THE COLONIAL ORIGINS OF LIBERAL PROPERTY RIGHTS

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INTRODUCTION

At least since the time of Locke, the notion of a "right" to property has played a central role in liberal political thought. Oddly, however, given the subject's significance, scant attention has been paid to the emergence of property rights conceptualization in early American legal history. Often commentators assume, for example, that when the framers of the Constitution solemnly promised to protect "property," they had in mind something with a clear and commonly understood definition. A close examination of colonial law, however, reveals that prior to the Revolution the notion of property right contained within it more incoherence and self-contradiction than clarity. Moreover, that incoherence did not result simply from the frontiersmen's crude disregard for common law forms or unenlightened failure to apply rigorous legal reasoning to the task of defining property relations. Instead, the self-contradiction stemmed directly from the fact that the idea of property in the colonies was inextricably linked to two irreconcilable visions of social life—visions which were simultaneously moral, political, and economic. Each contained its own account of the proper role of property within the social order and its own version of the source of legitimate title. Since the struggle between those visions re-

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mained unresolved, a coherent definition of property was impossible.

For purposes of this Article, those two competing visions have been labeled hierarchy and voluntarism. The first assumed the inherent legitimacy of a securely structured and paternalistic political, economic, and ecclesiastical hierarchy, with a corresponding structure of semi-feudal property relations premised on a divinely ordained inequality. The second directly challenged that hierarchy by proclaiming equality and freedom as the only possible foundation for a true republican community and also by regarding actual settlement and use of land as the only legitimate source of title.

The degree to which the conflict between these two alternative visions dominated colonial American thought cannot be overemphasized. They struggled against one another in political and religious debate and were lived out as part of the daily experience of colonial settlers. It was within the context of that struggle that the idea of rights began to gain its ascendancy as an organizing principle of American legal thought.

The main purpose of this Article is to examine closely the meaning of property rights in provincial New York, where its definition was especially problematic and closely bound up with the conflict between the hierarchical and voluntarist models of social organization. As a preliminary point, however, it is worth noting that the New York experience was representative of a conceptual dilemma well recognized by the most sophisticated of early liberal theorists. Indeed, much early liberal writing was devoted to the creation of mediating concepts which served to mask the inevitable irreconcilability of hierarchy and voluntarism. As one key example, modern readers of Adam Smith might be struck by the extent to which Smith's description of a "free" market economy incorporated both contradictory models; as Smith recognized, those models carried with them contradictory assumptions about the nature of law and morality. Smith's first model was the voluntarist model of free exchange and cooperative, value-enhancing barter,[1] which Smith explicitly associated with equalitarian societies where each member was a self-reliant producer and where laws were made by the participation of equal, independent citizens. Only such socie-

1. *See generally* A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (R. Campbell, A. Skinner & W. Todd eds. 1976).

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ties, Smith maintained, were wholly consistent with the "law of nature."[2] According to Smith, however, conditions of completely free exchange and legal consensualism existed only in parts of the colonies, where easy availability of land made each colonist potentially self-reliant. In other countries, "rent and profit eat up wages,"[3] and free exchange is inevitably distorted by the fact that some members of society are dependent on others.[4]

Nevertheless, such deviations from the purity of the voluntarist model were inevitable for the sake of promoting Smith's second model: the concentrated accumulation of capital and division of labor which was required for the efficient production of goods. Because that second model was premised on the protection of inequality, it required a legal, religious, and even epistemological system characterized by hierarchical authority rather than pure consensualism, reason rather than passion, aristocracy rather than republican equality, Anglicanism rather than radical puritanism.[5]

Smith never envisioned an economy—or a legal system—premised wholly on the hierarchy which seemed implicit in the protection of inequality. Such a hierarchy would lead to the king's monopoly over resources and the stagnation Smith associated with crown regulation, entail and primogeniture, and the monopoly engrossment of the free market. On the other hand, Smith's system obviously meant deviation from the model in which each person is an economically self-reliant republican citizen and therefore a truly free bargainer.[6] What Smith envisioned instead was a complex interaction between hierarchy and voluntarism. Each was denied in its static, pure form, but elements of each were incorporated into a new and dynamic middle ground.

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2. *See generally* A. SMITH, LECTURES ON JURISPRUDENCE (R. Meek, D. Raphael & P. Stein eds. 1978).

3. A. SMITH, *supra* note 1, at bk. 4, ch. 7, pt. 2, § 3.

4. *Id. See also* 1 K. MARX, CAPITAL 770-71 (F. Engels ed. 1967):

> The labourers most distinctly decline to allow the capitalist to abstain from the payment of the greater part of their labour. . . . What is now . . . the consequence of this unfortunate state of things in the colonies? A 'barbarizing tendency of dispersion' of producers and national wealth. The parcelling-out of the means of production among innumerable owners, working on their own account, annihilates, along with the centralization of capital, all the foundations of combined labour.

5. *See generally* A. SMITH, THE THEORY OF MORAL SENTIMENTS (D. Raphael & A. Mactie eds. 1976).

6. *See generally* A. SMITH, *supra*, note 2.

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This incorporation of extremes within a dynamic middle ground required a complex set of mediating devices. With respect to the market, the key mediator was the market price, that single figure which claimed objectivity and incorporated the effects of hierarchically imposed inequality, while at the same time reflecting the free play of subjective values on a supply and demand market. Similarly, theorists inserted the new notion of "self-interest" between the paternalistic authority of reason and the unpredictable disruptiveness of passion, describing interest as the driving force in economic and political life.[7] Smith's own conceptual mediator (still very crude, compared to later rights formulations) was the "natural spectator" standard of justice. The natural spectator represented man's natural feelings of sympathy rather than the outmoded moral traditionalism of the scholastics and the landed aristocracy. Therefore, he could be trusted to disapprove entailed estates and primogeniture, preferring instead that land be on the open market. On the other hand, the naturally sympathetic impulses of the spectator would be restrained by reason. They would not, for instance, favor leveling or impulsive benevolence. To those who were poor, for example, the natural spectator would explain that the protection of inequality, while it resulted in the inescapable poverty of many, "tended most to the prosperity and order of the whole, which we ourselves, if we were wise and equitable, ought most of all to desire."[8]

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7. *See* A. Hirschman, The Passions and the Interests 43-44 (1977).

8. A. Smith, *supra* note 5, at 274-75. The central role of property as mediator was recognized quite early by David Hume, who elaborated more fully than Smith its moral and epistemological implications. Hume started by postulating a system of subjective values and "bottom up" epistemology. He stated that reason is, and ought to be, the slave of the passions. *See generally* D. Hume, An Enquiry Concerning Human Understanding (C.W. Hendel ed. 1965). His system was premised on a dramatic ethical relativity; morals were, in effect, no more than shifting values on a supply and demand marketplace. Hume shrewdly recognized two points, however. If ethical hierarchies were really collapsed into this complete sea of relativity, then the legal authority built around secured property ownership would have no logical foundation. Moreover, he recognized, perhaps more clearly than did Smith, that the logic of completely free exchange could lead in the direction of redistribution: given the marginal utility of the dollar, which he assumed, then real exchange equilibrium (as we now say) meant equality. In turn, Hume associated the movement in this direction with sectarian religion, republicanism, and law as consensualism; and he even admitted that Sparta and Rome under agrarian laws had been said to benefit from the broad republican distribution of property which accompanied a broad distribution of political power. D. Hume, An Enquiry Concerning the Principles of Morals, in Hume's Ethical Writings 44 (A. MacIntyre ed. 1965).

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Notions such as the "natural spectator" were bound to appear clumsy. Part of the genius of liberal theory lay in its eventual appeal to legal forms as key conceptual mediators. One of the most central of these legal forms was the notion of an objective "right" to property, which concealed the fact that decisions about property relations are inevitably moral and social choices. This supposed apolitical objectivity masked the reality of continued moral conflict.

The purpose of this Article is to examine the emergence of the notion of an objective right to property within the context of a particular time and place—colonial New York during the two decades immediately prior to the Revolution—when the conflict between competing world views was particularly intense.[9] During the same

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To counteract that theoretical direction, Hume introduced into his description of law a wholly artificial virtue, "justice," which was to be known by the standard of ultimate, reasoned utility—specifically, the reasoned utility of private property ownership. "Justice," Hume announced unequivocally, was property. Notably, the old epistemological hierarchies were restructured, with artificial reason once again asserting its authority over the natural passions.

Hume's point was more subtle, however. This new hierarchy of reasoned utility was to reach no higher than utility itself—it was not, for example, to reach so high as to include outdated ethical constraints. Morals, he said, must always be handled with a view to public interest and he criticized the schoolmen for imposing their moral concerns into contract law. Moreover, this "ultimate" utility of property protection was combined with a more "immediate" utility, which allowed for the flexibility which was needed in a changing market.

Directly paralleling that distinction was the important distinction between the general legal principle of property protection (as against crown control or, particularly, levelling) and specific legal rules:

> [W]e must ever distinguish between the necessity of a separation [non-communalism] and constancy in man's possessions, and the rules, which assign particular objects to particular persons. The first necessity is obvious strong and invincible: the latter may depend on a public utility more light and frivolous. . . .

Id. at 146 n.3.

Indeed, Hume seems to have recognized that the same capitalism which required the protection of "property" also required that it be a word of infinite definition, whose meaning would change with every change in the economy. Thus, Hume could affirm the "inviolable" nature of private property and at the same time ask: "Does any one scruple, in extraordinary cases, to violate all regard to the private property of individuals, and sacrifice to public interest a distinction which had been established for the sake of that interest? . . . All other particular laws are subordinate to [public interest], and dependent on it." *Id.* at 48.

Similarly, Hume admitted that, except where changes were demanded by some immediate utility, the actual content of specific rules was rarely important. Many were based only on the "taste and imagination" characteristic of the lawyers. *Id.* at 125. The important point was that these rules were all within a legal system which recognized the bounds defined by "ultimate" utility—the bounds, in other words, which protected private ownership of property from the "immediate utility" of leveling.

9. This is not meant to be a complete history of property relations in colonial New

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period when Smith was attempting to resolve the conflict between contradictory economic and moral models on an abstract and theoretical level, New Yorkers were experiencing that conflict as part of the reality, sometimes violent, of their daily lives.

Section I of this Article will focus on the competing models central to the attempts to conceptualize property—title by occupancy and title as derived from a hierarchically situated sovereign. Those models represented in New York the basic conflict between hierarchy and voluntarism, which was still, simultaneously, a conflict about law, religion, politics, and economics.

Section II will show how those competing models were incorporated into the policy of a very real sovereign—the crown—still perceived as embodying the union of virtue and authority. Because crown policies during this period simultaneously affirmed the claims of both voluntarism and hierarchy, they contributed to the unintelligibility of property as a concept.

Finally, Section III will focus on specific legal disputes of the period, drawing on the papers of John Tabor Kempe, who served both as attorney general of New York and as counsel for private land claimants. The duality of his role often placed Kempe on opposite sides of the basic conceptual struggle, and, like other colonial lawyers, he was pressed to formulate a legal definition of property "right" which could serve as a mediator in those struggles and avoid the most extreme implications of either model.

York. Some of the most useful books on colonial New York history include: P. BONOMI, A FACTIOUS PEOPLE: POLITICS AND SOCIETY IN COLONIAL NEW YORK (1971); E. COUNTRYMAN, A PEOPLE IN REVOLUTION: THE AMERICAN REVOLUTION AND POLITICAL SOCIETY IN NEW YORK, 1760-1790 (1981); D. DILLON, THE NEW YORK TRIUMVIRATE: A STUDY OF THE LEGAL AND POLITICAL CAREERS OF WILLIAM LIVINGSTON, JOHN MORIN SCOTT, AND WILLIAM SMITH, JR. (1949); M. KAMMEN, COLONIAL NEW YORK: A HISTORY (1975); S. KIM, LANDLORD AND TENANT IN COLONIAL NEW YORK: MANORIAL SOCIETY, 1664-1775 (1978); D. LOVEJOY, THE GLORIOUS REVOLUTION IN AMERICA (1972); I. MARK, AGRARIAN CONFLICTS IN COLONIAL NEW YORK 1711-1775 (1940); J. REICH, LEISLER'S REBELLION: A STUDY OF DEMOCRACY IN NEW YORK 1669-1720 (1953); G. SMITH, RELIGION AND TRADE IN NEW NETHERLAND (1973); THE POLITICS OF DIVERSITY: ESSAYS IN THE HISTORY OF COLONIAL NEW YORK (M. Klein ed. 1974).

