisi ed., 2017); and Ron Harris, *The Encounters of Economic History and Legal History*, 21 L. & HIST. REV. 297 (2003).

4. CLAIRE PRIEST, *CREDIT NATION: PROPERTY LAWS AND INSTITUTIONS IN EARLY AMERICA* (2021). See especially PRIEST, *Property, Institutions, and Economic Growth in Colonial America*, in *id.*

indication that Priest is a “real” legal-economic historian is the fact that the book at the center of this symposium and the theme issue was published in the *Princeton Economic History of the Western World*, which is edited by an economic historian, publishes mostly books by economic historians, and is read primarily by economic historians.⁵ The fact that Priest’s book was published by the leading economic history book series, and that the *Yale Journal of Law & the Humanities* should devote a theme issue to it, may signal a new opportunity to recognize the potential of Priest’s approach to legal-economic history.

In this short essay, I will not offer a critique of *Credit Nation*, even though a great book such as this one also deserves a critical evaluation. Instead, I will converse with Priest’s book. The conversation will be based on the common literature that both Priest and I read and on my own work, which, in many respects, parallels Priest’s but only rarely overlaps with it. I hope that the frequent citations to my work will be excused by this intention.

MIGRATION

One particularly fascinating aspect of Priest’s book is that relating to the migration of land law from England to the North American colonies.⁶ Land law was shaped in England by its peculiar trajectory, which was marked by the shift from feudalism to centralized monarchy. It was also shaped by the need of the Norman minority elite to control a majority of Anglo-Saxons and Celts; by the strong reliance of the kings on Royal Courts as a governance tool; and by the formalization of writs and the formation of equity as a legal system intended to ease the rigidities of the common law system. Land was held based on a top-down feudal relationship, originating in the King, going down to the various ranks of the nobility, and eventually reaching the actual tenants on the ground. The tenants’ tenure on the land, from limited duration to lifetime succession, was determined by different types of estates. Land disputes were litigated through a complex array of common law writs and forms of action. There was no land title registration system. The complicated land law apparatus dealt with proving legal rights by resorting to history, to land conveyances, to writs issued by courts, and at times, all the way back to the Domesday Book.

By the beginning of the settlement of the Atlantic seaboard in the seventeenth century, productive land in England was practically fully

5. In fact, the only other legal historian to publish with this series is myself, a year before Priest, in 2020: RON HARRIS, *GOING THE DISTANCE: EURASIAN TRADE AND THE RISE OF THE BUSINESS CORPORATION, 1400-1700* (2020). Interestingly, Taisu Zhang’s book *THE LAWS AND ECONOMICS OF CONFUCIANISM: KINSHIP AND PROPERTY IN PREINDUSTRIAL CHINA AND ENGLAND* (2019) was also published in a Cambridge economic history series.

6. The term legal transplants, which was popularized by Alan Watson, is suitable only to a small subset of legal migrations. Others prefer legal circulation, legal transfer, and other terms. See ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (1993).

“owned.”⁷ In America, there was an entirely different reality: there was an abundance of unallocated land. Property rights were based on royal charters and treaties with indigenous leaders that were often written, public, and within memory. Priest’s book vividly shows how the different environment in the Americas affected the migration of English land law to the colonies. It highlights what, in my view, is the most interesting element in legal migration—namely, the modification of legal doctrines, classifications, and institutions.⁸ I will look here at two components of the legal transfer: title-establishment and asset partitioning.

TITLING

The title system in England, as shaped in the formative period of common law (the twelfth through thirteenth centuries) and still in force all the way through to the nineteenth century, was cumbersome. The system required claimants to go back in time along the long line of conveyances of complicated feudal titles in land in order to prove or disprove the legality of these conveyances. It was not suited to the New World, where settlers encountered what they perceived as an abundance of unclaimed, cultivatable land. It dawned on American colonists within decades of their migration that the system was unwieldy and not fit for their purposes. They looked for ways to simplify the system so that it would match their needs in proving initial allocation of land and rendering conveyances faster, cheaper, and more certain. There was no real controversy over the general desirability of simplification, given the simpler reality and a more rudimentary legal system. Initial colonial grants of land were recorded by corporations and governors, while subsequent land conveyances were often recorded in courts and regulated by colonial assemblies. There were variations among colonies in North America and the West Indies based on the form of colonial governance, nature of agriculture, and level of legal conservatism. The land titles recording and publicity reform was, at its heart, uncontroversial. Interestingly, this reform is in line with the near-consensus among property-economics theorists, developed from work by Alchian, Demsetz, de Soto, and Arruñada, who see only advantages in publicizing rights in valuable assets.⁹ To the extent that we buy the economic theory’s postulation that better records and better publicity constitute an efficiency gain—almost a free lunch, with no clear losers or

7. MARK OVERTON, *AGRICULTURAL REVOLUTION IN ENGLAND: THE TRANSFORMATION OF THE AGRARIAN ECONOMY 1500-1850*, at 147-51 (1996).

