

## A Glimpse of Early Modern Governance in Claire Priest's *Credit Nation*

Carol M. Rose

Claire Priest's remarkable book serves up a whole new view of commercial relations in the colonies that were to become the United States. Her striking revelation of the importance of slavery in colonial commercial innovation will undoubtedly catch the attention of readers and reviewers, coming as it does at a moment when the history of slavery has come under an especially searching spotlight. A second theme that will capture attention runs through the entire book: the countervailing efforts of colonial entrepreneurs to borrow and thus take potentially wealth-producing risks while also leavening risk with now-obsolete property devices like entailed fees.

Both these themes necessitate revisions of conventional views. The first revision, among others, concerns the geography of colonial commercial growth, which, as Claire reveals, very much involved trafficking in enslaved persons. The conventional view of colonial entrepreneurship is that the major location was in the north: Yankee clippers plying the seas, Ben Franklin types setting up print shops, Paul Revere producing silver goods, and so on. But in Claire's book, the major financial innovators were the southern planters, taking on debt to invest in what looks like industrial agriculture—staple crops like indigo and tobacco—and for that purpose pledging not only their land as surety but their slaves as well.

This is the aspect of the book that most readers will find most striking and indeed shocking. It gives fodder to present-day arguments that the American economy was not founded on bustling Yankee entrepreneurship at all. Instead, the argument goes, right from the start the American economy was built on the backs of African-American enslaved persons. In Claire's book, the geography appears very different from the conventional view: the southern plantation owners were the leaders in innovative financial arrangements, however cruel and odious those arrangements were.

The second major theme mentioned above—the efforts both to expand risk-taking opportunities and to hedge risks—also involves an important revision. Colonial entrepreneurs had to balance conflicting needs: on the one hand, they needed new financial devices to fund their commercial activities, but on the other, they needed security against too much risk. In a

very real sense, this tension divides the book itself. The early portions of the book present hard-driving, risk-taking enterprise, where the colonial players, aided by their British creditors, break down barriers inherited from English property law and pledge land and slaves in the quest for more capital. But the later chapters of the book concern the continuing use of some of those barriers to limit risks, particularly through the use of legal instruments to bar sales of landed property, keeping it within the family and safely out of the hands of creditors from afar.

The major topic here concerns entailed fees, the notorious “fee tail” of property lore, and of course the PBS show *Downton Abbey*, through which a current holder of the estate is barred from selling or pledging it so that the estate will roll on through the years from anointed heir to anointed heir. Claire’s work on entailed fees in this book and elsewhere has been a revelation. She has shown that the standard story about the American legal overthrow of entailment is sadly incomplete. American lawmakers did not reject entails because they eschewed aristocracy, she argues. They rejected entailed fees because they wanted to mortgage their lands to borrow more money for more land or more slaves or both. In short, in Claire’s revisionist version, relaxing and then abolishing entail was a part of the appetite for entrepreneurial risk and a portent of the relentless drive across the continent that would later be called Manifest Destiny.

But in the colonial era, there were limits to the appetite for risk. If the loans did not work, the effects of foreclosure could be devastating for the landowners and even more devastating for the landowners’ dependents. As Claire argues, the colonists continued to deploy entailment to protect widows and children. A particularly interesting aspect of the risk-reducing function of entailment is the window it opens into personal relationships, especially the efforts to protect more vulnerable family members. One has to wonder whether those efforts also applied at least to some enslaved persons. Slaves could not be entailed, no doubt because an entailed status would turn them into something akin to serfs, and immovability would much diminish their value as pledges. But did owners try to protect at least some enslaved persons from sales, perhaps by not pledging them in the first place, or in crisis situations, getting some lands released from entail so as to pay off the mortgage on the enslaved person? Questions like these, of course, test the informational limits of accounting books.

