THE EFFECT OF BANKRUPTCY LAW ON
ROMAN CREDIT MARKETS

Zachary Herz*

I. INTRODUCTION................................................................. 208
II. FACTUAL BACKGROUND.................................................. 211
   A. Bodily Collateralization in the Early and Middle Republics ..... 211
   B. The Late Republican Shift to Reputational Collateralization ..... 214
III. MODELING CREDITOR RESPONSES ..................................... 218
IV. EMPIRICAL EVIDENCE OF THE LATE REPUBLICAN/EARLY
   IMPERIAL PERIODS: TESTING THE HYPOTHESIS ..................... 226
   A. Property and Reputation as Determining Factors in Lending
      Decisions ................................................................. 233
   B. The Tablets of the Sulpicii: Credit Rationing in Action .......... 239
V. POSSIBLE SOURCES OF CREDIT FOR POORLY COLLATERALIZED
   BORROWERS ............................................................... 244
VI. CONCLUSION: THE LESSONS OF IMPERIAL ROME FOR MODERN
   CREDIT MARKETS? .......................................................... 246

ABSTRACT

Given the importance of lending to economies both ancient and modern, and given the widely acknowledged relevance of creditor and debtor protections for nurturing a vibrant and productive credit market, a large critical literature has developed exploring the intersection of law and lending. However, little work has been done analyzing the role of default law in historical credit markets, particularly those in the ancient world. This article attempts to remedy that gap by considering the interaction between Imperial Rome’s famously pro-debtor default laws and its idiosyncratic credit practices. By constructing a hypothetical model derived from economic analysis of foreign and domestic credit markets and comparing that model’s predictions to literary, historical, and documentary evidence of late Republican and early Imperial lending behavior, this article demonstrates the applicability of a law-and-economics analysis to the Roman world and provides a

* J.D., Yale Law School; Ph.D. Candidate, Classical Studies, Columbia University. This article has benefited enormously from the feedback of William Harris, Marco Maiuro, James Whitman, Edward Janger, Elizabeth Scharffenberger, David Ratzan, and others too numerous to mention. All citations to the Digest are to the 1985 edition, as edited by Theodor Mommsen, Alan Kreuger, and Alan Watson. All citations to other ancient texts refer to Loeb Classical Library editions, unless otherwise stated, and such texts are titled according to the conventions of that series. All translations are my own, unless otherwise stated.
historical study into the dangers of excessive debtor protection without highly sophisticated risk-sorting procedures on the part of creditors.

I. INTRODUCTION

“Sum quidem prope totus in praedii, aliquid tamen ff[a]enero.”\(^1\) While past scholars have treated the Roman economy as “conspicuously conventional, irrational and status-ridden,”\(^2\) in recent years it has been supplanted by a model that is more market-oriented, more economically savvy, and most importantly, more true to its sources.\(^3\) While this modernizing model of Roman law has already caught the attention of legal and economic scholars,\(^4\) what work exists on Roman debt law proceeds according to Finley’s model and posits credit as a locus for class warfare or elite socialization.\(^5\) It is clear from primary sources that this cannot be entirely true, and in fact, recent analyses of the Roman economy assume a thriving credit market. However, no one has yet performed a rigorous analysis of how Imperial debt law might have affected credit market size and efficiency. The major analytic text on the subject, Gustav Billeter’s GESCHICHTE DES ZINSFUSSES IM GRIECHISCH-RÖMISCHEN ALTERTUM BIS AUF JUSTINIAN,\(^6\) is over a century old, and further analysis of the topic has been primarily descriptive.\(^7\) This is particularly frustrating given the importance of Roman credit law to our modern ideas of lending. Rigorous comparative work is necessary to better understand how credit markets respond to different kinds of legal stimuli, and how a bankruptcy code that

---

1. PLINY THE YOUNGER, EPISTLES 3.19.8 (“I am almost entirely based in land, but I still lend out a little something.”).
3. See, e.g., RICHARD DUNCAN-JONES, MONEY AND GOVERNMENT IN THE ROMAN EMPIRE (1994). Recent work by Richard Duncan-Jones, David Hollander, William Harris, and many others has shown a level of economic sophistication in Roman markets far greater than that theorized previously. See, e.g., DAVID HOLLANDER, MONEY IN THE LATE ROMAN REPUBLIC (2007); William Harris, A Revisionist View of Roman Money, 96 J. ROMAN STUD. 1 (2006).
6. GUSTAV BILLETER, GESCHICHTE DES ZINSFUSSES IM GRIECHISCH-RÖMISCHEN ALTERTUM BIS AUF JUSTINIAN (1898) (HathiTrust ed. 2010).
is foundational to our own\textsuperscript{8} responded to the basic tension between fair treatment of debtors and encouraging lenders to enter the marketplace.

This article focuses on one aspect of the Roman credit economy—how late Republican and early Imperial moneylenders managed risk under the prevailing legal regime. This period is particularly germane due to major “modernizing” debt reforms that occurred in the late Republic. In contrast to a prior regime in which defaulters faced inescapable liability leading to slavery or death, debtors gained the ability to avoid personal liability for debt by forfeiting assets and accepting certain status penalties.\textsuperscript{9} Unfortunately, the existing scholarship on this issue takes a rather simplistic view of these reforms. For example, Martin Frederiksen argues that the Lex Julia de Bonis Cedendis (which established cessio bonorum) was an uncomplicated boon to the Roman lower class,\textsuperscript{10} and in the legal sphere, Judge David Kennedy refers to Caesar’s treatment of insolvents as “enlightened and compassionate.”\textsuperscript{11} However, this version of events assumes moneylenders were almost laughably unsophisticated.

If an individual can declare bankruptcy with almost no penalty—and, therefore, cannot be compelled to pay back his loans—no economically rational moneylender will work with him (at least not for anything less than exorbitant interest, and Roman interest rates had been capped since at least the Twelve Tables).\textsuperscript{12} This basic rule can be intuited easily enough, and it has been confirmed by several recent empirical studies that creditors are noticeably less likely to lend in regulatory environments that restrict their ability to seize property from delinquent borrowers.\textsuperscript{13} While the reforms


\textsuperscript{9} The procedure is commonly known as cessio bonorum. As to the availability of after-acquired property to satisfy suits, there is a disagreement in the sources. Cassius and Sabinus feel that cessio prevents the debtor from ever again being sued to recover debts outstanding at the time of the procedure (making cessio’s protection somewhat equivalent to a never-ending automatic stay, see 11 U.S.C. § 362(a) (2012)), whereas Ulpian and Modestinus feel that creditors should be able to sue for property acquired later, Dig. 42.3.4–7. Given that this is an article about early Imperial debt law, Cassius and Sabinus, both of whom were writing about the law during the first century C.E., seem more trustworthy than the third-century jurists Ulpian and Modestinus. Ulpian in particular suggests that this procedure changed after the first century. See Dig. 42.3.4.1 (Ulpian, Ad Edictum 59); infra notes 195–198 and accompanying text.

\textsuperscript{10} Frederiksen, supra note 5, at 141 (referring to the Lex Julia de bonis cedendis “honourable role”).


\textsuperscript{12} The exact language of the Twelve Tables is ambiguous, but all scholars agree that the text contains some form of usury law; see infra notes 19–22. That said, Roman usury laws for the period I discuss are somewhat better understood. See Koenraad Verboven, The Sulpicii from Puteoli and Usury in the Early Roman Empire, 71 LEGAL HIST. REV. 7, 8–9 (2003).

\textsuperscript{13} It should be noted that, in many cases, this seizure is not as much compensatory as it is punitive. This article will deal in large part with shaming punishments and other measures designed to affect the status of a delinquent borrower. While these may at first appear to be different in kind from the foreclosure system discussed in Part IV, these types of punishments are a common weapon in
Frederiksen describes would clearly have been tremendously helpful to those already indebted during Caesar’s period, we must consider these reforms’ effects on later activity. As it happens, the evidence shows lenders not only evaluating default risk in their credit decisions, but also taking debtor protection laws into account while doing so.

This article shows the relationship between debt law and Roman credit markets in six parts. Part II is a basic history of Roman credit regulation, culminating in the Caesarean debt reforms. This Part discusses how Rome’s credit market transformed from one based on bodily collateral to one based primarily on reputation. Part III examines modern research on credit markets and offers a hypothesis regarding how Roman lenders might have behaved, followed by an example of similar behavior in the context of Roman contracts. Part IV tests this hypothesis against the evidence for lending in Italy during the late Republican and early Imperial periods. After discussing the prevalence of money hoarding, lending within social circles, and other risk-minimizing behaviors in late Republican and early Imperial Rome, this Part examines the records of a commercial lending operation in Imperial Italy to determine what sort of borrowers were most welcome there. Part V offers some hypotheses on how Roman credit markets could have functioned under such strong restrictions on debt collection and collateralization, and examines the evidence for a potential shift in the treatment of default in later Roman law. Finally, Part VI considers whether this material is any way germane to modern lending, particularly given the wave of defaults that sparked the 2008 financial crisis.

But first, a caveat: A reader may notice that the model described above is remarkably light on specific numbers. It is one thing to say that borrowers of a certain legal status could consequently borrow at lower interest; it is another thing entirely to say what that lowered rate was. Here, regrettably, the single best source is Gaius:

[S]o far as money is concerned, although it might seem to have one and the same power everywhere, still, in certain localities it is more easily obtained and at a lower rate of interest than in others, where it is harder to get and the rate of interest is heavy.14

---

This variance is beyond dispute. Different regions of the Roman Empire employed different credit systems and enforcement mechanisms; it only stands to reason that the interest charged would vary accordingly.\(^\text{15}\) Unfortunately, when this natural variation is combined with the almost total lack of documentation of most loans, it becomes impossible to arrive at any useful estimate of actual rates of interest or aggregated credit activity. However, a project examining Roman credit can still be worthwhile as long as it stays in the bounds of available evidence, as this article (hopefully) does.

II. FACTUAL BACKGROUND

To properly model credit markets’ response to changes in Imperial debt law, one must first understand what those changes were. As such, this article begins with a simple summary of Republican debt law and how it had changed by the early Imperial period. Our earliest evidence of Roman laws of default shows a system of what could be called bodily collateralization—delinquent borrowers faced bodily punishments, ranging from debt-bondage to death.\(^\text{16}\) As time went on, this system became increasingly unstable, and Roman debt law came increasingly to rely on shaming punishments and property seizure to deal with default.\(^\text{17}\) The interaction between property seizure and collateralization is abundantly clear, but these shaming punishments served a similar function; the borrower who forfeited his reputation in default lost a good he would rather not part with. While “seizing” reputational capital in this way did not compensate creditors, it served as a strong deterrent.

A. Bodily Collateralization in the Early and Middle Republics

Our earliest information about Roman credit law depicts a legal regime relying on debt-bondage and other physical punishments to keep borrowers

---

\(^{15}\) See DUNCAN-JONES, supra note 3, at 176–77 (discussing possible causes for this phenomenon).

\(^{16}\) This term is hardly novel, but its usage in legal history appears to be. Elizabeth Grosz, commenting on Friederich Nietzsche’s exegesis of early Roman debt law in ON THE GENEALOGY OF MORALS (1887), refers to “bodily collateral” as underlying these sorts of contracts, but is primarily concerned with the moral, rather than mercantile, implications of such a system. Elizabeth Grosz, Nietzsche and the Stomach for Knowledge, in NIETZSCHE, FEMINISM, AND POLITICAL THEORY 49, 66 (Paul Patton ed., 2002). Gilles Deleuze also addresses the relationship between physical punishment and debt in the context of the Twelve Tables, but reads the relationships as metonymic rather than collateral; GILLES DELEUZE, NIETZSCHE AND PHILOSOPHY 134 (Hugh Tomlinson trans., 2006). While philosophers have addressed the ethical implications of linking bodily integrity and safety to credit, to my knowledge no one has seriously considered the impact of this form of collateralization on credit availability and market function.

in line. First, a note on sourcing: while Livy and Dionysus of Halicarnassus (among others) discuss economic concerns of the period from the fourth to first centuries B.C.E., they write from a later period animated by sharply different concerns, and this difference is visible in their work. While these later literary sources are probably correct on broad points of the period’s history, we simply do not have sufficiently reliable or detailed information to support anything more than a cursory overview of early Republican debt law.

We do, however, have two direct citations from the Twelve Tables on the subject of moneylending, both relevant to the present inquiry. First, the Tables place an explicit limit on interest rates; assuming Tacitus is quoting (or paraphrasing) the laws correctly, moneylenders were prohibited from charging greater than the fenus unciarium, or the “one-twelfth interest.”

Unfortunately, while the maximum legally permissible interest rate would have been quite clear to the Tables’ intended audience, it is much less clear to us. Billeter places the fenus unciarium at 8⅓% of principal per annum, whereas Barlow argues lenders could charge up to 8⅓% of principal no matter when the loan was called in (meaning, for example, one could loan out $100 and expect $112 back within three months for an annualized interest rate closer to 50%). Billetter’s reading seems to be better supported by the text. Either way, however, such a system must

18. See XII TAB. 8.18a, quoted in Tacitus, Annals 6.16. Given that the Twelve Tables were a public law code, it seems unlikely that Tacitus is making this up out of whole cloth—I would argue he is at least somewhat credible in his quotation of the text, even if the passage quoted does not survive directly. The reference to faeneratores should not be read (as Barlow rightly points out) as corresponding to the later use of the term for moneylenders more generally; Barlow, supra note 17, at 17. Given that the Tables are already establishing a maximum permissible interest rate, the only logical reading of this text is that the term refers solely to those charging interest over the permissible rate. Faenerator here reads better as “usurer” than as “moneylender.” For an in-depth treatment of the ambiguities surrounding the term faenerator, see Koenraad Verboven, Faeneratores, Negotiatores, and Financial Intermediation in the Roman World (Late Republic and Early Empire), in Pistoia Dain Ten Tecnhen: Bankers, Loans, and Archives in the Ancient World 211, 213–15 (Koenraad Verboven et al. eds., 2008).