My interpretation is based largely on a reading of: 1-4 THE DOCUMENTARY HISTORY OF THE STATE OF NEW YORK (E. O'Callaghan ed. 1849-1851) [hereinafter cited as DOC. HIST.]; 1-14 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK (E. O'Callaghan & B. Fernow eds. 1853-1887) [hereinafter cited as COL. DOCS.]; 1-6 NEW YORK STATE, ECCLESIASTICAL RECORDS OF THE STATE OF NEW YORK (1901-1905) [hereinafter cited as ECCL. RECS.]; and the Papers of John Tabor Kempe, New York Historical Society. My interpretation is consistent with Countryman's more thoroughly researched work, but not with Kim's.

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I. The Two Models: Voluntarism and Hierarchy

The liberal Whig newspaper articles of Gordon and Trenchard, first published in England during the 1720s, soon became the most widely read English political and economic theory in the colonies. They also formed the model for the *Independent Reflector*, a popular newspaper written in the 1750s by New York's leading "triumvirate" of ambitious young lawyers, William Smith, Jr., John Morin Scott, and William Livingston. The *Reflector* introduced New Yorkers to the most advanced liberal thought of the period; in its pages provincial citizens learned about the commercial wonders wrought by free exchange on an open market, and were warned to stand guard against the ever-imminent violation of their newly conceived civil liberties.

Early Whig rhetoric was characterized by the hearty, optimistic use of words which tended, upon analysis, to elude precise definition. Typical was the following, from Gordon and Trenchard: "And as Happiness is the Effect of Independency, and Independency is the Effect of Property; so certain Property is the Effect of Liberty alone, and can only be secured by the Laws of Liberty."[10] Presumably, few liberals in the eighteenth century would have disputed the happy connection between independency, property, liberty, and law, nor would they have doubted the Gordon-Trenchard assumption that those elements in turn provided the conditions necessary for vigorous commercial development.[11] Nevertheless, occasional attempts to define the various elements of "liberty" tended toward confusion and contradiction rather than clarity.

For example, in 1753 the authors of the *Independent Reflector* set out to explain to New Yorkers the meaning and origin of their right to property. According to their account (drawn somewhat vaguely from the natural law theorists), before civilization, "every Man might take to his Use what he pleased."[12] This "Use" led to

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10. J. Trenchard & T. Gordon, 1-4 Cato's Letters No. 28 (Wilkins, Walthoe, Woodward & Peele eds. 1724) [hereinafter cited as Cato's Letters].

11. As Gordon and Trenchard declared, in "free" countries, "[m]en bring out their money for their Use, Pleasure, and Profit, and think of all ways to employ it for their Interest and Advantage, New Projects are every day invented, new Trades searched after, new Manufactures set up . . ." *Id.* at No. 68.

12. *The Absurdity of the Civil Magistrate's Interfering in Matters of Religion*, Pt. 2 No. XXXVII, Aug. 9, 1753, in W. Livingston, W. Smith, Jr. & J. Scott, The Independent Reflector: or, Weekly Essays on Sundry Important Subjects More particularly adapted to the Province of New York 313 (M. Klein ed. 1963) (emphasis deleted) [herein-

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an original and natural right derived directly from occupancy and labor. Claims based on use alone, however, led inevitably to insecurity and disorder. Therefore, under the social contract designed to protect "liberty" by defining property relations, all property was necessarily "centered in the supreme Head,"[13] or sovereign. Thus, no man in civilized society could assume to himself a natural use right without "breaking in upon the Rights of his Sovereign,"[14] which had wholly superseded natural rights. Yet, the triumvirate also commented, when rights were thus centered in sovereignty, they seemed always dangerously subject to the "wild and stormy Administration"[15] of political power. In New York, that administration meant crown rule, which, to provincial property holders, seemed always to be on the verge of violating, not protecting, colonial "liberty."[16]

The triumvirate's somewhat unsatisfactory discussion of property rights did not stem from a failure to keep abreast of current legal theory. Indeed, in his great *Commentaries on the Law of England*, enormously popular among New York lawyers when it was published two decades later, Blackstone offered an account of property which was virtually identical to the triumvirate's.[17] Blackstone, too, located the origin of property in the Lockean natural and "robust" title by occupancy. To avoid the disorder caused by constant assertion of this "robust" title, however, the use right had been necessarily superseded by the feudal fiction that the king was the fountain of all property, so that all lands were "therefore holden either mediately or immediately, of the crown."[18] Between those two extremes was structured the whole "hierarchy of actions" which defined property relations in England.[19]

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after cited as INDEPENDENT REFLECTOR].

13. *Id.*

14. *Id.*

15. *Of Elections, and Election-Jobbers*, No. XXXII, July 5, 1753, in *id.* at 283.

16. *Id.*

17. 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *1-15 (W.D. Lewis ed. 1907).

18. *Id.* at *53. *See also* D. Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 209, 332 (1979).

19. *See generally* 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW, 1-183 (2nd ed. 1898). At the "top," so to speak, was the writ of right, which protected a pure right of property unconnected to any possessory claim (the claim was not that one was seized, but that one *should have been* seized); lower in the hierarchy were all the possessory writs, with the writ of ejectment close to the bottom. That lower writ was the one most often used in

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Despite his insistence upon the conceptual importance of centering property in the crown, Blackstone was careful to criticize all actual remnants of the feudal tenurial system as oppressive, and decidedly inconsistent with ancient English liberties.[20] In contrast, the natural and "robust" title by occupancy was indirectly retained even within the hierarchy of writs, incorporated through the prescriptive notion behind the statutes of limitations,[21] which, at least indirectly, allowed for title based on use.

Thus the tension between the "natural" and the feudal conception of property was obscured rather than resolved by Blackstone's lengthy description of the still largely procedural causes of action which made up English land law. Unlike the triumvirate, however, Blackstone seemed singularly untroubled by the lack of resolution evident in his account. He could afford complacency because, as he commented, the English people were generally content with legal decisions as to title and chose not to inquire into the "original and foundation of this right."[22] Moreover, any number of delicate questions about ultimate right could be comfortably ignored simply by ensuring that sovereign power be located in parliament, where consent was exercised only by those with property. As Gordon and Trenchard had earlier observed, with that parliamentary protection, property would be neither "barbrously robbed and engrossed"[23] by the crown, nor ravished by a leveling majority.[24]

That political solution, so conveniently achieved within the English parliament, was unavailable to the powerful leaders of the provincial New York bar. Unlike Blackstone, they lived daily with the direct exercise of crown control over both land use and trade. On the other hand, provincial leaders were also faced with the social reality of leveling republicanism in the form of politically unruly provincial townships; and those townships often asserted their claims to land and title in the vocabulary of occupancy and use.[25]

New York by owners against wrongful occupiers because of its procedural advantages. However, it was still a trespass action in form, originally brought by one who held only for a term of years and had been wrongfully turned out of possession.

20. 2 BLACKSTONE, *supra* note 17, at *76.

21. *Id.* at *266 n.7 (editor's note).

22. *Id.* at *2.

23. CATO'S LETTERS, *supra* note 10, No. 330.

24. *Id.*

25. As will become clear from the description that follows, "occupancy and use," when

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In the land disputes which erupted into violence after the mid-century, therefore, liberal lawyers were pressed to formulate a definition of property which avoided both of the extremes they feared: property as the direct extension of royal prerogative authority and property as an extension of the all-too-robust will of an independent republican people. Gordon and Trenchard (among others) had taught them that both extremes were to be avoided—each, in some clear sense, was alien to the "laws of liberty"[26] and therefore destructive of both happiness and commerce. Yet the easy rhetoric of "liberty" provided no clear indication of exactly where or how the doctrinal line was to be drawn.

The eighteenth century legal task was not made easier by the fact that conflicting conceptions of property in New York were closely identified with two conflicting theories of economic development, and even the most astute provincial leaders found themselves believing in both of those theories simultaneously. On the one hand there was much talk about the voluntary effort, initiative, and industrious self-reliance required if settlers were ever to cultivate the vast New York wilderness. Provincial leaders had a great fondness for the image of the hearty republican farmer cutting his way through the dense New York forest; his was the independent spirit which turned untamed wilderness into settled farmland. Yet the same self-reliant spirit which led to rapid settlement seemed at odds with another assumed requirement for development—the secured concentration of resources and accumulation of capital which would allow for a productive work force and investment in new enterprises. Thus, the pleasing image of the independent farmer was countered by the equally pleasing, but contradictory, image of an organized (dependent) work force efficiently transforming provincial resources into capital for new commercial ventures. Discussion of that dilemma filled letters, reports to England, and provincial newspapers. The same dilemma was also lodged deep at the core of the provincial definition of property, where it was expressed specifically in the vocabulary of title by occupancy

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actually asserted, bore little resemblance to the highly individualistic conception described by Locke and repeated by Blackstone. Whereas Locke seemed to envision a single person staking out a private claim in the wilderness, the occupancy and use argument was more typically asserted by whole townships on behalf of a complex collective vision about the role of property in community and religious life.

26. CATO'S LETTERS, *supra* note 10, No. 68.

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versus title by grant from the crown: the first was asserted as a (voluntarist) expression of republican self-reliance, while the second was conceived as necessary for the (hierarchical) protection of concentrated wealth.

Thus, the dilemma of economic development in the eighteenth century incorporated by reference the two basic models which still dominated colonial thought—voluntarism and hierarchy. Inevitably, those models were religious and political as well as economic. For a time, sophisticated provincial leaders became fond of announcing that New York was dominated by self-interest, not morality; unlike Massachusetts Bay, New York was never intended to be a "City upon a Hill."[27] Nevertheless, just as the moral paradoxes of Massachusetts Bay led to complex questions about the distribution of property, so too the economic dilemma discussed by New Yorkers merged with questions of morality. Interest and ideology, so to speak, were indistinguishable.

New Yorkers tended to associate the first vision of social life, that of pure voluntarism, with New England, religious dissent, and radical, leveling republicanism. Within that model, property was distributed equally to both protect and express the free will of a fully participatory congregation/township. The local republican community, the source of all moral and political authority, was conceived as the source of all property as well. In contrast, within the second model authority descended from God to the king, and from there ever downward through the levels of a carefully ordered and essentially static social hierarchy. The goal, characteristically Anglican, was to achieve a single, all-embracing religious and political harmony which would reflect, as nearly as possible in an imperfect world, the harmony of the Heavenly City. That goal could be obtained only by each person's peaceful submission to the assumed reasonableness of divinely ordained authority. Otherwise, social order would dissolve into the chaos of civil discord and unleashed private passion, and a peaceful religious harmony would fragment into the absurdity of a multitude of separatist sects, each

27. " 'Tis true, every Man ought to promote the Prosperity of his Country, from a sublimer Motive than his private Advantage: But it is extremely difficult, for the best of Men, to divest themselves of Self-Interest. . . ." *Public Virtue to be distinguished by public Honours: The Selling of Offices, which requires Skill and Confidence, a dismal Omen of the Declension of a State*, No. IX, Jan. 25, 1753, in INDEPENDENT REFLECTOR, *supra* note 12, at 111.

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arrogantly asserting its own particular version of truth. Within that hierarchical model, the king, at the top of the divinely ordained worldly hierarchy, was conceived as the fountain of both justice and property.[28]

Notably, despite the obvious differences between the models ("bottom up" versus "top down," local and particular will versus universal order, evangelical passion versus authoritative reason, and so on), both shared an assumed unity of law, religion, politics, and economics. No liberal wedge had yet been driven between virtue and authority, law and politics, state and civil society.