I leave these two themes, however, because I am certain that other readers and reviewers will take them up a length. Instead I want to discuss more extensively a third theme, one that is considerably more buried in Claire’s book. Indeed, the book touches on it in just a few pages; but those pages touch on a deep tension between the colonists’ commercial and entrepreneurial activities and the fundamental structure of imperial governance.

*Credit Nation* covers a good deal of ground about the Stamp Act and related imperial taxes. But in the midst of this, one moment is especially revealing about the form of imperial government at that time: the long-lasting tussles between colonists and colonial officials over land records, and insofar as these were kept at all, whether they could be kept locally or had to go to a central location.

At first glance, land records seem to be a rather odd point of conflict. Even today, land continues to be a quintessentially local topic, involving not only county recording systems but local land use regulation as well. Why then would the Privy Council and the colonial officials object to the colonists' creation of local land recording systems? Were the local records too sloppy? Well, perhaps, although even at the time, local recordkeeping served the colonists' needs better. From the relatively brief discussion of these conflicts in Claire's book, we see that the real reason lay elsewhere: anyone recording land documents had to pay a colonial administrator a fee for the service; the administrator was entitled to those fees and would lose them if some other entity could manage the records.<sup>1</sup>

*Credit Nation* puts the land records conflicts in the context of colonial legislatures' objections to taxes and fees controlled from Britain, but these land record conflicts also open a window on the more general character of early modern European methods of governing. Well into the eighteenth century, few European governments had efficient taxation or administrative systems. If governmental services were to be extended at all, they had to be recompensed by those who received them. As Nicholas Parrillo has demonstrated, the pattern of fee-for-service extended well into the nineteenth century even in the new United States, only gradually evolving into the modern practices of salaried governmental employment.<sup>2</sup>

But the land record conflicts had another element that was particularly associated with early modern governance. Early modern governing practices at all levels were a mixture of property and governance that is quite foreign to modern ideas about government. At least until the late sixteenth century, in theory if not in practice, even the king was supposed to "live upon his own." That is to say, he drew upon the crown's own estates to provide the income needed for royal administration; and if he needed more, he had to call parliament for subsidies from *their* property.<sup>3</sup> The idea that the king could "live upon his own" clearly no longer sufficed by the

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1. CLAIRE PRIEST, *CREDIT NATION: PROPERTY LAWS AND INSTITUTIONS IN EARLY AMERICA* 51-53, 117 (2021)

2. NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT 1780-1940*, at 1-5 (2013) (arguing that administrative and taxation weakness was a necessary precondition for governance through fees, although not sufficient one in later years).

3. ROGER LOCKYER, *TUDOR AND STUART BRITAIN 1471-1714*, at 27-28, 211-15 (1964); in early modern governmental theory, this was why the king had to call parliament from time to time: when the royal coffers ran short, the king had to ask the people (i.e., Parliament) for subsidies.

seventeenth century, but the pattern persisted as applied to other aspects of government. In an earlier review article, I described the standard early modern method of getting things done in the following way: “first, create an exclusive and lucrative property right to perform some activity, then attempt to hedge the right with directions for its use, and finally grant it to someone and hope for the best.”<sup>4</sup> The grantee might be a person or a corporate entity, but he (or it) *owned* both governing authority and its perquisites, and where necessary, another endowment that supported it. This grantee might receive land, like Walter Raleigh’s Roanoke colony. Or a grantee might receive monopoly authority over some activities in a given location, like city guilds’ authority over making clothing or baked goods. In turn, the grantee person or entity was authorized to keep good order in the territory or the activity. But the grantee—person or corporation—would take payment from monopoly rents and the emoluments associated with the office and effectively owned both the authority and whatever other endowment supported it.<sup>5</sup>