21. Barlow admits these loans could have wildly varying terms, as they were likely used for anything from seed money (thus covering the entire period between planting and repayment at harvest) to desperation funds to tide over a family for the last few weeks of winter. Id. Therefore, the law as Barlow conceives it essentially regulates nothing. A two-year loan with interest amounting to 8⅓% of principal strongly favors the borrower; a two-month loan with the same is abusive, and Barlow’s reading of fenus unciarium treats them both equally. It is simply impossible for lawmakers to think in this way, or to draft a prohibition that could be so easily sidestepped by shortening the terms of the loan. One should note that while Roman debt law did eventually adopt restrictions on total interest as a percent of principal like those Barlow hypothesizes here, those restrictions not only co-existed with caps on annual interest, but also capped total interest at a vastly higher proportion of principal (specifically at 100%). Verboven, supra note 12, at 8–9; see also Morris Silver, Finding the Roman Empire’s Disappeared Deposit Bankers, 60 Historia 301, 312 (2011) (discussing the implications of these credit restrictions). While Barlow is correct to point out the lack of other evidence for prorating of interest charges, Billeter’s reading of the law still makes more sense as a response to perceived social needs.
strike us as very peculiar, as interest rates in the ancient world are generally bound at the minimum to yearly returns on land investment, which hover around 12%. This forms an effective minimum on interest rates, since if creditors cannot receive returns at a higher rate, they will simply invest their capital in landholdings instead. How could early Republican credit markets have supported such a low maximum rate? As it happens, another excerpt from the Twelve Tables suggests a possible solution.

Early Republican bankruptcy law had severe penalties for default; Festus cites the Twelve Tables in reference to a procedure known as *nexum*. While this section of the Tables does not define the institution to which it refers, *nexum* is described in more detail in later authors, and it seems reasonable to presume that it carries the same meaning here: that creditors could make demands on the physical freedom of their debtors. The exact mechanics of *nexum* are unclear; Livy and Dionysus of Halicarnassus describe a form of indentured servitude in which borrowers worked off a debt, while Varro suggests *nexum* was instead a punishment for defaulters who were then forced into slavery. Of course, the Twelve Tables laid out a far harsher punishment for those unable to pay back a loan. Defaulters were seized and publicly exhibited, following which they could be sold into permanent slavery (with the price of sale going to pay off the loan), or possibly even killed. The evidence as to what actually


23. XII Tab. 6.1., quoted in Festus, De verborum significatu 173 (“cum nexum faciet, mancipiumque, uti lingua nuncupassit, ita ius est”).


26. Varro, supra note 24, at 7.105. One should note, however, this statement is ambiguous, and its interpretation depends highly on one’s reading of *debebat*. While this distinction would undoubtedly be highly relevant to the early Republican debtor, it is less so for the present project.

27. XII Tab. 3.1–6, quoted in Aulus Gellius, *Attic Nights* 20.1.42. This procedure is also referred to as *addictio*. Adolf Berger, *Encyclopedic Dictionary of Roman Law* 348 (1953); J.A. Crook, *Law and Life of Rome* 90 B.C.–A.D. 212, at 172–73 (1967); MacCormack, supra note 24, at 354.

28. Scholars have debated whether or not the punishments listed here reflect reality, or even whether they are a proper reading of the text as it is passed down. To give a few examples of the diversity of readings of this text, Alan Watson reads these procedures as comically extreme threats which would never have been practiced; Herbert Jolowicz argues they are standard punishments compared to other laws of the period; and Geoffrey MacCormack argues the text does not in fact allow for the slaying of a debtor, but merely a loss of status. While MacCormack’s argument in particular veers towards the absurd (with him being forced to claim that an explicit provision for the cutting up of a debtor’s body in fact only held force when a debtor died of natural causes within sixty days of imprisonment), these arguments demonstrate how unclear the surviving text is on its particulars.
happened to delinquent debtors in the early Republican period is contradictory, anachronistic, and vague; we do not know what might cause a debtor to undergo forced labor or physical punishment. However, all theories of early Republican debt law contain an important proviso that is absent from later debt regimes; the borrower mortgages his physical freedom as part of the debt.

This phenomenon can be best understood as bodily collateralization: the borrower offers to forfeit his physical integrity either as a condition of the loan or as a hedge against the losses incurred through default. This effectively allowed the vast majority of prospective early Republican borrowers to put forward collateral; while those who were not free or who were too infirm to provide much value would obviously be less well-collateralized than others, all borrowers have a body. The interplay between collateral and credit markets will be discussed in more detail in Part III, but it should suffice to state (for now) that creditors generally prefer lending to individuals who have collateral which can be seized in case of default. The laws of the Twelve Tables, while clearly quite harsh, allowed for extensive collateralization across all classes. This is a possible explanation for the abnormally low maximum interest rate found in the Twelve Tables, and almost certainly led to the development of a credit market that allowed for substantial lending to individuals without large holdings.

That said, this system had fallen out of favor by the late Republic, and by understanding how Roman debt law shifted from this system of near-universal bodily collateralization to one which was far more reliant on reputational capital, we can begin to develop a model of how credit markets would have responded to these changes.

B. The Late Republican Shift to Reputational Collateralization

Our sources describe substantial unrest in the Middle Republican period over debt policy. The exact mechanics of these reforms are both

---

29. Assuming it is, in fact, abnormally low. See supra note 21.
30. See, e.g., Dionysus of Halicarnassus, supra note 25, at 16.5; Livy, supra note 24, at 8.28; Valerius Maximus, Memorable Doings and Sayings 6.1.9. While all of these authors are writing well after the period in question, it seems notable that all of them refer to a large credit market in this period, even while disagreeing on individual events.
31. See, e.g., Livy, supra note 24, at 6.34–42; Barlow, supra note 17, at 36–46. Again, the fact that all extant histories of the period describe substantial unrest is strong, if not conclusive, evidence for its existence. Furthermore, to the extent this article is primarily concerned with late Republican and early Imperial reactions to changes in default law, any perceived link between civil unrest and lenient treatment of defaulting debtors would be highly relevant, whether or not it reflected historical reality. In a nutshell, this is probably true, but its truth doesn’t matter.
impossible to know and well outside of the scope of this article. For our purposes, what is relevant is the end result of these changes; *nexum* was outlawed, likely in the fourth century B.C.E., as were some of the harshest punishments for debtors. One of the most important changes to Roman debt law was the late Republican innovation of *cessio bonorum*; a debtor could declare his inability to pay (an action known as *decoctio*, which shall be discussed in greater detail below) in front of a magistrate, forfeit his remaining assets, and escape personal liability for the remaining debt. The defaulter could thus escape debt while remaining free and physically secure. These changes drastically altered the options available to late Republican and early Imperial creditors, who could no longer rely on access to the physical person of a defaulter; creditors were instead granted access to debtors’ property, as well as the ability to inflict reputational harm.

The first remedy available to lenders is one which survives to this day; the seizure of property. This remedy is attested in other contexts as early as the Twelve Tables, but by the late Republic the seizure of property from a delinquent debtor was an established method of dealing with default. Under this legal procedure, known as *bonorum venditio*, a creditor could enter the home of a debtor, remove all property that may be removed, set up a guard over all non-movable property, and arrange for the goods to be sold at auction. While this tactic was rarely used—at least in the late

---

34. This action is described in greatest detail in Frederiksen, *supra* note 5, at 135–38.
35. Specifically, the *praetor*.
37. This was not true in all parts of the Empire; Egyptian debtors, for example, often relied on an illegal, but nevertheless frequent, custom of escape to the deserts beyond the Nile Valley, known as *anakhoresis*. This would have constituted effective discharge—while there are records of occasional attempts to reintegrate *anakekhoretore* into their home regions, these were too irregular to do much and were in some cases accompanied by explicit offers of discharged tax liability. See 2 A.H.M. DUNCAN-JONES, *THE LATER ROMAN EMPIRE* 284–602, at 812–13 (1964) (discussing this phenomenon in a later period). This article focuses primarily on Italian markets, however.
38. XII TAB. 12.1., quoted in G. INST. 4.28.
40. The procedure itself was likely established in the late second century B.C.E., by the *praetor* Publius Rutilius; G. INST. 4.35. Again, the concept of foreclosure at auction should be familiar to us—state debt collection laws generally permit abrogation of a delinquent debtor’s property rights in order to satisfy a lien. E.g., *Conn. Gen. Stat. Ann.* § 49-22 (2012); *N.Y. Lien Law* § 50 (2012). However, while seizure and auction can be effective remedies for the individual creditor, they can generate extremely perverse incentives in the context of a multi-creditor default; this concern about “racing to the courthouse” arguably animates the modern Bankruptcy Code. See Elizabeth Warren, *Bankruptcy Policy,* 54 U. CHI. L. REV. 775, 777 (1987) (“I see bankruptcy as an attempt to reckon with a debtor’s
Republican period—it was clearly an option for creditors, and a powerful one. Crook suggests that propertied individuals would have gone to great lengths to pay off their debts before venditio came into play. However, to raise an obvious point, the amount of money raised by bonorum venditio is limited by the amount of property possessed by the debtor. This institution, if viewed as a replacement for legally sanctioned debt-bondage, markedly restricts the amount of collateral that certain prospective borrowers could produce. Specifically, this change would hinder collateralization among debtors without substantial wealth. The body or labor of a wealthy debtor would be only a small part of the total value of his holdings; the labor of a less-propertied debtor would constitute much more of his package of collateral. This change (from a system of bodily collateralization to one in which lenders could recoup their investments primarily through property seizure) would have very little impact on wealthy debtors while drastically altering poorer borrowers’ ability to collateralize.

However, bonorum venditio was not simply a method of collection. It was also a form of social violence; Cicero uses his description of the practice to gain sympathy for his client, and Petronius as proof of the defaulter’s buffoonery and degraded status. Obviously, these sources describe individual experiences, but both speakers assume that their audience (the Senate in Cicero’s case, and the reader in Petronius’) will be reasonably sympathetic; we can assume that the humiliation described by Cicero and avoided by Petronius’ freedman would not have been alien to others. Other methods of collection explicitly aim to humiliate the debtor; creditors were empowered to raise a mob in order to demand money (flagitatio) or to notify the public about the debt in written form.

Roman law never developed the institutions modern law uses to sort out the rights of individual creditors, most specifically the idea of the bankruptcy trustee managing liquidation on behalf of the creditors as a class—if the sources allowed it, a study of creditors’ attempts to negotiate their way through such situations in the absence of institutional mediation could be fascinating.

41. CROOK, supra note 27, at 170–76; but see PETRONIUS, SATYRICON 38 (“inclinatis quoque . . . rerum supervacuuarum”). At least by Petronius’ period, venditio (and the fear thereof) was widely enough known to be played for comic effect.
42. CROOK, supra note 27, at 174.
43. Minus, of course, the expense of the auction. Furthermore, it is by no means clear what sort of price could be gotten under such conditions; foreclosure sales often realize prices far below those resulting from leisurely negotiation. It is unclear why that would be any less the case in auctions carried out without the benefit of modern notification or pricing mechanisms. Forced liquidation would be an unattractive option then for creditors, but undoubtedly much more so for debtors; the specter of family property being sold to strangers on an auction block would have likely generated substantial in terrorem effects. See Alan Schwartz, The Enforceability of Security Interests in Consumer Goods, 26 J.L. & ECON. 117, 149 (1983) (defining in terrorem repossession).
44. CICERO, supra note 39, at 49.
45. PETRONIUS, supra note 41, at 38.
46. See J.M. KELLY, ROMAN LITIGATION 21–23 (1966). It should be noted that the term flagitatio
Both practices allow creditors to inflict reputational harm on those in default; an individual who was wrongfully subjected to *proscriptio* could sue under the same cause of action given to the object of defaming poetry or songs. *Proscriptio* was clearly a defaming punishment, and *flagitatio*—a nearly identical practice—had a similar effect.

This interplay between social esteem and credit extends to the peculiar and class-asymmetric penalties attached to formalized default, or *decoctio*. While *decoctio* is relatively rare in surviving formal legal material, the practice is well attested in other sources, as are the consequences thereof. It seems clear that *decoctio* was generally a shameful action, and a public one. Assuming Cicero’s discussion of the *Lex Roscia* is not entirely fictional, senatorial *decoctores* could not easily hide their status without refusing to attend games. *Decoctio* had political implications as well; defaulters were formally barred from public office and, judging by Cicero’s use of the accusation of *decoctio* in the *Philippics*, it seems probable that the claim would have seriously harmed any debtor’s aspirations to public life.

