

Foreword: From Ownership to Credit

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For much of the previous four decades—decades that saw the rise to prominence of both the New Institutional Economics and Law and Economics movements—the primary intellectual paradigm in property law was one of exclusion and security. The key functional virtue of property law in this paradigm was the security of private investments against outside expropriation, whether vertically from state actors or horizontally from other private entities, and therefore the predictability of returns to investment.¹ Such security was primarily achieved through exclusion rights, exercised both vertically and horizontally: takings law being a major example of the former, and trespass law the central example of the latter.² Property rights were therefore, above all, rights of ownership or dominion over things of value, and their primary economic functionality was to facilitate the creation of credible commitments against expropriation or invasion.

Claire Priest's new book *Credit Nation: Property Laws and Institutions in Early America* significantly upends this classic paradigm and lays out some compelling possibilities for a new one. It demonstrates how credit and liquidity drove the political and economic history of early American property law to a far greater extent than previously appreciated, and it argues that these features account for much of the institutional difference between American and English private law. This has several major implications for property theory in general, all of which are reflected in Priest's carefully constructed historical narrative.

First, and most obviously, it suggests that our fixation with exclusion and security overlooks other features of property law that were just as

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1. E.g., Douglass C. North, *Institutions and Credible Commitment*, 149 J. INST. & THEORETICAL ECON. 11 (1993); 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); Avner Greif, *Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders' Coalition*, 83 AM. ECON. REV. 525 (1993).

2. E.g., Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453 (2002); Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691 (2012). For a more skeptical take on this exclusion-based paradigm, see, e.g., Taisu Zhang, *Beyond Information Costs: Preference Formation and the Architecture of Property Law*, 12 J. LEGAL ANALYSIS 1 (2020).

socioeconomically significant in the broader arc of modern history, indeed arguably more so. As early as the colonial era—multiple decades before conventional economic histories of early America begin—the economic value of property rights went far beyond the mere ownership of things and extended into the construction of credit markets and the large-scale movement of liquid capital across long distances.

Second, the economic prominence of credit and liquidity drew upon a different set of legal rights and mechanisms than those relied on by credible commitment theory: rights of collateralization, foreclosure, asset shielding, and free alienation, perhaps more so than basic rights of physical exclusion. Moreover, the use of property as collateral and liquid capital necessarily placed greater burdens on the state to supply information about it in a standardized, authoritative form, leading to large amounts of political attention being placed on land records and archives.

Third, a credit-centric understanding of property also seems to dilute the economic differences between real and personal property, and between ownership of things and ownership of persons. In a theory of property that focuses more on the liquidity of assets and the flow of credit, abstract market value takes precedence over the physical dimensions and attributes of the property itself. It therefore no longer makes sense to treat the ownership of land as fundamentally distinct from the ownership of slaves.

None of this is to suggest, of course, that Priest's credit-centric paradigm is somehow incompatible with the traditional exclusion-centric paradigm. Quite the opposite, the two have some powerful synergies: most obviously, property rights cannot supply the economic foundation for credit markets if they are not reasonably secure against external expropriation. That said, certain kinds of exclusion rights—most notably, the right to exclude creditors from shielded assets—can do considerable damage to credit liquidity, leading to a sort of anti-commons problem in which the economic value of property is increasingly diluted by layers of asset partitioning arrangements. Ultimately, the difference between a credit-centric paradigm and an exclusion-centric one is more one of degree and emphasis than one of fundamental quality: unlike the latter, the former emphasizes the financial utility of assets more than their basic productive capacities.

A breakthrough of this magnitude is, of course, never without some room for debate and further conversation, and the essays in this symposium do an admirable job of identifying those spaces, even as they appropriately recognize and praise the book's immense contributions. The two central questions in Priest's book, as in many books about legal institutions, are "how did certain legal changes come to be," and "what were their socioeconomic consequences." The majority of comments made in the symposium essays accordingly address one, or both, of these questions.