8. HARRIS, *supra* note 5.

9. Alchian A. Armen & Harold Demsetz, *The Property Right Paradigm*, 33 J. ECON. HIST. 16 (1973); HERNANDO DE SOTO, *THE OTHER PATH: THE ECONOMIC ANSWER TO TERRORISM* (1989); Benito Arruñada & Nuno Garoupa, *The Choice of Titling System in Land*, 48 J.L. & ECON. 709 (2005); and BENITO ARRUÑADA, *INSTITUTIONAL FOUNDATIONS OF IMPERSONAL EXCHANGE: THEORY AND POLICY OF CONTRACTUAL REGISTRIES* (2012).

immediate distributive consequences—then we should not be surprised by this historical development in the colonies.

We can build upon Priest's analysis, then, to pose a puzzle. Why is it that the migration of land law from England to colonial Australia involved a modification that differed entirely from that involved in the migration of the same English land law to colonial North America? Indeed, the Australian land regime was shaped more than a century *after* the American land regime. But English law, itself, was not substantially reformed between these two migrations, and both North America and Australia had abundant land, indigenous populations whose land was dispossessed, and an influx of English settlers dreaming of owning their own homesteads, plantations, or farms.

The Torrens system of land registration was introduced in South Australia in 1857-1858.¹⁰ South Australia was the first common law jurisdiction to establish a system of registration of title to land. The system was based on the registering of titles and not conveyances as well as on the principle of conclusiveness of the register. The Torrens system was adopted in Queensland in 1861, in Tasmania, Victoria, and New South Wales in 1862, and in Western Australia in 1874. It later spread to New Zealand, Canada, and other parts of the Empire.¹¹ So what can explain the difference between the modification of the land-titling system in the First Empire and that implemented in the Second Empire?

A preliminary explanation points to German influence. In Europe, public recording of titles or transactions, often by notaries or on the municipal level, dates back to medieval and early modern times.¹² A German lawyer from Hamburg who emigrated to South Australia and met Torrens, may have been the link.¹³ No such German influence was apparent in America. Questions such as why colonial North Americans stopped where they did in their modification of English law and did not adopt French or German models (or did not invent their own original model of title registration) can serve as a starting point for an extension of Priest's work. After all, the theory that economists assert—that better recording and better publicity increase efficiency—does not postulate the arrival of the American titling model in the seventeenth century or the Australian model in the nineteenth century. More nuanced historical work that draws insights from theories of legal migration is called for.

10. Ron Harris, *Spread of Legal Innovations Defining Private and Public Domains*, in 2 THE CAMBRIDGE HISTORY OF CAPITALISM 153 (2014).

11. *Id.* at 154.

12. *Id.* at 136-37. Indeed, the French parcel *cadastre* was created after the Revolution and in Germany *Grundbuch* only after unification. But these were only the last step in a long process.

13. *Id.* at 154.

ASSET PARTITIONING

Asset partitioning tools are the legal doctrines that enable a property owner to determine which assets will be subject to collection by which creditor and which will be shielded from that creditor. Hansmann, Kraakman, and Squire have shown that asset partitioning better defines creditors' rights and increases efficiency by lowering monitoring costs, thereby facilitating risk-allocation and lower transaction costs in future credit contracts.¹⁴ There is no single, theoretical textbook solution to the question of what the optimal system for partitioning assets might be. Separating assets from the main pool and shielding them from creditors has its pros and cons. The main pro is that each creditor focuses her efforts on monitoring and evaluating a smaller set of assets and a smaller set of competing creditors, which is less costly than tracking all of the assets and creditors. The main con is that that each creditor is limited to collecting her debts from a smaller pool of assets.¹⁵ When looking at the legal migration of asset partitioning tools, the picture becomes murkier, as Priest shows us in her book. Priest argues that using asset partitioning tools to shield assets has a dual effect: on the one hand, it reduces the offering of credit and increases its price (the interest); on the other, it makes debtors more resilient to personal and systemic crises by enabling them to remain above the level of subsistence.¹⁶ Asset partitioning can be achieved using different legal doctrines that apply to different types of assets and provide different (stronger or weaker) levels of protection.