One final important feature of Roman debt law was a well-articulated system of suretyship; individuals could serve as guarantors for the loans of others, and if the original borrower were to default, these sureties would be liable for the full balance. While this institution played a large role in bears a close etymological relationship to forms of sexual shame; Catullus uses the term in reference to an adulteress, and men who had been anally penetrated were referred to as *flagitati* in early Latin. Catullus, Poems 42.10; Jonathan Walters, *Making a Spectacle: Deviant Men, Invective, and Pleasure*, 31 Arethusa 355, 359–61 (1998). Subjecting a debtor to *flagitatio* was not merely financially degrading, then, but appears to have touched on broader notions of morality and social acceptability.

---

47. See G. Inst. 3.220.
48. Id.
49. CROOK, supra note 27, at 176. See also G. Inst. 4.102 (discussing *decoctio* in legal discourse).
50. See, e.g., CATULLUS, supra note 46, at 41.4; CICERO, PHILIPPIPS 2.18; Pliny the Elder, *Natural History* 33.134; Seneca, *De Beneficiis* 3.17.4; Valerius Maximus, *supra* note 30, at 6.9.12. *Cessio bonorum* was also quite common in Egyptian papyri, where it served as a formal defense against unsupportable civic obligations. See, e.g., Naphtali Lewis, *The Compulsory Public Services of Roman Egypt* 103–9 (1997). However, this practice is so bound up with the Egyptian system of liturgies that I am hesitant to use it in support of broader claims about Italian credit.
52. A law which, according to Cicero, established special seating for *decoctores* at public events. See Cicero, supra note 50, at 2.44.
53. Id.
54. The text of this law has been most recently published in Allan Chester Johnson et al., *Ancient Roman Statutes* 96 (2003).
55. This would be particularly true given the necessity of available credit for aspiring politicians, particularly in the late Republic. See Israel Shatzman, *Senatorial Wealth and Roman Politics* 143–76 (1975) (discussing the expense of Roman political activity).
56. Sureties are common in the ancient sources and are discussed frequently in the modern ones as well. See, e.g., CROOK, supra note 27, at 247; Verboven, supra note 5, at 143–48 (2002); Verboven, supra note 18, at 224. This phenomenon is also common in modern credit transactions, as most
credit markets, as far as we can determine, it did not alter the sorts of remedies available; sureties who were unable to pay back the loans they had guaranteed were treated identically to debtors who could not pay back the loans they had received.\(^{57}\)

We can see that late Republican and early Imperial borrowers collateralized very different goods than did those in Rome’s earlier history. By the Imperial period, creditors were legally forbidden from accessing the physical persons of debtors, either by compelling labor as a form of payment on the loan or by outright seizure and sale (or execution) of the borrower in default. In other words, borrowers could not use their labor or physical integrity as a form of collateral.\(^{58}\) Instead, creditors were empowered primarily to seize property, to humiliate debtors, and to strip them of certain aristocratic privileges. Thus, borrowers were collateralizing property (which is hardly unusual) and, more importantly, collateralizing their reputations. While inflicting reputational harm obviously would not compensate a creditor facing a delinquent debtor, it would incentivize repayment, particularly among those with the most to lose. These penalties are notably class-asymmetric; someone involved in public life would suffer far more by this sort of humiliation than a private citizen, given that the privileges at issue were already reserved to elites.

At this point, we have enough basic information on the legal structures governing Imperial debt to begin to discuss how changes to those structures might have affected credit markets. Unfortunately, there are not enough data from this period to simply examine these markets themselves; instead, this article uses empirical studies of modern credit interactions to develop a theoretical model, which it then tests against literary, historical, and documentary evidence from early Imperial Italy. This model suggests that instituting reputational collateralization harmed Roman credit markets, particularly their ability to serve low-wealth borrowers.

III. MODELING CREDITOR RESPONSES

By the end of the Republic, creditors’ power to seize collateral had shifted profoundly; instead of claiming access to debtor’s physical person, creditors were limited to shaming punishments and property seizure.\(^{59}\) In a

---

57. Sureties, of course, had an action against the defaulting borrower. See Dig. 20.1.2 (Papinian, Opinions 3); Crook, supra note 51, at 368.

58. Although, notably, Roman law did allow certain individuals to use their labor to meet legal obligations, and to treat this labor as essentially fungible with cash—liberti (freedmen) could satisfy their obligations towards their former owners with cash payments or, alternately, the assignment of a set number of workdays under a sort of corvée system. Crook, supra note 27, at 52.

59. To be clear, I am not referring exclusively, or even primarily, to property that was collateralized by the granting of a specific security interest. Security interests (hypothecae) could be granted on specific pieces of property. See Dig. 20 (discussing specifically legal issues raised by
strict sense, this regime was far more “pro-debtor” than what came before—
these reforms were designed to gain favor with those already in debt, and
losing one’s dignity is obviously preferable to losing one’s freedom or
limbs. That said, creditors would have been just as aware of the law as their
potential clients, if not more so. As such, to understand the impact of
these reforms on Imperial credit, one must consider how creditors would
have reacted to the new laws.

This Part attempts to develop a hypothetical model of creditor
behavior in the early Imperial period. This model relies largely on
empirical research on bankruptcy and credit markets in modern economies;
while there is obviously no exact correlation between modern and historical
economic institutions, modern research shows that, across a wide variety of
legal cultures, creditors are far more likely to lend when they have the
power to seize collateral from delinquent debtors. When creditors cannot
easily collect from borrowers in default, they are more likely to restrict
lending, particularly to poorly collateralized borrowers. The model thus
suggests that late Republican and early Imperial creditors would be
markedly less willing to lend than their predecessors, and that this tendency
would be especially pronounced for borrowers without substantial real or
reputational collateral.

Intuition alone suggests that these reforms would have made many
potential creditors skittish about lending to the poor. As discussed above,
the penalties attached to default in this period were notably class-
 asymmetrical; a large class of people would have been able to default with
essentially no formal punishment. Assuming that creditors wanted to
minimize their losses from default, one would expect them to be very
reluctant to lend to this class. Of course, creditors might simply increase
their interest rates in response to these legal reforms; while lenders
would still lose money on those who defaulted, those costs could be amortized
over larger revenues gleaned from the class as a whole.

hypothe}
This was probably not creditors’ primary response to the new debt regime, however, for three reasons. First, as Emily Lin and Michelle White discuss, increases in the interest on a loan increase the rate of default and, thus, naturally limit creditors’ ability to mitigate potential default losses. Second, Joseph Stiglitz and Andrew Weiss argue that, without careful differentiation between desirable and undesirable borrowers, high interest rates can drive good borrowers away, increasing the lender’s risk further and leading to a form of adverse selection. Finally—and most importantly—Roman law featured hard caps on interest rates dating back to the Twelve Tables. As such, lenders would have been legally constrained from offsetting default risk entirely through raising interest rates. While it is not clear how—or how effectively—usurious lenders were punished, it seems clear that lenders would have had only a limited ability to insure themselves against default. As such, one would expect an economically sophisticated lender to simply refuse to extend credit to those who presented unacceptably high default risks. Under the lending system previously in place, lenders could be confident of attaining at least some return, either because they would have had access to the borrower’s labor through the practice of *nexum* or because the punishments for debt were so severe that they could be confident in a borrower making repayment a first priority. Without that, fairly substantial credit rationing would likely result.

This model makes a great deal of intuitive sense, but more importantly, it is supported by a wide variety of recent empirical studies. Following Rafael La Porta’s development of a quantifiable metric for creditor protections, social scientists have devoted considerable energy to determining the effect of a country’s legal regime on the size of its credit market. They have found, perhaps unsurprisingly, a strong correlation between creditors’ abilities to seize collateralized property and a large credit market. These findings—while obviously limited to modern states—

64. See supra notes 18–22 and accompanying text.
65. See Verboven, supra note 12, at 8–9.
67. See supra notes 33–43 and accompanying text.
69. I refer primarily to Simeon Djankov et al., *Private Credit in 129 Countries*, 84 J. FIN. ECON. 299, 316 (2007), but see also, e.g., Ross Levine, *The Legal Environment, Banks, and Long-Run Economic Growth*, 30 J. MONEY, CREDIT, & BANKING 596, 610–11 (1998) (focusing primarily on the correlation between creditor rights and GDP growth rate, but explaining that correlation primarily through an empirically demonstrated connection between creditor rights and the size of the banking
extend across several different regions with different legal and cultural traditions. Simeon Djankov et al. also found that, in countries which had recently established stronger legal protections for creditors, these reforms preceded expansion of credit markets, suggesting that creditor-friendly legal regimes grow credit markets, and not the other way around. These findings have been duplicated in other studies; Rainer Haselmann et al., separating out the “creditor rights” set forth by La Porta et al. into different classes, found that credit markets were far more responsive to rules giving creditors greater access to collateral generally than to rules laying out an orderly and predictable procedure for collateral collection in the event of default. This comparative evidence, drawn from a far larger and more detailed data set than anything that could be found in the ancient world, strongly suggests that lenders consider their ability to seize collateral when making credit decisions.

The correlation this literature suggests—between creditor protections and a thriving credit market—forms a critical part of this article’s hypothetical model; nevertheless, these studies are insufficient to determine the effect of such regulation on individual credit decisions. First—and this is a minor critique—the relationship between total credit and national GDP could be dominated by transactions with no corollary in the Roman economy. Furthermore, these studies only track the size of credit markets generally, with no discussion of how a default regime might affect individual credit decisions or of what factors creditors may privilege in making those decisions. Fortunately, studies of American lending practices provide the information on individual credit decisions that is necessary for a more rigorous theoretical model for Roman credit.

If Djankov et al. and Haselmann et al. have demonstrated a general link between lender protections and healthy credit markets, recent studies of American lending provide us with data that may be more applicable to the situation at hand. Emily Lin and Michelle White’s 2001 study of the relationship between American bankruptcy law and home improvement and mortgage loans discusses a type of credit which is, arguably, quite

---

70. Djankov et al., supra note 69, at 318–23.

71. Haselmann et al., supra note 69, at 567–68. These findings are particularly important, given that the institution of cessio bonorum altered collateralization while leaving collection procedures as they were—essentially, as a close analogue to the race to perfection still seen in many state law collection systems. See supra note 40. Because the states analyzed by Djankov et al. mostly instituted radically different collection procedures at the same time as they were altering collateralization regimes, Haselmann et al.’s research eliminates the potential lurking variable creditor ordering could otherwise present.

72. This is an obvious point, but credit transactions that rely on a fairly advanced corporate form which allows for the creation of a new, property-owning legal entity—such as the leveraged buyout—could not be performed under the Roman corporate institutions of societas and peculium. See Hansmann et al., supra note 4, at 1356–61.
analogous to that at issue here.\textsuperscript{73} While these specific credit instruments were obviously not an issue in the Imperial period,\textsuperscript{74} this sort of activity (lending to private citizens for the purpose of capital improvements) fits the ancient material better than broader samples that include corporate lending. Lin and White’s findings accord with those of Djankov et al.; examining data released in compliance with the Home Mortgage Disclosure Act from 1992 to 1997, Lin and White showed a significant negative correlation between protection for delinquent debtors and availability of home purchase and improvement loans.\textsuperscript{75} These data are, I believe, more on-point than those discussed above; because Lin and White restricted their study to loan applications made by private citizens, their data set more closely resembles the credit activity at issue.\textsuperscript{76} Notably, Lin and White also show a correlation between borrower income and credit decisions, but they do not discuss whether income significance varies across different regimes; it may be useful to see whether income (or wealth generally) becomes more or less important as bankruptcy laws become less severe. As it happens, evidence on American lending shows that credit rationing in response to debtor-friendly default laws falls mainly on the backs of the poor.

Reint Gropp et al.’s survey of consumer lending under different bankruptcy regimes supports the findings of Djankov et al., Haselmann et al., and Lin and White; tighter restrictions on what lenders can seize as collateral from delinquent debtors lead to greater credit rationing generally.\textsuperscript{77} Gropp also found, however, that this correlation itself

\textsuperscript{73} Lin & White, supra note 62, at 148–51 (describing the authors’ dataset).

\textsuperscript{74} Although loans for the purchase of real property were almost certainly available: considering the nature of certain kinds of cash crop agriculture, it is difficult to imagine, for example, viticulture functioning without the ability to finance capital purchases, as well as the early years of cultivation at a loss, without a functional credit market serving such vintners. COLUMELLA, ON AGRICULTURE 3.3.8–12; DENNIS P. KEOHE, INVESTMENT, PROFIT, AND TENANCY: THE JURISTS AND THE ROMAN AGRARIAN ECONOMY 198 (1997).

\textsuperscript{75} See Lin & White, supra note 62, at 148, 153–60. See also Karen M. Pence, Foreclosing on Opportunity: State Laws and Mortgage Credit, 88 REV. ECON. & STAT. 177, 180 (2006) (discussing a particular debtor protection’s effect on credit by isolating border counties). Looking at urban counties that shared all relevant characteristics except for residing in different states, Pence found statistically significant decreases in loan size for borrowers in states with judicial foreclosure requirements. Id.

\textsuperscript{76} Lin & White, supra note 62, at 154–60.

