Rethinking Property Rights in the Light of
*Credit Nation*

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The publication of Claire Priest’s new book, *Credit Nation: Property Laws and Institutions in Early America*, is an occasion well worth marking.¹ Several years ago, when I read her article *Creating an American Property Law*, the first piece in the project that became this book, I was dumfounded.² The subject of that article, the Act for the More Easy Recovery of Debts in His Majesty’s Plantations and Colonies in America, enacted by the British Parliament in 1732, was a major, unilateral revision of property rights to land in the colonies, though not in Britain. The act not only made it possible for creditors of colonial borrowers to seize land in payment of unsecured debts, but it stripped future generations of property rights that had long been secured to them under English law. How could it be that a redistribution of this importance was so little known until Priest called attention to it? How could it have been so completely ignored in writing on colonial political, legal, and economic history, especially in accounts of the British impositions that led to the Revolution? Much more minor afflictions, such as Virginia Governor Dinwiddie’s attempt in 1752 to levy the fee of one pistole for sealing land patents, have been singled out as precursors to the rebellion: “Liberty & Property and no Pistole!”³ Priest’s work not only remedies this omission, but by connecting the debt recovery act to later Revolutionary-era events, provides a deeper understanding of the protests over Dinwiddie’s fee, as well as over later, more consequential, levies such as the Stamp Act.⁴

Priest discusses these events in her book, but she is primarily interested in working out the implications of the change in colonial property rights for

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4. See especially PRIEST, supra note 1, ch. 6.
the American economy and its subsequent expansion. It is a basic tenet of economic theory that secure property rights are a necessary foundation for economic development. If economic actors fear that their returns from investing money, resources, or labor in an enterprise will be expropriated, or if they worry that the enterprise itself will be seized, they will not invest in the first place. This idea seems so obvious that we accept it on faith. But Priest’s study suggests to me that the theory is in need of modification. In the first place, I interpret her research as showing that, under the pre-1732 legal regime, property rights were in an important sense too secure. Not only did owners have the usual protections against intrusions on their lands, reinforced, as Priest documents, by local institutions that made it relatively easy to know who owned what, but their holdings could not be seized in payment of debts unless they were explicitly mortgaged. Moreover, even when property was mortgaged, foreclosures were subject to all sorts of procedural delays, not to mention the possibility that debtors or heirs would exercise their equitable right of redemption to pay off the original debt—a real danger in periods of inflation.\textsuperscript{5} Dan Bogart and Gary Richardson have documented the difficulties these overly secure property rights posed for the exploitation of land resources in England at around the same time. Because too many individuals (including those not yet born) had enforceable claims to family estates, without a special act of Parliament it was difficult for wealthy households to sell land, cut timber, or mine mineral resources—in other words, to do precisely the kinds things that had to be possible for economic development to proceed.\textsuperscript{6} With the inspiration of Priest’s study, moreover, it is easy to come up with other examples of cases where secure property rights inhibited economic development. In Old-Regime France, for instance, entrepreneurs seeking to build irrigation canals could not overcome the obstacles posed by the many affected property owners whose consent had to be secured.\textsuperscript{7} Similarly, in twentieth-century Haiti, the necessity of negotiating with multiple rights holders made it difficult to put together farms of sufficient size for profitable agriculture. As a result, land fell into disuse as young men discovered they could earn more as migrant farm workers elsewhere in the Caribbean than from raising crops on their own tiny farms.\textsuperscript{8}

A second problem with the basic theory, in my view, is that it is easy to come up with examples of large amounts of investment occurring in contexts where property rights were fundamentally insecure. The stampede

\textsuperscript{5} Id. at 61-67.


of multinational companies to build manufacturing capacity in early twenty-first-century China is one instance. Another is the California gold rush. At the time the gold rush started in 1849, there was effectively no government in the area—no entities with the ability to prevent valuable claims from being jumped or to protect arduously accumulated gold from theft or seizure. Why did people risk their lives and savings and rush to the gold fields? One possibility is that the potential returns were so high that it seemed worthwhile to take the risk. A second may have been that investors thought there was safety in numbers—that the simple fact that there were so many migrants brought about some reduction in risk. Certainly, the gold seekers who swarmed into California had a common interest in promoting law and order, and they were able to band together to establish rules governing property rights and also to provide some enforcement. Their efforts in turn shaped the structure of property rights embodied in the formal governance institutions that later emerged.9 In cases like modern China, investors may have had confidence that, if things went wrong, their numbers would give them sufficient economic or political clout to secure a solution—perhaps even a bailout—if not in China, then perhaps from their home governments.