In New York, the voluntarist model was most clearly approximated within the Long Island towns settled by early Dutch Calvinist immigrants or separatists from New England. In these towns, land was often distributed in lots which were roughly equal or else based on family size and ability to cultivate.[29] In cases where a family's land proved to be of poor quality, an additional share might be added, but all lots were granted on condition of settlement. Absentee landowning led to forfeiture, and contracts to sell unimproved land could be voided.[30] The goal was that all should

28. A much fuller elaboration of these models can be found in D. LITTLE, RELIGION, ORDER AND LAW: A STUDY IN PRE-REVOLUTIONARY ENGLAND (1969), which provides a marvelous description of the difference in world-view between Anglicans and Puritans in England. *See also* E. TROELTSCH, THE SOCIAL TEACHING OF THE CHRISTIAN CHURCH (1931), for his important distinction between church-type and sect-type, which is essentially the Anglican-Separatist distinction. Weber was influenced by Troeltsch in his attempt to relate Puritanism to capitalism. I think Weber's analysis is weakened by a failure to explain the tension *within* capitalism between accumulation and free exchange, and concentration versus "free" competition. In applying Weber to an analysis of England, Little emphasizes the link between sectarian Puritanism and the challenge to established monopolies and aristocratic economic privileges. Implicitly, however, that was *also* a challenge to all inequality. I am convinced that, at least in New York, free exchange and anti-monopoly sentiments were expressed by the most sectarian communities—during Leisler's rebellion the connection is quite notable—but the thrust was always against *all* unequal distribution of wealth and power.

The importance of the republican tradition has recently been stressed in a number of studies, for example, J.G.A. Pocock, The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition (1975); Q. Skinner, The Foundations of Modern Political Thought, (1978); G. Wood, The Creation of the American Republic, 1776-1787 (1972). *See also* T. Schroyer, *Cultural Surplus in America*, 26 NEW GERMAN CRITIQUE 81 (1982).

29. One report describes lot numbers being distributed by a child, to ensure no favoritism or inequality. *At a Special Court at Towne Hall at Kingston*, Apr. 5-6, 1760, in 13 COL. DOCS., *supra* note 9, at 449.

30. *See generally The beginning and progress of New Utrecht*, Feb. 23, 1660, in 1 DOC. HIST., *supra* note 9, at 635.

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be "supplied with good and valuable lands to give each man as content as near may be,"[31] but that none should use land for purely speculative profit[32] or to gain power over others.

That township model seems to have implied a complex (and at times difficult) combination of individualism and community. The often-repeated desire of township settlers was to labor only for the sake of themselves and their posterity.[33] As one Long Island petition for township land stated, the petitioners had previously "hired land of others"[34] but now wanted to "settle ourselves whilst we be in our strength to goe through our labour."[35] Otherwise, they said, they could make "no provision for their agge and families."[36] This independent spirit continued until the Revolution. As Colden wrote to the Lords of Trade in 1761, it explained why farmers preferred independent land ownership, even on stiff mortgage terms, to tenancy. They wanted "to bestow their labour where they think their posterity shall enjoy the benefit of it, rather than on lands, the property of others, however low the rent may be in proportion to the value of the lands."[37]

That preference, however, was not necessarily individualistic in the liberal sense. In other words, the desire to use one's labor for one's own benefit did not lead to a firm private/public line as be-

31. *A Commission to Captain Dudley Lovelace and others*, Mar. 24, 1669, in 13 COL. DOCS., *supra* note 9, at 443.

32. Stuyvesant, the first governor of New York, vigorously supported absentee landlord regulations, agreeing that nobody should "seek for pay or profit in such manner as to retard Cultivation." *The beginning and progress of New Utrecht*, Feb. 23, 1660, in 1 DOC. HIST., *supra* note 9, at 636. That policy was to be achieved by insuring that "everyone of what condition or quality 'soever he may be should cultivate, build and live on the lot he had obtained . . ." on penalty of forfeiture. *Id.* Similarly, as to contracts for the sale of land, sellers should restore anything over "the true value of his [seller's] fencing, and what he has expended in his cultivation of his lot, including the value of his own labour." *Id.* However, Stuyvesant did not contemplate a prohibition on servant labor or tenancy.

33. *Letter from President Colden to the Lords of Trade*, May 15, 1761, in 7 COL. DOCS., *supra* note 9, at 465.

34. *Petition of the Settlers of Jamaica, New York for Land on Long Island and Leave to Settle a Town* (undated), in 14 COL. DOCS., *supra* note 9, at 456.

35. *Id.*

36. *Id.* Similarly, the New Englanders who settled Jamaica petitioned for land by explaining they were "desirous to [provide] for their posterities, so as their outward comfortable subsistence and their soulles welfare might in the case of suitable means . . . be attained." *Letter from Mathew Gilbert to the Director General*, Nov. 8, 1661, in 13 COL. DOCS., *supra* note 9, at 208.

37. *Letter from President Colden to the Lords of Trade*, May 15, 1761, in 7 COL. DOCS., *supra* note 9, at 465.

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tween inhabitants and town community. Indeed, land in townships was held on the condition that owners contribute to community projects—maintenance of common pastures, road building, and even construction of grain mills.[38] This held true even if community purpose included grants to new inhabitants. A case illustrating that point arose in 1653, in the village of Middleburgh, Long Island. John Gray, defendant, was moved to "insolence and disobedience"[39] when asked to forfeit part of his land after the community (apparently by vote of town meeting) invited new inhabitants from the north. Later he admitted that the disobedience, for which he was imprisoned, was the result of an "ungovernable passion, roused by . . . [his] belief that the land belonged to him absolutely, by virtue of patent and conveyance, therefore he had a right to defend and protect it."[40] He was brought by the magistrates to understand that the land was "granted to the village in common"[41] and held only on the condition that the owners would, when required, "surrender the patents, they had received, and in the interest of the community assert no claims of more right and title in the lands, covered by the patents, than other inhabitants, if more people should come to the village. . . ."[42] Like his neighbors, Gray was required to surrender his patent for the readjustment necessary for equality. He was then ordered to ask God, with "uncovered head and bent knees to forgive him"[43] for his defense of absolute individual ownership.[44]

Despite this (sometimes forced) communitarianism, a firm public/private line seems to have been drawn for the sake of negating and excluding inappropriate assertions of private interest. One could not derive purely private advantage from the community labor of others. The "property" that was to be protected, in other words, was not abstract ownership, but the willing (even if public) use of one's labor. Thus, for example, riots broke out in the town

38. *See, e.g., The beginning and progress of New Utrecht*, Feb. 23, 1660, in 1 Doc. Hist., *supra* note 9, at 645.

39. In re *John Gray, Charge of the Fiscal*, Aug. 17, 1654, in 14 Col. Docs., *supra* note 9, at 285.

40. *Sentance of John Gray by the Director-General Peter Stuyvesant*, Aug. 17, 1654, in 14 Col. Docs., *supra* note 9, at 286.

41. *Id.*

42. *Id.* at 286-87.

43. *Id.* at 287.

44. *Id.*

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of New Castle when magistrates ordered the inhabitants to help repair not only a general cartway, but also a dike belonging to a Mr. Hans Block.[45] Block had requested the magistrates' aid, claiming his dike helped prevent flooding on a public footpath and was therefore "necessary and convenient"[46] for the town. The inhabitants willingly agreed to build a road and footbridge, and even to "secure the Dike . . . with a sufficient sluyce to draine the water outt."[47] They would not, however, make further repairs on the dike or flyer, which they called "not a publique butt a privett Concerne."[48] As they declared, they would not be forced to be "slaves to Hans Block's particular Interest."[49]

Given the close link between property and sovereignty, it is not surprising to find that the township model of land distribution was closely associated with the most direct forms of participatory democracy. In early East Hampton, for example, where lots were distributed equally, laws were also enacted directly by all the citizens assembled at town meeting (called the General Court), and fines were issued for failure to appear.[50] Every year three magistrates were elected to administer laws, but any decision by the magistrates could be appealed to the General Court. In an early history of the town it is reported that these town meetings were frequent and "became burdensome on the people,"[51] for "being their own lawmakers they made a multiplicity of laws for regulating the fences to fields pastured in common; for division of lands; making highways; building a mill or meeting house and this took up much of their time."[52] Nevertheless, this "burdensome" freedom to make laws, and especially to try disputes by town meeting, was often referred to in petitions as a condition to town settle-

45. *Petition from the Inhabitants of the District of New Castle Relative to Making Two Dikes or Highways Through the Marsh Belonging to Mr. Carr to Governor Andros*, June, 1675, in 12 Col. Docs., *supra* note 9, at 532.

46. *Letter from William Tom, Clerk of the Court at New Castle to Governor Andros*, June 8, 1675, in 12 Col. Docs., *supra* note 9, at 535.

47. *Petition from the Inhabitants of the District of New Castle Relative to Making Two Dikes or Highways Through the Marsh Belonging to Mr. Carr to Governor Andros*, June, 1675, in 12 Col. Docs., *supra* note 9, at 532.

48. *Id.*

49. *Id.*

50. *See John Gardner's Notes and Observations on the Town of East Hampton, Long Island*, Apr. 1798, in 1 Col. Docs., *supra* note 9, at 680.

51. *Id.* at 680-81.

52. *Id.*

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ment. This was the cherished "[l]iberty for the judging of such difarances as may [in] any way hapin amongst as to give a final determination thereof. . . ."[53]

This equalitarian republicanism was, more often than not, also related to separatism or sectarian enthusiasm. In the petition quoted above, for example, the township founders stipulated that they were to have "[l]iberty in point of worship"[54] and the "[c]hoise of our owne Ministar and that nothing may be imposed upon him which may be ofensive unto his Conshence."[55] This did not reflect a desire for a civil libertarianism, but for a cohesive sectarian community; the "enlargement of the Kingdom of Christ in the Congregational way and all other means of Comfort in subordination thereunto," as another petition stated.[56]

An important tract by John Leydt, a radical Dutch churchman, illustrates the connection between political and religious voluntarism.[57] Leydt directly challenged the conservative tenets of the Anglican and Dutch Churches. Conservative Dutch ministers in America had, like the Anglicans, always maintained that the mysterious process of redemption was a wholly private and invisible experience, without social or political significance. That private and inward experience, they insisted, was to be carefully separated from the world of external action, where peace and harmony could be achieved only through submission to a hierarchial structure which ultimately linked both church and state. Otherwise, the radical impulse to realize here on earth the perfect community of "visible saints" could lead to a rejection of all law and earthly authority as unnecessary and irrelevant.[58] Those who had experienced the possibility of an unmediated and regenerate relationship with God and the human community were bound to find that all fixed, formal structures (legal, political, or intellectual) were oppressive and

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53. *Petition for a grant of 4,000 acres of land above and below the fall on the Deleware, with the privilege of liberty of worship, calling a minister, holding court, etc.,* May 8, 1671, in 12 COL. DOCS., *supra* note 9, at 521-22. Here the petitioner recognized that some "matters" would go to the Court of Assizes.

54. *Id.* at 522.

55. *Id.*

56. *Letter from Mathew Gilbert to the Director-General,* Nov. 8, 1661, in 13 COL. DOCS., *supra* note 9, at 208.

57. J. LEYDT, *True Liberty the Way to Peace: or an Account to Show how the Negotiations with a View to Peace and Unity were Broken Off, and What Retarded the Happy Consumation,* Aug. 10, 1760, in V ECCL. RECS., *supra* note 9, at 3762-92.

58. *Id.*

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illegitimate. According to the Anglicans, the inevitable result of such impatience was a frightening social chaos.

