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Northwestern Law School and American Bar Foundation
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I am in the process of revising a book manuscript entitled *Credit Nation: A History of Property Laws and Institutions in Early America* to be published with Princeton University Press. The basic claim of the book is that the creation of an American property law was centrally influenced by the desire of colonists and English creditors for economic development by using land and slaves as a liquid form of wealth to be used to obtain credit. I explore the creation of title recording institutions and the modification of English laws of property that promoted credit markets. I also try to show the impact of these institutions and laws on our view of American political history in the Founding Era.

I have attached the draft Introduction to the book, as well as Chapter 2, which includes new work I've done on the history of property title recording in the colonies.

Please do not cite or circulate without my permission.

Thank you for inviting me and I look forward to your comments.

Sincerely,

Claire Priest

CREDIT NATION:
PROPERTY LAWS AND INSTITUTIONS IN EARLY AMERICA

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Introduction

What are the early origins of the property rights and legal institutions serving as a foundation for the market economy and political system of the United States? We often take for granted that our laws allow the passing of legal title from person to person, the use of assets as collateral, and the legal institutions—such as title records and courts—that secure property rights and provide a backdrop to the vast credit economy. Yet, clear property rights in real estate, corporate stock, and other assets are a precondition to their purchase and sale in the market as commodities. Legal rules allowing assets to be leveraged as collateral and offering remedies to creditors propel the extension of wealth for investment and consumption. Our credit economy, with its many advantages, but also with risks of over-leveraging, real estate bubbles, and widespread foreclosures, rests on a structure of laws and institutions that are often obscure in our day-to-day life.

This account looks historically at the legal origins of our credit economy in the British colonial era through the American Founding period, from roughly the 1660s through the 1790s. It examines the emergence of the property laws and institutions at the heart of the market economy of the United States. With regard to early American history, it asks how did the institutions supporting the property and credit economy emerge? How was English law relating to property and credit imported to the colonies and how was it adapted for the colonial context? How are property and institutions implicated in the history of slavery in the U.S.? How does the drive for credit shape our understanding of early American history? A second line of historical questions relate to how the legal history of credit relates to the political history of the United States. How were property laws and institutions shaped by the context of British imperial rule? Is property law inherently linked to representative government in American history? How did the legal and

institutional foundations of the credit economy feature in the American Revolution and Founding Era?

This account traces three themes. First, it examines colonial *legal institutions* relating to property and credit. It focuses on both the "higher-level" institutions of the colonial representative legislatures that enacted laws defining property rights, the law of slavery, and debtor-creditor relations. It also provides a history of "ground-level" legal institutions, such as courts and title recording offices that protected property titles, supported mortgage markets, and processed debt claims, and that were deeply tied to the growth of the colonial economy. Second, the account examines the laws enacted by colonial legislatures relating to credit. Here, the principal colonial development was the *commodification* of land and slaves. Originating in both statutes enacted within the colonies, as well as an English Parliamentary Act of 1732 effective throughout British America, the law converted land and slaves to be principal assets serving as the underpinning of the economy as well as primary forms of collateral used to gain credit to finance agriculture and commerce. The body of colonial laws privileged creditors' claims over those of family members and heirs. The commodification of land and slaves in the colonies had profoundly important social, political, and economic implications.

One of the great atrocities of American slavery, present from its origins, was the widespread use of slaves as collateral for debt. Being sold or auctioned off to pay the slaveowners' debts tore slaves from their families and communities. The constant threat of such a sale in the context of highly liquid slave markets was equally as coercive and cruel as the more well-known punishments of whippings and gang labor. Legal institutions played a central role in advancing this form of cruelty in slavery. Colonial legal institutions offered a centralized location to record mortgages with slaves as the collateral, enforced debt judgments involving the

seizure of slaves, and administered slave auctions. Slavery, perhaps more so than land, formed the basis of the credit economy in areas relying on slave labor.[1]

Third, the account focuses on the role of Parliamentary oversight and imperial law. Parliament and imperial officials likely promoted the colonial credit economy by providing a check on colonial legislatures' ability to enact laws that would harm outside traders and creditors. Parliamentary law expanded the scope of creditors' remedies throughout the British colonies. At the same time, imperial policy promoted the expansion of slavery. In sum, what emerged was a truly *colonial* property law: a body of law and institutions developed to encourage cultivation and the market for imports in the British colonies, societies with social, political, and economic structures entirely different from that of England. Leading to the American Revolution, colonial legislatures' economic policies were confronted by increasingly active oversight on the part of Parliament and the imperial authorities. This account emphasizes that Parliament's Stamp Act of 1765—which triggered the American Revolution—was offensive in part because it taxed ground-level economic institutional services to generate revenue for the crown. It threatened colonial legal institutions as well as representative assemblies' power to

[1]Bonnie Martin, "Neighbor to Neighbor Capitalism: Local Credit Networks and the Mortgaging of Slave" in *Slavery's Capitalism: A New History of American Economic Development* Sven Beckert and Seth Rockman, eds. (2016); Bonnie Martin, "Slavery's Invisible Engine: Mortgaging Human Property," *Journal of Southern History*, Vol. 76, No. 4 (NOVEMBER 2010), pp. 817-866; Bonnie Martin, "Silver Buckles and Slaves: Borrowing, Lending, and the Commodification of Slaves in Virginia Communities" in *New Directions in Slavery Studies: Commodification, Community, and Comparison* (Jeff Forret & Christine E. Sears, eds., Baton Rouge: Louisiana State University Press, 2015); Edward E. Baptist, *The Half Has Never Been Told: Slavery and the Making of American Capitalism* (New York, Basic Books, 2014); Edward E. Baptist, "Toxic Debt, Liar Loans, Collateralized and Securitized Human Beings, and the Panic of 1837," in *Capitalism Takes Command: The Social Transformation of Nineteenth-Century America*, ed. Michael Zakim and Gary J. Kornblith (Chicago: University of Chicago Press, 2012), 72, 89; Richard Kilbourne, *Debt, Investment, Slaves*; Suresh Naidu, "Start-Up Nation? Slave Wealth and Entrepreneurship in Civil War Maryland" (with Felipe González and Guillermo Marshall) - *The Journal of Economic History*, 77(2) (July 2017), 373-405; Carl Wennerlind, *Casualties of Credit: The English Financial Revolution, 1620-1720* (Cambridge 2011), p. 230 Looks at how English slave trade used to back South Sea company, which was an integral part of English financial revolution; Holly Brewer's new work; Chris Tomlins.

regulate them to the advantage of the colonies. This account also highlights Founding Era legal reforms of property laws and institutions that built upon the colonial past.

For many decades, scholars and political commentators have focused on institutional foundations and property rights as a central determinant in countries' economic and political well-being. The origin of this field of inquiry is most prominently associated with the economist Douglass C. North, whose work emphasizes the importance of property and institutions for economic growth.[2] North uses the terms "property" and "institutions" flexibly, often referring to

[2] The origin of this field of inquiry is most prominently associated with the work of Douglass C. North in Douglass C. North & Barry R. Weingast, "Constitution and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England," *Journal of Economic History* 49 (1989): 803, and Douglass C. North, *Structure and Change in Economic History* (New York : Norton, c1981). For more recent scholarship in this field, see Daron Acemoglu, Simon Johnson & James A. Robinson, "Institutions as a Fundamental Cause of Long-Run Growth," in *Handbook of Economic Growth,* eds Philippe Aghion & Steven N. Durlauf (Amsterdam: Elsevier, 2005), 385, 387 (; Daron Acemoglu & James A. Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (New York: Crown Publishers, c2012); Stanley L. Engerman & Kenneth L. Sokoloff, "Factor Endowments, Institutions, and Differential Paths of Growth Among New World Economies," in *How Latin America Fell Behind: Essays on the Economic Histories of Brazil and Mexico, 1800–1914*, ed. Stephen H. Haber (Stanford, Calif.: Stanford University Press, 1997), 260; (David S. Landes, *The Wealth and Poverty of Nations: Why Some are so Rich and Some so Poor* (New York : W.W. Norton, c1998); Douglass C. North, John Joseph Wallis & Barry R. Weingast, *Violence and Social Orders: A Conceptual Framework for Interpreting Recorded Human History* (Cambridge ; Cambridge University Press, 2013); Carol M. Rose, "What Government Can Do for Property (and Vice Versa)," in *The Fundamental Interrelationships Between Government and Property,* eds Nicholas Mercuro & Warren J. Samuels (Stamford, Conn. : JAI Press, 1999), 209 (; Daron Acemoglu, Simon Johnson & James A. Robinson, "The Colonial Origins of Comparative Development: An Empirical Investigation," *American Economic Review* 91 (2001): 1369 (linking economic growth to the effect of mortality rates on institutional development); Daren Acemoglu & James A. Robinson, "Persistence of Power, Elites, and Institutions," *American Economic Review* 98 (2008): 267; Abhijit Banerjee & Lakshmi Iyer, "History, Institutions, and Economic Performance: The Legacy of Colonial Land Tenure Systems in India," *American Economic Review* 95 (2005): 1190; Dan Bogart & Gary Richardson, "Making Property Productive: Reorganizing Rights to Real and Equitable Estates in Britain, 1660–1830," *European Review of Economic History* 13 (2009): 3; Stanley L. Engerman & Kenneth L. Sokoloff, "The Evolution of Suffrage Institutions in the New World," *Journal of Economic History* 65 (2005): 891; Henning Hillmann, "Economic Institutions and the State: Insights from Economic History," *Annual Review of Sociology* 39 (2013): 251; Daniel M. Klerman, "Jurisdictional Competition and the Evolution of the Common Law," *University of Chicago Law Review* 74 (2007): 1179; Daniel M. Klerman et al., "Legal Origin or Colonial History?," *Journal of Legal Analysis* 3 (2011): 379; Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, "The Economic Consequences of Legal Origins,"*Journal of Economic Literature* 46 (2008): 285; Kenneth L. Sokoloff & Stanley L. Engerman, "History Lessons: Institutions, Factor Endowments, and Paths of Development in the New World," *Journal of Economic Perspectives* 14(2000): 217; and Kenneth L. Sokoloff & B. Zorina Khan, "The Democratization of Invention During Early Industrialization: Evidence from the United States, 1790–1846,"*Journal of Economic History* 50(1990): 363.

central government confiscation of property and representative bodies that enact laws binding all political actors in the society.[3]

More recently, James A. Robinson's and Daron Acemoglu's *Why Nations Fail*, attributes the differential between thriving economies and poor economies to institutional foundations.[4] In their account, countries with inclusive political institutions tend to foster local institutions that promote widespread economic growth. They contrast these countries with those whose political systems and institutional structures serve the narrow interests of elites to the detriment of broader growth. Where governments operate to the benefit of a narrow elite, long-term growth suffers.

Equally important to the historical account offered here is the work of the economist Hernando de Soto, whose works *The Other Path* (1989) and *The Mystery of Capital* (2000) attribute national wealth disparities to ground-level local institutions, rather than central government policy and representative government.[5] In de Soto's *Mystery of Capital*, economic prosperity depends upon local policies that allow individuals to convert assets into fungible and liquid wealth. The de Soto prescription for economic growth involves building institutions that confer clear title to property, that enable assets to be used as collateral, and that enforce credit agreements, so long as the institutions do not impose bureaucratic hurdles and fees that push market participants into the informal sector.[6] Katharina Pistor's *The Code of Capital* (2019)

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[3] In their influential article of 1989, for example, Douglass North and Barry Weingast explain the growth of English capital markets as deriving, in part, from the Glorious Revolution of 1688, which empowered Parliament to impose restraints on the monarchy and to credibly commit to upholding property rights. Douglass C. North & Barry R. Weingast, "Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England,"*Journal of Economic History* 49 (1989): 803.

[4] Acemoglu & Robinson, *Why Nations Fail.*

[5] Hernando de Soto, *Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York : Basic Books, 2000).

[6] Similarly, the World Bank's researchers advance the view that formalizing property titles improves individuals' chances of obtaining credit and increases property values.For World Bank data on the number of procedures, time, and cost of registering title in 185 countries, see http://www.doingbusiness.org/data/exploretopics/registering-property. The World Bank has implemented many title registration programs as part of its longstanding economic development program.

details the legal mechanisms described in this account, how capital is created by assets and a "legal code" that allows the asset to generate wealth.[7]

This account addresses similar questions in the context of colonial British America. The legal underpinnings of property marketability and credit are not often included in histories of the pre-Revolutionary world, and institutions do not play a central role in the typical depiction of Founding Era reforms. Yet, the study of early American law reveals that property rights and the creation of what would become an "American" property law can be seen at the heart of the entire, slowly emerging, enterprise of the colonization of the New World, the development of colonial governments, immigration and the rise of slavery, the imperial rule of England over the colonies, the American Revolution, and the creation of a new society in the Founding Era.