The 1732 act at the heart of Priest’s book grew out of just this kind of confidence. British merchants lent funds to colonial planters on the security of the future crop, knowing full well that under the existing property-rights regime, they would have a hard time collecting on the debts if the value of the crop fell too low. When merchants who had lent to planters in Jamaica found themselves unable in 1731 to realize what they were due, however, they lobbied Parliament to change the rules so that they could seize the debtors’ land.10 The new regime was thus an endogenous response to problems with the old one. Standard economic theory suggests that property rights will be created or modified endogenously when it worthwhile to do so,11 but if there are different interests contending over the change there is no guarantee the outcome will be more efficient—that is, better promote economic welfare—than the old. It may simply redistribute resources to the most powerful group. Priest suggests that it was welfare enhancing for the colonists to facilitate borrowing against the one asset they had in abundance—land—and she presents evidence that governments in a few colonies, for instance in Massachusetts, came to this realization on their own and revised their laws accordingly. However, in other colonies, for instance Pennsylvania, there was more back and forth—with the

10. PRIEST, supra note 1, at 8-9, 77-80.
government enacting similar legislation, but then subsequently backing away from the innovation. In yet other colonies, like Virginia, elites were generally hostile to the change, lobbied intensely against it, and went back to the old rules with independence. The Virginia case is particularly interesting. Large landowners borrowed funds in Britain, but smaller landowners borrowed from their larger neighbors. After Parliament passed the 1732 act, the House of Burgesses changed Virginia’s law to protect debtors’ land from creditors who resided in the colony. Who pushed for that change, and whether the large planters supported it, would be interesting to research. Regardless, large planters still had to worry that their lands were exposed to seizure by British creditors, and, as T. H. Breen has argued, their rising indebtedness was an important cause of anti-British sentiment in the colony on the eve of the Revolution.12

Even if the debt recovery act were imposed on unwilling colonial subjects, it may still have had positive effects on economic growth and development. What can we say about the implications of this shift in property rights for economy’s subsequent trajectory? Priest addresses the question in her last substantive chapter, and though she is quite circumspect in her answers, in the end she concludes the heritage of these changes was an important building block of the capitalist economy.13 I would be even more circumspect. On the most basic level, it is difficult to make the case that the change in property rights in land was necessary for commercial and industrial development. After all, Britain was the world leader in these areas over the next century, and land in Britain was still subject to the old regime’s protections. Moreover, my own research on financing industrial development in New England indicates that merchants and manufacturers rarely relied on land as security for borrowing.14 Priest argues that mortgages on enslaved persons were important for the growth of the plantation economy in the South, but as she acknowledges, such chattel mortgages were already in common use before 1732. At best, then, the debt recovery act played a prophylactic role, reassuring creditors that colonial assemblies would not be able to change the rules and protect slaves in the same way as land.15 Thus even if one were to subscribe to the conventional wisdom of the new historians of capitalism that slavery was the foundation of American economic development, it would be difficult to attribute much, if any, causal significance to the Debt Recovery Act.16

13. PRIEST, supra note 1, ch. 9.
15. PRIEST, supra note 1, at 84.
16. See, for example, SVEN BECKERT, EMPIRE OF COTTON: A GLOBAL HISTORY (2014). For an important critique of the view that slavery was crucial for economic development, see Alan L. Olmstead
What the new regime did do was facilitate widespread landownership in the United States by making mortgages more attractive to lenders and thus more readily available. One of the most important consequences, as Priest emphasizes, was to expand the proportion of the population who could vote, because in the early years of the republic, the franchise in many states was restricted to landowners. This expansion in turn altered the political economy of the United States in ways that mattered for property rights—though not always in the direction of enhancing their security. Whenever land-hungry settlers flooded into an area, for example, their growing political clout tilted the property-rights regime in their favor. The expropriation of native peoples that resulted is well known. Absentee landowners who had bought property in these areas with the aim of profiting from rising land values could be victims as well—their titles effectively erased by liberalized adverse possession laws and other legal changes that benefited squatters.17 More generally, the large proportion of indebted landowners in the voting population produced state insolvency laws and later a federal bankruptcy law that, especially compared to Britain’s, favored debtors.18 As Priest notes, when these laws failed to protect debtors from repossession during the crises that periodically wracked the American economy, the same governments often enacted emergency stay laws to protect small holders at creditors’ expense.19 Thus the revision of property rights that a politically powerful group of creditors secured in 1732 worked over the ensuing decades to increase the relative political clout of debtors. Nor were the effects of this reversal consistent with the simple theory of secure property rights. The rising power of debtors did little to impede the rapid economic growth and development that would transform the United States economy into an industrial powerhouse over the next century.

18. See, for example, EDWARD J. BALLEISEN, NAVIGATING FAILURE: BANKRUPTCY AND COMMERCIAL SOCIETY IN ANTEBELLUM AMERICA 12-14 (2001).
19. PRIEST, supra note 1, at 149.