\textsuperscript{77} See Reint Gropp et al., Personal Bankruptcy and Credit Supply and Demand, 112 Q.J.ECON. 217, 231–33 (1997). See also Jeremy Berkowitz & Michelle J. White, Bankruptcy and Small Firms’ Access to Credit, 35 RAND J. ECON. 69, 83 (2004) (finding a significant negative correlation between state homestead exemptions and small business credit availability). But see Susan Block-Lieb & Edward J. Janger, The Myth of the Rational Borrower: Rationality, Behavioralism, and the Misguided “Reform” of Bankruptcy Law, 84 TEX. L. REV. 1481, 1508–18 (2006) (arguing that credit rationing is not actually occurring in the American economy. While the bulk of the empirical evidence available does suggest rationing, Block-Lieb and Janger complicate this analysis by pointing to massive aggregate growth in the consumer credit industry, which they claim implies a lack of rationing). Id. at 1508 fig. 7.

That said, Block-Lieb and Janger argue that, inasmuch as the American credit market has avoided rationing, it has done so by modifying interest rates based on calculations of borrower-specific risk. In a state without advanced credit scoring techniques and with usury laws in place, Block-Lieb and Janger’s analysis actually supports the likelihood of credit rationing. Id. at 1514 (“In sum, credit scoring models
correlates with income; pro-debtor bankruptcy laws had a far greater effect on lending to those in the bottom income quartile of Gropp et al.’s dataset than it did on those higher up. This, again, makes intuitive sense; since low-income borrowers are substantially more likely to default, laws that make loan default more costly to lenders will have a disproportionate impact on credit transactions involving those portions of the population. Furthermore, high homestead or property exemptions allow low-income borrowers to shield a higher proportion of their total assets, lessening the penalties of default and making strategic default more attractive. This, in turn, would lead an economically sophisticated lender to either increase interest rates when lending to such high-risk populations or to simply ration credit more closely. One would expect a similar phenomenon to occur in Roman credit markets. The sharply class-asymmetric penalties associated with cessio bonorum, as well as the real-holdings-asymmetric penalties linked with confiscation and sale, would lead to the same effect. High-status borrowers would lose much, much more by defaulting on a loan than would their low-status equivalents. As such, we would expect creditors concerned about losing money on debt default to become extremely skittish about lending to those without substantial collateral (in the form of property or reputation) or sureties possessing the same.

While the comparison between modern credit markets and those of early Imperial Italy is obviously nowhere near perfect, these data provide an empirically well-supported framework for a hypothetical model of credit transactions in the late Republic and early Imperial periods. Of course, this model assumes economically rational behavior among Roman lenders—some scholars of the Roman economy might take issue with such a claim. That said, while there are no records of lenders discussing the impact of cessio bonorum on their decision-making, Roman merchants’ response to the lex Laetoria, a feature of Roman contract law, shows the same sophistication and sensitivity to risk which this model assumes in the credit context. While Roman history provides no shortage of evidence for economically “irrational” actions among its populace or absurd regulations leading to unproductive activity, there is strong evidence that enforceability
concerns loomed large in Roman economic thought, and it is exactly these concerns which animate creditor behavior under the model above.  

Under the *lex Laetoria*—in force from the second century B.C.—men under the age of twenty-five were effectively barred from contracting. However, relatively little attention has been paid to the exact mechanism that excluded these individuals from the marketplace, and this area of Roman commercial law suggests substantial awareness of default risk. Strictly speaking, Roman men under twenty-five were entirely free to contract, and there were no formal restrictions on their commercial activity. In fact, they had even greater freedom than their elders—a man under twenty-five could, by alleging fraud, have any contract which he had entered into voided after the fact. In many ways, this man—whatever his class or moral character—is in the same position as the low-status borrower; both are equally free to walk away from their obligations. So how were such individuals received in the Roman marketplace?

In a word: poorly. These individuals, who were perfectly free to form contracts but could not place themselves under legally binding restrictions, were effectively excluded from Roman commerce. As far back as the play *Pseudolus*, Plautus is able to use this law as a plot point, construing it as simply an outright ban on commerce. Given that Plautus is generally understood to be working within a Roman legal framework, this would appear to be strong evidence that Plautus’s audience viewed men in Calidorus’ position to be incapable of borrowing due to merchants’ fears of being defrauded. More importantly, Ballio explicitly references his inability to trust someone who cannot be held to normal legal obligations. Ballio displays exactly the kind of reasoning that the model suggests—Ballio is considering his ability to protect himself against breach before entering into a contract and, thus, participating in a form of rationing which

---

81. For example, consider an Imperial satirist’s account of the time his friend is forced to waste ritually indicating his subservience to a patron, MARTIAL, EPIGRAMS 12.18.1–6, or his own obsequious requests to be released from regulations involving children, *id.* at 2.91–92. Even if this poem does not itself reflect Martial’s legal position, again we can assume that Martial is satirizing a real emotion among his readership, and that time was, in fact, spent trying to work around this law (or, alternately, to comply with it, although such time was more enjoyably spent).

82. DIG. 4.4.24.1 (Paul, Sententiae 1); Laurens Winkel, Forms of Imposed Protection in Legal History, Especially in Roman Law, 16 FUNDAMINA 578, 580 n.9 (2010).

83. DIG. 4.4.1.1 (Ulpian, Ad Edictum 11).

84. *id*.

85. Calidorus: *Perii, annorum lex me quinavicenaria. Metuont credere omnes.* Ballio: *Eadem est mihi lex: metuo credere.*

86. See, e.g., Paul B. Harvey Jr., *Historical Topicality in Plautus*, 79 CLASSICAL WORLD 297, 298 (1986). *But see* ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 76 (1993) (pointing out instances where Plautus may, in fact, be referring to Attic law in his plays). While the instance Watson describes is disputed, I would submit that the law referred to here—one that makes merchants afraid to trust certain buyers based on their “years”—has an obvious referent in Roman law, with no known Attic parallel.
excludes from the market an individual who cannot be punished for breaking his promises.

Of course, using Plautus as evidence of the thought processes of Imperial bankers is deeply problematic—Pseudolus predates this article’s period by over two centuries. However, one can find similar treatment of the lex Laetoria (and similar reasoning applied to it) in the legal writings of Paul, who claimed that transactions with minors should not be voided in all cases—not for the sake of the merchants who would be inconvenienced by such behavior, but for the sake of the minors themselves, who would be unable to contract under such a system. While Paul writes in the later Empire, in conjunction with Plautine evidence, he makes a powerful case that commercial actors demonstrated a sophisticated understanding of risk throughout Roman history—exactly the sort of understanding that would lead a creditor to refuse funds to anyone who was not in a position to be harmed by confiscation or public shaming. Furthermore, Paul states even more explicitly than Plautus that such conceptions of risk were widespread; Paul does not say it would be wise to refuse business from the young, but simply that everyone would. Paul offers no explanation for why this might occur; his commentary on the law makes it clear that the average reader of his text would have understood the logic at play.

Plautus and Paul demonstrate that an understanding of default risk—and an aversion to contracting with those for whom such risk could not be contained—was widespread within the Roman economy. Lenders who exhibit this sort of sensitivity to default risk and awareness of prevailing commercial law would likely carry this reasoning into the credit economy, and the research described above lays out a clear model of how creditors might apply that reasoning. Based on this evidence, I hypothesize that late Republican credit reforms led to severe credit rationing and restricted lending to those without substantial real or reputational collateral. By forbidding borrowers from putting their labor or physical freedom up as collateral, and by instituting a default procedure that allowed a substantial segment of the population to walk away from credit obligations without serious penalty, Republican debt reforms would have made borrowing money substantially more difficult, particularly for the poorly collateralized. The remainder of this article tests this hypothesis against surviving Roman material. While data from the Empire are obviously far less extensive than those from modern states, extant data accord with this hypothesis, showing lenders determining default risk in no small part by class and property holdings, and excluding potential customers who could not demonstrate their likelihood of repayment.

87. DIG. 4.4.24.1 (Paul, Sententiae 1).
88. Id. (S.P. Scott trans.) (“Business transactions with minors should not, however, always be rescinded, but such matters should be based upon what is good and just, to prevent persons of this age from being subjected to great inconvenience, since, otherwise, no one would contract with them . . . .”).
Having developed our theoretical model of credit markets’ reaction to the liberalization of credit laws which occurred over the course of Republican history, this article now tests it against the surviving evidence of late Republican and early Imperial lending. The available literary and historical evidence, combined with the surviving records of an Imperial banking operation, suggests that lending in this period was heavily restricted by class and collateralization, specifically because of substantial concerns over default.

At a macroeconomic level, a notable feature of the late Republican and early Imperial economy is its extraordinary supply of real money; if we take Duncan-Jones’ estimate of Roman money supply to be anywhere close to reality, then Imperial liquid money stocks were exceedingly high, even by the standards of other pre-industrial societies. More importantly for our purposes, the money supply increased rapidly—Rome was minting a great deal more coinage at the end of the Republic than it had previously. According to the quantity theory of money, this would be correlated with one (or more) of the following three things: (1) increasing price levels, or inflation; (2) an increase in the total real value of transactions, or rising GDP; or (3) decreasing velocity of money, or a decrease in the number of transactions a given unit of money is used in.

In this case, all three phenomena appear to have worked in concert—the late Republican and early Imperial periods were marked by severe inflationary crises, but the increase in coined money was too substantial to manifest solely in inflation without generating even more severe effects than we have found in the literature (particularly as we only hear about periodic crises, as opposed to the long-lasting hyperinflation which would be implied by the increase in coin). Similarly, while the Empire’s

89. DUNCAN-JONES, supra note 3, at 167–70.
92. Which states that MV = PQ, where: M = the total money supply in an economy; V = the total velocity of money, or how many times a given unit of currency is spent; P = the total price level of goods within an economy; and Q = the real value of monetized transactions within an economy. GREGORY MANKIW, MACROECONOMICS 86–88 (7th ed. 2010).
93. See infra notes 106–132 and accompanying text.
94. See HOLLANDER, supra note 3, at 153–55. See also Hopkins, supra note 91, at 109 (“We have no evidence of a substantial rise in the price of goods; the argument from silence is notoriously dangerous. But surely, even our jejune sources might have noted a five- or tenfold increase in prices.”).
economy was growing rapidly, this growth cannot explain the increase in coinage, even when accounting for inflation.  

The role of hoarding becomes especially prominent when we consider William Harris’s work on this subject—Harris has unearthed substantial evidence for late Republican use of sophisticated banking procedures, which tend to increase monetary velocity. Harris’s evidence is convincing, but the increase in coinage suggests that other phenomena cancelled out these innovations and led to an environment in which more coins were needed to maintain the same number of economic interactions. The most plausible explanation for this phenomenon is hoarding; if money were being kept in physical form (as opposed to lent out, invested, or exchanged for consumables), those pieces would depress the overall velocity of money, requiring an increase in the real money supply. The most recent scholar to discuss monetary policy in this period, David Hollander, has no real explanation for this phenomenon; he focuses instead on increased monetization as outlying areas were brought into the Roman coinage system. Willem Jongman, however, is more concerned with the decreasing velocity of money and actually puts forth a theory to justify what he sees as the late Republican desire to hoard coins—specifically, Jongman argues that hoarders simply preferred liquid money in order to simplify bequests. This argument, however, is deeply problematic; Jongman’s argument rests on the difficulty of dividing real estate. It is well known that, at least among the upper classes, huge proportions of wealth were held in land despite this difficulty; while a desire to simplify inheritance might explain keeping money in coin as opposed to in land, it cannot explain keeping money in land as opposed to lending it out. If wealthy Romans wished to maintain capital in forms which were easy to divide, this preference for real holdings becomes extremely problematic.

Loans at interest would be a far preferable use of capital; we know that Roman finance provided all of the tools for sophisticated management of such capital, including the use of third-party debt to meet specific

---

95. Hollander, supra note 3, at 154 (positing fairly high aggregate economic growth, while acknowledging that even these optimistic assumptions require a substantial decrease in velocity).


97. Hollander, supra note 3, at 141–49, 153–55. Given the nature of Hollander’s project, though, this is hardly unreasonable, and his argument that increased monetization played a role in the increase is convincing. I simply focus on a different aspect.


99. Id. at 195 (citing Pliny the Younger, supra note 1, at 7.11, 7.14).

100. This is something of a truism, but see, for example, Hollander, supra note 3, at 75–78; Phillip Kay, Rome’s Economic Revolution 133–34 (2014).

101. As Jongman himself notes. See Jongman, supra note 90, at 196. See also generally Jean Andreau, Banking and Business in the Roman World 30–49 (Janet Lloyd trans., 1999) [hereinafter Andreau, Banking and Business] (discussing Roman deposit banking); Jean Andreau, La Vie Financière dans le Monde Romain 528–606 (1987) (discussing the role of professional
financial shortfalls,102 and as such, capital lent at interest could be easily divided among heirs. Instead, this relatively high proportion of money supply to GDP is more likely a reaction to what Jongman refers to as the “precautionary motive.”103 Before his discussion of inheritance, Jongman briefly states that “in the absence of highly liquid bank accounts or short-term credit on easy terms, people needed to hold large cash reserves.”104 In other words, the credit economy was sufficiently restricted that even aristocrats could not rely on credit to meet sudden needs. Furthermore, this restriction is itself the result of large amounts of capital being kept in cash on hand as opposed to lent out; it appears that wealthy Romans thought it safer to keep money in coin or real estate holdings than to expose it to credit markets.