I. *Institutions*

Colonists settling in America brought with them some familiarity with English laws, customs, and legal institutions. Building a new society from the ground up, however, offered the opportunity for dramatic innovations to English laws and institutions. One of the most novel and important features of American property law is centrally linked to American political history: property law and local institutions were created by means of the statutory enactments of local representative assemblies. The creation of property law and institutions by local legislatures was quite in contrast to the property law of English monarchy, which reflected centuries of customary practice, political negotiation between kings and elites, and the legacy of feudalism. In the American colonies, the legislatures defined the problems to be addressed, shaped law, modified it, improved upon it, built institutions, controlled their costs and regulated their operation in response to local conditions. In hindsight, Founding Era commentators and legal writers of the

[7] Katharina Pistor, *The Code of Capital: How Law Creates Wealth and Inequality* (Princeton: Princeton University Press 2019), 2.

nineteenth century recognized that the legislative creation of property law during the colonial era was a special phenomenon. The colonial legislatures had initiated a process of representative involvement and input into local institutions and laws that led to highly significant innovations. This account emphasizes the degree to which, in creating an "American" property law, the colonial and state legislatures focused their energies on matters relating to credit: whether in building institutions that supported credit markets, in enacting property law doctrines that enabled greater use of land, slaves, and goods as collateral and, equally important, in enacting policies to manage the widespread problem of financial risk during times of recession.

One of the colonial legislatures' tremendously important innovations was to create a system of local institutions underlying the property system. The colonial legislatures established local common law courts where disputes over land titles could be resolved and publicized, helping to secure individuals' titles to land. They provided an inexpensive public forum for publicizing title and mortgage claims against the property in question. The system of courts and registries came to be recognized as greatly improving upon English conveyancing law in stimulating markets in land and the extension of credit on the basis of a mulitiplicity of assets.

Yet, slaves were among the most valuable of these "assets." The institutional apparatus advanced slavery because it enabled slaves to be a central marketable commodity, as well as form of collateral in colonial economies. It is estimated that by 1770, 467,000 black people lived as slaves in the North American colonies.[8] Alice Hanson Jones's study of probate records reveals that, at the time of the American Revolution, in the South slaves constituted 35.6% of wealth.[9] Property held in slaves was a central underpinning of colonial American credit markets. Indeed, because slaves were literally mobile wealth, they were more easily transferred than land. Slaves

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[8] John J. McCusker & Russell R. Menard, *The Economy of British America, 1607-1789*, at 54 tbl. 3.1 (1991).

[9] Alice Hanson Jones, *Wealth of a Nation To Be* 98 & tbl.4.5 (1980). This data was republished in Marc Egnal, *New World Economies* 15 tbl.I.2 (1998).

were routinely mortgaged, and leased and sold to pay debts. By providing for easy recordation of slave and land mortgages, the colonial title registries permitted slaveowners to leverage themselves to the maximum extent to purchase more slaves. The profitability of slavery combined with a well-functioning credit system led to a veritable slavery mania in many British colonies in America and the West Indies.

The book will suggest that "ground-level" institutions had an interplay with "higher-level" institutions in the colonial political order. The representative assemblies were strongly protective against imperial interference in the local institutions that underlay the American credit economy. Starting in the late 1600s, land policy, which was initially within the exclusive control and prerogative of the imperial executive authorities, the colonial Governors and Proprietors, was slowly wrenched out of executive hands and came to be maintained and controlled by local county-level institutional authorities. The legislatures retained ultimate control over institutional design and controlled fees and costs. In sum, the colonial *legislatures* gained power throughout the empire—a landmark event entrenching the representative form of government—in part by creating *local institutions* relating to property rights, and by improving upon them, and regulating their appointment processes and fees. It was the shared history, the rise of colonial legislatures through assertion of the right to create local institutions such as courts and land title registries serving their constituencies, that characterizes the institutional side of property and credit in the history of early America. In the face of imperial rule, a profound accomplishment of the colonial legislatures was to take control over fees for ground-level institutional services, while decentralizing control over their operation to local communities. The colonial legislatures buffered these institutions from imperial taxation and imperial officials' interference.

II. *Commodification*

A second major development involved the scope and process relating to creditors' remedies. Traditional English laws and procedures stabilized the English landed class by shielding landed estates against creditors' claims to allow descent down the line of eldest male heirs. Land was primarily treated by the law as a source of wealth of families that, like an endowment, would persist through the generations. Although each British colony had its own land policy and political, economic, and social culture, overall in the colonies, the English emphasis on protecting stable land ownership through the generations gave way to a more commercial view privileging the value of land as a monetary asset in credit agreements.

In matters relating to credit and trade, British imperial rule pushed colonial property law farther from the model of English landowning. According to the British mercantilist agenda, the role of the colonies was to promote the interests of England. English imperial authorities prioritized the interests of the English creditors who lent extensively to the colonies over any interest in replicating English law and political society. The centerpiece of these efforts was Parliament's Debt Recovery Act of 1732, which required throughout the colonies that all land and slaves were assets available for seizure by creditors. Parliamentary law therefore defined the broad contours of colonial debtor-creditor law, which involved commodifying land, slaves and other assets throughout the British Empire.

In 1731, English merchants who had extended credit to planters in the British Atlantic colonies lobbied aggressively for Parliament to pass sweeping legislation regulating the status of colonial property rights. By August, a group of thirty-two merchants in London submitted a petition to the Board of Trade complaining that they had no "Remedy for the recovery of their just Debts" in some of the colonies due to the laws in place, to court processes, and to currency

manipulation.[10] Their attention at that moment was focused on Jamaica, where the legislature had exempted land from creditors' claims. In September, John Tymms, a partner in a merchant house in Kingston, wrote to Humfrey Morice, who was Governor of the Bank of England and an MP, that the Jamaican legislature refused to pass a law favoring the collection of debts. Tymms remarked that "the principal parts of [Jamaican] estates are exempted by law from the payment of debts and negroes are frequently driven away into the woods or mountains out of the Marshall's way." He noted that the Jamaican legislature's failure to act made it "evident we must still labour under the uncertainties and difficulties we have done for many years to our unspeakable loss" which "*Insists* on the need of a law" to make land and slaves fully available to be seized by creditors.[11] In the same vein, the Board of Trade reported to Parliament that the concerns raised in the English merchants' petition "may be very proper Objects for a Parliamentary Consideration in *Great Britain.*"[12]

In 1732, Parliament responded by enacting the Debt Recovery Act, which required that, throughout the all of the British colonies in America, all land, houses, and slaves were assets available for seizure by creditors.[13] The Debt Recovery Act was a landmark: English society had long privileged land as a unique form of property that warranted shielding from creditors. Land conferred on its owners political and social status. Legal protections on land from

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[10] Petition of Several Merchants of the City of London (Aug. 12, 1731), in 38 *Calendar of State Papers, Colonial Series, America and West Indies, 1731*, No. 367i, at 224, 225 (Cecil Headlam & Arthur Percival Newton eds., Kraus 1964) (1938), quoted in M. Bladen et al., *Representation of the Board of Trade Relating to the Laws Made, Manufacturers Set Up, and Trade Carried On, in His Majesty's Plantations in America* (n.p. 1734), at 9 [hereinafter *1734 Board of Trade Report*]; *see also* 4 *Proceedings and Debates of the British Parliaments Respecting North America* 89, 128 n.13, 130, 153–54 (Leo Francis Stock ed., 2003) (referring to enactment of colonial statutes impeding the recovery of debts in parliamentary sessions of 1730 to 1732).

[11] Letter from John Tymms to Humfrey Morice (Sept. 13, 1731), in 38 *Calendar of State Papers, Colonial Series, America and West Indies, 1731*, No. 434ii, at 294 (Cecil Headlam & Arthur Percival Newton eds., Kraus 1964) (1938).

[12] *1734 Board of Trade Report*, at 10.

[13] 5 Geo. 2, c. 7 (1732) (Eng.).

creditors' claims reduced widespread financial risk, promoted social stability through the inheritance of estates, and stabilized the political system. In contrast, Parliament's Debt Recovery Act mandated that throughout the British colonies in America and the West Indies, property held in landed estates as well as slaves would be mere "chattels" or things, when creditors' claims were at stake. As Joseph Story later described, this law made colonial "land, in some degree, a substitute for money, by giving it all the facilities of transfer, and all the prompt applicability of personal property."[14] Although not mentioned by Story, in reality, slaves, even more so than land, were the primary collateral and liquid asset in many areas. For the remainder of the eighteenth century, in Europe, land might still at base secure the political, economic, and social status of elites and the nobility. In contrast, in the British colonies, the legal structure had made these assets more liquid, more extendable as collateral, and in a world with economic upswings and downswings, wealth based on land and slaves was infused with financial risk. This legal shift fundamentally transformed the economic, and indirectly, the political and social structure of the colonies.

Slaves had been used as collateral and had been sold in judicially supervised auctions long before Parliament enacted the Debt Recovery Act. The Act, however, transformed local practice, which could be overturned by legislation, into an imperial mandate. In 1806, in the first known pamphlet on slave auctions, Bryan Edwards, a Member of the House of Commons, describes the practice of auctioning slaves to satisfy the slave owner's secured and unsecured debts as a grievance "so remorseless and tyrannical in its principle, and so dreadful in its effects," which, "though not originally created, is now upheld and confirmed by a British act of parliament."[15] Edwards says of the Debt Recovery Act: "It was an act procured by, and passed

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[14] Joseph Story, *Commentaries on the Constitution of the United States*, Book 1, Section 182, p. 168.
[15] 2 Bryan Edwards, *The History of the British Colonies in the West Indies* (Phila.: James Humphreys, 1806), 366. Thomas Russell, the modern scholar most knowledgeable about American slave auctions, identifies the Edwards essay as the earliest known writing on the frequency of slave auctions. *See* Thomas D. Russell, "A New Image of

for the benefit of British creditors; and I blush to add, that its motive and origin have sanctioned the measure, even in the opinion of men who are among the loudest of the declaimers against slavery and the slave trade."[16] After describing the horrors of the slave auction and the fact that the practice of selling slaves at auction to satisfy debts "unhappily . . . occurs every day," Edwards states: "Let this statute then be totally repealed. It is injurious to the national character; it is disgraceful to humanity. Let the negroes be attached to the land, and sold with it."[17] The extent of the market for slaves and the importance of slaves as a source of capital has recently been gaining greater recognition in the economic history literature.[18]

III. *Imperial Rule*

The American colonial law and Parliament's Debt Recovery Act provided a strong foundation for the extension of credit, economic development, and the expansion of slavery. The legal framework, however, was one in which landowners and their dependents were exposed to significant financial risks. Treating all forms of property as a commodity for the purpose of

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the Slave Auction: An Empirical Look at the Role of Law in Slave Sales and a Conceptual Reevaluation of Slave Property," *Cardozo Law Review* 18 (1996): 473, 481 (conducting an empirical analysis of slave auctions in antebellum South Carolina and finding that courts conducted or supervised a majority of slave auctions).

[16] 2 *Edwards, The History of the British Colonies in the West Indies,* 366.

[17] Id. 367–68. Parliament repealed the Debt Recovery Act with respect to slaves in the remaining British colonies in 1797. *See* 37 Geo. 3, c. 119 (1797) (Eng.).

[18] *See* Felipe González, Guillermo Marshall & Suresh Naidu, "Start up Nation? Slave Wealth and Entrepreneurship in Civil War Maryland" (NBER Working Paper No. 22483, August 2016) ; Rafael I. Pardo, "Bankrupt Slaves," *Vanderbilt Law Review* 71 (forthcoming 2018). An essential work is Richard Holcombe Kilbourne, Jr., *Debt, investment, slaves : credit relations in East Feliciana Parish, Louisiana, 1825-1885* (Tuscaloosa : University of Alabama Press, c1995). According to Kilbourne,

> Slaves represented a huge store of highly liquid wealth that ensured the financial stability and viability of planting operations even after a succession of bad harvests, years of low prices, or both. Slave property clearly collateralized a variety of credit instruments and was by far the most liquid asset in most planter portfolios . . . . [A]n investment in slaves was a rational choice, given the alternatives for storing savings in the middle of the [nineteenth] century.

Debt, Investment, Slaves, 5.

creditors' claims and the stream-lining of court procedures meant that in hard economic times all debtors in the colonies were potentially exposed to loss of their land and other property by process of law.

In America, colonists turned to their legislatures for temporary relief from creditors during economic downturns. Colonial legislatures frequently issued bills of credit (paper money) to counter deflationary periods and legal tender laws, which allowed debts to be paid at a reduced rate or in goods for a temporary period. In England, protection against financial risks came in the form of slow Chancery court processes and judicially-administered doctrines that protected family wealth. In contrast, in colonial America, colonists looked to their representatives to enact laws providing colony-wide relief for a temporary period.

Colonial laws and institutions were built up through representative involvement and input. Colonial legislatures' responsibility for crafting property law and local economic policy empowered them to become powerful forces within the imperial governing structure. Parliament's Debt Recovery Act and various currency regulations were early measures where Parliament stepped in to curtail the power of local assemblies to shape debtor/creditor law throughout the British Colonies. In the 1760s, after the Seven Years War' however, British imperial authorities began expanding oversight of colonial laws and institutions. One pivotal moment was the Stamp Act of 1765, when Parliament imposed a tax on colonial institutions that provided basic services fundamental to the colonial economy. Unlike the Debt Recovery Act, the regulations of the 1760s were perceived as suppressing the colonies' economic prospects, leading to Revolution.