The entail, which created fee tail right in land, was designed to bind the title-owners of a piece of land to transfer it intact to the next generation, ensuring the dynastic continuity of the family. While the entail was not as important a tool in America as it was in England, it was used in the colonies for asset partitioning. Entailed land could not be fully seized by creditors of the fee tail holder because one could create an entail to separate the entailed land from the pool of assets any future creditors could take. Entailed land was practically unmortgageable and could not be foreclosed by unsecured creditors. The entail was also a self-commitment device because the creator had to endure a long and expensive court proceeding to revoke it. As Priest shows, the entail had a dual effect, protecting essential land from creditors but also limiting the fee tail holder's access to loans.¹⁷

It is interesting to compare the entail to the Chinese Dian studied by

14. Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 398-405 (2000); and Henry Hansmann et al., *Law and the Rise of the Firm*, 119 HARV. L. REV. 1333, 1344-50 (2006). See also Ron Harris, *A New Understanding of the History of Limited Liability: An Invitation for Theoretical Reframing*, 16 J. INSTIT. ECON. 643 (2020).

15. Hansmann & Kraakman, *supra* note 14, at 1344-46, 1353.

16. PRIEST, *supra* note 4, at 110-11.

17. *Id.* at 93-111, 138-45.

Zhang.¹⁸ They both played with the time dimension but in different ways: in the former, the land returned to the family upon the death of the fee tail holder; and, in the latter, it returned when the family was able to exercise the option and buy it back. What I find interesting is the fact that entail (and the Dian) had disappeared by the nineteenth century. Today, Anglo-American law offers no functionally equivalent legal device for taking real estate out of a personal pool of assets. Did this type of asset partitioning die out because it ceased to be relevant or because it was inefficient? Or did we lose an interesting option just because of some historical contingencies? While neo-classical rational choice theory holds that it is inefficient to mandatorily shield some assets from creditors or constrain property holders from committing their assets as security to creditors, behavioral economics can provide a rationale for the older tool and view its disappearance as inefficient change. Heuristics and biases such as Optimism Bias, Time Discounting, Present Bias, and Tunneling may lead to the conclusion that legal rules and tools that intervene in choice and provide self-commitment devices are efficient.¹⁹ These theoretical insights resurrect and further complicate the puzzle of why tools such as the entail, the strict settlement, and the Dian disappeared.

Another type of asset partitioning is the non-recourse loan. In this case, a real estate asset is mortgaged as security for a loan, typically the loan that financed the purchase of the asset. The result, in terms of asset partitioning, is that the other private assets of the borrowers (usually movables and future earnings) are placed in a separate pool and shielded from the lender.²⁰ Studying the history of non-recourse loans in the United States would definitely be a worthwhile endeavor. In particular, it would be interesting to examine whether this tool was available and in use during the period covered by Priest's book—and, if not (which is probably the case), why?

An important tool used in colonial and early republic America for altering the access of creditors to property was the reclassification of a specific type of property into a different category. Classifying slaves as real property could render them less accessible to creditors. Classifying lesser types of titles in land as movable could render them more accessible to creditors and better security for loans. An interesting question posed by Priest that could be further explored is: which jurisdictions were willing to be more flexible in this sense? Which tried to provide a jurisprudential rationale for the

18. TAISU ZHANG, *THE LAWS AND ECONOMICS OF CONFUCIANISM: KINSHIP AND PROPERTY IN PREINDUSTRIAL CHINA AND ENGLAND* (2017).

19. OREN BAR-GILL, *SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS* (2012); Ron Harris & Einat Albin, *Bankruptcy Policy in Light of Manipulation in Credit Advertising*, 7 *THEORETICAL INQUIRIES L.* 431, 454-66 (2006); and SENDHIL MULLAINATHAN & ELДАР SHAFIR, *SCARCITY: WHY HAVING TOO LITTLE MEANS SO MUCH* 205-25 (2013).

20. Ron Harris & Asher Meir, *Non-recourse Mortgages—A fresh start*, 21 *AM. BANKR. INSTIT. L. REV.* 119 (2013).

reclassification and which viewed it as a pure fiction? I find these questions particularly intriguing as, many years ago, I addressed the question of how corporate stock was classified.²¹ But there are differences between the issues we have each investigated. Her examples were older forms of assets that were reclassified. Mine were newer forms of property that kept changing at a rapid pace. The initial attempt by contemporary jurists was to classify shares in corporations according to the assets held by that specific corporation. Canal and water-supply companies held mostly real estate and their shares were classified accordingly. Overseas trade corporations held mostly goods and ships, and their shares were accordingly considered movables. With time the connection between the nature of the assets owned by a corporation and the legal classification of its shares was disjointed. It will be interesting to compare the changing conceptualization of shares and the ability to use shares as security for loans in England as well as in colonial and post-independence America in the seventeenth through nineteenth centuries.