How would such behavior accord with our model? As it happens, quite well; we have already seen in Djankov et al. and Haselmann et al. a substantial positive correlation between legal protections for creditors and a large credit economy. In the absence of such protections, credit markets tend to shrink, and lending is a major component of monetary velocity.105 One possible explanation for the increasing demand for coinage attested by the available physical evidence is a drop in lending during the late Republic; as we will see, this is also borne out by literary sources from the period.

Our records of Middle Republican lending, such as they are, demonstrate fairly frequent unrest revolving around interest rate spikes and unavailability of credit;106 that said, this material is unreliable for the reasons given above.107 Any history written in a later period will obviously focus on crisis points; however, it is notable that so many of these problems are described as arising specifically from credit concerns.108 By the late Republic and early Empire, however, our sourcing is generally more reliable, and it describes a succession of severe credit shocks.109 For example, several ancient sources describe a near-total collapse of credit markets during Caesar’s invasion of Rome.110 I hesitate to make too much

102. Harris, supra note 3, at 15–16.
103. Jongman, supra note 90, at 191.
104. Id. (emphasis added).
105. Specifically, given that nomina could be transferred between parties as a form of exchange, a unit of currency lent out at interest could be spent by the debtor (obviously) and by the creditor (by using the nomen to pay for another good) at the same time. A decrease in the volume of lending in Italy would curtail citizens’ ability to use these sorts of instruments to pay for goods, leading to greater demand for coinage.
106. See Barlow, supra note 17, at 36–46, 58–66.
107. See supra notes 18–19 and accompanying text.
108. See supra note 31.
109. TACITUS, supra note 18, at 6.17.
110. For brevity’s sake, I refer the reader to Verboven’s excellent summation of the crisis and accompanying citations. Koenraad Verboven, 54–44 BCE: Financial or Monetary Crisis?, in CREDITO
of the events following Caesar’s invasion or to connect them to the broader regulatory environment—the military situation at the end of the Republic placed substantial demands on the Roman moneyed classes, which would have produced an exogenous demand for credit sufficient to deplete available reserves. But there is another potential cause of this crisis: Caesar’s massive seizures of land—and consequent resale—drove down the price of real estate, which could have diverted capital out of credit markets and into land. If the credit supply were adversely affected by capital flight, this would be a form of credit rationing; as the regulatory regime in force became more hostile to lenders, deployment of capital in credit markets would become less attractive compared to deployment in land, particularly as the price of real estate fell. More importantly for our purposes, even prior to Caesar’s invasion, interest rates were high and sharply rising; problems with credit markets appear to predate the most serious political unrest of this period and may well have themselves been a contributing factor. These sharply increasing interest rates are exactly what the model would predict as a response to the curtailment of creditor protections; as the supply of credit decreases, whether demand remains stable or rises, the price of credit (i.e., the interest rate) will spike. Generally speaking, a system with abnormally generous protection for borrowers would also likely be marked by high interest rates and severe credit rationing (particularly once those interest rates were capped).

It should be noted, however, that one of the most substantial pieces of “pro-debtor” legislation in force in our period—the lex Julia de bonis cedendis—had not yet become law at the time of this crisis; while there were broad concerns about debt relief and widely held fears that creditors would be barred from collecting outstanding accounts, the lex Julia was developed, at the earliest, during the period following Caesar’s re-entry into Rome. To properly examine the impact of debt law on Roman credit markets, it may be more useful to examine a crisis that (1) postdated one of the most dramatic innovations in the law, and (2) occurred in the absence of the military turmoil, which may have affected interest rates independently of law in the early 40s B.C.E. As it happens, another severe credit crunch, this one under Tiberius in 33 C.E., offers further evidence that the Imperial

---

111. See id. at 56; Dio Cassius, Roman History 41.37. See also supra note 55 (discussing the costs of senatorial life).
112. See infra notes 122–124 and accompanying text.
114. Notably, this was believed to be the case by some contemporary sources. See, e.g., Cicero, Letters to Friends 7.3.2; Julius Caesar, The Civil Wars 1.4.2.
116. Id. at 135–41; Verboven, supra note 110, at 52.
credit market was unable to effectively respond to external pressures, and that credit supply under the prevailing legal regime was profoundly tenuous and unsteady.

The credit crisis of 33 C.E., which was not accompanied by the sort of demand spike seen at the end of the Republic, further supports the interpretation of late Republican and early Imperial credit markets offered above; here we see clear evidence of a supply shock leading to market failure, requiring massive state intervention to resolve. Our best source for this incident is Tacitus, who gives a somewhat confused account of proceedings; after an attempt by the praetor Gracchus to enforce long-standing caps on interest, Tacitus describes a severe shortage of credit. This occurred simultaneously with massive sales of property seized from condemned men and a later senatorial decree requiring that capital be invested heavily in Italian land. Debts were called in, and borrowers, unable to take out new loans to meet these sudden expenses, were forced to sell their property, driving down the price of land and further disrupting markets. Tiberius finally intervened by lending huge amounts of cash at no interest, which stopped the foreclosure cycle and eventually led to the re-establishment of private credit. This crisis is arguably a “purer” example of Roman debt market shock than that described above; since there is no evidence in Tacitus of any external event (at least prior to the inopia rei nummariæ) that might lead to a spike in demand for credit, we can more effectively isolate supply mechanisms for credit and what led to their sudden collapse.

The most obvious explanation for the crisis of 33 is that it was simply a response to Gracchus’ actions. A sudden reduction in interest rates would have made lending less attractive and led to a flight from the market. As individuals who had been relying on new credit to meet existing obligations were forced into default, falling land prices due to forced sale would have decreased creditors’ ability to recoup possible losses through land seizure, causing a total market collapse. Alternately, we can read the crisis of 33

117. See TACITUS, supra note 18, at 6.16–17. See also Dio Cassius, supra note 111, at 58.21; Suetonius, Tiberius 48.2.
118. TACITUS, supra note 18, at 6.17 (“Hinc inopia rei nummariæ, commoto simul omnium aere alieno . . . .”).
119. Id. (“[E]t quia tot damnatis bonisque eorum divenditis . . . .”). André Tchernia argues that Tacitus is being ahistorical here and that these seizures occurred, at the latest, almost a decade prior to the crisis. André Tchernia, Remarques sur la Crise de 33, in CREDITO E MONETA NEL MONDO ROMANO, supra note 90, at 131, 141. That said, these two arguments can easily be reconciled. Property seized as a result of the condemnation of Sejanus and his associates could easily be entering the market in 33 C.E.
120. TACITUS, supra note 18, at 6.17 (“Senatus praescripsit, duas quisque faenoris partis per Italiam conlocaret.”).
121. Id. (“[C]reditores in solidum appellabant . . . .”)
122. Id. (“Sic refecta fides . . . .”)
as primarily the result of these falling land prices—Tacitus refers to the sale of condemned men’s goods in the context of Imperial silver hoarding, but if enough land was seized, this could easily have affected real estate prices. For the reasons described above, falling land prices would have caused interest rates to rise or credit to dry up altogether if rates were capped—the Senate’s attempt to drive up land prices (by compelling purchase) would have merely exacerbated the problem by forcing more potential lenders to invest in real property. While this would certainly have increased prices, this demand-side stimulus would have driven still more capital out of credit markets. Furthermore, mass foreclosures were increasing the supply of land, making real estate an attractive investment target while simultaneously decreasing the value of borrowers’ collateral. These two scenarios are not mutually exclusive—tougher enforcement of interest caps would make lending less desirable under any circumstances, but would also render markets incapable of responding to a drop in the price of land brought on by Imperial sale.

Of course, this crisis was clearly triggered by a specific supply shock and is not indicative of the functioning of credit markets in this period more generally; that being said, some factors stand out. First of all, Tacitus’ narrative—if taken at face value—clearly shows that “pro-debtor” actions had immediate negative effects on the credit supply; although Tacitus strongly supported interest rate caps, even he acknowledged that they led to credit rationing. This accords with the model, showing that the interplay between interest rates and credit rationing theorized by Gropp was in force in this period. Furthermore, the eventual outcome of this crisis shows Roman creditors becoming extremely concerned with the real wealth of prospective borrowers, which is to be expected in a society that limited seizable collateral to property holdings.

While the actions of Gracchus and of the Senate clearly played a large role in causing the crisis of 33, the crisis must also be understood in light of concerns about default and loss on the part of creditors. If we understand the events of 33 as resulting solely from lending losing its appeal compared to investment in land, we must ask ourselves why the money that was removed from the credit market was not immediately invested in land. Tacitus refers to substantial hoarding on the part of faeneratores, which he claims was done for the purpose of buying the land that was eventually placed in foreclosure. However, Tacitus’ reading of these creditors’

124. See id. at 340.
125. See TACITUS, supra note 18, at 6.16 (equating caps with the “bonum publicum”).
126. Id. at 6.17. See also Claude Nicolet, Les Variations des Prix et la “Théorie Quantitative de la Monnaie” à Rome, 26 ANNALES: HISTOIRE, SCIENCES SOCIALES 1203, 1217–18 (1971).
127. Gropp et al., supra note 77, at 231–33.
128. TACITUS, supra note 18, at 6.17 (”[F]aeneratores omnem pecuniam mercandis agris condiderant.”).
motivations makes little sense. Since cheap land was already on the market, it seems unlikely that creditors would, en masse, forgo this purchasing opportunity and hold out instead for a price drop that would have been difficult to predict. While Tacitus’ broader narrative clearly describes a liquid market for foreclosed land (and thus creditors with sufficient cash on hand to purchase land that was being sold in a fire sale), he provides no specific evidence for the motivations behind creditors’ hoarding of cash reserves, and his statement of their purpose is best taken as mere speculation. Instead, these creditors—eventually lured to the market as the price of land fell—simply fled credit markets at first, hoarding cash as a precaution.129 Obviously, hoarding generates no interest; Roman lenders would only behave in such a fashion if they believed the risk of lending outweighed its possible benefits. Given that the risks of lending were intimately tied to the amount of collateral a creditor could seize from a delinquent debtor—since default laws in this period forbade bodily collateralization—all creditors had access to was the seizure of land and the threat of humiliation.130 In other words, the amount of collateral a borrower could provide was directly related to land prices; if land prices dropped, the risk of lending money would sharply increase, necessitating higher interest rates in order to make moneylending a profitable endeavor.

This version of creditor behavior is almost certainly a better explanation for the role of falling land prices in sparking the credit crisis of 33 than simple capital flight into investment in land; if capital were simply fleeing to wherever it could be more profitable, we would be unlikely to see the hoarding Tacitus describes. The crisis of 33 may have begun as a result of aggressive legal action against creditors, but the depth of the crisis can only be understood as a function of debt laws, which restricted collateralization to real goods owned by the debtor.131 This phenomenon would, of course, make new loans even riskier as the price of land fell due to oversupply, thus exacerbating the crisis. This vulnerability to self-reinforcing supply shocks is also in keeping with the model. As opposed to other ancient debt laws that gave creditors access to the physical person or labor of the delinquent borrower, the laws of this period allowed only collateral in property, which was subject to price fluctuations. Since credit supply tends to decrease in tandem with the price of land for reasons already discussed, this would have magnified the impact of land prices on supply and led to severe credit crises like that described by Tacitus, Suetonius, and Dio. While all three authors describe Tiberius as eventually resolving the crisis through massive state intervention, a key detail (again

129. See Kay, supra note 100, at 112–13 (discussing the potential impact of creditor willingness or unwillingness to lend on the money supply).
130. See Tacitus, supra note 18, at 6.17 (“[N]ec decorum appellatis minuere fidem.”).
found in Tacitus) shows the importance of collateral even to lenders working on behalf of the state.

All three authors describe Tiberius lending vast amounts of money as a way of solving the credit crisis; however, Tacitus notes that these loans were restricted to those who could advance collateral property equal to twice the amount borrowed. 132 This is not in and of itself unusual, but offers further evidence of a credit market which was extremely concerned with property holdings. While Tiberius could have afforded to lose money on defaulters, he was lending money under a regime in which non-collateralized debtors had fairly little to lose in case of default. By restricting his lending activity to debtors from whom he could confiscate property worth far more than the debt itself, Tiberius ensured he would only deal with debtors with strong motivation to repay. This, again, echoes the findings of Gropp; borrowers with substantial property holdings had more to lose in case of default, and restricting collateralization had less impact on credit interactions between lenders and wealthy clients. 133 That said, a delinquent debtor could still lose more than property—we have already seen that defaulting on a debt brought on dishonor and the curtailment of certain upper-class privileges. Thus, in addition to the general increase in credit rationing already shown, the model predicts that creditors would focus on both real and reputational collateral when making individual credit decisions. An analysis of late Republican and early Imperial sources bears out this prediction.