In this pattern, in many towns on the European continent, local guilds controlled their respective trades and had the responsibility to keep order in them—which meant that they also enjoyed monopoly rights over shoemaking or tailoring or brewing beer, along with the monopoly rents that accompanied those rights.<sup>6</sup> From the early seventeenth century onwards, early modern royals had to scramble for revenue, and they made much more use of the property-like grants of governing authority: they turned these grants into a source of revenue. Elizabeth I famously (or infamously) granted a monopoly over commerce in playing cards—one of a number that she granted. She retracted some, but her successor James I continued to give out even more monopolistic grants, then known as “patents.”<sup>7</sup> By the end of the seventeenth century, however, the most notorious examples came from France, where among other offices, judgeships were sold to raise revenue; those offices could be inherited, creating a whole class of so-called “nobles of the robe,” who would play an

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4. Carol M. Rose, *Public Property, Old and New*, 79 NW. U. L. REV. 216, 219 (1984-1985) (review of Hendrik Hartog, *Public Property and Private Power* (1983)).

5. *Id.* at 219-21.

6. MACK WALKER, *GERMAN HOME TOWNS: COMMUNITY, STATE, AND GENERAL ESTATE, 1648-1871*, at 77-79, 81 (1971).

7. Chris R. Kyle, *But a New Button on an Old Coat: The Enactment of the Statute of Monopolies, 21 James I cap. 3*, 19 J. LEGAL HIST. 203-06 (1998); see also LOCKYER, *supra* note 3, at 208-09 (describing Parliamentary objections to Elizabethan grants of monopolies). A major reason for Parliamentary objections to these and similar royal revenue-raising devices was the fear that the monarch could avoid calling Parliament, particularly heightened during the reign of Charles I. In the early American republic, traces of a similar concern surfaced in fears that the public lands could serve as an endowment that would enable the President to rule without Congress. See Carol M. Rose, *Claiming While Complaining on the Federal Public Lands: A Problem for Public Property or a Special Case?* 104 GEO. L.J. ONLINE 94, 107-12 (2015).

important role in the events leading up to the French Revolution.<sup>8</sup> Officials who owned their offices were supposed to perform governmental functions, taking compensation from payments by service recipients, including litigants in the case of judges. This pattern now would seem rife with conflicts of interest, and even at the time, critics complained of corruption inherent in the venality of offices.<sup>9</sup> But France was not alone in the practice of selling offices. Other early modern European governments also sold offices, including the Netherlands, Spain, and England.<sup>10</sup>

Indeed, the English colonial efforts illustrated the early modern pattern of governing through grant of endowed authority. Early on, Raleigh's Roanoke was one such grant, but a century later, William Penn got a charter to govern Pennsylvania.<sup>11</sup> Meanwhile, the East India Company was chartered as a monopoly to manage trade with India, taking its revenue from the trade.<sup>12</sup> Important aspects of this pattern—endowed delegated authority—continued into what was to become the United States later. Hendrik Hartog has written about the way that the Corporation of the City of New York had an endowment of land and used its endowment to promote commerce. The corporation allocated water lots on the shores of Manhattan on condition that the grantee would wharf out and provide for shoreline access, presumably taking their pay from wharf customers. In this way, New York promoted its own ends by grants of property-like authority to others. The pattern, as Hartog observes, was that the Corporation's property was not simply private but was essential to its governing authority.<sup>13</sup>

Returning to colonial administration and the land records: given the pattern of early modern administration, it is clear why the colonial administrators and the Privy Council insisted that no one else could record deeds. The official's activity of recording documents carried an entitlement to the fees; the activity and the fees were effectively his endowed property. Thus, while *Credit Nation's* discussion of the land recording conflict is relatively brief, it is a telling one nevertheless. The colonists' establishment of their own local recording systems suggested how the needs of commercial enterprises began to hollow out a whole system of early modern governmental administration. A much more dramatic example was to come

8. For the ascendance of the nobles of the robe, see FRANKLIN L. FORD, *ROBE AND SWORD: THE REGROUPING OF THE FRENCH ARISTOCRACY AFTER LOUIS XIV* (1953); for venality, see Thomas Brennan, *Review of William Doyle, Venality: The Sale of Offices in Eighteenth Century France*, 16 L. & HIST. REV. 605-07 (1998).