During the 1750s John Leydt directly assaulted those traditional assumptions by heading his argument with the startling title "True Liberty the Way to Peace."[59] Like the conservatives, Leydt stressed the importance of peace and harmony in household, church and state. He insisted, however, that peace could not be imposed from above, but must be founded on "proper conditions," which meant that it must be "wrought by the Spirit of Peace in the heart,"[60] which in turn produces "reconciliation," or unity, with both God and the human community.[61]

Leydt's definition of peace through individual reconciliation implied that only reconciled individuals, gathered together in the "true communion" of love, could establish laws consistent with "true peace"[62] and the "Fundamental Law of Christ."[63] Since justice was thus conceived as following from the hearts of a loving people, not as a standard to be imposed by authority, just laws could best be determined by participatory democracy at the local level. This "liberty" in the introduction of laws "as each locality shall require,"[64] constituted "the very distinction between the pious laws of the congregation and the tyrannical commandments of the Pope."[65] That radical religious conception of law paralleled the

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59. *Id.*
60. *Id.* at 3764.
61. *Id.* at 3764-65.
62. *Id.* at 3764.
63. *Id.* at 3775.
64. *Id.*
65. *Id.* at 3763-87. Leydt was one of a group of Dutch churchmen who caused no end of trouble to the established Dutch church in New York (which shared with the Anglicans the distinct privilege of incorporation), and to the classis in Holland, their ecclesiastical overseer. Leydt eventually led the widespread opposition to the established church. Both he and Reverend Goetschius, another influential radical, were students of Reverend Frelinghuysen, minister of the Raritan Valley church, who from the time of his arrival antagonized even members of his own congregation by insisting upon separating out the visibly elect from the unregenerate. Moreover, he demonstrated an outrageous tendency to find that the true saints were more likely to be found among the "crushed, lowly, broken in heart . . . The wretched and needy" than among the prosperous landowners of the Raritan community. J.R. TANIS, DUTCH CALVINISTIC PIETISM IN THE MIDDLE COLONIES 118 (1967).

In many ways Frelinghuysen was the New York counterpart of Jonathan Edwards in New England. *See generally* P. MILLER, JONATHAN EDWARDS (1948). Through Frelinghuysen, the Great Awakening arrived early in New York, and arrived there first among the Dutch, who then frequently invited English-speaking New Light ministers from outside the colony to speak in their churches (the influential Whitefield from England, for example). For an

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republican conception of property. The individual's willing labor on the land, like the individual experience of redemption, was something to be valued, protected, and encouraged. Ideally, moreover, that protection enhanced rather than destroyed a spirit of public labor and community participation.

There were many variations on what I have here described as an abstract model—Long Island records show some townships with more inequality of land ownership than others, less religious orientation, more extensive political authority by magistrates, and so on. Nevertheless, when New Yorkers described leveling republican communities dangerously influenced by New England dissenters, they clearly meant that combination of self-government and roughly equal distribution of land which characterized much of Long Island. Moreover, that system, with its complex combination of individual initiative and community cooperation, seemed in many ways ideally suited to promote rapid cultivation. Indeed, it is possible to trace a continuous line of crown and provincial rhetoric favoring the Long Island model for purely economic reasons—from the West India Company's insistence that Peter Stuyvesant (who became Governor of New York in 1647) not impose religious and political restraints on Long Islanders despite their unruly tendencies,[66] to a group of proprietor/investors in 1779 trying to promote profitable settlement in the Genesee area and describing the New England system of common gardens, equal lots, and so forth as ideal for that purpose.[67] Nobody doubted that Long Island was more rapidly settled than any other rural area in the colony.

The voluntarist model, so often praised, was nonetheless feared. To many, of course, it represented the complete diffusion of property and therefore of both moral and political authority. Colden, for example, viewed republicanism as privatized anarchy: the degeneration of all public authority—and therefore all spirit of

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account of Dutch church controversies, the importance of which has been underestimated by historians, see generally the ECCLESIASTICAL RECORDS, *supra* note 9, and J.R. TANIS, *supra*.

66. G. SMITH, *supra* note 9, at 194-96, describes at length the West India Company's tendency to favor a high degree of political and religious freedom as a means of encouraging both cultivation and free trade. To Stuyvesant's dismay, even Quakers were protected.

67. As they added somewhat incidentally, it was also conducive to the "satisfaction" of being part of a "society laboring together." *Letter V of T. Romeyn Beck, Esq. from a Gentleman to his Friend*, Nov. 8, 1779, in 2 DOC. HIST., *supra* note 9, at 1146-51.

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public good, justice, and decency—into an atomized chaos.[68] Long Islanders did, in fact, have a long history of political disruption in relation to crown authority, opposing trade restrictions, colonial administration, crown taxation, monopolies, and forced salary payments to Anglican ministers. Thus, Governor Nicolls in 1666 complained that the citizens of Southold, Southampton, and East Hampton "distill into ye hearts of his Maties good subjects, such refractory and mutinous humours, as tend to ye disturbance and breach of the Lawes Establish't."[69] That potentially mutinous spirit was expressed with special force in a remarkable "Remonstrance"[70] the citizens of Flushing directed against an anti-Quaker law imposed by Stuyvesant. The inhabitants (dissenting, but non-Quaker) admitted that their refusal to prosecute Quakers might make them "seeme unsensible of the law and the Lawgiver."[71] Nevertheless, they explained that the purpose of all civil law was to "give an outward libertie in the State by the law written in man's heart designed for the good of all."[72] Given that purpose, it necessarily followed that any law inconsistent with the "law of loue peace and libertie" [73] as written in the hearts of the local inhabitants was no law at all.[74] As they explained their primary legal obligation to the uncomprehending Stuyvesant: "Maister, wee are bounde by the Law to doe good unto all men."[75]

Fear of this radical potential, however, related not only to disputes between crown and colony. The voluntarist thrust of sectarian republicanism was perceived by provincial leaders as a threat to *all* legal continuity and order, leading to Colden's dreaded vi-

68. *See, e.g., Letter from Lieutenant-Governor Colden to the Earl of Dartmouth*, Aug. 22, 1774, in 8 COL. DOCS., *supra* note 9, at 486. This view was expressed frequently. For example, Samuel Johnson, President of King's College, endessly railed against the enthusiastic anarchy and "mere democracy" of New England townships. *Letter of Reverend Dr. Johnson to the Archbishop of Canterbury*, May 15, 1761, in 7 COL. DOCS., *supra* note 9, at 440.

69. *Letter from the Governor to Captain Topping*, Apr. 19, 1666, in 14 COL. DOCS., *supra* note 9, at 577.

70. *Remonstrance of the Inhabitants of Flushing, Long Island Against the Law Against Quakers and Subsequent Proceedings By the Government Against Them and Others Favoring Quakers*, Jan. 1, 1658, in 1 ECCL. RECS., *supra* note 9, at 412-14.

71. *Id.* at 412.

72. *Id.* at 413.

73. *Id.*

74. *Id.*

75. *Id.* at 412.

sion of atomized chaos. Furthermore, this much-feared radical voluntarism emerged within specific legal argumentation as well as in political rhetoric. For example, in a dispute concerning a minister's salary and glebe, the defendant congregation questioned the legal enforceability of even voluntarily entered contracts. The minister claimed that if there had been an initial agreement to the contract terms (as there had been in this case), then that agreement rendered the terms enforceable "to the end."[76] Only passion, not reason, could lead to resistance. The congregation, however, replied that if the issue were really one of voluntary consent, then the question should be focused, not on the merely "legal" contract terms themselves, but on the question of voluntary consent itself—and therefore on the *continuing* free will of the congregation.[77] Since in this case the will had ceased, so also had the contract.[78] That point of view, extended broadly, was no less destructive to the liberal social contract theory then espoused by the Whig triumvirate of lawyers (William Livingston, William Smith, Jr., John Scott) than it was to crown authority. Not surprisingly, William Livingston, a firm believer in the civil libertarian "right" to freedom of religion, was suspicious of both enthusiasm and republicanism.

The republican threat to legal authority was also conceived, of course, to be a threat to all secured inequality of wealth. William Smith, Jr. stated the general assumption about the real content of popular will: "The poor never want will to devour the Rich if it can be done with impunity."[79] By the time of the Revolution this paranoia reached its full intensity, but it was also apparent throughout the colonial period.[80]

Moreover, the fear of leveling was a fear specifically about labor as well as land. For example, in the Hans Block case cited

76. *Mr. Lewis Ron's Third Memorial*, Apr. 10, 1724, in 3 Doc. Hist., *supra* note 9, at 1175.

77. *Id.* at 1162-63 (emphasis added).

78. *Id.* This seems to have been a complex and difficult case. There are several references to it in the documents; the question of legal contract as opposed to continuing will was only one aspect.

79. *Quoted in* L.F.S. Upton, The Logical Whig: William Smith of New York & Quebec 113 (1969).

80. The intensity of the paranoia can be seen in the following statement: "[L]eveling principles are held up—the country is convulsed everywhere. God knows what the end will be." E. Spaulding, New York in the Critical Period 85 (1932).

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above,[81] the inhabitants had made no attempt to seize Block's property—they had simply refused to be coerced into working for him. Yet that refusal was perceived as a direct threat to secured property protection. William Tom, a magistrate of New Town, justified his pro-Block stand by invoking, with mounting incoherence, scenes of leveling chaos: When a "plebian faccon"[82] with "there frenzicall braynes"[83] takes legal decisions into its own hands, then "noe man knowes his owne and trade must dye when noe man is sure of his owne estate, witness former examples as Mazinello John of Leyden Jack Gade and Wat Tyler and DeWitts. . . ."[84] He petitioned Governor Andros that "two fyle of soldiers may be sent hither to ly in this river to keepe the people in awe and vs in security."[85]

William Tom was not wrong in perceiving a link between "free" labor and legal self-determination, for, from the republican perspective, the defense of one's title by labor also meant a defense of the ultimate liberty to decide law by community will: that connection flowed naturally from the perceived unity of property and sovereignty. As one township figuratively described the khadi-justice court the inhabitants had established to defend their land, they had "put their hands to the plow and would not quit it till they had got justice to take place."[86] During the Revolution, the notion described by Gordon Wood,[87] that the "people out-of-doors"[88] were the source of all law, was closely linked to the idea that "the people at large" were the "true proprietors of land."[89]

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81. *See supra* text accompanying notes 45-49.

82. *Documents Relating to the History of the Dutch and Swedish settlements on the Delaware River*, June 23, 1675, in 12 COL. DOCS., *supra* note 9, at 536. Similarly, attempts were made to quash the influence of both Whitefield and the Moravians in New York, because they had "debauched the Minds of the people with Enthusiastical Notions." *Id.* The danger was illustrated in part by the fact that they enticed "[s]imple, illiterate persons, who were wont to be Content to busy themselves in their Native Country in the Ordinary & humble Occupations they were bred to vixt Brick-layers, Carpenters, Woolcombers, Taylors and Such like Mechanical or handy-Craft Trades," till they were infatuated with a dangerous and disruptive degree of "[e]nthusiasm or Folly. . . ." *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 537.

86. *Affidavit of Solomon Boyle of Morris County*, May 13, 1747, in 6 COL. DOCS., *supra* note 9, at 347.

87. G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1972).

88. *Id.* at 319.

89. *See, e.g., Petitions of the Protestants of New York*, Dec. 30, 1701, in 4 DOC. HIST.,

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Both assertions had roots deep in the colonial past.

The republican tendency to protect freedom of choice in labor and not to protect the unequal accumulation of property was clearly recognized as a threat to the second model of economic development: secured concentration of wealth, capital investment, and a productive work force. In this second model, what required protection was not property as a source and expression of republican self-reliance, but property as a source and product of wealth accumulated from the work of others. That model, in turn, required a decidedly anti-republican definition of property rights.

Since its Dutch founding, provincial New York had been characterized not only by small republican townships, but also by huge land grants which extended for hundreds of thousands of acres. Originally conferred on a few politically favored families, those grants had once been conceived, especially by Tories, as a way of maintaining a hierarchically structured, crown-centered political authority, as against an alarming trend in the direction of rampant, separatist diversity.[90] Many grant proprietors had been given the authority to conduct manor courts and name ministers, as well as to collect rents.[91] Such authority was understood as an extension of the crown's ultimate prerogative authority over law and religion, as well as land. During the disruptive 1760s, proprietors reasserted generally unexercised prerogative privileges with renewed vigor.

Undeniably, a number of proprietors exercised their authority with a paternalistic regard for the public good which exemplified the best of the Anglican tradition. William Johnson, who took a special interest in the welfare of the Indians, is an outstanding example.[92] Increasingly, however, sophisticated proprietors linked that transcendent vision of the public good which can only be located at the top of a moral/political hierarchy with the forced extraction of surplus value from tenant labor. Thus, the defense of hierarchical authority became closely linked to the defense of capital accumulation.