A. Property and Reputation as Determining Factors in Lending Decisions

Unfortunately, there is little record of individuals (much less professional moneylenders) deliberating on whether to lend money to a particular borrower—no surviving source provides the entree into creditors’ minds that might allow for any confident statement. 134 That said, what material exists on the subject of individuals’ creditworthiness supports the claim above; reputational concerns played a huge role in credit decisions, one heavily correlated with creditors’ fear of default. It is also quite likely that such concerns drove the common Roman practice of lending within tight social circles, rather than engaging with large-scale commercial credit

132. TACITUS, supra note 18, at 6.17 (“[S]i debitor populo in duplum praediis cavisset.”). While this particular detail appears in neither Suetonius nor Dio, both of these accounts are far later and far briefer than that provided in Tacitus—furthermore, it seems far more likely that later authors would have forgotten (or neglected to include) a small proviso in Tiberius’ lending practices than for Tacitus to invent such a thing out of whole cloth. See Teherria, supra note 119, at 132–33.
133. See Gropp et al., supra note 77, at 231–33.
134. In other aspects of Roman business, we have evidence that is more persuasive on motivation, in the form of agricultural manuals or epistolary material discussing renting out estate land. See, e.g., COLUMELLA, supra note 74, at 1.7.2–3. However, apart from some vague letters of Cicero, we have no such source for lending behavior. See infra notes 147–148 and accompanying text.
enterprises; while some historians have previously interpreted this behavior as economically unproductive or irrational, it may be better understood as a practical method of limiting default risk by imposing substantial social penalties on defaulters who could not be otherwise sufficiently punished under the prevailing debt regime.

There is substantial evidence of upper-class Romans using friends and acquaintances as sources of credit; even a cursory reading of Cicero’s correspondence shows several instances of his reliance on social relationships to borrow money, and more importantly, we see similar behavior in the Imperial period (after the institution of cessio bonorum). Such behavior has been largely discussed as a response to peculiar features of Roman elite financial life—a society in which wealth was primarily held in land, but that required substantial cash expenditure in the context of status presentation, would place even wealthy citizens in a constant liquidity crisis. Land, while desirable as a store of value, could not always be quickly sold, which forced wealthy landowners to turn to borrowing when faced with sudden expenses. These exigencies are obviously an element in the high demand for credit found among the Roman aristocracy.

That said, there is no inherent reason for credit demand to be so heavily concentrated within social groups; late Republican and early Imperial Rome had the makings of a commercial credit industry, which could theoretically meet the needs of an illiquid, high-spending class of borrowers. The structural features of the Roman economy frequently brought up to explain this phenomenon do not themselves justify Roman’s preference for lending within social groups. Instead, social lending can be understood as a form of risk avoidance within a regulatory regime which restricted collateralization—by restricting credit activity to individuals who could be severely socially penalized for default, lenders could extend credit much more securely than in interactions with strangers, as would occur in a private banking context. On one hand, social lending is a natural outgrowth of the trend towards reputational collateralization described above—in a lending system built around trustworthiness as a source of credit, it makes sense that credit activity would be most vibrant in the area where one’s reputation was strongest, that is to say among friends and family. On the

135. See, e.g., FINLEY, supra note 2, at 196–98.
136. As scattered examples among many, see CICERO, supra note 60, at 7.3.11; CICERO, supra note 114, at 2.3.
137. E.g., Pliny the Younger, supra note 1, at 3.19.8.
138. See, e.g., CROOK, supra note 27, at 170–72; Richard P. Saller, PERSONAL PATRONAGE UNDER THE EARLY EMPIRE 120–22 (1982); VERBOVEN, supra note 5, at 148–66.
139. See Shatzman, supra note 55, at 84–98.
140. See Hollander, supra note 3, at 75–78.
141. See ANDREAU, BANKING AND BUSINESS, supra note 101, at 28.
142. Instead, authors tend to treat this preference as a given and discuss its effects. See CROOK, supra note 27, at 171; VERBOVEN, supra note 5, at 103–04.
other hand, social lending defends against the threats posed by that same trend; late Republican and early Imperial debt law severely restricted the sorts of non-reputational harm one could inflict on a defaulting borrower, making lending a far more risky proposition. It only makes sense that those who were considering lending money out at interest would consequently prefer to lend to individuals whom they knew and trusted, and who would face serious social consequences for default.  

Social lending also accords with the studies informing the model above. Gropp et al.’s database of American lenders’ credit decisions shows that, when states adopt laws which restrict the level of collateral that a creditor can access in case of default, lenders respond not by restricting credit equally across the board but instead by becoming more reluctant to lend to those individuals who cannot offer substantial collateral. In the case of Imperial credit markets, social lending would have offered an opportunity for potential lenders to restrict credit activity to individuals who were both well known to the lender and who could be seriously harmed in case of default. In other words, both modern and ancient creditors practiced some form of risk aversion. Risk-motivated social lending is hardly remarkable in and of itself, but could restrict credit further for individuals without access to the social networks that provided credit in this period. While commercial banks were available as a source of credit, social lending predicated access to a large segment of the Roman credit economy on social networks and reputational capital.

Of course, reputational capital consists of more than friendship; an examination of late Republican and early Imperial literature shows a strong correlation between credit availability and reputational qualities, such as honor and shame. The most prominent source for this connection is Cicero, who refers to his own ability to borrow money at low rates of interest as a direct result of his previous behavior; “ego autem meis rebus gestis hoc sum adsecutus, ut bonum nomen existimer.”

143. See Charny, supra note 13, at 412.
144. See Gropp et al., supra note 77, at 234–36.
145. The relationship between prior knowledge and creditworthiness is somewhat intuitive, but complex in practice. Firstly, there is the borrower’s exposure to social punishment for default, which is discussed above; secondly, a well-known borrower could be seen as a lower default risk through the lender’s knowledge of his credit history. See Charny, supra note 13, at 412. Presumably, a man offering a loan to a close friend or family member would know if the potential borrower had a habit of walking away from debts, and could thus price the risk of default more accurately than he could if lending to a stranger. See A. Jorge Padilla & Marco Pagano, Sharing Default Information as a Borrower Discipline Device, 44 EUR. ECON. REV. 1951, 1955–75 (2000) (giving a more articulated model of lending behavior in the context of prior knowledge). Finally, in case of default, one lending to a known party would enjoy greater likelihood of access to the defaulter’s goods, presumably the prior relationship would make it more difficult for a decoctor to hide goods in the context of a claim of cessio bonorum.
146. One of which has left substantial surviving records; see infra Part IV.B.
147. CICERO, supra note 114, at 5.6.2 (“I have managed my affairs in such a way that I am considered a good risk.”).
something to explain Cicero’s own paranoia about being caught out on a loan: “[s]i quid eiusmodi acciderit, ne quid tibi sit fama mea potius.”148 As discussed above, the inability to pay a loan was seen as personally degrading; Cicero (at least) felt that his reputation for management of fiscal affairs directly impacted his position in the credit market. Of course, Cicero predates some of the most important changes to credit that occurred at the end of the Republic, but Imperial literary evidence suggests similar concerns with reputation and honor as key determinants of creditworthiness.

Specifically, Seneca’s discussions of moneylending betray similar moralizing and reputational elements. Seneca uses moneylenders’ reliance on trust as an analogy for his distrust of those who ignore his advice: “[q]uomodo fenerator quosdam debitores non appellat, quos scit decoxisse et in quorum pudorem nihil superest, nisi quod pereat.”149 While this analogy appears in the context of a broader discussion of nonmonetary themes, that only makes it more likely that Seneca’s statement here reflects a broader social belief: Seneca is not arguing that moneylenders behave in this fashion but rather using their behavior as an illustration. Seneca’s claim is, in fact, only successful if Seneca’s audience takes such behavior as a given, and one can safely assume that Seneca is referring to a well-known tendency among lenders.150

So what is this tendency? Seneca gives two grounds for a moneylender refusing to extend credit: decoctio and, more generally, a lack of pudor.151 The refusal of credit to decoctores is not particularly surprising; Cicero references the shame associated with the practice in his attack on Antony,152 and we have already seen how disapproval of default was well attested in this period. However, this text makes explicit what can only be inferred from the others—that a history of decoctio could harm someone’s credit. The question, then, is why?

The full context of Seneca’s statement suggests that this aversion stems from fears about future behavior; Seneca compares a fenerator’s rejection of those who have declared bankruptcy to his own refusal to engage those who, based on their past behavior, Seneca fears will ignore him.153 From this, we can infer that moneylenders were applying (or at least commonly understood to be applying) similar logic—decoctio was seen as a sign that future interactions were unlikely to be productive. In

148. CICERO, supra note 60, at 16.2.2 (“If anything of this sort [in the context of a discussion of debt] should happen, don’t let anything be more important to you than my reputation.”).
149. SENECA, supra note 50, at 5.21.3 (“Like how a moneylender does not work with debtors whom he knows to have defaulted, and of whose honor nothing remains except that which is lost . . . . “).
150. Or at least a tendency that Seneca believes to be well known.
151. SENECA, supra note 50, at 5.21.3.
152. CICERO, supra note 50, at 2.44. See supra notes 49–55 and accompanying text.
153. SENECA, supra note 50, at 5.21.2–3.
other words, someone who has refused to pay once will refuse to pay again. One could view the relationship between past and future default as simply one of a shared root in weak morals; Seneca may see _decoctio_ as a mark of poor moral fiber, increasing the risk of similar breaches of trust in the future. However, on a close reading it becomes clear that Seneca is also considering the fact that a borrower whom a moneylender _scit decoxisse_ has nothing more to lose, and that this immunity to punishment plays a role in the logic of the _fenerator_. Note the phrasing of the second clause, which is longer and more detailed: “of whose honor nothing remains, except that which is lost.” _Superest_ is a notable word choice here—if a lender were simply refusing to lend to individuals who had already demonstrated a preexisting lack of character, why emphasize that which no longer remains? It was never there in the first place. Instead, one who defaults actively loses their _pudor_ and, with it, their ability to borrow money. Given that a default was seen as gravely injuring one’s honor, and that this loss of esteem was accompanied by relatively minor concrete punishments, the most logical gloss on this passage is that Seneca is referencing the _decoctor_’s inability to be further shamed. One who has no honor remaining faces, effectively, no punishment for default, and thus his creditors cannot count on repayment. This reading fits neatly with what we already know of _decoctio_; since the penalties for this practice do not appear to be cumulative—except, perhaps, for the loss of goods obtained since the previous default, which even then would, by definition, be less than the amount lost by the lender—one who had already faced the ignominy and loss of social status associated with such behavior could walk away from a second debt with impunity. Seneca suggests that creditors were concerned with the risk of default in making decisions about whether or not to extend loans, and assumed that those who would not lose status as a result of default (whether due to a prior _decoctio_ or some other black mark) could not be compelled to keep their word.

Furthermore, Seneca describes individual credit primarily in moral terms. To Seneca, a _decoctor_ lacks _pudor_. According to Robert Kaster’s exhaustive study of _pudor_ in Latin literature, this term carries a force very different than what a modern audience might expect in a discussion of lending. Kaster identifies the emotional state of _pudor_ as arising from a state in which “I see my self being seen as discredited, when the value that I or others grant that self is not what I would have it be.” Pudor (when

---

154. See id. at 5.21.3.
155. Id.
156. See CROOK, supra note 27, at 177.
158. KASTER, supra note 157, at 29. Of course, the reader may note that Kaster refers to an individual lacking in _pudor_ as “discredited.” The interplay between honor and lending remains, in a
identified as a positive attribute, as it is here) suggests a strongly held conception of self, sufficient to trigger distress at the realization that others perceive one as lesser or that one has become lesser in any way. This perception generally has nothing to do with money; Livy refers to pudor in one who is recognized as a military failure.\textsuperscript{159} Ovid applies it to victims of rape afraid of being seen as promiscuous,\textsuperscript{160} and—from a later period—Ulpian uses the term to demonstrate the wrongness of a freeborn citizen being called into court by a freedman or child.\textsuperscript{161} At first glance, none of these examples seem anything like what Seneca describes—how does pudor apply here?

When examined closely, however, these instances of pudor mirror Seneca’s decoctor, and accord with the nature of Roman bankruptcy as discussed above. First, all of these examples involve public shame; to have pudor is to have sufficient concern for one’s reputation that others’ negative opinion causes distress. For Seneca to refer to the decoctor’s pudor as the principal casualty of his default shows again the highly public nature of Imperial bankruptcy; someone who has already defaulted cannot fall further in the esteem of those around him as a result of defaulting again. Furthermore, pudor retains a highly aristocratic dimension; Ulpian invokes pudor when someone is taken to court by a social inferior, and the mere use of the term in relation to an individual implies that the individual described is of fairly high status.\textsuperscript{162} This fact is of particular note when considering the relationship between creditworthiness and collateralization implied by this model—if dishonor constitutes the main punishment for default, honor itself becomes collateral. An individual who has no honor to put at risk by taking out a loan is an individual who can default without substantial penalties, and borrowers with little to lose are the primary victims of credit rationing on the part of lenders. Obviously, one author’s statements on debt are hardly dispositive, but Seneca’s statements accord very closely with what modern scholarship would predict for credit markets in an era of cessio bonorum; potential creditors would be wary of lending to those without a good reputation, as they cannot be harmed by the stain of default.

Before moving on to the surviving evidence of commercial banking in the Imperial period, I should note—as something of an aside—that some more modern forms of credit scoring appear to have been institutionalized during the late Republican period; defaulters’ names were publicly posted fashion, even now.