During the Stamp Act crisis, William Knox, as English undersecretary of state from 1770 to 1782, was a central strategist in policy-making relating to the American colonies throughout the Revolutionary Era. In reaction to the Stamp Act protests and the Independence movement,

Knox vehemently defended Parliamentary authority over the colonies. To Knox, the primary advantage held by the British colonies over colonies of other countries, like France, was due to the "superior credit given to the planters by the English merchants." And, "if we inquire into the cause of this unbounded confidence and credit given by the English merchants to the Colonies, from which the Colonies have reaped so great advantage," the source was the body of laws and the institutions that processed claims. It was "*the security which they have for their property by the operation of the laws of England in the Colonies.*" There are countries where the English merchants might have found "greater profit" than the British colonies, "but in foreign countries they cannot be certain of a legal security for their property, or a fair and effectual means of recovering it; whereas in the British Colonies they know the laws of England follow their property, and secures it for them in the deepest recesses of the woods."[19] Later Knox emphasized the importance of the Debt Recovery Act in particular, which he describes as "subjecting lands and negroes in the Colonies to the payment of English book debts." To Knox, it "may truly be called the Palladium of Colony credit, and the English merchants' grand security." If they gained Independence, the colonial legislatures would likely enact laws that brought an "end of their confidence" and that would check "the prosperity of the Colonies."[20]

To Knox, Parliamentary authority was best defended by its oversight of debtor/creditor laws and the record of colonial economic growth. Alexander Hamilton reflected in the 1780s that the Debt Recovery Act "*Admitted more then our Legislature ought to have assented to*; it was

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[19] *William Knox, The Interest of the Merchants and Manufacturers of Great Britain, in the Present Contest with the Colonies, Stated and Considered* (London 1774) (Boston, Draper's 1775), 35-36. Knox was influential in setting English policy for the colonies during the period. *See* Jack P. Greene, William Knox's Explanation for the American Revolution, 30 Wm. & Mary Q. 293, 293 (1973) ("[F]ew people in power in Britain thought more seriously or more deeply about the quarrel with the colonies at any stage of its development.").

[20] *Id.* at 36, 38.

One of the Highest Acts of Legislature that one Country could exercise over another."[21] But, however reluctantly, many in the Founding Era recognized the value of federal oversight of local economic policies. Moreover, in the Founding Era, state legislatures reformed institutions to bring greater transparency to property titles, further advancing credit markets.

A legacy of Parliamentary regulation was the federal structure over the laws defining the contours of debtor/creditor relations. The Framers of the U.S. Constitution tried to insert Parliamentary-style control by prohibiting state legislatures from passing legislation that would "impair the obligations of contracts," from coining money, and from making anything but gold and silver legal tender. Despite these provisions, the subsequent relationship of the states to the federal government was one in which the states maintained local control over laws pertaining to property and credit, receiving only indirect forms of oversight. American property law is still principally a creature of state legislatures.

. . .

No work to date has placed the desire of colonists to obtain credit at the center of an American history of property law and its supporting institutions. For many years, the colonial era was characterized by leading historians as a pre-market world of small, largely self-reliant communities insulated from the types of economic problems we face today.[22] Examining the history of property in early America through the lens of the emerging economy leads to a deeper understanding of the political and economic system political leaders in the Founding Era felt they were creating in America. In the Founding Era and early nineteenth century, dynamism and mobility of American property were viewed as important underpinnings of Republicanism, as

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[21] Alexander Hamilton, Practical Proceedings in the Supreme Court of the State of New York (circa. 1782), in 1 *The Law Practice of Alexander Hamilton* 55, 97 (Julius Goebel, Jr. ed., 1964) (second emphasis added).

[22] Michael Zuckerman, *Peaceable Kingdoms: New England Towns in the Eighteenth Century* (U.S.: W.W. Norton & Co., 1978).

was the institutional infrastructure of courts and land title registries that protected individuals' property rights and that allowed for property, including slaves in many states, to be used for economic advancement. An overlooked aspect of the Founding Era itself (after the Revolution) is the widespread movement by many state legislatures to enact laws further modifying, improving, and lowering the costs of the courts and land title registries. A profoundly important colonial legacy was a deep commitment to institutions that would inexpensively publicize property interests for the purpose of market exchanges and credit markets. These trends were advanced immediately after the American Revolution.

The role of institutions in colonial economic growth?

Some might ask: Are institutions a springboard for economic growth, or in contrast, does production of goods propel growth, making institutions like courts and title recording less important? In other words, did the markets for colonial exports drive growth irrespective of the types of laws and institutions that were implemented? Recent historical work on the history of capitalism, such as Sven Beckert's *Empire of Cotton* (2014) and Walter Johnson's *River of Dark Dreams: Slavery and Empire in the Cotton Kingdom* (2017) examine the emergence of capitalism through the lens of power politics and forms of coercion deriving from efforts to expand production and access to markets.

This account proposes that institutions mattered. First, contemporaries believed that institutions mattered considerably. This is seen throughout the language of the voluminous colonial statutes enacting laws and creating institutions that specifically explain their objective as promoting credit. To repeat merely one example, after the Declaration of Independence of 1776, North Carolina chose to enact a law signaling to outside creditors that the rule of law would apply and their debts would be honored. North Carolina's statute of 1777 explicitly states that it

was directed toward "divers Persons residing in other States or Governments [who] contract Debts with the Inhabitants of this State," and that "by the Policy and Genius of our present Constitution, Lands and Tenements ought to be made subject to the Payment of just Debts, when the Debtor hath not within the Limits of this State Goods and Chattels sufficient to satisfy the same."[23] If laws and institutions "did not matter" for creditors, how does one explain the attention given the issue in colonial legislatures? Voluminous colonial sources confirm that colonists perceived a clear connection between laws, institutions, and the costs of credit.

More generally, however, empirical evidence for the impact of institutions on economic growth is difficult to find because the vast majority of commercial transactions between economic actors did not rely on institutions directly. When an English ship carrying goods from Europe arrived in a colonial Virginia port, the ship captain might have unloaded the goods, and reloaded the ship with tobacco, and sailed off. What did the institutions matter? When a Pennsylvania farmer brought his wheat to market, and in return bought a few household necessaries, did institutions matter? More generally, colonial creditors sought a steady stream of income from their debtors, and typically had no desire to foreclose upon productive estates.

Yet, laws and institutions *did* have an impact on these transactions in the sense that 1) public recording of titles and mortgages provided transparency and encouraged creditors to trust that the system would recognize their priority over subsequent creditors; 2) the background laws set the ground rules that would apply when things went wrong. When a debtor had taken on too much debt, or during times of economic recession, it mattered greatly whether land and slaves were available to be seized as assets to satisfy debts. Even in good times, the background

[23]"An Act for Establishing Courts of Law, and for Regulating the Proceedings Therein," ch. 2, § 29 (1777) in *Acts of Assembly of the State of North Carolina* (Newbern, James Davis 1778), 8, 16; *see also* Act of Feb. 15, 1791, 1791 N.H. Laws 122 (establishing a regime whereby lands would be transferred to creditors in kind, with a one year statutory redemption period, when a debtor's personal property was deficient).

property exemption laws provided constant leverage for creditors seeking repayment, even if they never exercised the legal option of seizing the debtors' assets. To understand the importance of colonial laws and institutions, one need only look through the court records of any county in the colonial era to see that litigation on debts dominated the dockets. No, most economic actors did not sue each other routinely when commercial relations were going well. But the dominance of actions based on debts and mortgages in the colonial court records show that colonial institutions served as an essential backdrop to the entire commercial system.

IV. *Conclusion*

Beyond economic development, the account here also speaks to the origins of democracy. The rise of representative government was closely connected with the ownership of property—both land and slaves—in the history of the United States. In the United States, democracy originated in the assemblies of property owners in the colonial era who asserted themselves and assumed control over lawmaking in the face of imperial officials who also sought power to rule. The first representative legislatures were constituted by property owners and viewed the protection of property interests as a principle role of government. At the Constitutional Convention in 1787, Alexander Hamilton described "the security of Property" as one of the "great obj[ects] of Gov[ernment]."[24]

The ownership of property made individuals *stakeholders* in the society. The eighteenth century view was that owning land conferred an "attachment" to the political order, meaning that landowners were in the best position to protect the society's long-term interests. In England, rule by a landed nobility was defended on the grounds that nobles were deeply attached to the realm based on their inherent ties to fixed landed estates. Landowners were also believed to have the

[24] *Records of the Federal Convention of 1787*, ed. Max Farrand (New Haven : Yale University Press, 1937), vol. 1, 302.

necessary "independence" for political decisions. Those who could support their family totally from the income generated by landed property were assumed to made decisions without being beholden to anyone superior to them. For these reasons, until the early nineteenth century, even in America, landownership was a prerequisite to vote and to participate in the political system.

Throughout the colonial era of the United States, the policy of the English empire was to distribute land widely to settlers in small parcels and to encourage cultivation. Immigration from Europe and the importation of slaves were encouraged by explicit English policy. The English policy of granting land in small parcels was designed primarily to maximize the land under cultivation in order to increase the wealth of the realm. It was feared that granting land in large parcels might lead to land being held in reserve, delaying cultivation. The English hoped that land put under cultivation would increase the wealth of England. Moreover, landowners that cultivated crops could afford to consume more imports from England. In granting small parcels, the English crown appears to have been indifferent to the political repercussions on colonial society. By creating a nation of landowners, the imperial policy, without the express intention of doing so, laid the foundation for a republican society, a radically different sort of political system than existed in England. The key element was that the great extent of landowners led to a society where many people held an important stake—by owning land. These landowners, capable of representation in elected assemblies with the power to make laws, served as the foundation of the democratic political system.

At the time of the American Revolution, the accepted wisdom was that a defining feature of the United States was its very high proportion of landowners among the white males. The large distribution of land among free men contributed to the power gained by representative legislatures throughout the colonial era. As historians such as Jack Greene have also described, over the eighteenth century, American politics was characterized by a "rise in the assembly" so

that, by the American Revolution, representative assemblies had assumed control over most important aspects of governance.[25]

The society that emerged was one with strong representative politics. The emphasis on property ownership also led to individuals' focus on their liberties. As mentioned previously, in describing the causes of the American Revolution, Joseph Story explained that early Americans' "jealous watchfulness of their rights and . . . a steady spirit of resistance against every encroachment" was a character trait flowing from the fact that the "yeomanry are absolute owners of the soil, on which they tread."

The society was also highly market oriented. The republicans of the United States Founding Era were fearful of the entrenchment of an aristocracy like in Europe. The dominant ideological framework of the Founding Era equated large consolidated landholdings with aristocratic property law that privileged inheritance and inalienability. Aristocracies were believed to exist because property law protected land from the dynamism of the market. Land markets, in contrast, were predicted to break down aristocracy.

Security of title was the linchpin of the economic and political system. The simplicity and relative inexpensiveness of American conveyancing allowed landowners to buy and sell property as a liquid asset, and supported the vast colonial credit system. The institutional infrastructure developed in colonial America was the formal mechanism for protecting property rights, and the essential foundation underlying the credit system.

That credit system also promoted the slave system of labor. Property held in slaves was a central underpinning of colonial American credit markets. As described by the historian Edmund S. Morgan in *American Freedom, American Slavery* (1975), "[t]he rise of liberty and equality in

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[25] Jack P. Greene, *The Quest for Power: The Lower Houses of Assembly in the Southern Royal Colonies, 1689-1776* (Chapel Hill: Published for the Institute of Early American History and Culture at Williamsburg, Va., by the University of North Carolina Press, 1963).

America had been accompanied by the rise in slavery." The concept that all free white men were equal, such as in the U.S. Declaration of Independence of 1776, which states that it is self-evident "that all men are created equal," emerged most profoundly in the parts of the U.S. where slavery was the dominant labor system. Whites united as "equal" in the highly unequal system of racial domination under slavery. The concept of equality led to acceptance of early democracy.

Beyond the harm to individual slaves, the growth trajectory of economies relying on slave labor has a mixed pedigree. As Gavin Wright has described in *Slavery and American Economic Development*, however, slavery led to a particular type of economic growth. Slavery often emerged in areas with the highest land values—slavery was most profitable in areas with the best soil for growing lucrative staple crops.[26] Yet, the lasting legacy of slavery was often of a mixed sort, even beyond the systems of racial subjugation that persisted. Slavery was often associated with mono-culture staple crop production which led to land exhaustion, meaning that slaveowners often sought out new land and migrated to new regions seeking the greatest profits.[27] Although there are numerous examples of slaves working in diverse jobs such as iron mills and shipping, over a large range the economic development brought on by reliance on slave labor was often highly specialized in staple crop production. These regions lacked the level of commercial diversity of areas reliant on free labor. As Wright has emphasized, regions in America relying on slave labor failed to adopt the types of institutions that would attract

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[26] Gavin Wright, *Slavery and American Economic Development* (Baton Rouge: Louisiana State University Press, 2006), 29.

[27] Gavin Wright, *Old South, New South : revolutions in the southern economy since the Civil War* (New York : Basic Books, c1986), 24–26, 30–31 (asserting that the large amount of wealth invested in slaves placed pressure on slaveowners to put slaves to their most productive use, which led to high rates of geographic mobility).

immigrants.[28] The economic history is complex, but the laws and institutions promoting slavery, over the long term, did not lead to robust economic health.

Thus, the republican government championed in Founding Era America and in the United States Constitution was based on several historical contingencies: the profound commitment of the longstanding British imperial policy to equal land distribution among white males and the relatively equal landholding that resulted; the rise in power of strong representative institutions; the emergence of the concept of equality, which appeared most profoundly in the slaveowning south; and a commitment to the protection of property rights. The lasting legacy of treating land like a commodity, the legacy of slavery, and the economic institutions still functioning today, remain at the foundation of our economic and political life.

Chapter 1 examines how, colonial land policy, a central crown prerogative, led land typically to be distributed in relatively small parcels, leading to more widespread ownership among free immigrants than existed in England. The same policy, however, encouraged the importation of slaves. Chapter 1 provides context by describing Parliament's legal regulation of commerce in British America and the general structure of trade and credit.