One clearly pro-accumulation, and therefore anti-republican, argument can be found in Judge Robert R. Livingston's public paper denouncing taxation of uncultivated land (a measure designed

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supra note 9, at 935.

90. *See* S. KIM, *supra* note 9, at 10-14.

91. *Id.*

92. *See* E. COUNTRYMAN, *supra* note 9, at ch. 1.

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to discourage the accumulation of land in the hands of a few families, and force it onto the open market).[93] His argument was specifically about the organization of resources and labor. Livingston noted that the New England system of equal "small parcels" (gradually made smaller by the rules of partible inheritance) led townships to be generally "poor and incapable of bringing anything to market."[94] It was a system conducive to subsistence farming and barter rather than either profitable agricultural productivity or manufacture: "For when the Farms are small the Husband Man will consume the whole produce, and a Habit of Idleness and Sloth is produced for want of Employment."[95] Livingston admitted that the republican tradition of independent self-sufficiency promoted a hearty martial spirit, useful for defense against the French, but he

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93. Some proprietors combined tenant farming with the speculative investment in uncultivated land. "Selling I am not fond of att all," stoutly declared Phillip Livingston, second Lord of Livingston Manor. P. BONOMI, *supra* note 9, at 186. Therefore, there was much pressure to put more land on the open market. Taxing uncultivated land was one measure designed with that end in view; not surprisingly, the tax was supported by merchants. It should be noted, however, that there really was no consistent "landed" viewpoint as opposed to "market" viewpoint. The real question was where the line was to be drawn between the two extremes of complete, monopolized concentration and complete diffusion of resources. From the start, proprietors were interested in the market value of their land. Livingston, opposing the tax, explained that the land's value would increase with an increase in population. The Livingstons' decision to hold rather than sell was an investment decision based on an obviously rising market. Moreover, as prices did rise and leasing proved increasingly unprofitable, proprietors started to sell. However, they did so at high prices or on stiff mortgage terms and they fiercely resisted official plans to put ungranted land on the open market. *Letter from Governor Bellomont to the Lords of Trade*, Oct. 17, 1700, in 7 COL. DOCS., *supra* note 9, at 465. (Colden said that mortgages after the mid-century were often given without down payment which farmers could not afford but at high interest rates. As a result, there were many forfeitures, after which farmers lost even the value of their improvements—something they retained, at least in large part, under leases). In other words, proprietors wanted to take advantage of a market they controlled, while merchants wanted to enter speculative land ventures at lower than monopolistic prices. Those merchants who did speculate in land, like DeLancey, were then just as keen as the other landowners to protect their investment from the threat of even greater diffusion.

Undeniably, the contests between merchants and landowners (the DeLancey faction versus the Livingston-Morrisites) were the subject of much bitter quarreling over specific issues, including tax allocation, fur trade, and defense policies. That quarreling dominated New York politics in the eighteenth century. Such infighting, however, need not obscure the broader issues which also were being discussed. From a more general perspective, land policies could be viewed as one part of the basic question New Yorkers debated so often: how best to organize resources and labor in order to promote productivity.

94. McAnear, *Mr. Robert R. Livingston's Reasons Against a Land Tax*, 48 J. POL. ECON. 63, 88 (1940).

95. *Id.*

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warned that self-reliant republican farmers would soon find themselves defending a "[c]ountry scarce worth the Trouble of Defending" because it would be a country with no concentrated wealth.[96] Attacking the whole potent historical tradition of republicanism, Livingston asserted that the much admired independent martial spirit of the early Roman republic had only been achieved at the expense of productivity:

> By dividing the Lands into smaller Parcels the Romans became formidable, But at the same Time it is evident that . . . they were so far from furnishing Materials for Trade, that they were frequently in Danger of Starving for want of Bread, & when this was imported to them from abroad they had nothing wherewith to purchase. . . .[97]

In contrast, Livingston argued that proprietors of large tracts could force from tenants a production that exceeded subsistence: "The Proprietors of Large Tracts by parcelling them out in a proper Manner (i.e., in lots of sufficient size, to tenants) enable, & by the Rents they insist on, oblige their Tenants to . . . raise more than they consume."[98] Moreover, because landlords had the capital necessary for investment in mills, over which they held an effective monopoly to the extent of their own land, the wheat output could be both efficiently processed and also concentrated in the hands of a few landlord-merchants for investment on the world market. With wheat a prime commodity in world trade, the manor system of farming was viewed as a source of capital needed for further provincial development. By the 1760s most landlords were, in fact, also traders on the world market—products included iron from manor mines and forest products as well as flour and biscuits from wheat.[99]

Livingston concluded his argument by recognizing more astutely than most writers of the period that "liberty" was a word capable of holding two contradictory definitions. His purpose was to warn New Yorkers not to be beguiled by the New England republican definition:

> [I]t will be worth every Man's while, who has a proper regard for his Posterity, to consider how dangerous this [policy of discouraging accumulation] may become to their Liberty for what is a security to the Liberties of the Charter

96. *Id.* at 88-89.
97. *Id.* at 89.
98. *Id.* at 88.
99. *See generally* S. KIM, *supra* note 9, at 135-75.

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> Governments to the Northward, i.e., the granting of Lands as they are settled, I have shewn already would be very dangerous to ours.[100]

According to Livingston, liberty meant the "Independency" and "Happiness" of secured inequality, not secured self-reliance.[101]

Nevertheless, the tenancy system was also generally believed to hinder rapid, industrious cultivation and population growth. The assumption was that tenancy, even on easy lease terms, was at odds with those useful virtues which republicanism, despite its dangers, seemed to promote—voluntary initiative and a hearty spirit of self-reliance. Governor Bellomont's comment on the subject became well-known: If it were not for the huge land grants, New York

> would out thrive the Massachusetts Province and quickly outdoe them in people and trade . . . for to use Mr. Grahm's [the attorney general] expression to me and that often too, what man will be such a fool to become a base tenant to . . . our mighty landgraves when for crossing Hudson's river that man can for a song purchase a good freehold in the Jersies.[102]

Similarly, in the legal correspondence of the eighteenth century one reads often that large tracts granted to single families inevitably introduced a spirit of feudal "vassalage" and "internal weakness" inappropriate in the New World, and there were proposals for agrarian laws to limit holdings.[103] The *Independent Reflector* praised the "Spartan" spirit of republicanism and glowingly described a spirit of unrestrained freedom as essential for economic growth.[104] Yet, as if to illustrate the dilemma, the same paper warned against following the New England model of land distribution, which led to the "mischievous Consequence"[105] of encouraging settlement without first providing the investment necessary for

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100. McAnear, *supra* note 94, at 90.

101. *Id.* at 72.

102. *Letter from Governor Bellomont to the Lords of Trade*, Nov. 28, 1700, in 4 COL. DOCS, *supra* note 9, at 791.

103. *See, e.g.*, R. MORRIS, STUDIES AND HISTORY OF AMERICAN LAW 76 (1930).

104. *The Advantages of Education, with the Necessity of instituting Grammar Schools for the Instruction of Youth, preparatory to their Admission into our intended College*, No. L, Nov. 8, 1753, in INDEPENDENT REFLECTOR, *supra* note 12, at 419-26. *See also The Consideration of the natural Advantages of* NEW YORK, *Resumed and Concluded*, No. LII, Nov. 22, 1753, in INDEPENDENT REFLECTOR, *supra* note 12 at 433-38.

105. *A brief Consideration of New-York, with respect to its natural Advantages: Its Superiority in several Instances, over some of the neighbouring Colonies*, No. VIII, Jan. 18, 1753, in INDEPENDENT REFLECTOR, *supra* note 12, at 106.

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the "[r]ise of Arts and useful Manufactures."[106] The triumvirate described "[e]very Town Unemployed in those"[107] as a "dead Weight upon the Public,"[108] for inhabitants in such towns would only "endeavor to support themselves by Barter and Exchange,"[109] which by itself can "by no Means augment the Riches of the Public."[110]

The general view, in other words, was that while republican equality led to the stagnation inherent in completely diffuse resources (matching the diffusion of moral and political authority), massive concentration of resources led to the vaguely feudal stagnation that comes from sapping voluntary initiative. Put in such starkly negative terms, the dilemma would seem almost immobilizing. Typically, however, provincial leaders simply incorporated elements of both conceptual models into a vaguely conceived combination, never fully articulated, which would simultaneously draw on the virtues of both self-reliance and inequality. The combination was inherently unstable, however, and seemed always on the verge of unravelling into its two contradictory elements.

The depth of the provincial dilemma was underscored by the fact that crown policy during the provincial period also reflected both models of development and quite specifically enacted them into the "law" of title in New York. Thus title was simultaneously said to derive from occupancy and labor, but also, exclusively, from crown grant. As a direct result, by the 1760s "property" in New York was a virtually unintelligible concept. The relationship between crown policy and New York property law will be examined in the next Section.

II. Crown Policy

Despite the presence of relatively autonomous local government institutions (assembly, governor, courts), under the British constitution the crown remained supreme in its authority over provincial New York and, with respect to property conflicts, served as the only legitimate source of title. The existence of the crown as an institution operated both administratively and conceptually to pro-

106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*

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mote, however inconsistently, both basic models of property.

This was true in part simply because the Board of Trade (charged with implementing crown policy in the colonies) tended to favor, simultaneously, both the hierarchical and the voluntarist models of economic development. Consistently with the former, the Board viewed the colonies from an early corporatist, mercantile perspective and conceived of provincial resources as naturally subject to whatever direct regulation was required for promoting the broadly conceived "public good" of Britain. In New York this led, in particular, to an emphasis on the centrally managed production of naval stores and a consequent reservation of all pine trees for crown use. More generally, it led to a conception of property as an extension of prerogative authority, so that a primary method of maintaining order in the colony was through extensive land grants which were conveyed to a few political favorites. In theory, as the provincial aristocracy, those landlords would reflect and maintain the crown's own paternalistic authority throughout the reach of their vast semi-feudal estates.

Paradoxically, however, the Board of Trade also viewed rapid settlement as one of its key goals—indeed, according to the widely-read natural law treatises of the continent, the promotion of cultivation was one of the solemn obligations of sovereignty.[111] Like others of the period, the Board assumed that rapid settlement could best be achieved through toleration of an essentially voluntarist model of social organization, which discouraged the accumulation of uncultivated land in the hands of a few. Thus, crown grants contained direct conditions of settlement and quit-rent reservations, both of which served to negate claims not based on use and occupation, even while affirming the sovereign's authority as a source of title by the very fact that only conditional, not absolute, titles were conveyed. Those grant conditions were coupled with explicit instructions to governors stressing the importance of encouraging settlement by giving effect to land claims based on actual occupancy and labor. In addition, there was an indirect tendency to determine private disputes according to a general equitable use and occupancy standard, which served to affirm the substantive relevance of local township practices. In effect, at the very top of the hierarchical legal structure (the king, as fountain of both jus-

111. E. VATTELL, 1 LAW OF NATIONS, ch. VII, (T. & J.W. Johnson eds. 1852).

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tice and property) there was support for the claims at the very bottom—property rights derived from occupancy and use, as consistent with local republican township standards.

This practical correspondence between actual crown standards and radical settler standards parallels a broader conceptual correspondence. The crown's position at the top of a feudal hierarchy seemingly affirmed the hierarchical model, with title and justice both flowing down from the sovereign. Yet the crown as the single embodiment of sovereignty tends to suggest, as well, the crown as the embodiment of the whole people—the people themselves as contained within the king. In fact, kingship has traditionally derived much of its force from precisely that fusion of kingship and people: because the king and people are one, the king legitimately speaks with the voice of the whole community.