\textsuperscript{159} Livy, supra note 24, at 3.67.1–2.
\textsuperscript{160} Ovid, Amores 3.6.77–78.
\textsuperscript{161} Dig. 2.4.10.12 (Ulpian, Ad Edictum 5).
\textsuperscript{162} Id. For example, pudor is almost never used in reference to slaves, as the public esteem for which the term requires was not granted to slaves as a matter of course. Kaster, supra note 157, at 29 n.3.
on a monumental column.\textsuperscript{163} Public posting seems like a logical step for creditors to take, particularly commercial bankers lending to strangers; borrowers who knew they could be publicly exposed as a \textit{decoctor} (and presumably shut out from credit in the future) would be more inclined to pay outstanding debts.\textsuperscript{164} Similarly, lenders could assume that if a prospective client defaulted in the past, they would know about it; this allowed commercial bankers to lend with more confidence (and presumably at lower rates). Effectively, public posting allows all borrowers to generate increased reputational collateral; even a borrower with little property and little concern for shaming penalties could mortgage his ability to participate in credit interactions in the future.\textsuperscript{165} Unfortunately, there is no evidence for such a practice continuing into the Imperial period; however, this would be a practical solution to some of the problems posed by the loss of bodily collateralization for Roman credit markets.

\textbf{B. The Tablets of the Sulpicii: Credit Rationing in Action}

So far, the only evidence this article has provided for the workings of professional (or semi-professional)\textsuperscript{166} moneylenders is the writing of Seneca; however, Seneca is not describing his own behavior, and there is no proof he ever acted in the fashion his letters suggest. While it is important to determine views of creditworthiness among the upper class generally, we cannot take Seneca’s word for it on the subject of commercial moneylending. Fortunately, one Italian moneylending operation has left substantial records, which illuminate at least one commercial lender’s approach to evaluating creditworthiness. While no one bank can be assumed to represent the whole of commercial credit during the Imperial period, a close examination of the Sulpicii archive\textsuperscript{167} shows operations substantially in accordance with the model of risk evaluation and credit above—the Sulpicii, an active moneylending operation in southern Italy, only lent to individuals who were reasonably likely to pay them back and

\begin{flushleft}

\textsuperscript{164} See Padilla & Pagano, supra note 145, at 1978–79 (discussing this “disciplinary effect” of divulging information about prior default behavior).

\textsuperscript{165} See generally Lyn C. Thomas et al., \textit{Credit Scoring and its Applications} (2002) (discussing modern credit scoring institutions and their economic impact). Thomas et al. confine their discussion to modern periods, and in fact assert that “this history of credit scoring is only 50 years old.” \textit{Id.} at 3. However, this point is ancillary to their discussion.

\textsuperscript{166} See Andreau, \textit{Banking and Business}, supra note 101, at 74–75; Verboven, supra note 18, at 212 (both discussing \textit{faeneratores} whose wealth derived primarily from noncredit activity).

\textsuperscript{167} For future reference, all citations to this collection are to the edition contained within Giuseppe Camodeca, \textit{Tabulae Pompeianae Sulpiciorum: Edizione Critica dell’Archivio Puteolano dei Sulpicii} (1999).
\end{flushleft}
not take advantage of the lenient default laws in place in the Imperial period.

According to the records of the Sulpicii, commercial moneylending was, in practice, limited to men of fairly high wealth and status. While there are exceptions to this rule, these exceptions are effectively predicted by the model; while some borrowers appear who were not prominent figures (as determined by attestations of the family name), these borrowers tend to recur frequently, suggesting a long-standing business relationship allowing moneylenders to reduce the risk of default. Alternately, other borrowers were either men of low status but high wealth (such as Imperial freedmen) and, thus, men with a great deal of seizible property, or men who were able to provide a number of wealthy, desirable sureties, which would allow the moneylender to recoup even in the case of a default by the original borrower. The Sulpicii provide one more piece of evidence of how Roman credit markets responded to early Imperial debt law. While many aristocrats developed social credit circles that allowed for informal credit-scoring and extralegal punishment for default, commercial moneylenders appear to have simply restricted their business to borrowers they knew were likely to repay; without the bodily collateral provided by more archaic procedures, individuals without money, connections, or social esteem appear to have been shut out of this highly regulated credit market almost entirely.

The Sulpicii consistently made decisions which drastically reduced their risk of default. Specifically, the Sulpicii nearly always made loans supported by pledges of property. While these borrowers could theoretically default, risk exposure was limited by the possibility of compensatory property seizure. Of course, in most cases seizure was not necessary. However, the mere possibility of this form of recoupment—insurance against the specter of losing the entire value of the loan—allowed commercial moneylenders to manage their risk of default and make loans that would otherwise be unacceptable for a profit-seeking enterprise. As such—particularly under a regulatory regime that treated property confiscation as the primary compensation for a jilted lender—secured loans

168. For example, there is evidence of relatively small loans being made to individuals without demonstrable property or status. See infra notes 182–185 and accompanying text.

169. See, e.g., TPSulp. 51–52, 79, 85, 90–92 (using grain and slaves as pledges). Notably, this use of slaves as pledges appears to contradict Barlow’s statement that the offering of labor or laborers as a pledge shows the lack of professionalization among Republican moneylenders. Barlow, supra note 17, at 20. Obviously, the Roman economy was far more advanced in this period than in the one Barlow describes, but this material still clearly shows how a professional moneylender can make use of slaves that come into his possession.

170. See TPSulp. 85, 90–92. Furthermore, notice the aggressive publicization of this sale of pledge goods. While it obviously makes sense to inform potential buyers of a sale of goods, were that the sole purpose of this posting, we would have to ask why the Sulpicii specifically noted these slaves’ role as pledge, and the exact date of proscription. It is clear that this posting also calls attention to Marcia Aucta’s delinquent behavior, and serves a shaming or publicity function.
would be particularly attractive for commercial lenders, and are thus well represented in the Sulpicii archives.

One other notable feature of the Sulpicii moneylenders’ primary financial activity is their frequent interactions with individuals from prominent families; this feature of the Sulpicii’s decision-making accords further with the relationship between status, humiliation, and default discussed in Part II. While Sulpicii loan documents did not mention the social status of borrowers, modern scholars have been able to quantify the prominence of Sulpicii clients through their attestations in other sources. The Sulpicii’s preference for frequently attested borrowers may simply reflect a preference for wealth; presumably, these are rich families, and in the case of the Marii, we see a gens that is both prominent and willing to use their property holdings as collateral. However, these are also the same families who would be most wounded by the stigma and legal penalties which accompanied default in the Imperial period.

Families with members who were politically active would obviously prefer not to be barred from office; families entitled to prominent places in local society would wish to preserve that privilege. Therefore, the Sulpicii’s preference for lending to members of well-known families can be considered a hedge against default risk for the reasons cited above—the moneylender’s ability to punish a delinquent borrower itself counted as a form of insurance (since one can assume that the borrower will work hard to repay the loan, and would be unlikely to risk the penalties accompanying default without some confidence that he could avoid them), and thus allowed the moneylender to be more confident in repayment. However, borrowing was not the sole province of the aristocracy—Imperial freedmen also did quite well with the Sulpicii, suggesting that more traditional forms of property collateralization could still facilitate credit even without family connections or reputation.

If the Sulpicii were relying solely on honor to gauge the risk presented by certain loans, then we would expect activity to be restricted to the aristocracy. However, it was clearly possible for those without substantial reputational holdings to obtain credit—the Sulpicii repeatedly lent to comparatively unknown borrowers, as long as they possessed sufficient property holdings or could put forth desirable sureties. The most obvious examples here would be the frequent references to Imperial freedmen

171. See, e.g., TPSulp. 1–2, 4–5, 8, 53, 79, 83–84 (all referring to the Marii); 2, 3, 27, 61 (referring to the Faenii). For TPSulp. attestations of these families’ prominence in the area, see GIUSEPPE CAMODECA, L’ARCHIVIO PUTEOLANO DEI SULPICII 59–60 nn.65, 70 (1992).
172. CAMODECA, supra note 171, at 95 (discussing evidence that the Marii were one of the Sulpicii’s most frequent business partners, and also an important family in the region).
173. Such as the Vitrasii, appearing in TPSulp. 9, one of whose members was a prefect of Egypt from 38–41 C.E. CAMODECA, supra note 171, at 69–70.
174. See supra notes 51–55 and accompanying text.
within the archive, such as in TPSulp. 21.175 These men were obviously of low social status, being freedmen, but were nevertheless upwardly mobile borrowers with substantial holdings.176 It thus seems clear that decoctio would have carried risks for these men that it would not for an average freedman with fewer possibilities for advancement, and that these risks informed the Sulpicii’s calculations. That said, it is probably most logical to view these freedmen’s access to credit as a reflection of the wealth that accompanied service in the Imperial court. Private freedmen would also have had a consistent income, and frequently needed capital, given how many freedmen worked as independent contractors with minimal obligations to their original owner.177 However, private liberti are not represented in the documentary evidence to nearly the same extent as their Imperial counterparts, likely due to the increased possibility of recoupment when lending to those who had recently left the court.

That said, some private freedmen did receive loans from the Sulpicii, which might appear to disprove the argument cited above. But these borrowers almost all had one thing in common—connections to the sorts of prominent families that are common in the archive.178 Given the strong connection between the status of a freedman and his patron household,179 this makes sense; the Sulpicii could count on the family intervening on behalf of a delinquent freedman if at all possible, thus allowing them to use the connection as an informal form of suretyship for the purposes of risk evaluation.180 In other contexts, these guarantees were more explicit: many credit documents in the archive include a long list of sureties.181 These connections appear to be the principal mechanisms by which individuals without money or status could obtain loans from the Sulpicii, and are entirely consistent with the model of default risk evaluation discussed above; while the libertus himself would not suffer substantial penalties for default, the wealthy family which freed him (or the wealthy sureties who endorsed him) would. This allowed the Sulpicii to extend credit to

175. For the frequency of such figures within the archive, see CAMODECA, supra note 171, at 95.
176. See JOHN D’ARMS, COMMERCE AND SOCIAL STANDING IN ANCIENT ROME 124–26 (1981) (discussing the sorts of responsibilities often discharged by such borrowers); Keith Hopkins, Elite Mobility in the Roman Empire, 32 PAST & PRESENT 12, 21–22 (1965); Pedro López Barja de Quiroga, Freedmen Social Mobility in Roman Italy, 44 HISTORIA: Zeitschrift Für Alte Geschichte 326, 330–42 (1995).
177. CROOK, supra note 27, at 188–92.
178. Note, for instance, the extension of credit to a Zenobius, freedman of the Tyrii, in TPSulp. 4. For the prominence of the Tyrii in the Imperial period, see CAMODECA, supra note 171, at 64–65.
180. Of course, we cannot ignore the possibility that these freedmen are also serving as business proxies for their former masters. See D’ARMS, supra note 176, at 44–45, 103–04. In this case, however, such instances of lending simply fall into the first category above; these families are prominent and wealthy, and the Sulpicii can be confident of repayment for the reasons given.
181. E.g., TPSulp. 21.
individuals who would otherwise, under Imperial debt and bankruptcy laws, present an unacceptable risk to moneylenders.

Notably, some individuals in the archive did not even meet these basic standards for credit; consider the example of Euplia the Melian, daughter of a freedman, and her surety Epicharis. These loans seem, at first, highly problematic; there is no evidence that either Euplia or Epicharis possessed money or reputational capital comparable to that of the Sulpicii’s other clients. Note, however, the repetition of names here; Euplia and Epicharis appear in three separate credit documents, spanning a full year. Essentially, these are repeat customers who would have proven their worth to the Sulpicii over the course of multiple transactions. These borrowers—by establishing a relationship which would presumably be severed should they fail to meet their obligations—generated reputational capital which would be lost in the case of default. Much as Cicero and Pliny used social lending to create space for extralegal punishment of delinquent borrowers, these borrowers created a situation in which they had a clearly understood incentive to pay off their loans promptly; once again, this allowed moneylenders to work with more confidence and expanded access to credit markets.

The Sulpicii show tendencies very similar to those found in literary sources from the period (and very different from what appears to have been going on in the Early Republic); the Imperial credit market was highly concerned with personal trustworthiness, credit history, property holdings, and social class. While Harris is correct that “the [interest] rates available to good quality borrowers never seem to have been strikingly high,” in the Imperial period, “poor quality” borrowers appear to have been shut out. This is exactly what the model implies; Gropp’s examination of modern American lending practices showed that reforms offering greater protection to bankrupts frequently result in credit rationing, with poorly collateralized potential borrowers being unable to receive loans, and with lending being

---

182. These two figures receive three loans from the Sulpicii, as described in TPSulp. 60–62.
183. Of course, it is hardly inconceivable that one or both of these individuals was, in fact, fabulously wealthy. Our understanding of this place and time is not so complete to foreclose the possibility that these people were frequently attested, with no evidence surviving. However, this is an argument from silence; there are other, more compelling reasons why these two people might have received credit, as will be argued shortly.
184. TPSulp. 62 refers to a transaction occurring thirteen days prior to the Kalends of April 42, with TPSulp. 60 referring to the same day in 43.
185. Of course, this lending activity had to begin somewhere; at some point, the Sulpicii would have had to offer credit money to someone with whom they did not have a longstanding professional relationship in order for that relationship to get off the ground. Note, however, the small amounts of money being dealt with here; a loss of HS 1000 could be absorbed by an operation lending sums in excess of HS 50,000. While it is true (and notable) that the largest sum lent to these figures was not given until two other loans had already been paid back, at no point were Euplia and Epicharis borrowing so much money as to present a serious risk in case of default.
That said, it is unlikely that any credit economy could survive without any lending to undesirable borrowers; the next Part will discuss how Roman credit markets could have adapted to any credit shortages created by the then-extant legal regime.