Chapter 2 describes the basic colonial legal institutions that served as a foundation for credit. Starting in the 1600s, colonial legislatures began establishing county-level common law courts where debts could be litigated and enforced and where disputes over land titles could be resolved and publicized. Moreover, each of the colonial legislatures enacted laws instituting local title recording that often expressly promoted the security of mortgages. These recording offices or registries allowed for simple conveyances by deed, publicly accessible records, and the extension of credit on the basis of a mulitiplicity of assets including, importantly, slaves.

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[28] Wright, *Slavery and American Economic Development*, 62, 73.

Colonial laws and institutions were built up through representative involvement and input and colonial legislatures assumed authority over establishing the level of fees imposed by the county-level institutions.

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

Chapter 4 examines how Parliamentary law pushed colonial property law farther from the model of English landowning through the Debt Recovery Act of 1732. Parliament's Debt Recovery Act, which made all land and slaves assets available to be seized by creditors, was a law for the colonies only, starkly differentiating the colonial property regime from that of the English. In England, the property law shielded land and protected inheritance. In the colonies, creditors' claims trumped the interests of landowners and heirs and made slaves highly vulnerable to be sold when their owners faced financial distress.

Chapter 5 and 6 discuss how financial risk was managed in the Colonial Era by legislative and private means. Chapter 5 describes colonial legislatures' use of currency policies to expand liquidity and its importance for credit conditions in the case of Massachusetts. Chapter 6 examines the principal private means by which individuals could shield wealth from creditors in the Colonial Era, which was to own it in a form called the fee tail or entail. This practice had particular importance in Virginia, where the current historiography suggests that a

large amount of land was entailed, and thus shielded from English creditors and removed from market exchanges, at the time of the American Revolution.

Chapters 7 and 8 examine the legacy of colonial property law and the reform of laws and institutions in the Revolution and Founding Era. Chapter 7 begins with a more detailed description of institutional-related arguments during the Stamp Act crisis. The colonial protestors found the Stamp Act taxes offensive because, among other things, they damaged the colonial economy in ways the English failed to perceive. The Stamp Act taxed official legal documents in the course of services offered by colonial institutions, like land transfers, mortgages, and court procedures. These institutional services were as crucial to colonial credit markets as the English laws recognized by Knox. John Adams said it was "manifest from the Stamp Act" that "a design is formed . . . to introduce the inequalities and dependencies 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."[29] The opposition to the Stamp Act was, in part, rooted in a profound hostility to raising the fees and costs of the institutional infrastructure that was foundational to the day-to-day workings of the colonial economy. The legislative reforms of the Founding Era reveal that a lasting legacy of the colonial era was a strong commitment to streamlining and lowering the costs of institutional services.

Chapter 8 discusses the Founding Era laws relating to creditors' rights. It discusses the aftermath of Parliament's Debt Recovery Act in state law both relating to creditors' claims and in the law of slavery. Although English abolitionists mounted an attack against the commodification of slaves in the Debt Recovery Act, in America, southern states moved farther toward full "chattel" slavery, retaining slaves' liquid features with respect to creditors' claims to promote southern labor and credit markets. The chapter discusses the reform of legal institutions

[29] John Adams, A Dissertation on the Canon and Feudal Law (1765), in *The Papers of John Adams* (Robert J. Taylor ed., 1977) Vol. 1, 106.

toward greater transparency by state legislatures in the 1780s. It also analyzes the abolition of the fee tail estate in land through the lens of debtor/creditor relations.

Chapter 9, in conclusion, discusses the federal structure of debtor/creditor law in the Founding Era. Chapter 9 also relates the account presented here to existing scholarship on institutions and economic growth, as well as the historical scholarship on the Founding Era.

Chapter 2

The Backbone of Credit: The Economic Institutions of Colonial America

In all regions of the country, colonists relied on local institutions heavily to secure property rights and enforce credit agreements. With regard to economic development, the creation of an institutional infrastructure surrounding dispute resolution and land conveyancing was a profoundly important colonial achievement. The reality, however, was that the process of institutional creation was a highly complex, at times politically-charged experience in each of the various colonies. Colonists wanted institutions that secured property rights and that resolved disputes, at a low cost, and wanted them run by representatives in local communities. Imperial officials, however, often expressed competing claims to authority in their struggle to regulate land distribution, to collect fees and taxes, and to control the expanding institutional infrastructure. This Chapter necessarily will paint with a broad brush in providing a historical overview of the colonial courts and land title registries, the institutional underpinnings of the American property system that persists today.

The Chapter begins by discussing the role of the common pleas courts in colonial credit relations. It then examines the early history of title recording. Historical sources reveal that in most colonies, the adoption of public title recording was driven by concerns over fraudulent conveyances, that is, problems arising from a lack of transparency in the mortgage and sale markets for land and slaves. Public authentication of deeds and title recording stream-lined English conveyancing practices and recorded all forms of property—land, slaves, and other property—serving as collateral. Moreover, the value of transparency was a legal adaptation originating within recording from its infancy: The records were intended to publicize and prioritize claims to property. The account also demonstrates an aspect of how, in the British colonies in America, strong legislatures and local institutions securing property rights emerged in

a deeply intertwined manner. Creating and empowering local institutions required the colonial legislatures to assert their authority, often in the face of countervailing assertions of power by imperial officials.

I. *Courts And Credit: Debt Litigation And Property Titles*

The county-level colonial common pleas courts were one of the central institutions underlying colonial economic activity and credit markets. By the early eighteenth century, each colony hosted courts of common pleas that were held in local counties quarterly on a rotating basis.[66] At the common pleas sessions, for a fee, clerks of the court recorded debt litigation based on various forms of debts or mortgage bonds.[67] Courts confirmed property titles in legal actions brought by property owners, sometimes in cases where the property owners used legal fictions to invent disputes, simply to get recorded court rulings confirming the titles. In some colonies, it was in the courts, rather than in separate recording offices, that colonists recorded sales and mortgages of land and slaves. They recorded and entered into probate the wills of individuals who died. Each of these institutional services secured property rights and conveyed important market information to interested members of the community.

The official production of court records at the quarterly court sessions provided a venue for the broader transmission of information throughout a community by word of mouth. Court days were highly popular events. Entire communities would converge at the location of the court

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[66] *See, e.g.*, William E. Nelson, *Dispute and Conflict Resolution in Plymouth County, Massachusetts, 1725–1825*, (Chapel Hill: University of North Carolina Press, 1981), 23–24; A.G. Roeber, *Faithful magistrates and republican lawyers: creators of Virginia legal culture, 1680-1810*(Chapel Hill: University of North Carolina Press, 1981), 39–43.

[67] A vast number of such colonial records survive today, and several collections have been published. *See, e.g.*, 1–10 *Plymouth Court Records, 1686–1859*, ed. David Thomas Konig (Wilmington, Del. : M. Glazier, 1978–1980); Marsha Martin, *Lancaster County, Pennsylvania, Land Records, 1729–1750, and Land Warrants, 1710–1742* (Westminster, Md.: Family Line Publications, 1998).

sessions to hear about the court business of the day.[68] At court day, individuals would personally observe or immediately hear about land conveyances, mortgages, the probate of wills, and lawsuits based on debts. As A.G. Roeber describes, court days were an essential time to discover "who was recovering against whom and what their own roles might be at any given moment."[69] The role of institutions was therefore twofold: to actually create a formal record of the legal actions related to property status, and to provide a forum where the entire community became informed of property-related status changes.

In the colonial era, people would go to great lengths to avoid litigation in the course of ordinary commercial transactions. Family relationships, personal acquaintances, and the spread of information about an individual's reputation and honor were a centerpiece of colonial society. Maintaining your credit meant gaining a reputation for paying back debts. In the small transactions taking place within local communities, litigation was an unfortunate event. Being sued on court day would inform the whole community that a debtor was unable to pay his debts, undermining the debtor's reputation and credit. Moreover, court fees were imposed to compensate officials for every aspect of the paperwork involved, reducing creditors' incentives to litigate.

With regard to trans-Atlantic credit transactions between the English and their colonial counterparts, finding recourse in the colonial courts was close to a last resort. Not only were colonial courts highly inconvenient for English creditors and costly, but colonial juries were

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68 Roeber, *Faithful magistrates and republican lawyers* ,73–95; E. Lee Shepard, "'This Being Court Day,' Courthouses and Community Life in Rural Virginia," *Virginia Magazine of History & Biography* 103(1995): 459.

69 Roeber, *Faithful magistrates and republican lawyers*, 85.

perceived to be biased in favor of local residents. The common law courts met only four times each year and were often criticized by English creditors for their excessive delays.

Yet, debt litigation dominated the business of the courts. The extent of debt litigation in the court records is a reflection of the centrality of credit agreements to the colonial economy. Where today, routine market transactions take place by means of cash, credit cards, and electronic payments, in the colonial era, webs of debt often bound a community together. Colonial market transactions involved debts on book accounts and promissory notes (analogous to a check) or, for larger transactions, by sealed bonds.[70] In the colonies that lacked a staple crop, like in New England, there was often little cash, and members of the community extended credit and were repaid in goods and services over time. Individuals also frequently took out lines of credit with merchants and shopkeepers, satisfying the debts later through crop harvests or other goods.[71] In colonies that produced staple crops, the staple crops served as currency. Manufactured goods were extended on credit, with repayment occurring over years, while, in the meantime, more credit was routinely extended.

Moreover, the desire for the acquisition of slaves led colonists producing staple crops to leverage themselves as much as possible to expand their slave labor force to enhance their profits. Slaves were a highly costly investment, and creditors were encouraged to lend money for slaves purchases by a legal system that enforced debt agreements. Slaves themselves were a

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[70] *See, e.g.*, Cornelia Hughes Dayton, *Women Before the Bar: Gender, Law & Society in Connecticut, 1639–1789*(Chapel Hill: University of North Carolina Press, 1995), 77-79; Bruce H. Mann, *Neighbors and strangers : law and community in early Connecticut q* (Chapel Hill : University of North Carolina Press, 1987), 11–46; Claire Priest, "Currency Policies and Legal Development in Colonial New England," *The Yale Law.Journal* 110 (2001): 1303, 1327–31.

[71] *See* Jacob M. Price, *Capital and Credit in British Overseas Trade: The View from the Chesapeake, 1700–1776* (Cambridge, Mass.: Harvard University Press, 1980); James H. Soltow, *The Economic Role of Williamsburg* (Williamsburg, Colonial Williamsburg : distributed by the University Press of Virginia, Charlottesville, 1965), 128–55.

primary form of collateral, and often served as the "currency" with which debts were paid off when their owners fell on hard times.

The expansion of slavery throughout British America is thus rooted, in part, in the institutional infrastructure of courts, and in the underlying laws that allowed all assets to be seized. Adam Smith compared British colonial courts favorably with those of the Spanish and Portuguese colonies where "irregular and partial administration of justice, [. . .] often protects the rich and powerful debtor from the pursuit of his injured creditor." Indeed, Smith continued, these justice systems "make the industrious part of the nation afraid to prepare goods for the consumption of those haughty and great men, to whom they dare not to refuse to sell upon credit, and from whom they are altogether uncertain of repayment."[72] The British colonies in America and the West Indies could become the large exporters of sugar and tobacco export in the eighteenth century, in part because strict enforcement of debt agreements encouraged British merchants to lend money to planters to buy slaves. Slavery, of course, is only one example of economic investment in the colonies promoted by the enforcement of the common law.

Even in areas that were not heavily reliant slave labor, land was highly commodified in colonial America and was a central form of collateral. In many areas, individuals had little personal property and land was a principal store of wealth. Alice Hanson Jones's study of probate records at the time of the American Revolution reveals that land reflected 81.1 percent of

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[72] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, ed.,Edwin Cannan,(Fourth ed., London: Methuen, 1925), Vol. II, 125. In listing the reasons why English colonies flourished economically, Adam Smith emphasized "above all that equal and impartial administration of justice which renders the rights of the meanest British subject respectable to the greatest, and which, by securing to every man the fruits of his own industry, gives the greatest and most effectual encouragement to every sort of industry."

wealth in New England, 68.5 percent in the mid-Atlantic region, and 48.6 percent of wealth in the South (with slaves constituting 35.6 percent).[73] Mortgages extended on the basis of land and slave property were an essential source of credit.[74] G.B. Warden's study found that 3,617 mortgages were recorded in Boston between 1692 and 1775 with a total value of £94,380.[75] Russell Menard's study of mortgages of land and slaves in eighteenth century South Carolina found that by means of mortgages, capital flowed "from the city and mercantile fortunes toward the country and plantation development."[76]

Litigation was essential to the credit system. Bringing a lawsuit on a debt established a creditor's priority to the debtor's assets. Debts were satisfied in the order in which creditors requested the court to issue writs of execution empowering the sheriff to physically seize the debtors' assets.[77] Word that one creditor was bringing a debt action against a debtor would, of course, be highly relevant to all of that debtor's other creditors. Debt records provided a priority list of creditors' claims against defaulting members of the community.[78] In times of general

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[73] Alice Hanson Jones, *Wealth of a nation to be : the American colonies on the eve of the Revolution* (New York : Columbia University Press, 1980), 98 & tbl. 4.5. See also Marc Egnal, *New world economies : the growth of the thirteen colonies and early Canada* (New York : Oxford University Press, 1998), 15 tbl. 1.2..