That fusion, however, proves potentially dangerous to the hierarchical model upon which it is based. If the people see in the crown the embodiment of their own sovereignty, it is not surprising to find them invoking crown authority on behalf of the standards they have evolved themselves, within their own participatory communities. In New York, this included invoking the crown in support of the claim to land title based on occupancy and use; and the crown's own policies made the invocation far from implausible. With that invocation, however, the notion of a single sovereign at the top, embodying virtue, authority, and the people, lost its unity and began to suggest the notion of a diffuse sovereignty at the bottom, eventually invoked by the people *in their own name.* Thus, hierarchy carried with it the seeds of its own destruction: when all the intermediate levels between crown and people are collapsed, then the local people *are* the sovereign, the particular becomes universalized, and so on.

In that sense, the struggle between hierarchy and voluntarism is a struggle that has always been part of the inner dynamic of hierarchical structures themselves. Even as Constantine made his pact with institutionalized Christianity, welcoming the moral sanction it provided for wealth and worldly authority, he had learned from the radical sectarian Christians of his own day how readily the same moral categories used to sanction inequality could also be invoked to challenge it—calling for a collapse of all intermediate hierarchical steps between that embodiment of perfection which stands only at the top of the hierarchy and the people themselves

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at the bottom. That internal tension has been a fundamental part of the intellectual and social history of the Western world. Thus, the Flushing remonstrance on behalf of the disruptive Quakers and the dissenter challenge to the established Anglican and Conservative Dutch churches in New York are only a small part of a much longer story; so too are the assertions, mounted with increasing frequency during the eighteenth century, that the "people out of doors" are the only true sovereigns.[112]

A. *Settlement and Cultivation as Conditions to Crown Grants*

Express conditions of settlement had been a part of land ownership since the time of the Dutch. The West India Company (WIC) in 1654 confirmed Stuyvesant's authority to "dispose of lots already granted but not occupied,"[113] and repeatedly encouraged him to enforce tillage conditions and to grant no more land to any one individual than could be cultivated.[114] For the sake of promoting population, the WIC directed, Stuyvesant must "keep good order, that every one may find a suitable place and that the land may be divided with . . . equality."[115] As the WIC managers insisted, they were "willing to grant as much land to everybody, as he will undertake to cultivate and populate, but we do not intend to give away the land with unlimited boundaries. . . ."[116] Otherwise, "many valuable pieces of land might be claimed as property . . . and the land itself would remain unpeopled."[117]

The chief exception to this pro-cultivation and anti-accumulation policy was Van Rensselaer's manor, and from the time of the initial grant by the WIC to this successful patroon, disputes erupted between the managers of Rensselaerswyck and the WIC over the extent of Van Rensselaer's authority over his property.[118] For example, Stuyvesant objected when the manager of the manor

112. *See supra* text accompanying notes 71-75.

113. *Letter from the Directors of the West India Company to Peter Stuyvesant*, May 18, 1654, in 14 Col. Docs., *supra* note 9, at 262.

114. *Id.*

115. *Letter from the Directors of the West India Company to Peter Stuyvesant*, Apr. 4, 1652, in 14 Col. Docs., *supra* note 9, at 168.

116. *Id.*

117. *Letter from the Directors of the West India Company to Peter Stuyvesant*, Mar. 21, 1651, in 14 Col. Docs., *supra* note 9, at 132.

118. *Minutes of the Council of New Netherlands*, Jan. 24, 1652, in 14 Col. Docs., *supra* note 9, at 149-51.

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refused to allow other settlers to bring wagons and carts onto the manor to chop and carry away wood, and required that the settlers take wood only from an area where the thickets and underbrush were heavy. Thus, people needing wood were forced "to carry the wood begged from him on their shoulders in slavish trouble and dependence through thick and thin, ice and snow, for the amusement of this overbearing Commander and his merciless associates."[119] A proclamation was issued, affirming the WIC's intent to allow the colonists to use Van Rensselaer's manor, but only for gardens, plantations, or summer homes.[120]

Seventeenth-century English governors generally followed the same policy as the Dutch, avoiding excessive grants and enforcing the conditions of settlement. Specific grant terms varied slightly as to exactly how much land had to be cultivated within a given number of years, but there seems to have been no question about the enforceability of the terms. In fact, in one instance Governor Lovelace warned that the forfeiture policy would be enforced even in the absence of a specific forfeiture clause written into the patent.[121] Land granted by Governor Nicolls to Matthias Nicolls had been sold to a Captain Berry, who had made no effort to settle it. In 1671/2 Lovelace warned Berry that it was a "[c]ustome . . . that a certaine time is usually prfixt wherein some Improvement is to bee made. . . ."[122] Although no time was "menconed in the said Patent for the settlement thereof,"[123] Lovelace noted that in Berry's case "nothing hath as yett been expected thereupon towards a Settlem't,"[124] and warned Berry that within three years the land must be settled "according to the Custome of New Plantacions and of ye Intent of ye Graunts of such Patents of New Lands."[125]

Similarly, in 1675, Governor Andros referred to lands in the Delaware which he had granted without reservation of quit rents, in order to promote cultivation. This, he said, had

> prov'd Inconvenient, by many takeing up land and not seating at all I Doe therefore repeal and recall the same, Except for Such as have seated and

119. *Id.* at 149.

120. *Id.* at 150.

121. *Proclamation of Governor Lovelace*, Jan. 24, 1671/2, in 12 COL. DOCS., *supra* note 9, at 494-95.

122. *Id.* at 494.

123. *Id.*

124. *Id.* at 495.

125. *Id.*

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Improved but . . . all Such as have taken up land, and not Seated and Improved . . . to bee recorded to forfeit the same, and the land not seated and Improved, to bee disposed as Vacant lands. . . .[126]

The pressure to prevent private engrossment of uncultivated land also came from town inhabitants, who sometimes sought the governor's aid in enforcement. For example, a petition to Governor Andros from the magistrates of Whorekill, in 1680, described the original plan by which the town was to be divided into equal lots and "the Land and woods that lye back was to be common."[127] After a survey of the area had been conducted, attempts were made by some outsiders to claim the common woods for themselves, and also a "greate marsh . . . which if it should be at any time here after taken vp by any perticolar person it would be a great Inconuenancey."[128] Whorekill magistrates asked that the land be protected by the governor, so that it may "[l]ye in common."[129] It was, they reported, too much in the practice of court-appointed surveyors to "lay out such Large tracts of land for a peticolar person, that might sarue many famileys to liue Comfortably vpon; there haue been Expearance of the like."[130] Objecting that "sume persons . . . sall land before they make any plantation or Settlement thereon,"[131] they requested Andros' "positive order as to that Concerne."[132]

So far as I can determine, the governors seem to have complied with such requests—for example, Nicolls wrote to the Oyster Bay magistrates: "[A]s to the business of *Samuell Daytons* having foure Lotts. . . . Its thought fitt hee should have one either to enjoy or otherwise to dispose of, but no more, the other three may be reserved for the Encouragement of other families to come and settle upon them."[133]

This policy of limiting private holdings of uncultivated land

126. *Order of Governor Andros Regulating the Payments of Quitrents in Delaware*, Oct. 26, 1678, in 12 Col. Docs., *supra* note 9, at 609.

127. *Letter from Whorekill Magistrates to Governor Andros*, June 26, 1680, in 12 Col. Docs., *supra* note 9, at 654.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 655.

132. *Id.* at 654-55.

133. *Report from the Governor to the Committee of Trade on the Province of New York*, Feb. 22, 1687, in 1 Doc. Hist., *supra* note 9, at 179.

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was paradoxically allowed to coexist with the vast holdings of a few proprietors, chiefly Van Rensselaer and Livingston, the Dutch patroon, a favorite of early English governors. These two tracts covered vast areas, but evidently constituted an exception to general practice. According to the Board of Trade, prior to Governor Fletcher's administration in the 1690s, almost all land grants were under 1,000 acres.[134] The fact that a very few grants were immense and later became notorious has obscured the extent to which the dominant policy was one of limitation; it was that policy with which most provincial settlers were likely to be familiar. Although this anti-accumulation policy became increasingly difficult to enforce, it was hardly peculiar to think of it as "law."

The most extensive land grants were issued under Governor Fletcher, and those grants raised troublesome legal questions that plagued the colony until the Revolution. Under Fletcher, a few political favorites received huge tracts. For example, Reverend Dellius, a powerful conservative Dutch minister with close ties to the Anglicans, received the largest tract, 620,000 acres, granted with no condition of settlement and with a quit rent reservation of only one beaver skin per year.[135]

Prior to Fletcher's administration, instructions from the crown had expressly stipulated that no grants were to exceed 2,000 acres.[136] For some reason, explicit restrictions to granting authority were omitted from Fletcher's instructions, but it was argued that the restriction was implicit given the history of land grant policy. Although the precise legal force of an implied restriction in royal institutions was something of an open question, in 1698 the Board of Trade instructed Fletcher's successor, Bellomont, to revoke the massive Fletcher grants:

> And whereas we have also been informed . . . that many exorbitant grants of vast tracts of land have been made of late years (and particularly some in the Mohacques Country) without any reservation of competent Quit Rents to His Majesty, or any obligation upon the . . . grantees to cultivate and improve the same, as reason requires: . . . the improvement and peopling of the whole Province must of necessity be in great measure obstructed, together with many other inconveniences evidently attending the same: We do hereby di-

134. *Report of the Board of Trade on the Affairs of the Province of New York*, Oct. 16, 1698, in 4 COL. DOCS., *supra* note 9, at 392.

135. *Answer of the Agent of New York to a Memorial against the Act vacating certain Grants of Land*, Oct. 26, 1700, in 5 COL. DOCS., *supra* note 9, at 11.

136. *Id.* at 10.

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rect and require you to put in practice all methods whatsoever allowed by law, for the breaking and annulling of the said exorbitant irregular and unconditioned grants; . . .[137]

They further ordered that no grants be allowed in the future for a quit rent of less than two shillings per 100 acres, nor without obligation to "settle and effectively cultivate" within three years.[138]

Bellomont, who fiercely opposed the large proprietors and also wanted land available for naval stores production, was eager to carry out the instructions. The question was, what methods, if any, were "allowed by law." Attorney General Graham advised him that the instructions could not legally be followed, "telling me it could not be done, 'twas the grantees' property right an originall right by vertue of the Great Seal of England and the publick faith of England."[139]

Bellomont, however, argued that all grants without condition of settlement constituted a fraud against the king's still essentially feudal authority over land. Legal doctrine on that authority was still highly protective. As Bellomont declared: " 'Tis a very presumptuous and unnatural act to make the King degrand himself . . . as by that clause in the instructions allowing grants without imposing restrictions he is made to do."[140] He argued that the policy of reserving quit rents and requiring settlement was so clearly a part of previous instructions, and of colonial land practice, that grants failing to conform to it were by definition fraudulent and destructive of royal authority, and "how common a thing it is in England to break grants of land made immediately by the King himself, when 'tis found that the King is deceived in his grants."[141] He cited a recent act of Parliament to resume all the Irish forfeitures,[142] and added that as a result of similar large grants in New York, many people were being "stripped of their land by these grantees,"[143] stressing also the extent to which the Mohawks had

137. *Instructions from the Lords Justice to Governor Bellomont*, Nov. 10, 1698, in 4 Col. Docs., *supra* note 9, at 425.

138. *Id.*

139. *Governor Bellomont's Notes on His Conversation with Mr. Graham*, May 4, 1699, in 4 Col. Docs., *supra* note 9, at 813.

140. *Letter from Governor Bellomont to the Lords of Trade*, Jan. 2, 1701, in 4 Col. Docs. *supra* note 9, at 823.

141. *Id.*

142. *Id.*

143. *Id.*

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been deceived and bribed in their sales to Dellius and Bayard, both Fletcher grantees.[144]

Instead of instituting legal proceedings (which he thought doomed to failure due to the opposition of the legal profession), Bellomont successfully urged the then anti-Fletcher assembly to pass a vacating law, annulling the largest grants under Fletcher.[145]

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144. *Id.*

145. *Letter from Governor Bellomont to the Lords of Trade* Jan. 2, 1701, in 4 COL. DOCS., *supra* note 9, at 823-24.