BUSINESS FIRMS

New World agriculture, unlike its Old World predecessor, was export-oriented and, in some regions, it was based on large-scale plantations and slave labor from the start. The credit needs of American and Caribbean farmers and plantation owners were different from those of English near-autarkic (or local economy-reliant) yeoman and small-estate owners. Based on the modern dichotomy between consumer credit and business credit, much of America's credit related to the latter or to semi-business contexts. Agriculture and trade were integrated. Priest uses the term "financial risk" to denote the increased risk of foreclosure created by the use of property as collateral.²² For me, financial risks are the risks borne by financial institutions—not those of the kind borne by farmers.²³ Farmers were subject mainly to personal risks (death, illness) and weather-related risks including extreme cold temperatures, floods, and famines. Merchants were subject to oceanic risks and the threat of political instability or warfare. All or any of these types of risks could pose a threat to the credit system and to specific loans. There were various ways of dealing with the business risks of agriculture and trade, including risk-spreading, risk-pooling, insurance, and, of course, the choice to engage in less risky activities. Asset partitioning, such as the use of the entail, was not directly relevant for the

21. RON HARRIS, *INDUSTRIALIZING ENGLISH LAW: ENTREPRENEURSHIP AND BUSINESS ORGANIZATION, 1720-1844* (2000).

22. PRIEST, *supra* note 4, at 163-65.

23. Ron Harris, *General Average and all the Rest: The Law and Economics of Early Modern Maritime Risk Mitigation*, in *SHARING RISK: GENERAL AVERAGE AND EUROPEAN MARITIME BUSINESS (VI-XVIII Centuries)* (M. Fusaro et al. eds., 2022).

level of risk created in the business activity. Another way of understanding the role of credit in semi-capitalist agriculture is as leverage. Loans enabled farmers to grow more crops, on shorter circulation, exploiting more African slaves. The more land that was entailed, the less security there was available to lenders, the less leverage farmers had, and, as a result, the lower the level of risk. On the other hand, the more that assets, slaves, and land were classified as movables, the more assets were available as security for lenders and the more credit was injected into the system, leading to higher risk.

GROWTH

The million-dollar question raised by Priest's book (and by mine and, indeed, by institutional economics more generally) is how to determine the extent to which institutional change impacts economic growth. Regressions, the first option that comes to mind, require a lot of data, often several time-series, sometimes natural experiments, and smart design. These are hard to achieve. The move from correlation to causation—to determine whether the institutions led to growth or advanced economies give rise to more advanced institutions—is even more complicated. It is a genuine rarity in the published scholarship and is often controversial.²⁴ Comparative institutional analysis is another inroad into the relationship between institutions and economic performance. Quantitative comparison between Britain and the United States to examine the role of law in economic development is practically non-existent. Comparison between China and Britain, between mortgages and the *Dian*, cannot be tackled quantitatively. More nuanced qualitative and theory-informed studies are required and could benefit from the ingenuity of Claire Priest and Taisu Zhang. Quantitative comparisons between U.S. states are easier to design and implement, compared to cross-cultural comparisons, due to the basic similarities that enable researchers to easily control more variables. For example, in the field of consumer credit, the impact of differences in homestead exemptions on credit markets has successfully been investigated.²⁵

But how, in the absence of quantitative data, can we learn about the relationship between legal institutions and growth? One way of approaching this is to apply theory to institutions in an attempt to determine how efficient they are. It is harder to determine, in the abstract, how efficient a single institution is, but one way forward is comparative efficiency analysis. Priest

24. Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998); Rafael La Porta et al., *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285 (2008); and Daron Acemoglu et al., *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 AM. ECON. REV. 1369 (2001).

25. Richard M. Hynes, *Credit Markets, Exemptions, and Households with Nothing to Exempt*, 7 THEORETICAL INQUIRIES L. 493 (2006); and Richard M. Hynes et al., *The Political Economy of Property Exemption Laws*, 47 J.L. & ECON. 19 (2004).

offers an example of this approach. Another way to examine the economic consequences of institutional reforms is by examining contemporary responses to a given reform in political and legislative debates. For example, Priest looks at reactions to the Stamp Act as evidence for the importance of title-recording and mortgage-recording.²⁶ Such methods of approaching the issue of the impact of institutions on economic growth are as fruitful as doing more regressions.