[74] Edward Countryman, "The Uses of Capital in Revolutionary America: The Case of the New York Loyalist Merchants," *William & Mary Quarterly* 49 (1992): 3, 19 n.47; Russell R. Menard, "Financing the Lowcountry Export Boom: Capital and Growth in Early South Carolina," *William & Mary Quarterly* 51 (1994): 659, 667; G.B. Warden, "The Distribution of Property in Boston, 1692–1775," *Perspectives on American History* 10 (1976): 81, 87–98.

[75] Warden, "The Distribution of Property in Boston,"81. Boston mortgages stated a one-year term but Warden found that they were typically paid off in six to eight years. Id. 96.

[76] Menard, "Financing the Lowcountry Export Boom," 670.

[77] Mann, *Neighbors and strangers*,40; Dayton, *Women Before the Bar*,91, 99; Claire Priest, "Colonial Courts and Secured Credit: Early American Commercial Litigation and Shays' Rebellion," *The Yale LawJournal* 108 (1999): 2413, 2421.

[78] See Priest, "Colonial Courts and Secured Credit," 2444.

economic recession or uncertainty, litigation volume skyrocketed as creditors scrambled to get a place in line.

Thus, although those entering commercial dealings naturally tried to avoid litigation in order to settle disputes, the presence of a legal system that would strictly enforce debts if necessary was an essential feature of the economy of colonial British America, equally in areas relying on slave labor and not, and in cash poor areas and not.

II. *Early Colonial Title Recording: Localization And Credit Markets*

The origins of institutions related to property titles and credit in the colonial era of the United States is mysteriously neglected in scholarship on the period.[79] Initially, Colonial Governors and Proprietors maintained records of the land they granted in the course of exercising their royal prerogative to control the distribution of crown lands. In each colony, however, a system of recording property titles developed in response to the need to keep reliable records of subsequent conveyances and mortgages in close proximity to where the property was held. The historical evidence suggests that it was the desire for better functioning property and credit markets that led

[79] Marshall Harris, *Origin of the Land Tenure System in the United States* (Ames: Iowa State College Press, 1953), 331-44 offers a useful comprehensive, but essentially bibliographic account of colonial legislation relating to property, as does Amelia C. Ford, "Colonial Precedents of Our National Land System as it Existed in 1800" (PhD diss., University of Wisconsin, 1908). The other articles on land title registration examine in a very technical fashion how the system differed from English law, see Joseph H. Beale, "The Origin of the System of Recording Deeds in America," *Green Bag* 19 (1907): 335 ; George L. Haskins, "The Beginnings of the Recording System in Massachusetts," *Boston University Law Review* 21 (1941): 281 ; R.G. Patton, "Evolution of Legislation on Proof of Title to Land," *Washington Law Review & St. B. J.* 30 (1955): 224; and S.G. Nissenson, "The Development of a Land Registration System in New York," *New York History* 20 (1939): 16. Herbert Osgood's sweeping histories of the colonies entitled *The American Colonies in the Seventeenth Century* (3 vols.New York: The Macmillan Co.; London, Macmillan & Co., 1904-07), and *The American Colonies of the Eighteenth Century* (4 vols. New York: Columbia University press, 1924) provide the most detail on the political undertones of the establishment of land title registration, but the discussion of the topic sporadically interspersed within the broader narrative of colonial political history.

to the innovative method of a widespread system of county level public records of property conveyances.

One principal development involved *record-keeping* and how formal records of property titles, which were initially within the exclusive control of the imperial executive authorities, the colonial Governors and Proprietors, came to be maintained and controlled by local county-level institutional authorities. Public land title recording began with grants of land from the Crown. English law required the monarch to maintain public records of land grants, an early and important precedent for government transparency. As Blackstone describes, "[N]o freehold may be given to the king, nor derived from him, but by matter of record." The records of such grants were to be publicly known. The "patent" granted by the king meant "open," according to Blackstone "so called because they are not sealed up, but exposed to open view, with the great seal pendant at the bottom; and are usually directed or addressed by the king to all his subjects at large."[80] By extension of the king's authority in the colonies, the proprietors and governors of the British colonies kept open records of their own land grants. Imposing fees for placing royal seals on land grants was often treated as an important crown prerogative and a source of revenue.

Acting independently, starting in the 1620s and continuing through the colonial era, each of the British colonies in America and the West Indies instituted courts and land title recording. Records of colonial *grants* of land were initially kept and maintained by high-level officials of the founding corporations, proprietors, and Governors' offices. The control over recording of subsequent land *conveyances* became a contested issue: the question was whether the records would be maintained centrally or in local communities. The crown-appointed Governors

[80] 2 *Blackstone, Commentaries* *346. Blackstone continues that "These grants, whether of lands, honours, liberties, franchises, or ought besides, are contained in charters, or letters *patent*, that is, open letters, *literae patentes*. Id.

perceived the need to maintain records of subsequent conveyances to retain control over land distribution and, in many colonies, to promote the collection of quit-rents, a form of land tax. When institutions moved to the county-level, more of the fees would go to county officials, not the crown-appointed officials in the colonial capitals. But the inconveniences of keeping all records with the Governors and Councils in colonial capitals meant that subsequent transfers and conveyances often went unrecorded.

In response, colonial assemblies passed laws to move record-keeping of conveyances and mortgages to the counties. The decentralization of record-keeping followed a different timeline in each colony. In Virginia, for example, the Virginia Company maintained land records beginning in 1619. When Virginia became a royal colony in 1624, grants of land were confirmed in England. The grants were reported to Virginia for recording in one colony patent book.[81] In 1629, an act reflecting the executive's desire for full information on subsequent conveyances required the recordation of all land conveyances in one central location near the Governor and Council in Virginia's capital. The Act states that "all sales of lands & deeds of gift of land made & agreed on between partye" must be "brought in to ye Court at James Citty & there recorded & enrolled w'thin one year and a day."[82] Even boundary disputes were required to be resolved in the capital. Statutes of 1624 and 1632, require that the Governor and Council resolve all disputes of "mayne importance" about the "bounds recorded."[83] Only "petty differences" could be resolved by local surveyors.[84]

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[81] Harris, *Origin of the Land Tenure System in the United States*, 331.

[82] "Minutes of the Council and General Court, 1622-1629," *Virginia Magazine of History & Biography* 26 (1918): 235, 242.

[83] Act 38 (1632) in 1 *Laws of Virginia*, ed. William W Hening (Phila.: Thomas Desilver, 1823), 197.. *See also* Act 13 (1624) in Hening, 1 *Laws of Virginia,* 125.

[84] Act 38 (1632) in Hening, 1 *Laws of Virginia,* 197. *See also* Act 13 (1624) in Hening, 1 *Laws of Virginia,* 125.

A broad survey of colonial legislation reveals that, across the colonies, county-level, public title recording typically was adopted for the stated reason of bringing greater transparency to the markets and mortgages for land and slaves by addressing the problem of fraudulent conveyances. In Virginia, for example, in 1639, seven years after the statute requiring boundary disputes to be resolved by the Governor and Council in the capital, transparency in mortgage markets became the primary object of legislation on recording. A 1639 statute was passed to address the problem that "Whereas divers persons (as daily experience informeth) do closely and privately convey over their estates by way of mortgage not delivering possession whereby their creditors are defrauded and defeated of their just debts." The law moved record-keeping of conveyances to the court sessions held in the newly-created counties. The act required that deeds or mortgages "made without delivery of possession" be acknowledged and entered into the records of the "Quarter or Monthly court."[85] In 1656, the legislature, again addressing the problem of conveyances "whereby [a landowner's] creditors not haveing knowledge thereof, might be defrauded of their just debts unless such conveyance were first acknowledged," gave the parties the choice of either recording their conveyance "before the Governour and Council or at the monthly courts . . . in a book for that purpose within six months after such alienation."[86] Importantly, the 1656 act extended its scope to the recording of chattel mortgages. It states that "no part of any estate, whether in lands, goods or chattels shall be made over" without being recorded within six months.[87] A similar statute was enacted in 1662 that stated its goal was to

[85] "Concerning Fraudulent Deeds and Conveyances, Acts of General Assembly 1639-40," *William & Mary Quarterly*4 (Jul. 1924): 149-50; Act 16 (1639), in Hening, 1 *Laws of Virginia*,227. A 1642 Act repeated this language. Act 12 (1642) in Hening, 1 *Laws of Virginia*, 248.

[86] Act IV, Against fraudulent deeds in Hening, 1 *Laws of Virginia*, 417, 418.

[87] Act IV, Against fraudulent deeds in Hening, 1 *Laws of Virginia*,418.

prevent creditors from being defrauded and to allow recording of transactions in all "lands, goods or cattle," either before the "governor and councell at the general court, or before the justices at the county courts."[88]

Several colonies had more mixed success with establishing local recording in the face of pressure from colonial officials to keep records, and the collection of fees associated with recording, in the capitals. In the Carolinas, recording first took place in two centralized offices in Charlestown. A 1698 "Act to prevent Deceits by Double Mortgages and Conveyances of Lands, Negroes and Chattels" stated that it was intended to prevent "knavish and necessitous" persons from making two or more sales of "the same plantation, negroes, and other goods and chattels" which led "buyers of plantations, and lenders of money" to lose their money.[89] It established a system of voluntary recording, which held that, with regard to the sale, conveyance or mortgage of *lands*, those first registered in the "Register's Office" in Charlestown would be deemed the earliest and given priority. That statute provided that recording the sale or mortgage of "negroes, goods or chattels," was available in the "Secretary's Office" in Charleston. The recording fees would be collected by either the Register and the Secretary, respectively.

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[88] Act 73, Against fraudulent conveyances (1662) in Hening, 2 *Laws of Virginia,* 98-99. The statute explained that it was enacted so that "noe person or persons whatsoever shall passe over by conveyance or otherwise any part of his estate whither lands, goods or cattle, whereby his creditors not having notice therefore might be defrauded of their just debts, unless such conveyances or other deeds be acknowledged before the the Governor and Councell at the general court, or before the justices at the county courts, and there registered in a booke for the purposes within six months after such alienation." In December of 1662, the assembly passed another act to address the issue that "dayly experience sheweth that" Virginians "defraud their creditors in this country of their debts" by conveying their land privately to people in England. The act required that with regard to any conveyance to a party in England, copies of the deed must be sent on the "next shipping" to be entered in the Virginia general court records or else they would be deemed fraudulent and not a bar to the claims of creditors in Virginia. Act 9, "Noe conveyances allowed which are made in England unless recorded the next shipping after in the secretaryes office." (1662) in Hening, 2 *Laws of Virginia,* 168.

[89] An Act to prevent Deceits by Double Mortgages and Conveyances of Lands, Negroes and Chattels (October 8, 1698), 2 *Statutes at Large of South Carolina,* ed. Thomas Copper (Columbia SC: A S Johnston, 1836),137-38.

In 1729, the colonies came under direct rule of the Royal Government (became British Crown colonies), as two separate colonies. An Act of 1731 stated that the colony of South Carolina was now ruled directly by "his Majesty." It recognized that "it having been found by experience" that the office recording titles "has had the good effects expected by the same, and has been of great use and service to this Province, as it has been distinct and separate from any other office."[90] Under the act, the "recorder or register of deeds and conveyances of land and mortgages, shall be and continue separated and distinct from any other office." It is clear that after the American Revolution, local, county-level recording in South Carolina had been established. In 1785, the South Carolina legislature enacted "An Act for establishing county courts," which required the recording of conveyances of land "in the clerk's office of the county where the land mentioned was to be passed."[91] The 1785 law, however, still provided for one central Secretary's office where records of all conveyances would be kept. The act states that "to the end that persons who are inclined to lend money upon the security of lands or Negroes or to become purchasers thereof, may more easily discover whether the lands or slaves offered to be sold or mortgaged, be free from incumbrances," the state of South Carolina would maintain one registry in the Secretary's office.[92] Under the Act, the clerks of the county courts were required to "transmit memorials" of all recorded conveyances to the central office in every January and June.[93]

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[90] An Act for Remission of Arrears of Quit-Rents . . . and for keeping the office of Publick Register of this Province from being united to other office or offices, appointed or to be appointed by his Majesty, for Registering, Enrolling, or Recording of Grants or Deeds (August 20, 1731), Statutes at Large of South Carolina, Section 18, 296.

[91] An Act for establishing County Courts and for regulating the Proceedings therein *Acts, Ordinances, and Resolves of the General Assembly of the State of South Carolina* (Charleston, SC: A. Timothy, Printer to the State, 1785), 24.

[92] Id. 25.

[93] Id.

In other colonies, decentralized recording was established from the beginning. As corporate colonies throughout the colonial era, Massachusetts and Connecticut had a different system in that towns were delegated with control over granting land as early as 1629. In 1640, the first act relating to the recording of conveyances was enacted for "avoiding all fraudulent conveyances and that every man may know what estate or interest other men may have in any houses, lands or other hereditaments they are to deal in . . . no mortgage, bargaine, sale or graunt . . . where the Graunter remains in possession shall be of force against other persons except the Graunter and his Heirs" unless it is recorded.[94] Similarly, by 1678 in Maryland, land sales were recorded by clerks of the county courts.[95] In New York, an act was passed in 1683 which stated that "No grants deeds Mortgages or other conveyances whattsoever of any Lands or Tenements. . . shall bee of force, power or validity in Law" unless the conveyances are "entered & recorded in the Register of the County wherein such lands or Tenements do lye" within six months. But the New York law also required that the local county officials send the records and, importantly, the Secretary's fees to the Secretary's office every year. According to the act, the records must be "Transmitted once every yeare to the Secretarys office att New Yorke with the fees ordained for the same, there to be registered and Entered."[96] If the clerk or register failed to transmit the records and fees to the Secretary's office the "Clerk shall loose his place & be made for ever incapable to Execute any place or office of trust within this Province."[97] In 1693, *Catologue of*

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[94] Conveyances Fraudulent. (1640, 1641) in T*he Book of the General Lawes and Libertyes Concerning the Inhabitants of Massachusetts* (1648) ed. Thomas G. Barnes (Huntington Library facsimile edition, San Marino, CA, 1975), 13-14.