The English spent one hundred years bemoaning the evil influence of the legal profession. In large part, complaints both of governors and colonists had to do with self-interested dealing in land. Later governors like Colden have often been quoted on the subject, but the problem seems to have arisen early. In 1699, for example, Governor Bellomont reported that Chief Justice William Smith "arbitrarily and by strong hand" forced Southhampton to take only £10 for a large tract of beach land; that £10, he said, was not even "a valuable consideration at law, for Colonel Smith owned himself to me that . . . he cleared £500 a year for whales taken there." *Letter from Earl of Bellomont to the Lords of Trade*, July 22, 1699, in 4 COL. DOCS., *supra* note 9, at 535. Similarly, William Pinhorne, an important judge under Governor Fletcher in the 1690s, agreed to act as a factor for a woolen draper in London. He sold four or five thousand pounds worth of goods entrusted to him and invested the money in land. Then, to evade liability to the merchants, he conveyed the estate in trust to the use of his wife and children. *Letter from the Earl of Bellomont to the Lords of Trade*, June 22, 1698, in 4 COL. DOCS., *supra* note 9, at 321.

It is hard to know whether such outright dishonesty was as typical as many at the time claimed, but by the middle of the eighteenth century most leading lawyers were, by family, marriage, and/or skillful manipulation of opportunity, also major landowners. Vigorous efforts were undertaken to ensure that the legal profession remain within carefully restricted, elite circles. *See, e.g.*, W. UPTON, SELECT CASES OF THE MAJOR'S COURT 1-62 (R. Morris ed. 1935) [hereinafter cited as SELECT CASES].

This colonial history of elitism and self-interest seems indisputable. One might be tempted, therefore, to see the colony's legal history entirely as a history of selfish opportunism. That would ignore, however, at least two points. First, by the mid-eighteenth century, the elitism of the profession carried with it the requirement of a rigorous training period—seven years of clerkship after a Bachelor of Arts degree. Lawyers clerking under William Smith, Sr., for example, were required first to master political theory, geography, history, divinity and rhetoric—knowledge designed to make a complete lawyer. Actual legal studies included major civil and natural law treaties (Tyrell, Pufendorf, Vattel, Grotius), general common law theory (Fortescue, St. German, Hale, Bacon) and the technicalities of Coke, Brackton, and the writ system. *Id.* at 53.

As a result of such training, Goebel claims, New York lawyers at the dawn of the Revolution were the best lawyers the state has ever seen—not yet made degenerate by the "pabalum" of Blackstone's "cloying text." J. Goebel, *Courts and the Law in Colonial New York*, in ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW 271, (D. Flaherty ed. 1969). So much learning certainly produced a shared culture that was inevitably elitist; that shared culture, however, did not necessarily imply "self-interest" as something *apart from* culture.

Second, and more to the point here, the "self-interest" of lawyers was intimately linked to the economic development of the colony, and the viewpoint of lawyers on how best to achieve that development was marked more by self-contradiction than by a single consistent policy. I think the legal doctrine of the period came to embody those contradictions, but the

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He intended to urge passage of a subsequent act to vacate earlier exorbitant grants—vacating a total of thirteen grants which together constituted seven million acres.

Predictably, the Vacating Act of 1698/9 met with fierce opposition. Even the Board of Trade delayed final confirmation, announcing itself absolutely obliged to scrutinize the language of each annulled grant before confirming the Act. Bayard, whose land was vacated, publically declared that Bellomont "projected the reduceing ye whole plantation to poverty and misery by spolying and eradicating all foundations of property,"[146] and by "tending to ye destruction of ye *properties freeholds* and *inheritances* of His Majesties subjects."[147]

Governor Cornbury, who succeeded Bellomont, immediately and vigorously opposed the Act as "passed in [the] form of [a] Law to forfeit and confiscate ye estates of ye subject without any crime Conviction or attainder to deprive the subject of his just legal and natural right."[148] Under Cornbury, an act was passed in the assembly to repeal the Vacating Act. As it was later explained, new assemblymen thought "titles precarious" while it was still in effect. In 1708, however, Queen Anne disallowed the Act of Repeal and instead confirmed the Vacating Act by Order of Council. Governor Hunter, who succeeded Cornbury, was instructed to regrant to each proprietor "a suitable number of Acres not exceeding 2000 to any one person."[149] When the proprietors angrily refused to accept "such a proportion of Acres," the lands reverted to the crown and were regranted in small parcels to others.[150]

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subtle process by which that happened was surely more complex than the judicial calculation of self-interest in each specific case.

146. *Letter of William Atwood to the Commissioners for Trade and Plantations*, Oct. 26, 1709, in 5 COL. DOCS., *supra* note 9, at 105. Several others, including Atwood, made similar public declarations. *Id.*

147. *Id.*

148. *Lord Cornbury's Reasons for Suspending Abraham De Peyster, Esq.*, Oct. 2, 1702, in 4 COL. DOCS., *supra* note 9, at 1014.

149. *Letter of the Lords of Trade to Secretary Cragg*, Apr. 12, 1720, in 5 COL. DOCS, *supra* note 9, at 536.

150. *Id.* Apparently, the only form of redress was through petition to England. One petitioner claimed that he had, in fact, settled and improved his land, and then was out of the country serving "in your Majesty's sea service" when the assembly of "[i]gnorant, necessitous, and profligate persons" passed the Vacating Act, stripping him even of his improvements. In that case, the Board recommended that the queen would "be graciously pleased" to restore the land to him, or grant an equivalent. *Petition of Captain John Evans to Her Majesty the Queen*, Nov. 1, 1711, in 5 COL. DOCS., *supra* note 9, at 284. So far as I can tell,

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These events left dangerously unresolved the exact legal status of other accumulated uncultivated land and of grants, like Livingston's, made contrary to express crown instruction as well as policy. In the eighteenth century, the political situation in New York was such that no vacating law could have passed, but some governors (for example, Cosby and Colden) were convinced that the grants were invalid even in the absence of a vacating law, and were anxious to attack the proprietors' titles in court. Proprietors especially feared that chancery courts might be used to try titles and collect long overdue quit rents.[151] The *Independent Reflector* expressed a similar fear. Arguing against accepting a crown charter for a provincial college, the *Reflector* described the inherent precariousness of all grants dependent upon Crown authority. Crown charters were

> subject to certain express or implied Conditions, and may, in particular, be annulled, either on a Prosecution in the Court of *King's Bench* or *Quo warranto* or by *Scire Facias* in Chancery or by *Surrender*. Nor does it require a great Abuse of Privilege to determine its Fate by the first Two means, while mere Caprice, or some thing worse, may at any Time work its Dissolution by the latter. . . . Besides, upon its Disolution all the Lands given to it are absolutely lost. . . . They revert to the Donor. Nor is there much Reason to expect a charitable Reconveyance from the Reversioner.[152]

So far as I can determine, there had been no instances in the province of dissolved corporations, nor reason to fear such dissolution. The suspicion of arbitrary crown authority expressed here was derived more directly from experience with crown land grants and the precarious status of provincial land titles. That experience seemed to provincial leaders to parallel the English experience with corporate charters, which were also still viewed, like land grants, as the extension of prerogative authority.[153]

Fletcher's other grants were, however, not affected; Bellomont died before a subsequent act was passed.

151. Quit rents, of course, operated like a tax on uncultivated land. If quit rent reservations were high and also enforced, accumulation of land would be too expensive to be worthwhile. Thus, quit rents also served as a source of revenue, independent of the assembly.

152. *Remarks on Our Intended College, continued*, No. XIX, Apr. 1, 1753, in INDEPENDENT REFLECTOR, *supra* note 12, at 185-86.

153. *See* H. HORTOG, PUBLIC PROPERTY AND PRIVATE POWER: CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870, ch. 4 (to be published in 1983).

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B. *Conflicting Notions of Title: Title Based on Cultivation Versus Title Based on Crown Grant in Private Dispute Resolution*

Titles were rendered precarious not only by lingering crown conditions, but also by the practical difficulty within the colony of basing title right on anything other than a use and cultivation standard. Thus, governors, arbitrators, and the early courts all tended to favor an equitable use and cultivation standard to determine ownership in cases of private dispute.[154] In fact, that standard seemed almost compelled given the often confused testimony about Indian deeds and rights, boundary markers, conflicting surveys, and so on. It was typical for plaintiff and defendant each to have an Indian deed, purchased with the governor's permission, but from different tribes. Equally typical were boundaries called by Indian names meaning merely "tree" or "stream." The courts would then hear complex testimony about landmarks and about Indian tribal "ownership" rights. In fact, of course, the Indians often did not understand those rights in an English legal sense at all, and would patiently explain they had never conveyed the soil, but only the grass, for a season. Under those circumstances, a formal definition of ownership rights based on title or deed seemed virtually impossible.

One of the first suits brought specifically as an ejectment action (although without fictionalized pleadings) was *Stevens v. Richardson*,[155] brought in 1679/80 in the Court of Assizes during Governor Andros' administration. Stevens, the plaintiff, asserted his patent as against Richardson, who claimed to have a valid Indian deed and to be "first settler by virtue of his improvements."[156] The court first announced that Richardson should be

154. Many land disputes were settled directly by the governors, through arbitrators appointed by them or by town agreement. The latter, in fact, was the method governors tended to encourage as most conducive to peaceful settlement. Even after the establishment of a structured court system to try property rights ("as is proscribed and Enacted in the present Lawes, and the right determined accordingly without any distinction of Persons or places," as was declared of East Riding), one could apparently also appeal directly to the governor, who would, in turn, issue orders or appoint arbitrators. The courts were, so far as I can tell, simply an available alternative. *See, e.g., A Letter Written by Order of the Governor to the Constable of Flushing*, Mar. 27, 1665, in 14 COL. DOCS., *supra* note 9, at 566.

155. The case is also captioned as *Gloven v. Jones*, where Jones was Richardson's attorney, and Gloven was another interested party. *Letter from Ephraim Herman to Secretary Nicolls, Relating to Various Matters in Delaware*, Jan. 17, 1689/90, in 12 COL. DOCS., *supra* note 9, at 641.

156. *Id.* at 636-41.

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presumed to be entitled to his quiet possession, but would be answerable to "any other just Claim."[157] The testimony then offered went almost entirely to the question of first settler, and illustrated the extent to which "ownership" depended upon that settlement. It was reported by a surveyor that Richardson had once tried to sell the land and wanted his title confirmed by survey: "The surveyor refused, saying that sales of land were not permitted before settlement."[158]

Other witnesses, however, confirmed Richardson's claim that he had settled the land, and that the plaintiff had failed to do so. Two deponents had once refused to buy the land from the plaintiff's representatives, who offered to "sell their land to yor Depont for a pr of shoos apeece and yor Depon't told them if they would not [be] Seated they had noe Right of Land here and yor Deponant tould them he would not by it."[159] After hearing the evidence the jury found for Richardson, "being hee is the first settler to have Right to the Same hee hath seated."[160] Apparently settlement superseded Steven's undisputed patent. The court affirmed the jury verdict.[161]

Petitions sent to the early English governors also indicate that a use and labor standard seems to have been applied. It is difficult to determine exactly how often such petitions were successful, but the underlying assumption seems to have been that if one could show actual cultivation and a genuinely equitable claim, that claim would defeat even an official patent. For example, in a petition for a rehearing of a trial in Whorekill, the petitioner claimed that he had a certificate of survey and an Indian deed and had also "[s]eatead and Improved ye sad Land by my Seullefe and fammalley."[162] He also claimed he had gone "throu maney hardshipes by lying in ye Wendes maney neightis and Many days trauell and

157. *Id.*

158. *Id.*

159. *Id.* at 641.

160. *Id.*

161. *Id.* at 636-41.