V. POSSIBLE SOURCES OF CREDIT FOR POORLY COLLATERALIZED BORROWERS

Assuming the available evidence is representative, and individual borrowers without substantial real or reputational collateral were excluded from Roman credit markets, what did these people do? It seems inconceivable that the poor of the Imperial period simply did without (especially given the prevalence of credit among the poor in earlier periods of Roman history), but there is little record of their participation in formal credit operations such as those of the Sulpicii. How were they able to borrow? Unfortunately, the evidence here is necessarily far less substantial than that for elite lending, and as a consequence this Part is necessarily speculative.

What seems most likely is that the poor worked mainly beyond the reach of regulation; while legally compliant lenders would have every reason to keep a paper trail to present at court, dodgier operations might be less inclined towards recordkeeping, which would explain the lack of recorded credit activity among the poor in this period. Furthermore, an illegal lender could easily manage his default risk or pass it on to the borrower in the form of higher interest rates. The loan shark who threatens defaulters with violence is by now a cliché; however, it is hardly inconceivable that lenders could have used such threats to decrease the possibility of default. Assuming that lenders were rationing credit according to the logic set forth above, one of the key issues making it difficult for poorly collateralized borrowers to obtain credit would be their ability to ignore the debt without sanction; obviously, if such behavior would lead to death or maiming, the risk of its occurrence would decrease.

Similarly, to the extent that such individuals still presented a high possibility of default, lenders working outside the law could simply charge interest rates above the legal maximum and, therefore, improve their potential returns. Verboven outlines a number of practices unethical bankers could use to evade the procedures establishing a maximum interest rate; the fact that defenses to debt actions claiming illegal moneylending were used widely enough to be attested to in our sources suggests, at the very least, that loan sharking was a factor in the Roman credit market.

188. Verboven, supra note 12, at 10–24. While Verboven’s final conclusions about the Sulpicii are admittedly speculative, his discussion of the mechanics of usury in this period makes clear that a banker who wished to do so could mitigate the risk inherent in lending to low-status individuals by exceeding
Similarly, Plutarch’s discussion of usurers and graffiti found in Pompeii offer strong circumstantial evidence of illegal lending in the Imperial period, and Imperial sources refer to punishments for default very much like *addictio* well after they were theoretically made obsolete by changes in the legal code. This material strongly suggests that individuals were participating in a number of extralegal (if not illegal) contracts in an attempt to gain access to credit. While none of our sources suggest that illegal lending formed the whole of credit available to the urban poor, this was clearly an option that desperate Romans of modest status were occasionally driven to exercise, and one which thrived in a regulatory regime that made these people incapable of legal borrowing.

Of course, the urban poor also likely made use of informal credit channels, like those described above. The same mechanisms that made credit possible in the aristocratic circles of Cicero (specifically, the extralegal punishments that could be inflicted on an insolvent debtor, which allowed lenders to hedge against risk) would have worked just as well among men of more modest means. Furthermore, this is exactly the sort of activity that would be least likely to survive; such credit transactions would be informal, practically unenforceable, and rarely undertaken for sufficient amounts to inspire any sort of popular attention. As such, the absence of records of such activity does not mean the absence of the activity itself—in fact, it would be strange if close-knit groups in need of funds never turned to each other for informal help. What is relevant is that in neither of these cases did low-status borrowers enjoy the benefits of regulation that was proposed—at least nominally—for their benefit. While low-status borrowers could use informal credit systems to obtain money, it seems unlikely that that would have sufficed for large sums; lenders who could provide capital for a business venture, or even enough money to cover a substantial shortfall, appear to have refused to lend to such borrowers within a legal context. As such, these borrowers could expect usurious interest or other illegal practices. Effectively, by making it difficult to punish delinquent borrowers—and by capping interest rates at an amount too low to accurately reflect the risk that certain borrowers posed—the Imperial regulatory regime simply created a shadow economy and deprived the legal rate of interest.

189. *PLUTARCH, MORALIA* 829.C.
191. *See AULES GELLIIUS, supra note 27, at 20.1.46; Frederiksen, supra note 5, at 129 n.11, 13.*
193. For example, some guilds in Roman Egypt appear to have formalized this type of social lending among their members. *See Philip F. Venticinque, Family Affairs: Guild Regulations and Family Relationships in Roman Egypt, 50 GREEK, ROMAN, & BYZANTINE STUD. 273, 282–83 (2010).*
194. *See Frederiksen, supra note 5, at 128–30* (describing some of the inhumane punishments for debtors that had been outlawed).
low-status borrowers of the very protections that were put in place for their benefit.

Of course, we should also consider later developments in the law of *cessio bonorum*. While the practice seems to have persisted for some time in Egypt, the juristic treatment of *cessio bonorum* suggests that the doctrine might have been curtailed, at least in Italy. Notably, by the third century when Ulpian and Modestinus discuss the practice, both picture it as a temporary stay of enforcement that does not release the debtor from liability attaching to after-acquired property. The first-century jurists Cassius and Sabinus, however, view the discharge as permanent. It is not unusual for jurists to disagree about the proper interpretation of law in the Digest; in fact, Modestinus and Ulpian themselves disagree on the propriety of a basic living allowance being exempt from creditors. However, this is not a dispute on the fine points of law, nor is it a disagreement among contemporaries—Cassius and Sabinus, both of whom wrote in the early Empire, simply understand *cessio* to mean something different than do Ulpian and Modestinus, writing about two centuries later. The evidence is circumstantial, but permanent relief from actions on pre-*cessio* debt may have been removed from the law between the first and third centuries C.E. The law to which Ulpian and Modestinus refer still puts serious hurdles in front of creditors, who would have to monitor the finances of their debtors in default, but it obviously presents fewer risks than its first-century equivalent. Thus, we can speculate that one response to the *lex Julia de bonis cedendis* was simply to alter it.

VI. CONCLUSION: THE LESSONS OF IMPERIAL ROME FOR MODERN CREDIT MARKETS?

Of course, any extended discussion of credit markets’ response to default brings to mind recent events. The financial crisis of 2007 has been traced in large part to misunderstandings of default risk in the context of home mortgages. Lenders advanced funds to borrowers from whom they had no hope of recoupment in the case of a drop in real estate prices, leading to mass foreclosures and crippling losses on the part of the

---

195. See LEWIS, supra note 50, at 103–09.
196. DIG. 42.3.4, 7 (Ulpian, Ad Edictum 59; Modestinus, Pandects 2).
197. Id. 42.3.4.1 (Ulpian, Ad Edictum 59) (summarizing the two jurists’ earlier treatment).
198. Notably, by the time of Ulpian and Modestinus, contractions in the credit market seem to be increasingly visible, perhaps because they were affecting upper-class borrowers as well. That said, this crisis appears multi-determined. See Silver, supra note 21, at 308–19.
That said, we cannot blame this catastrophe on the liberality of modern bankruptcy law— one can imagine a world in which banks came into possession of millions of enslaved debtors, but that is not a world in which any of us would want to live. Instead, modern credit regimes typically punish default by stripping delinquent borrowers of a class-symmetrical form of reputational capital, in the form of a credit score. The analogue here is not the complex aristocratic penalties of Imperial bankruptcy, but rather the public listing of decoctores described above. All borrowers receive some reputational capital at the beginning of their financial lives, which is then tracked by independent organizations that provide information to prospective lenders. Good borrowers are viewed as low risks; poor borrowers are viewed as high ones. While this system is hardly perfect, it does avoid the critical problem seen in Imperial Rome; credit rationing, in its extreme forms, is restricted to borrowers with actual negative history.

So why did credit markets fail so spectacularly? One prevailing theory is that both sides of these doomed credit interactions misunderstood the risks of default; borrowers took out loans without considering the possibilities or consequences of default, and lenders behaved similarly. This is not an article about modern credit markets— so I ask the reader’s forgiveness if my treatment is cursory— but this examination of Imperial lending suggests possible solutions for the future. If insulating borrowers from the consequences of default led to greater default rates, then creditors would be expected to respond with rationing. However, if lenders are similarly insulated, then “rational rationing” may not occur, leading to overlending and possibility of catastrophic mass default. One potential answer to this problem may simply be ensuring that both parties to a loan are incentivized to carefully consider the likelihood and consequences of default before entering into an agreement.

For borrowers, a major issue may simply be ignorance of the consequences of bankruptcy. Any debt regime that intends to incentivize

---

202. See Block-Lieb & Janger, supra note 77, at 1509–14 (discussing credit scoring’s history and how it can solve some of the problems associated with liberal debtor protection policies).
203. See supra notes 163–165 and accompanying text.
204. See Block-Lieb & Janger, supra note 77, at 1510–12.
205. Id. at 1511–12.
207. Chintal A. Desai et al., Effects of Bankruptcy Exemptions and Foreclosure Laws on Mortgage Default and Foreclosure Rates, 47 J. REAL EST. FIN. & ECON. 391, 396 (2013) (“Filing for bankruptcy is more attractive in states with higher levels of homestead and personal property exemptions.”).
repayment relies on a debtor’s awareness of the punishments built into the system. To use an extreme example, public execution of delinquent borrowers would only be a deterrent if the borrower knew her life was on the line when making decisions about repayment. In the instant case, all evidence suggests that borrowers were only dimly aware of the risks they were running; we cannot expect borrowers to consider their credit score when making borrowing decisions if they fail to understand the basics of credit-scoring and their own credit history. Furthermore, a strong relationship between punishment for defaulters and responsible borrowing behavior assumes that prospective borrowers understand whether or not their choices will likely lead to default; evidence suggests that the increasing complexity of mortgage instruments has made consumers far less able to accurately predict the default risk attached to their credit decisions. These problems could, theoretically, be resolved through greater disclosure requirements or by better education about the American credit scoring system. To the extent that borrowers should be expected to consider their risk of default when making credit decisions, they can only do so if given the tools to properly understand the risks inherent in our particular debt regime. Otherwise, we can hardly fault borrowers for ignoring consequences for default that are somewhat abstract and frequently minimized in credit negotiations.

Lenders are more problematic. Mortgage providers were obviously aware of the risks borrowers would face in cases of default, and given their profession should have been aware of the risks to themselves. In fact, lenders effectively insulated themselves from the risk of default by securitization—packaging similar mortgages together and selling them to third parties who could not analyze each loan individually.

---


209. See Preserving the American Dream, supra note 201 (testimony of Jean Constantine-Davis, AARP); Jinkook Lee & Jeannie Hogarth, The Price of Money: Consumers’ Understanding of APRs and Contract Interest Rates, 18 J. PUB. POL‘Y & MARKETING 66, 67–68, 74 (1999) (discussing pre-existing empirical literature on lack of consumer understanding of credit instruments; presenting the authors’ own findings on consumer understanding of specific terms of home mortgages; and finding consumers consistently failed to understand how their own interest rate was calculated, respectively).

210. Both of these techniques, however, have been the subject of substantial scholarly concern. For some of the difficulties in crafting effective loan disclosures, see Deborah Pogrund Stark et al., Ineffective in Any Form: How Confirmation Bias and Distractions Undermine Improved Home-Loan Disclosures, 122 YALE L.J. ONLINE 377, 394 (2012) (“The results of this study suggest that improving disclosure forms, without more, may be insufficient to educate consumers on the consequences of taking out home loans.”). See also Lauren E. Willis, Against Financial-Literacy Education, 94 IOWA L. REV. 197, 204–09 (2008) (discussing the lack of empirical support for claims of financial literacy education’s success in improving financial planning skills, as such education programs are currently constructed); Lauren E. Willis, The Financial Education Fallacy, 101 AM. ECON. REV. 429, 432–33 (suggesting that prohibitions on irrational behavior may better serve borrowers).

211. Subprime Mortgage Market Turmoil: Examining the Role of Securitization: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs Comm. Subcomm. on Securities, Ins., and Inv., 110
have a credit interaction in which a party that faces no cost from default lends money to another party who is unaware of the costs of default. Is it any wonder default occurred? Limits on securitization could help solve this problem, as could the more radical solution of absolute restrictions on alienation of mortgages by lenders. All of these reforms could theoretically lead to a more functional mortgage market by allowing parties to better evaluate and respond to default risk. However, this article is emphatically not the place for a solution to the world’s financial problems; these are simply ideas, springing from a comparative study that has demonstrated the importance of risk evaluation to credit markets’ functioning.

In conclusion, I want to re-emphasize that, in making the claims I do about Roman debt law, I am not advocating for the return of debt bondage, or even saying it was an improvement over the Imperial regime. The system which Livy and Dionysus describe—a system in which the wealthy could kill or enslave anyone unfortunate enough to fall into debt—is repugnant to modern sensibilities, and rightly so. That said, we live in a time where credit markets are an absolute prerequisite to any sort of functioning society, and where different borrowers’ vulnerabilities in case of default can lead to catastrophic market distortions. While modern society has (mostly) fixed these distortions through compensatory legal innovations, it is nevertheless worth examining how other societies have attempted to solve this problem. I (hopefully) have shown that the credit innovations of the late Republic were not nearly as unambiguously positive as they first seem. While they created a formal regulatory system that was far more friendly to borrowers than that seen before, the warping effect this had on the reality of credit in the Imperial period cannot be ignored. Any analysis of Roman commercial regulation must grapple with this problem and account for the adaptive behavior that occurs when profit-seeking individuals react to new legislation; the most important law in any society is the law of unintended consequences.