9. FORD, *supra* note 8, at 121.

10. K.W. SWART, *SALE OF OFFICES IN THE SEVENTEENTH CENTURY* 2-3 (1949)

11. The Roanoke charter is reproduced in R. HAKLUYT, *VOYAGES* 115-20 (Dent ed., 1926); Penn's is reproduced in M. KAMMEN, *DEPUTYES AND LIBERTYES* 164-66 (1972).

12. NICK ROBBINS, *THE CORPORATION THAT CHANGED THE WORLD: HOW THE EAST INDIA COMPANY SHAPED THE MODERN MULTINATIONAL* 22-24, 30-32 (2012)

13. HENDRIK HARTOG *PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870*, at 45-46, 51-52, 65 (1983); *see also* Rose, *supra* note 4.

with the Boston Tea Party, protesting another British governmental monopoly grant: the East India Company's special right to sell tea in the colonies, which of course shut out the Yankee traders.<sup>14</sup>

Thus at a pivotal moment in America's revolutionary history, a conflict erupted between commerce on the one hand, and endowed governmental privileges and emoluments on the other. As *Credit Nation* relates, conflicts over such privileges carried important political connotations in the colonies, where fees enjoyed by colonial administrators threatened to turn into taxes that escaped the authority of the colonies' representative assemblies. Nevertheless, the conflict between commerce and endowed governmental authority went beyond its American association with representative government and extended to some monarchs' efforts to modernize. In a notable example, the eighteenth-century Kings of Prussia promoted factory industry and commerce outside guild authority, seeking at once to gain new sources of revenue while sidelining rival authorities in Prussian towns.<sup>15</sup>

The colonial land records' conflict, then, is a glimpse not only of early modern governance practices, but also of the serious disruption that newer forms of commerce posed for those practices. In a subtle way, this same disruption makes an appearance in the issues that Claire describes concerning the relaxation of entailment and other rules against mortgaging land. In England and on the continent, landowning families had long been expected to stay in place and run matters affecting the locality—another whiff of a system in which property carried durable governing authority. Thus one might naturally assume that the abolition of entailment in the new United States derived from the sturdy small-r republican rejection of these trappings of aristocracy. In this regard, as mentioned above, Claire's work on entailment has been boldly revisionist, arguing that a central reason for abolishing entail was to free up credit so that agricultural entrepreneurs could fund the purchase of more land and slaves.<sup>16</sup> Nevertheless, others, including Dan Hulsebosch in this journal issue, argue that the abolition of big aristocratic estates was still part of this picture.

But whatever the intention, abolishing entailment was a blow to an aristocratic perspective in which property and governance were intimately linked. Hendrik Hartog's work suggests that a modern political economy has to sever that link and separate governing authority from any specific endowment. From the political perspective of a democracy, the ownership

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14. Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J. L. & PUB. POL'Y 983, 1007-08 (2013); Arthur Meier Schlesinger, *The Uprising Against the East India Company*, 32 J. POL. SCI. 60, 67-77 (1917).

15. FLORIAN SCHUI, REBELLIOUS PRUSSIAN: URBAN POLITICAL CULTURE UNDER FREDERICK THE GREAT AND HIS SUCCESSORS, 30-31, 41-42 (2013).

16. PRIEST, *supra* note 1, at 141-45.

of offices conflicts with the ability of representative bodies to control their agents. From the economic perspective of modern commerce, a system in which governing authority is owned by someone or some entity presents too many conflicts of interest and clogs too severely the workings of entrepreneurial capitalism. The East India Company's monopoly on delivering tea to the colonists is a well-known example, but so is Claire's brief example in which colonial administrators claimed monopoly control over records of real estate transfers. Thus *private* property and *public* governance are what we now assume to be fundamental characteristics of our own political economy, and we object to the blurring of public office with property as corruption, as when officials demand payment for performing public duties or refuse to leave office at the end of their lawful mandates.