On the origins of legal institutions, both Daniel Hulsebosch and Steven

Pincus attempt to reframe some of the politics surrounding legislative breakthroughs such as the Debt Recovery Act of 1732 and its various aftershocks in the early Republic. Hulsebosch seeks, in particular, to find a somewhat stronger role for the American Revolution, whereas Pincus pleads more generally for a deeper intellectual dive into some of the key figures in Priest's colonial narrative. Classic debates over the origins of legal institutions tend to pit economic determinists—those who believe that, over the long run, institutions respond primarily to economic forces—against those who favor a more politics-oriented narrative. This is, of course, a largely continuous theoretical spectrum, as opposed to a bipolar either/or choice. Priest's book seems to carve out a position somewhere in the middle, recognizing both the importance of imperial politics and the broader economic forces underlying colonial legal development, whereas Hulsebosch and Pincus edge closer to the politics end of the spectrum. Sections of Laura Edwards's essay point to yet another possible position, one that focuses more on the social tensions between distant creditors and closely-knit communities—a variation of the classic *gemeinschaft/gesellschaft* distinction in sociology³—than on higher level political debates in legislatures. These differences in posture raise fundamental questions of political and sociological theory, just as they identify significant debates in historical interpretation.

The issue of politics also emerges in a different set of comments on land recording. As Edwards, Robert Ellickson, Ron Harris, and Carol Rose all point out, one of the most interesting contributions in Priest's book is its somewhat brief discussion of land recording systems in the colonies. Here again, Priest identifies both economic and political reasons for the rise of land recording institutions: they were undoubtedly necessary for credit transactions and capital liquidity, but at the same time, were subject to complex political and social negotiation over what could be recorded and by whom. Both Priest and her commentators recognize that standardized information is never a straightforward "objective" reflection of on-the-ground reality, but is instead always a sociopolitical construct potentially subject to systemic manipulation. If written records were to become the core evidentiary foundation for legal rights, then naturally they would also become a focal point for the sociopolitical conflicts that inevitably accompany any distribution of wealth and capital.

Of the eight essays in this symposium, those by Ron Harris and Naomi Lamoreaux focus most explicitly on economic consequences, and there the possible debates are just as complicated, if not more so, than on the political origins. Both Harris and Lamoreaux seek to expand the comparative perspective that underlies much of Priest's economic analysis—Harris by

3. Eugene Kamenka, *Gemeinschaft and Gesellschaft*, 17 POL. SCI. 3 (1965).

broadening the perspective to cover property institutions in non-European economies, and Lamoreaux by probing more deeply into the Anglo-American comparison at the heart of *Credit Nation*. Both are highly sympathetic to Priest's primary claim that credit institutions were centrally important to the early American economy, but both also seem skeptical that it was uniquely important. Harris points out that similar institutional dynamics and developments can be found across the early modern world, with varying economic outcomes, whereas Lamoreaux notes that the tighter restrictions on debt recovery in England did not seem to significantly damage its economic vitality in the eighteenth and nineteenth centuries. Ultimately, while Priest has undoubtedly supplied an important missing piece of the puzzle, the "million-dollar question" of economic causation remains open to different interpretations.

Finally, a number of the essays, most notably Eleanor Brown's contribution, engage closely with Priest's analysis of slavery. As Pincus notes, *Credit Nation* fits snugly into a recent movement in American history towards emphasizing the importance of slavery to Anglo-American capitalism, but it nonetheless stakes out significant new ground by focusing on the credit relations that commodified slavery enabled. Brown's comments extend the applicability of this analytical framework beyond the American colonies into the West Indies and potentially other slave-based economies in the early modern world that were integrating into transregional credit markets.

All in all, it is surely a testament to the intellectual depth and richness of *Credit Nation* that it has been able to motivate such a wide range of commentary, touching upon a number of truly foundational questions in the social sciences—and it should be noted that, in terms of the humanities/social sciences division in historical writing, *Credit Nation* is firmly on the social sciences side of things. By persuasively placing credit relations at the very heart of early American history, Priest forces us to fundamentally rethink the socioeconomic functionality of property: the shift from a static, exclusion-based, ownership-centric conception of property to a fluid, market-oriented, credit-centric one promises to inject, or reinject, legal institutions into numerous debates on transatlantic empire, modernity, capitalism, slavery, and economic development in substantively new ways.