[95] Osgood, 2 *The American Colonies in the Seventeenth Century*,43.

[96] An Act to prevent frauds in conveyancing of lands (Nov. 3, 1683) in 1 *The Colonial Laws of New York* (reprint Clark, NJ: The Lawbook Exchange, Ltd., 2006)(Albany: James B. Lyon, 1894), ch. 15,141-42.

[97] Id. 142.

Fees Established by the Governour and Council at the New York Assembly's request noted various fees owed the Governor, for example, "For the great Seal to every Patent for and under 100 Acres, 12 shillings."[98] The "Secretary's Fees" included "For a Patent for a House, Lot or Confirmation of Land, formerly possessed, 12 shillings"; "For a License to purchase Land of the *Indians*," 6 shillings.[99] Under the section, "Fees for the Justices in or out of Sessions" is listed "Acknowledging a Deed of Sale, 2 shillings, 3 pence."[100] The section on "Fees to the Clerk of the Sessions and Common Pleas" includes "Searching the Records within one Year 6 d" and "Every Year backwards, 3d more."[101]

Then in 1753, New York law incorporated a special provision for mortgages only that made no mention of sending records and fees to the Secretary's office. The act recognized that "many frauds and Aubuses have been Committed as well by Persons Mortgaging their lands Tenements and Real Estate and afterwards selling the Same Lands to other Persons who were Ignorant of Such Mortgages."[102] It noted that "Persons have been defrauded of great Sums of Money Wherefore for preventing those Evils for the future."[103] The 1753 required that "Each and every of the Clerks of the Several and Respective Citys and County's within this Province Shall provide a fit and proper Blank Book for the Registering of all Mortgages of Lands Tenements

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[98] *A Catalogue of Fees Established by the Governour and Council at the Humble Request of the Assembly, NY* (New York: Printed and sold by William Bradford, printer to Their Majesties, King William and Queen Mary, at the Bible in New-York,, 1693), 1-11, 1.

[99] Id. 2.

[100] Id. 3.

[101] Id. 4.

[102] An Act for preventing frauds by Mortgages (Dec. 12, 1753) in 3 *The Colonial Laws of New York*(reprint Clark, NJ: The Lawbook Exchange, Ltd., 2006)(Albany: James B. Lyon, 1894), ch. 945, 957-58.

[103] Id.

and Real Estate lying within their Respective City's & County's."[104] Subsequent laws in the colony repeatedly tried to improve upon the record-keeping in the local mortgage books required in the 1753 law.

In 1715, North Carolina law recognized that the founders, the Lords Proprietors, granted as one of the colony's "privileges and immunities," the power of the free men to "choose public registers." With the end of "the more effectual prevention of fraudulent deeds, alienations, and mortgages" the freemen of each precinct were to elect three candidates for public register, of which one would be chosen by the colony's Governor. The law required within the precinct that all conveyances, *except mortgages*, were required to proved "by one or more evidences, upon oath" either before the chief justice or in the court of the precinct and then registered by "the public register of the precinct where the land lieth."[105] Recording a mortgage was not required, but gave priority over subsequently executed debts. The power to select the public register was given fully to the counties after the Declaration of Independence, in 1777.[106]

Pennsylvania similarly allowed local recording by 1706. In contrast to North Carolina, the mandatory recording in the "office of deeds of every county" applied *only* to mortgages, with voluntary recording available for titles.[107] What were the tradeoffs relating to mandatory or

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[104] Id. 958. The Register was to include descriptions of the "Boundary's of the Lands Mortgaged," the names of the parties, the dates and time when the mortgage was to be paid."

[105] An act to appoint public Registers, and to direct the method to be observed in conveying lands, goods, and chattels; and for preventing fraudulent deeds and mortgages, ch. 38, 1715 North Carolina Sess. Laws. 17.

[106] *See* id. (reference to later statute modifying act).

[107]An Act for the Acknowledgment and Recording of Deeds, Ch. 136 (January 12. 1706) in 2 *The Statutes at Large of Pennsylvania*(Clarence M. Busch, State Printer, 1896), 206-212.; An Act for the Acknowledging and Recording of Deeds, Ch. 170 (February 28, 1711) in 2 *The Statutes at Large of Pennsylvania*(Clarence M. Busch, State Printer, 1896), 349-355; An Act for Acknowledging and Recording of Deeds, Ch. 208 (May 28, 1715) in 3 *The Statutes at Large of Pennsylvania*(Clarence M. Busch, State Printer, 1896), 53-58. In the 1819 case *Keller v. Nutz*, the Pennsylvania Surpeme Court refers to a 1775 act and states "The only deeds, before that act, required to be recorded, were mortgages, or defeasible deeds in the nature of mortgages. These, if not recorded within six months, were void against subsequent purchasers; but no law previously to that act of assembly required, under the penalty

voluntary recording? Mandatory recording acts stated that all conveyances (sales, mortgages, gifts, etc.) were required to be recorded in order to effectively execute the transaction. The benefits of mandatory recording were that the public records became far more complete, which created greater transparency. The problem with mandatory recording, however, was that colonists often executed agreements without recording them. These statutes held *unrecorded* sales or security agreements to be defective after a time. Innocent parties who had executed land sales or mortgages but had failed to record were therefore unfairly penalized. In contrast, voluntary recording systems had the advantage that they did not invalidate unrecorded agreements. When recording was voluntary, the first recorded sale or mortgage was privileged over other agreements. Unrecorded agreements were still legally effective, however, and could be proved in court at a later time. And in the absence of competing claims, why hold invalid an agreement the parties intended to make enforceable, simply because it was not recorded? In a frontier society, in a culture where public recording was largely a novelty, voluntary recording proved to be the dominant approach.

The enactment of laws providing for systems of title and mortgage recording was merely one step in clarifying titles. Closer examination on the ground level reveals an atmosphere frought with confusion, disagreements, and at times disruptive political tensions over land ownership in the colonies, as well as officals' desire to collect fees viewed to be a prerogative of the crown. In the Massachusetts Bay colony, for example, under the 1629 charter, the colonial leadership clearly had land-granting authority. Nonetheless, the historian David Thomas Konig's close study of Massachusetts land policy in the seventeenth century concludes that

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of forfeiting the estate conveyed, the registry of an absolute deed." *Keller v. Nutz*, 5 Serg & Rawle 246, 252 (Pa.)(1819).

"early land use was characterized by inexactness in distribution, inattention to recording, and neglect of the most basic statutory requirements of occupancy and fencing."[108] A lack of a uniform surveying system, and laxness on the part of those allocating land led to uncertain boundaries and confusion over ownership. Konig notes that by the 1660s and 1670s, greater pressure for land led town authorities to focus more attention on the recording of deeds and the firming up of boundary lines. A wave of land titling took place both in the individual towns and at the level of the largest landholders, some of whom acquired vast parcels made available after King Philip's War of 1675-76.[109] In 1686, King James II created the Dominion of New England, which was designed to subject all of the New England colonies to firmer royal control and placed Massachusetts within it.

When Sir Edmund Andros was appointed in 1686, his commission and royal Instructions specified that he was to review the land titles that colonists had formalized outside of the official processes for granting royal land. Andros was highly suspicious of the actions of the previous administrations and ruled that all land titles in Massachusetts were effectively invalid.[110] He announced a program whereby residents would apply for new land patents, with the land surveyed by his office and with titles formalized with the royal seal. In addition to surveying costs, he imposed fees for obtaining the new land patents. Invalidating land titles undermined the legitimacy of the primary asset held by most Massachusetts residents.[111] Thus it is not

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[108] David Thomas Konig, "Community Custom and the Common Law: Social Change and the Development of Land Law in Seventeenth-Century Massachusetts," *American Journal of Legal History*18 (1974): 137137-38.

[109] *See* John Frederick Martin, *Profit in the Wilderness: Entrepreneurship and the Founding of New England Towns in the Seventeenth Century* 260-80 (1991); Richard R. Johnson, Adjustment to Empire: The New England Colonies, 1675-1715 (1981); Viola F. Barnes, *The Dominion of New England: A Study in British Colonial Policy* (1923); Dror Goldberg, "Why Was America's First Bank Aborted," *Journal of Economic History* 71 (2011): 211.

[110] Martin, *Profit in the Wilderness*, 263.

[111] The prominent lawyer Samuel Sewall wrote,

surprising that an uproar throughout the colony ensued. With regard to the fees imposed, a 1691 account of the events written by members of Andros's Council emphasized that "[I]t *hath by some been computed that all the money in the Country would not suffice to patent the lands therein contained.*"[112] The land patent issue was central to Andros being violently overthrown in what was referred to as a Revolution.[113]

When the New Jersey Assembly passed a bill to record deeds at the county level over the winter of 1710-1711, a member of the Council wrote a letter to one of the Proprietors and listed the act as one of several that the Council clearly had to reject. The problem with the act, "An Act for Acknowledging and Recording of Deeds and Conveyances of Land within each respective County of this Province," was the impact it would have on the fees to which the Secretary felt he was entitled. He emphasized that the act:

> took away the Only Valuable Perquisite belonging to the Secretaries Office, & was directly contrary to his Patent, & indeed impracticable the Clerks of many Counties being

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> The title we have to our lands has been greatly defamed and undervalued: which has been greatly prejudicial to the inhabitants, because their lands, which were formerly the best part of their estate, became of very little value, and consequently the owners of very little credit.

Samuel Sewell, 1 *Diary of Samuel Sewell, 1674-1729* (Boston, The Society, 1878-82),219-21, 237, 251.

[112]A Narrative of the Proceedings of Sir Edmund Andros and his Complices, Who Acted by an Illegal and Aribtrary Commission from the Late King James during his Government in New England 11 (1691), *in* 1 *The Andros Tracts* (New York, 1868), 133, 143 [hereinafter *Andros Tracts*]. Others wrote that the fees for obtaining new titles could reach 25% of the value of the underlying land. 1 *Andros Tracts* includes the following testimonials: p. 98 (hearing his land was to be taken, one resident "caused his Writ to be entred in the Publick Records in *Mr. West's* Office, which he paid for the Recording of; notwithstanding Sir *E.A.* ordered Captain *Clements* (as he said) to survey the same, and he shewed me a Plat thereof, and said, if I had a Patent for it, I must pay three pence *per* Acre, it being 650 Acres. He was further informed, That if the said *Russell* would not take a Patent for it, Mr. *Usher* should have it.); p. 205 (Whether Husbandmen do need to be put in mind of the blessed Priviledge to which they were advancing, of taking Patents for their Lands, at a rate which would have reduced them to a meaner Estate than the Famine once brought the Egyptians unto?).

[113] William Johnson, an Assistant, for example, wrote that: Had not an happy *Revolution* happened in England, and so in *New-England*, in all probability those few ill men would have squeezed more out of the poorer sort of people there, than half their Estates are worth, by *forcing them to take Patents*. Major *Smith* can tell them, that an Estate not worth 200l. had more than 50l. demanded for a Patent for it. William Johnson (Jan. 30, 1689), *in* 1 *Andros Tracts*,98; Martin, *Profit in the Wilderness*, 263.

> Scarce able to write, & having no particular Offices, and on Other Acco'ts most Incapable of Such a Trust.[114]

Yet, in 1713-1714, the Assembly tried to enact the law another time. The Act stated that the "Inhabitants of this Province are under great Inconveniences, and put to much trouble and Charges by reason there is no Records of Deeds and Evidences of Lands kept within the respective Counties."[115] It allowed deeds to be proved and recorded at the common pleas courts in the counties and required that the clerk of the common pleas "keep a Book or Books, wherein all Deeds, Conveyances and Evidences of Lands, lying within the same County, . . . shall, or may be Recorded by him." The Act was disallowed by the Privy Council in January, 1722. Governor Burnet wrote the Board of Trade in May, 1722 explaining that the act "hurt the Prerogative" of the Secretary's office.[116]

Despite the direct disallowance of the Privy Council, the New Jersey Assembly, for a third time, renacted the law permitting the recording of deeds in the counties in 1727.[117] Facing the loss of his fees, the Secretary of Pennsylvania, James Smith, wrote desperately to the Board

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[114] He continued that "It was moreover proved, that the Records of Severall Counties have been lost or embezzled by the Negligence or Roguery of the Clerks, besides Severall other Reasons which were urged, too tedious to relate." Extract of a Letter from a Member of the Council in New Jersey to Mr. Dockwra relating to the Proceedings of some of the Council and of the Assembly of that Province, and to Colonel Hunters Administration (1711), Archives of the State of New Jersey, First Series, Volume IV, p 121. (The identity of the council member is unknown.)

[115] An Act for Acknowledging and Recording of Deeds and Conveyances of Land within each respective County of this Province (March 15, 1713/14) in 2 *Laws of the Royal Colony of New Jersey, 1703-1745* (Bernard Bush, compiled) (Trenton, NJ: Archives and History Bureau, New Jersey State Archive); New Jersey Archives, 3d. Ser., 160-161.