EQUALITY

One might ask, what is the value of analyzing the relationship between legal institutions and economic growth, which is measured in GDP-per-capita terms? After all, law is not only an instrumental system that should facilitate growth. Many jurists believe that efficiency is a controversial yardstick for morality. Law is also, some would say primarily, about justice. Some would put equality at the center. Some would place autonomy there. The usual step forward in the literature is to replace GDP with HDI—the UN’s Human Development Index that, in addition to GDP (more precisely, GNI in PPP terms) also captures life expectancy, health, and education. The next step that was done recently is to measure development in terms of IHDI (Inequality Human Development Index), which also takes into account inequality. So the question to be answered by the next generation of historians is how did institutional change impact growth in more comprehensive terms (inspired by HDI or IHDI)?

Looking at things from the perspective of China rather than Europe, the role of normative and legal orders is to enhance stability, for example by avoiding famines, maintaining family and social order, giving deference to the elderly, and blocking barbarian invasions.²⁷ Priest’s book on the United States and Zhang’s book on China both provide a good entry point into the tradeoffs between growth, on the one hand, and stability and equality, on the other. Comparison of the Chinese *Dian* and the Anglo-American mortgage regime is illuminating in this respect. The *Dian* includes a buyback option for the original owners of the land.²⁸ The mortgage regime includes entails, family settlements, and (later) homestead exemptions and non-recourse mortgages.²⁹ In theory, credit is more readily available at

26. PRIEST, *supra* note 4, at 115-27.

27. See, for example, R. Bin Wong & Peter C. Perdue, *Famine’s Foes in Ch’ing China*, 43 HARV. J. ASIATIC STUD. 291, 297-99, 309, 323 (1983) (reviewing PIERRE-ÉTIENNE WILL, BUREAUCRATIE ET FAMINE EN CHINE AU 18^e SIÈCLE (1980)). For studies of the historical Islamic Middle East that show how trends towards equality, family cohesion, and peace, eventually curtailed growth, see: Avner Greif, *Cultural Beliefs and the Organization of Society: A Historical and Theoretical Reflection on Collectivist and Individualist Societies*, 102 J. POL. ECON. 912 (1994); and Timur Kuran, *The Absence of the Corporation in Islamic Law: Origins and Persistence*, 53 AM. J. COMP. L. 785 (2005).

28. TAI-SU ZHANG, THE LAW AND ECONOMICS OF CONFUCIANISM: KINSHIP AND PROPERTY IN PREINDUSTRIAL CHINA AND ENGLAND 36 (2017).

29. In the English context, the entail and the strict settlement were used in order to entrench the

lower interest rates without these mechanisms. Priest shows that the shielding offered to some types of real estate in some American colonies provided risk mitigation in times of crisis.³⁰ Yeoman settlers in New England, an example mentioned by Priest, could end up landless and below subsistence under the legal regime favored by English lenders or else resume cultivation of their small lots under the legal regime the yeomen favored as borrowers.³¹ Subsistence was a major concern and an essential objective of legal systems in the pre-modern era in which Malthusian threats were immanent, an objective that was forgotten by many modern jurists.

Priest's book is an invitation to seriously consider, through a historical prism, some of the most profound dilemmas faced by modern societies. Can we achieve both growth and equality simultaneously? Or is there a tradeoff between the two? And, looking south, can social equality be achieved substantially above the subsistence line to provide resilience to crises? Might it be the case that equality serves societies in the short term but blocks their development in the longer term?

I am thrilled to have had the opportunity to converse with Claire Priest through Credit Nation over a set of fascinating questions and puzzles. I have visited and revisited these issues for many years and, nevertheless, feel that the book has taken my understanding of them a big step forward.

political status of the landed elite. LLOYD BONFIELD, MARRIAGE SETTLEMENTS, 1601-1740: THE ADOPTION OF THE STRICT SETTLEMENT (1983); and Eileen Spring, *The Strict Settlement: Its Role in Family History*, 41 *ECON. HIST. REV.* 454 (1988). In colonial America, as Priest shows, their function changed, due to the different environment and social structure, to protect the poor and middle classes.

30. PRIEST, *supra* note 4, at 12. While Schwartz would prefer contractually based default bankruptcy and foreclosure rules, Listokin would say that law and macroeconomics would favor the mandatory shielding of such assets from creditors as an anti-cyclical tool. Alan Schwartz, *A Contract Theory Approach to Business Bankruptcy*, 107 *YALE L.J.* 1807 (1998); and Yair Listokin, *Law and Macroeconomics: The Law and Economics of Recessions*, 34 *YALE J. ON REG.* 791, 793 (2017).

31. PRIEST, *supra* note 4, at 59-61, 72-73.