Nevertheless, some traces of the early modern system persisted into more recent times, and indeed, persist today. Nicholas Parrillo's book on the "salary revolution" shows that important features of that system continued in the United States well into the nineteenth century. As he demonstrates, even when administrative and taxation systems could have converted more governing functions into salaried positions, many government officials still drew their pay from fees for services rendered.<sup>17</sup> Even more closely recalling early modern practice, the Homestead Act of 1862 granted property titles (known as patents) to individuals in exchange for their settlement in the western territories, thus helping to create an American frontier presence that would counteract encroachment by European powers. A version of homesteading lives on today in some cities' grants of tax-delinquent properties to "urban homesteaders," whose restorations, it is hoped, will revitalize decaying urban areas and bring them back on the tax rolls.<sup>18</sup>

An even more recognizable holdover of the early modern governance system appears in intellectual property, whose major devices originated in the seventeenth century<sup>19</sup> and were embedded in the Constitution of 1787. Inventors may receive patents on their inventions, which give them monopoly rights to the income from their inventions for a period of years, during which they "promote the useful arts" by developing the invention or licensing it to someone who will. Copyright operates in the same way, albeit with a less firm monopoly grant but for considerably longer periods.

It is not hard to see in these devices the early modern governance pattern: a grant of authority for a service to the public, recompensed by an

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17. See PARRILLO, *supra* note 2, at 42-43 (summarizing argument that bounties continued to be favored as incentives for enforcement well into nineteenth century).

18. Homestead Act of 1862, 43 U.S.C. §§ 161-180 (repealed 1976); see also Carol M. Rose, *Property in All the Wrong Places*, 114 YALE L.J. 991, 1007-08 (2004) and sources cited therein (describing motivations for homesteading and urban homesteading programs).

19. Kyle, *supra* note 7, at 203.

endowment in the proceeds that come from that grant. Equally recognizable are the complaints about these devices: that instead of serving their purposes, it is said, our current patent and copyright systems clog creativity and entrepreneurship.<sup>20</sup> It is significant that other methods for encouraging creativity are certainly in use, such as salaried research, prizes, and direct subsidies, but those methods can raise complaints that they put government in the position of directing creative efforts or “picking winners.” Insofar as eighteenth-century commentators defended property in offices, they too stressed that proprietary office-holding protected the recipients’ independence from governmental pressures.<sup>21</sup>

This reasoning is unconvincing insofar as we think that officials should actually carry out governmental policies, and in any event, it cannot defend what many see as the overprotectiveness of our current patent and copyright systems—far from it. But it does suggest that the unstructured character of remuneration-through-property may have payoffs that are peculiar to innovation policy: if appropriately reformed to reflect the genuine needs of inventors and artists, the property form could encourage diversity in inventiveness in a way that salaries, directed subsidies, and prizes do not.

The land record battles give only distant glimpses of a pattern of governance that was much more far-reaching in the colonies and indeed in Europe itself in the early modern era. But in those miniature quarrels over where land records should be kept, Claire’s readers get an insight into a largely forgotten political economy, one in which governing authority merged with property, and one now largely transformed into public governance and private property. As with her much more extensive discussion of the relationship between colonial credit and slavery, Claire’s description of the land records conflict serves as a reminder how much our institutions have changed—but also how some elements are still with us today.

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20. See, e.g. Michael Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 *SCIENCE* 698 (1998) (arguing that proliferation of patents may stifle research); William Landes & Richard Posner, *Indefinitely Renewable Copyright*, 70 *U. CHI. L. REV.* 471 (2003) (arguing against length of copyright protection for most works); JASON MAZZONE, *COPYFRAUD AND OTHER ABUSES OF INTELLECTUAL PROPERTY LAW* (2011) (recounting numerous examples of overreach of current copyright law, inhibiting creativity).

21. FORD, *supra* note 8, at 122.