[116] Letter from Governor Burnet to the Lords of Trade (May 25, 1722), Archives of the State of New Jersey, First Series, Volume 5, 32.

[117] An Act concerning the acknowledging and registering Deeds and Conveyances of Land, and declaring how the Estate or Right of a Feme Covert may be conveyed or extinguished (February 10, 1727/28) in 2 *Laws of the Royal Colony of New Jersey, 1703-1745* (Bernard Bush, compiled) (Trenton, NJ: Archives and History Bureau, New Jersey State Archive); New Jersey Archives, 3d. Ser., 388-391.

of Trade in November 1728, explaining that the Governor, William Burnet, had been paid 600 pounds by the Assembly to go along with the reenactment. According to Smith,

> Notwithstanding which Disallowance; the late Governour William Burnet, Esq. did in the Year 1727; for the Sum of Six hundred pounds given to him by the Assembly, under the name of Incidental charges, Reenact the Aforesaid Laws, and caused a New Ordinance to be Made in which the fees only of the Secretary are Reduced very near to what they were when first complained of.[118]

Smith goes on to state that some objections were made by the New Jersey Council about reenacting the laws "[t]o remove which; the Assembly voted to the Secretary twenty five pounds a year . . . in consideration of the loss his Office would Sustain thereby, which he is Sure will be more than Sixty Pounds a Year." Yet, Smith explained that when he raised the losses of his fees in the Council, he "found it was to no purpose, and if he did not accept of the said twenty five pounds a year, he would have nothing."[119]

The Asssembly persisted and enacted the law a fourth time in 1743, stating that many of the inhabitants of the colony "live at a great Distance" from any of the officials permitted to record deeds, and in those areas "People labour under considerable Inconveniencies for want of a Law for acknowledging Deeds and Conveyances of Land."[120] Moreover, in a fifth effort in1766, the Assembly enacted a law to prevent fraud by mortgages, which stated that "immediately" after the law was published, "each and every of the Clerks of the several Counties" shall "provide a fit and proper Book . . . for the registering of all Mortgages of Lands, Tenements and real estate

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[118] Letter from James Smith, Secretary of the Province of New Jersey, to the Lords of Trade in relation to two Acts pass'd there in 1727 whereby he was prejudiced with respect to his Fees (November 14, 1728), Archives of the State of New Jersey, First Series, Volume 5, 199.

[119] Id .

[120] An Act concerning the acknowledging Deeds in the Colony of New-Jersey, and declaring how the Estate or Right of a Feme Covert may be conveyed or extinguished (December 2, 1743) in 2 *Laws of the Royal Colony of New Jersey, 1703-1745* (Bernard Bush, compiled) (Trenton, NJ: Archives and History Bureau, New Jersey State Archive); New Jersey Archives, 3d. Ser. 588-590.

lying within their respective Counties." With regard to the mortgage book "all Persons whatsoever, at proper Seasons may have Recourse and Search" for the the clerks were to receive three shillings for the mortgages entered and nine pence for ever Search.[121]

A similar conflict likely occurred in Pennsylvania, where a law was passed in January of 1706 providing for the recording of conveyances in the city or county where the land existed. With regard to mortgages, the act stated that no mortgage would be good to pass an estate unless it was recorded locally. The law was repealed by the Privy Council in 1709.[122] In February of 1711, the legislature enacted a similar law setting up an "office of record, which shall be called and styled the enrolment office" in the towns and counties. Under the law, the recorder was required to keep books of conveyances, which could be searched. Like the previous law, it held that mortgages would only validly pass interests in land when recorded locally. The Privy Council repealed the law in February of 1714.[123] Yet, in May of 1715, the legislature renacted the law again. This time, the Privy Council failed to respond and the act remained effective "by lapse of time."[124] The colonial laws of Pennsylvania and New Jersey reveal that the institutions relating to title recording presented a fundamental struggle for power between colonial officials and the colonial legislatures. Colonial legislatures, likely responding to popular demand for local insitutions, enacted laws shifting control over institutions to the local counties. The

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[121] An Act for preventing Frauds by Mortgages which shall be made and executed after the First Day of January, 1766 (1765) in 4 *Laws of the Royal Colony of New Jersey, 1760-1769* (Bernard Bush, compiled) (Trenton, NJ: Archives and History Bureau, New Jersey State Archive); New Jersey Archives, 3d. Ser. 334-336.

[122] An Act for the Acknowledgment and Recording of Deeds, Ch. 136 (January 12. 1706) in 2 *The Statutes at Large of Pennsylvania*(Clarence M. Busch, State Printer, 1896), 206-212, at 212.

[123] An Act for the Acknowledging and Recording of Deeds, Ch. 170 (February 28, 1711), *The Statutes at Large of Pennsylvania*, Vol. 2 (Clarence M. Busch, State Printer, 1896), 349-355, 355.

[124] The notation on the statute book says "Allowed to become a law by lapse of time, in accordance with the proprietary charter, having been considered by the Lord Justices in Council, July 21, 1719, and not acted upon." An Act for Acknowledging and Recording of Deeds, Ch. 208 (May 28, 1715) in 3 *The Statutes at Large of Pennsylvania*(Clarence M. Busch, State Printer, 1896), 53-58, 58.

pushback came from appointed officials who feared losing the source of their salary. Ultimately, throughout the British colonies in America, the drive for local control over institutions largely prevailed.

III. *The Novelty Of The Colonial Land Title Registries*

What was innovative about title recording in the colonial courts and registries? Title recording existed in England but, in the colonies, stream-lined conveyancing and recording, offered at a low cost became widespread practice and was normalized in a manner not achieved in England.[125] The first innovative aspect was that, procedurally, authenticating conveyances and mortgages in public institutions allowed for *vastly simpler and less expensive* methods of conveying title in comparison to the typical combination of procedures and formalities relied upon in England. Lower costs likely increased the amount of mortgages and conveyances. Second, the court records and title registries *publicized* conveyances and mortgages to the broader audience of purchasers and creditors. The colonial records lowered the cost for creditors to gain relevant information about the status of property. Open records also reflected a cultural and political shift: The English landed elite strongly favored privacy in matters related to the leveraging of property as well as greater reliance on reputation as a driving force in credit markets generally. The third innovative characteristic was that recording of conveyances and mortgages could be used for *any kind* of property. (English procedures and formalities distinguished between land and chattel goods.) From the start, particularly in the southern colonies and in the West Indies, mortgages in slaves and other chattel goods were a major source

[125] As S.G. Nissenson describes, the English Statute of Uses of 1535 and the Statute of Enrollments of 1536 were intended to create greater transparency by recording land titles, but the recording provisions were not widely complied with. In the early feudal system, transfers of rights were recorded in the minutes of the lords' courts. Copyhold transfers were a matter of public record. Land transfers were enrolled or registered in the borough courts. Centralized registration developed in the king's courts at Westminster. S.G. Nissenson, "The Development of a Land Registration System in New York," *New York History* 20(1939): 16.

of credit. Moreover, by means of successive statutory enactments, the legislatures designed the institutions to serve the broad population of land and slave owners. The colonial legislatures could modify and improve their structures and appointment processes, and could control the fees and costs associated with their use.

As described above, to provide reliable information to potential purchasers and creditors at a low cost, most colonial laws simply held that the first conveyances to be recorded, including mortgages, had presumptive validity over other claims. Creditors were therefore notified, through publication, of prior claims against an asset. Colonial land conveyancing began with a written deed or mortgage bond executed by two parties. The form and content of the deeds themselves closely replicated the forms used in England.[126] In colonial law, however, the deed itself fully conveyed the property. This was possible because having the deed authenticated or "proved" in court and recorded in the court records or registry provided the required element of "notoriety" of the transaction.

Simple conveyancing and local recording existed in England since the Statute of Enrolments of 1536, under which a "bargain and sale" contract for land would convey legal title.[127] The Statute of Enrollments resembled the later colonial statutes that required title recording of land conveyances and provided that the sales were to be recorded in "one of the King's courts of record at *Westminster*" or "within the same county or counties where the same

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[126] *See, for example*, Nathan Dane, 4 *A general abridgment and digest of American law: with occasional notes and comments* (Boston : Cummings, Hilliard & Co., 1824), 38 ("We have adopted the English deed substantially in the English form.").

[127] J. H. Baker, *An Introduction to English Legal History* (4th ed., London : Butterworths LexisNexis, 2002), 305-306.

manors, lands or tenements, so bargained and sold, lie or be" before at least two officials, including the "clerk of the peace."[128]

Under English law, a basic conveyance of land was referred to as a "feoffment" (as opposed to a gift, or a lease, for example). The deed was (and is) a writing executing the conveyance. In England, however, the conveyance was required to be perfected in a ceremony called "livery of seisin."[129] The purpose of the ceremony was to publicize the conveyance to the community. As described by William Blackstone, the ceremony's function was to be a "public and notorious act, that the country might take notice of, and testify the transfer of the estate: and that such, as claimed title by other means, might know against whom to bring their actions."[130] The ceremony involved the parties and their attorneys coming to the land itself, and in the presence of witnesses, declaring the property to be conveyed. The prior owner would deliver to the new owner "a clod or turf, or a twig or bough there growing" and state that "I deliver these to you in the name of seisin of all the lands and tenements contained in this deed."[131] Done properly, the livery of seisin would be documented in writing on the back of the deed with a list of witnesses and details about the manner, place and time of the ceremony. According to Blackstone, because the ceremony was relied upon for notoriety of the conveyance, if a deed conveyed land in different counties, "there must be as many liveries as there are counties."[132]

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[128] 27 Hen. 8, cap. 16.

[129] Without the ceremony, the new owner was a tenant at the will of the former owner. *See* William Blackstone, 2 *Commentaries* 311.

[130] Id.

[131] Id. 315.

[132] Id. Alexander Hamilton's *Practice Manual* also views livery of seisin and acknowledgement of a deed in court as substitutes. *See* Alexander Hamilton, "Practice Manual," in 1 *The Law Practice of Alexander Hamilton*, ed. Julius Goebel, Jr.(New York : Published under the auspices of the William Nelson Cromwell Foundation by Columbia University Press, 1964),55, 87 (.

A principal benefit of having land conveyances authenticated and recorded in the colonial courts and land title registries was that it improved upon the livery of seisin ceremony in providing notoriety regarding land conveyances. Zephaniah Swift's 1795 treatise on Connecticut law emphasizes that Connecticut's recording act was

> founded in the highest wisdom and policy, and has a most effectual operation to reduce the titles to things real to certainty and lessen the sources of litigation. The records and files of the towns, *will shew to every person, that is pleased to enquire, in whom is vested the legal title to lands, and inform him whether he can purchase with safety. This renders all conveyances of lands a matter of much more public notoriety, than the ancient method of livery of seisin . . . .*[133]

Similarly, the conveyance law enacted in 1715 in North Carolina states that deeds proven in court and registered in the precint shall be valid "without livery of seizin, attornment or other ceremony in the law."

Public access to court records and land title registries was a central feature of colonial institutions. The Massachusetts recording law of 1658, for example, stated that "every Inhabitant of the Country shall have free liberty to search and view any *Rolls, Records, or Registers*, of any Court or Office, except of the Council and to have a transcript or Exemplification thereof written, examined and signed by the hand of the Officer, paying the accustomed fees." A 1720 Massachusetts law, which confirmed a process of electing county registers by election every five years, provided that each person chosen as country register "shall keep his office daily open in the respective shire town of each county, and therein keep the books, records, files and papers to the said office belonging."[134] A 1698 law enacted for the Carolinas held that if the Register or

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[133] Zephaniah Swift, 1 *A System of the Laws of the State of Connecticut* (1795), 307-08 (italics added).

[134] An Act in addition to an Act entitled "An Act for the More Safe Keeping the Registry of Deeds and Conveyances of Land," (1720) reprinted in 2 *The Acts and Resolves Public and Private of the Province of Massachusetts Bay* (Boston: Wright & Potter, printers to the State, 1874), 187.

Secretary falsely certified that no sale, conveyance or mortgage had been recorded on a parcel of land or "Negroes and other Goods and Chattels," the official would be liable for costs and damages to "such Person who made Enquiry and is damaged by Reason of such false Certificate."[135] New Jersey's recording acts of 1714 and 1727 Act stated "all Persons concerned may have Recourse to the said Records, as they shall have occasion."[136] A later New Jersey statute detailing all of the information that needed to be recorded stated that that "all Persons, whatsoever, at proper Seasons may have Recourse and Search" the mortgage book for the legislatively approved fee.[137] The 1753 New York *Act for preventing frauds by Mortgage* stated that "all persons whatsoever at proper Seasons may have Recourse and Search" the register of mortgages." [138]

Another dramatic departure from the English common law involved the recording of slave mortgages. English land conveyancing formalities—such as the livery of seisin ceremony—were ill-suited for slave conveyances because of the mobility of slave property (having the neighbors recognize ownership through an unrecorded public ceremony made little sense for a form of property that might be transported elsewhere). The simple colonial court procedures adopted to record conveyances and mortgages of land, however, could easily be used

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[135] An Act to prevent Deceits by Double Mortgages and Conveyances of Lands, Negroes and Chattels (October 8, 1698) in *Statutes at Large of South Carolina*, 137-38.

[136] An Act for Acknowledging and Recording of Deeds and Conveyances of Land Within Each Respective County of this Province New Jersey (1713/1714).

[137] The 1766 statute stated that the clerk of each county was to maintain a book including a comprehensive account of all mortgages, which contained clear information about the property, the parties involved and the amount mortgaged on the land and when the debt was payable.

[138] An Act for preventing frauds by Mortgages (Dec. 12, 1753) in 3 *The Colonial Laws of New York*(reprint Clark, NJ: *The Lawbook Exchange, Ltd.*, 2006) (Albany: James B. Lyon, 1894), ch. 945, 958.

for chattel property as well. By instituting a simplified process, therefore, the colonial legislatures created a flexible system which promoted credit markets in slaves. As mentioned, Virginia adopted chattel mortgages in 1662. South Carolina's recording statute of 1698 stated that, in addition to recording of land transactions, "the Sale or Mortgage of Negroes, Goods or Chattels which shall be first recorded in the Secretary's office in *Charles-Town*, shall be . . . held to be the first Mortgage" in all the courts of the state, any "Sale or Mortgage for the same Negroes, Goods and Chattels not recorded" notwithstanding.[139] Slavery is therefore an important driver of an institutional legacy that persists in the modern United States, which is an openness to the types of goods (and people) that can serve as commodified collateral. Some economists have argued that credit markets in developing countries are held back due to the absence of chattel mortgages and the lack of flexibility in the types of property that serve as security.[140] The history reveals the unique legal path of the British American colonies that originated in chattel mortgages for slaves, recorded in courts and registries.

The *public* nature of the court records and land title registries, used as a widespread and normalized practice, was strikingly different than English conveyancing law. As mentioned above, there were various movements to introduce public registries in the seventeenth and eighteenth centuries in England, but large landowners opposed the proposals.[141] In England, the

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[139] An Act to prevent Deceits by Double Mortgages and Conveyances of Lands, Negroes and Chattels (Oct. 8, 1698), No. 161 in 1 *The Laws of the Province of South-Carolina*, 66-67.

[140] *See, for example*, Mehnaz Safavian, Heywood Fleisig & Jevgenijs Steinbucks, "Unlocking Dead Capital," (Mar. 29, 2006), World Bank Working Paper (describing the important role of chattel mortgages for economic development and their absence in many developing countries). One recent study of relatively primitive economies estimates that barriers to secured transactions have led to economic losses in Argentina and Bolivia amounting to between ten to fifteen percent of their respective gross domestic products. Heywood Fleisig, "Secured Transactions: The Power of Collateral," *Finance & Development* (1996): 44; Heywood Fleisig & Nuria de la Pena, "Design of Collateral Law and Institutions: Their Impact on Credit Allocation and Growth in Developing Economies," World Bank Background Paper (2002).

[141] For inrollment of bargains and sales (Statute of Enrollments) 27 Hen. 8, cap. 16.

public debate over court authentication and registries resulted in a vastly different outcome than the simultaneous institutional development in the colonies. Rather than relying on recording, Parliament enacted the Statute of Frauds in 1677. Invoking a similar issue as the colonial fraudulent conveyance statutes mentioned above, the English Statute of Frauds was enacted "[f]or prevention of many fraudulent practices" involving land conveyances. Where the colonial laws introduced title recording, however, the Statute of Frauds simply required land conveyances to be put in writing (rather than be made orally). According to the statute, "All Leases, Estates, Interests of Freehold or Term of Years . . . made or created by Livery of Seisin only or by Parole and not putt in Writeing and signed by the parties . . . shall have the force and effect of Leases or Estates at Will only . . . ."[142] The act failed to establish local registries or to disrupt the private system of conveyancing.

Although widespread registration was not instituted in England until 1869, registries were adopted in the county of York (West Riding in 1703, East Riding in 1707, and North Riding in 1735) and Middlesex in 1708.[143] The law for West Riding provides a unique clause explaining the need for a registry. It states that the residents of the county are interested in using their land as collateral for debts but are unable to because of the lack of the registry. The West Riding statute states:

> *West Riding* of the County of *York* is the principal Place in the *North* for the Cloth Manufacture, and most of the Traders therein are Freeholders, and have frequent

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[142] Statute of Frauds, 29 Car. II c. 3 (1677); *See* Philip Hamburger, "The Conveyancing Purposes of the Statute of Frauds," *American Journal of Legal History* 27 (1983): 354.

[143] An Act for the publick registering of all Deeds, Conveyances, and Wills, West Riding, 2 & 3 Anne cap. 4 (effective Sept. 29, 1704); An Act for the publick registering of all Deeds, Conveyances, and Wills, East Riding, 6 Anne cap. 35 (effective Sept. 29, 1708); An Act for the publick registering of all Deeds, Conveyances, and Wills, Middlesex, 7 Anne cap. 20 (effective Sept. 29, 1709); An Act for the publick registering of all Deeds, Conveyances, and Wills, North Riding, 8 George 2, cap. 6 (effective Sept. 29, 1735); Langford, *Public Life and the Propertied Englishman,* 50.

> Occasions to borrow Money upon their Estates for managing their said Trade, but for want of a Register find it difficult to give Security to the Satisfaction of the Money Lenders (although the Security they offer be really good), by Means whereof the said Trade is very much obstructed, and many Families ruined.

It is notable that those promoting the registry emphasize that the need comes from the desire of "Traders" to mortgage land in response to the pressures of commerce. Moreover, the traders are "freeholders," meaning they are landowners, not tenants, and own their land in a form that allows them to mortgage it. They have "really good" credit and security, but the existing property law structure prevents them from convincing the "money lenders" from extending more on the basis of mortgages on land. In other words, the traders of York desired to use the wealth held in land as collateral to obtain funds to expand their trading operations. They thereby distinguished themselves from the landed elite, who often held some portion of their estates in illiquid form for the benefit of heirs, and for whom the property law offered political, economic and social stability. The English county-level statutes reveal the impact on credit markets contemporaries believed the registries to have.

In sum, colonial title recording involved no massive government surveying effort and was not linked to taxation. Although some colonies experimented with requiring recordation, most established a voluntary process. Under the voluntary recording system, whoever recorded a title or a mortgage gained priority over subsequent parties trying to record title or to mortgage the same property. The records did not confirm the validity of the title—what is referred to as registration—instead, the priority rule operated in the case of a conflict. The statutes enacting the recording regime were rooted substantively in older English fraudulent conveyance law but publicly searchable records were a new institutional solution to fraudulent conveyances that had not gained widespread acceptance in England. In sum, colonists adopted a low cost way to secure property rights and to promote credit markets. A secondary effect was that public

institutions played a far more central role in credit markets than in England. This made the issue of the fees imposed for institutional services highly political.

IV. *No Taxation without Representation: Legislative Control over Fees and Taxes*

Colonists came to rely heavily on courts and the offices that recorded mortgages and title transfers as a central underpinning of the credit economy they developed. These institutions were paid for by means of fees imposed for each institutional service. It is a remarkable feature of colonial history that, for the most part, public institutions underlying the economy such as courts and title recording offices imposed fees that reflect a payment for the services offered. In the colonial era, control over fees and taxes became a central power of the colonial representative assemblies. By the mid-eighteenth century, the delegation to representative colonial assemblies of the power to tax and impose fees had gained the general acceptance of the English authorities.[144]

The colonial assemblies assumed the power to tax in the early years of colonization. In one of the earliest formal meetings of the Virginia General Assembly, it held that the Virginia Governor's power would be limited in the following respect:

> That the Governor shall not lay any taxes or impositions upon the colony their lands or commodities other than by the authority of the General Assembly, to be levyed and employed as the said Assemble shall appoint.[145]

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[144] *See* Jack P. Greene, *The Quest for Power: The Lower Houses of Assembly in the Southern Royal Colonies, 1689–1776* (Chapel Hil: Published for the Institute of Early American History and Culture at Williamsburg, Va., by the University of North Carolina Press, 1963).

[145] The First Laws made by the Assembly in Virginia, No. 8 (1623) in Hening1 *Laws of Virginia,* 124..

Fees for institutional services were viewed as a tax. As Jack Greene has emphasized, in most colonies, the representative assemblies "came to regard fees as taxes and claimed the right to establish and regulate them by statute."[146] Royal instructions from England often gave the appointed colonial Governors' the power to set fees. But, as Greene shows, "the American lower houses denied the governors' authority to levy fees without their consent and almost always resisted any attempt to do so . . . ."[147]

Starting in the seventeenth century, colonial legislatures frequently enacted into law extensive schedules of fees documenting every institutional service and how much each would cost. The Massachusetts legislature, for example, established detailed fee schedules in 1692, in 1743, 1744, 1747, 1751, 1753, 1757, 1776, 1778 and then after the Revolution in 1782, in 1785, and in 1786.[148] The Virginia legislature in the colonial similarly enacted general schedules of fees in 1632, 1643, 1662, 1680, 1696, 1718, 1732, 1734, 1738, and 1745, with many more detailed laws relating to fees in other years.[149]

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[146] Greene, *The Quest for Power*, 148.

[147] Id.

[148] The fee laws of Massachusetts illustrate colonial legislatures' assertion of control over fee levels. See, e.g., 1 *The Acts and Resolves, Public and Private, of the Province of Massachusetts Bay* (Boston: Wright & Potter, 1869) (1692 fee schedule), 84-88; 3 *The Acts and Resolves, Public and Private, of the Province of Massachusetts Bay* (Boston: Wright, 1878), 13-18 [hereinafter 3 *Acts and Resolves of Massachusetts*]; 3 *Acts and Resolves of Massachusetts*, 101–07 (1743 fee schedule); 3 *Acts and Resolves of Massachusetts*, 176–81 (1744 fee schedule); 3 *Acts and Resolves of Massachusetts*, at 328–33 (1747 fee schedule); 3 *Acts and Resolves of Massachusetts*, 525–31 (1751 fee schedule); 3 *Acts and Resolves of Massachusetts*, 656–66 (1753 fee schedule); 3 *Acts and Resolves of Massachusetts*, 1032–38 (1757 fee schedule); 5 *The Acts and Resolves, Public and Private, of the Province of Massachusetts Bay* (Boston: Wright & Potter, 1886), 486-95 (1776 fee schedule) [hereinafter 5 *Acts and Resolves of Massachusetts*]; 5 *Acts and Resolves of Massachusetts*, 761–70 (1778 fee schedule); 1782–1783 Mass. Acts, 10–24 (1782 fee schedule); 1784–1785 Mass. Acts, 458–62 (1785 fee schedule); 1786–1787 Mass. Acts, 226–38 (1786 fee schedule). See also Robert J. Taylor, *Western Massachusetts in the Revolution* (Providence: Brown University Press, 1954), 31 (describing fee schedule revisions).

[149] Act 64 (1632) in Hening 1 *Laws of Virginia,* 176; Act 47 (1643) in Hening 1 *Laws of Virginia,* 266; Act 139 (1662) in Hening 2 *Laws of Virginia,* 143 ; Act 16 (1680) in Hening 2 *Laws of Virginia,* 485; Act 12 (1696) in Hening 3 *Laws of Virginia,* 153; Act 1 (1718) in Hening 4 *Laws of Virginia,* 59; Act 10 (1732) in Hening 4 *Laws of*

The level of the fees, of course, had a direct impact on all who relied on the institutions. There were *ex ante* and *ex post* effects of fees for institutional services. The fees levied to record titles and mortgages were direct costs paid by those acquiring land and lenders and borrowers. *Ex ante* (before the individual used the service), the level of fees would impact an individual's decision whether or not, for example, to record a land conveyance. The statutory fee level influenced the total amount of land and slave sales and mortgages recorded in an economy in which land and slaves were primary assets.

In contrast, court fees on litigation also posed an *ex post* problem for debtors and creditors. In the colonial era, court fees were imposed on the party losing the litigation. Court fees on debt litigation operated as taxes on debtors who were already unable to repay their debts (thus, taking away from the assets available to creditors as well). During times of widespread economic recession, the volume of litigation ballooned, increasing the total amounts extracted for the payment of fees.[150] Thus, it is not surprising that fees for institutional services were a contested political issue in the colonies.

As will be described in a later Chapter, the Stamp Act of 1765 was a Parliamentary tax on institutional services such as court processes and title recording. Parliament's decision to tax basic institutional services was viewed as a betrayal of the understood delegation of authority over fees and taxes to colonial legislatures. Moreover, by using institutions to generate revenue for the crown, the Stamp Act would have suppressed economic activity by making it more costly for colonists to avail themselves of services the economic culture had come to rely upon. That

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Virginia, 340; Act 10 (1734) in Hening 4 *Laws of Virginia,* 409; Act 10 (1738) in Hening 5 *Laws of Virginia,* 38; Act 6 (1745) in Hening 5 *Laws of Virginia,* 326.

[150] Priest, "Colonial Courts and Secured Credit," 2444-47.

the Stamp Act served as a breaking point propelling the movement for Independence reveals just how important institutions were to the colonial economy and to colonists sense of the proper realm of authority of the colonial legislatures.

In sum, imperial policies and institutional developments in the colonial era led to a society heavily reliant on legal institutions. British policy led to massive land distribution to individuals willing to cultivate it. Far more than in traditional English society, land was often viewed as a source of wealth that could be bought and sold, and used for collateral for debts. Slaves too were treated as assets and were a primary form of collateral driving the economy in many areas. Colonists relied on local institutions to record these transfers and mortgages of land and slaves. In addition, representative assemblies were highly active in creative institutions and in innovating, and setting fees. In the process, they empowered themselves vis-à-vis the crown.