162. *Petition by Barnard Hodges for a Rehearing of his claim to a tract of land 400 acres, granted by the court of Horekill*, 1680, in 12 Col. Docs., *supra* note 9, at 657. I could not determine exactly what the lawyer threatened, because the court had already refused to give "[g]ugment in aney maneur of way." *Id.* Only seven men could be found willing to serve as jurors. *Id.*

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Loues of all my children."[163] After these hardships he was informed that a man from Maryland claimed the land by bill of sale from a Thomas Merrit, who had held it by patent from Governor Lovelace. The petitioner claimed that the "[s]ad Merit did Departe for England and Thare Resides haveing thare by Deserted his Clame and tytalle to ye said Land."[164] The Maryland purchaser, however, had "[i]mployed a Cuning aturney," who was harassing the petitioner with a trespass suit; the governor's direct aid was sought.[165]

Another typical petition, sent to the governor in 1678, explained that after the petitioner had settled his land a Mr. Whitwell produced a patent for "fower hundred acceres wheare I was setted wheare vpon I was forced to beecome his tennant."[166] The petitioner asked that

> I may haue my Land which hee hath suruayed from mee . . . he is bute a single man & hath besides that . . . other seates of Land . . . and newly theare Commeth seuerall men who would gladley settell but that the land is into such menes handes that they must either bey or go without. . . .[167]

Similarly, in *Schaggen v. Jacquet*,[168] Jacquet apparently held a patent for the land on which Schaggen had "expended my labor and sown 4 schepels of rye."[169] Schaggen agreed to share the labor and profits if he were allowed to remain unmolested on the land. Jacquet later refused to provide the help and storage facilities agreed upon and attempted to drive Schaggen off the land, "so that I was compelled to suspend my work and leave the land in a bad plight."[170] Schaggen charged Jacquet with "obstructing . . . possession, cultivation, and occupation of lands,"[171] and asked that the land simply be granted to him. In Council it was agreed that Schaggen should have the land "upon which he . . . lived, worked

163. *Id.*
164. *Id.* at 658.
165. *Id.*
166. *Petition by George Mertin in relation to his land on Delaware Bay*, July 30, 1678, in 12 COL. DOCS., *supra* note 9, at 601.
167. *Id.*
168. This caption is imaginary, and only for the reader's convenience. *See Complaints against Vice-Director Jean Paul Jacquet and his subsequent removal from office*, Mar. 20, 1657, in 12 COL. DOCS, *supra* note 9, at 167-68.
169. *Id.* at 167.
170. *Id.* at 168.
171. *Id.* at 169.

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and planted,"[172] despite Jacquet's title.

Another petition explained that the petitioner's neighbors, who had, like good community members, always been "redy to assist us at any time,"[173] suddenly found that their land had been previously granted to another. The neighbors were, it was reported, "discouraged in that they are like to bee put out of there places."[174] On their neighbor's behalf, petitioners said, "wee can doe noe lesse than giue our testimony . . . And doe not question that if the Gouernorr comes to understand things throughly butt that hee will sett all to writes."[175]

Another aspect of the tendency to protect cultivation over "title" as a source of right was illustrated in trespass rules, which tended to protect owners from trespassers only when their land was in active use; there was no protection of absolute rights of ownership as such. The clear assumption was that if an owner had not fenced land, as a sign of cultivation and use, then another settler could enter the land for uses such as gathering wood. This was emphatically stated in a 1679 case,[176] decided by Governor Andros. Two men had entered another's land to burn a lime kiln, about a mile and a half from the owner's house. They complained to the governor that the owner "fors't them from Thence, upon pretence that it was . . . [the owner's] land and though out of fence, you wuld not suffer it."[177] The official order from the governor to the defendant stated:

> These are to Acquaint you, and lett you know, that it hath been the Constant practice (Throughout the whole Government, that all persons may & have had Liberty & soe adjudged) to cutt wood, timber, fetch stones, make & carry a way lime & c., upon & from any Land or Ground not within Fence . . . according to which you are also to have regard and not only suffer those men to proceed in their Lawful Labour, (if without fence) but also to take care so to Satisfy them, that they do not further Complaine of your obstructing

172. *Id.* at 168.

173. *Petition by Thomas Olive and other Inhabitants of Burlington, N.J., in favor of Henry Jacobs, Tenant in Possession of Matiniconk Island,* Oct. 5, 1678, in 12 COL. DOCS., *supra* note 9, at 615.

174. *Id.*

175. *Id.*

176. The case is not mentioned by name in the documents. *See Letter from Secretary Nicolls to Mrs. Billop at Staten Island,* June 18, 1679, in 13 COL. DOCS., *supra* note 9, at 535.

177. *Id.*

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them, nor any other in the like occation.[178]

Similarly, while regulations about the fencing of animals varied among the townships, the general rule of the colony was that animals could roam at large; owners of land fenced animals *out*. This was even mentioned in the *Zenger*[179] trial: "I believe it would be looked upon as a strange Attempt for one Man here, to bring an action against another, whose Cattele and Horses feed upon his Grounds not enclosed, or indeed for eating and treading down his Corns if that were not inclosed."[180] The analogy was to the fence of honest and upright conduct which one built to protect one's own reputation.

This fencing-*out* rule was affirmed by act of assembly; one could kill a hog doing damage to one's property, but even then the dead hog was to be returned to the owner. The rule was opposed, however, by the "men of Estates," as Hunter termed them, who complained that it would cost the estate owners more to fence in their property than the farmers' hogs were worth.[181] The farmers successfully opposed that position until roughly the middle of the eighteenth century; after that, it is possible to trace a long series of assembly acts confirming fencing-*in* regulations.

While property rights tended to be protected only to the extent of cultivation and fencing (a recurring symbol of use), it is important to note that property use, including fencing, could also be restricted according to a more general community benefit standard. "Use" was generally protected over title, but the privilege of use was not unlimited. Once, when a fence obstructed a common passageway for cattle and wagons, it was declared that "everybody must have liberty to fence in the land granted to him in the easiest and least expensive manner, but also good roads are required and necessary for the welfare and growth of the village, . . ."[182] The

178. *Id.* at 535-36.

179. August, 1735 (charges of printing and publishing seditious libels).

180. *A Brief Narrative of the Case and Trial of John Peter Zenger*, in L. RUTHERFURD, JOHN PETER ZENGER, HIS PRESS, HIS TRIAL 205 (1904).

181. *Letter from Governor Hunter to the Lords of Trade*, May 7, 1711, in 5 COL. DOCS., *supra* note 9, at 208.

182. *Council Minutes: Magistrate appointed for Long Island Towns; Land granted and Land matters on Long Island; Ferry to Long Island*, Apr. 19, 1663, in 14 COL. DOCS., *supra* note 9 at 524. This case was reviewed by Stuyvesant, who had appointed arbitrators to review the situations complained of by the magistrates. In regard to the meadowland, Stuyvesant affirmed the policy that "no private bouwery or plantation should prejudice a

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standard invoked was "reason and equity."[183]

Similarly, the magistrates of New Middleburgh complained in 1656 that one citizen, Thomas Stevensen, was using his land in a manner destructive to community welfare. For example, he closed a publicly used wagon road running near his house, and caused it to run instead near a river, where he had also built a dam. This new road was dangerous to the animals, who were likely to "come to grief"[184] as they made a sharp turn near the dam. Stevensen maintained that the old road had separated his house from his barn, and prevented him from fencing them in together. It was decided, however, that "common interests must be preferred to individual interests."[185] The old road on his land was to be reopened because it was straighter and more convenient, but only to the point where the new one became easily passable.

Stevensen had also fenced in two strips of meadowland which his neighbors claimed were to be used by the community in general, in return for which he was to receive equally large shares in the "large meadow"[186] (apparently owned in common). Stevensen claimed a patent right to the meadowland, but this right was not acknowledged to allow strictly private use. He was allowed only one-third of the meadowland for his own private possession.[187]

The rough correspondence between local communitarian standards and the crown's pro-cultivation policy in the province produced paradoxical results. The crown's own policies, favoring the cultivation standard for the sake of promoting settlement, for the most part corresponded to and reinforced the voluntarist conception of property associated with local republican townships. Yet while a single town inhabitant might sternly be ordered to forfeit three of his four small lots, a few families, like the Livingstons, Van Rensselaers, and Van Cortlandts, still claimed uncultivated tracts extending for hundreds of thousands of acres, and did so

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village community." *Id.*

183. *Id.*

184. *Report of the Commission appointed to inquire into some Differences between inhabitants of Middleburgh, (Newton), L.I.*, Sept. 22, 1656, in 14 COL. DOCS., *supra* note 9, at 367.

185. *Id.* Stevenson was also prevented from running a fence into a river and thereby hindering passage of cattle coming from the woods "which causes the same frequently to return into the woods to their great disadvantage." *Id.*

186. *Id.*

187. *Id.*

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expressly by virtue of crown grant. What emerged was a peculiar juxtaposition of two conflicting policies and legal standards. The tension between them eventually erupted into armed conflict, resulting in the famous land riots of the third quarter of the eighteenth century. While border disputes with the New England colonies during the 1760s and 1770s exacerbated those conflicts, the tension had already been evident well before the second quarter of the century. As Cadwallader Colden reported to the Board of Trade in 1726, since a few vast tracts had been granted to men who "had no thoughts of improveing them for their own use," settlers in other parts of the colony who had "wanted land for their children" had been "[o]bliged to send them into the Neighboring Colonys."[188] This resulted in conflict between proprietors and local townships, and "began lately to raise a Clamor & uneasiness & make the Proprietors of these large Tracts affray'd of reassuming as once has been practised in this Government or that the Government might be enduced to enquire into these Grants which some people imagine are defective in some material points."[189]

By the time these conflicts arose, many provincial settlers had come to associate their own equitable use standard of property with law. When the correspondence between their conception and official court standards began to break down, as it did by the middle of the century, some settlers were quite ready to seize control of both land and the legal system. They did so explicitly in the name of "justice," and many assumed they would have the backing of the crown. Thus the inhabitants of Elizabethtown, defending their settlement by force against the claims of proprietors as early as 1747, explained to the proprietors' representative:

> [W]hen the King should have notice that such a multitute of his Subjects . . . are turned Mob and act as they do, he will say or think, what's the matter with my subjects? [S]urely they are wronged or oppressed or else they would never Rebell against my Laws, and some grivious oppression hath caused them to act thus or else they never would have done it or some words to this effect or so, said they, he will order us to have our land; . . .[190]

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188. *Letter from Cadwallder Colden to Secretary Popple*, Dec. 4, 1726, in 5 COL. DOCS., *supra* note 9 at 806.

189. *Id.*

190. *Affidavit of Solomon Boyle of Morris County, N.J.*, May 13, 1747, in 6 COL. DOCS., *supra* note 9, at 347. A correspondence between the king's law and community practice was once argued with considerable sophistication in relation to a question at least analogous, if not identical, to property rights in land. An inhabitant of East Hampton, Samuel Mulford,

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While in this instance settlers still invoked the name of the crown, they did so after making their own determination as to the substantive content of "justice." It is hardly surprising that within decades, when anti-proprietor rioters again violently seized local courts, they did so in the name of the people themselves, having both transcended and discarded any explicit basis in crown authority.

C. *Conflicting Crown Policies: Encouraging Settlement and Republican Self-Sufficiency Versus Encouraging Productivity Through the Central Management of Resources and Labor*

Although such settler declarations as to the king's true intent were not wholly inaccurate, the question of land title was enormously complicated in New York by another express policy of the crown—encouragement of productive manufacture. This was not an across-the-board policy, since English mercantile policies favored discouraging, rather than encouraging, competition with British manufacture. Nevertheless, the crown was determined to use the great forest resources of the New World for the production of naval stores, and New York was especially blessed with the

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claimed as an "antient Custom" the right to freely hunt whales off the coast. *Samuel Mulford's Defence for his Whale-Fishing*, Mar. 15, 1715/16, in 3 Doc. Hist. *supra* note 9, at 372. The governor had attempted to impose a licensing requirement, claiming that the whale was a royal fish and fell under the crown's prerogative authority, which superseded prescriptive right by customary usage. *Id.* Mulford argued that any particular local custom which was neither contrary to reason nor expressly forbidden by township patent, or governor's instructions, etc., was itself "law." *Id* at 374. Moreover, this was a law which could not be defined by a judge, but should be determined by twelve men from the town. During trial, the chief justice of the New York Supreme Court considered the only question for the jury to be whether whales had value; the authority to license he treated as a question of law. Mulford objected, however, on the grounds that

> in a particular Custom (as this is) the Student of Law saith . . . if it rise in Question in the King's Courts, Whether there by any such particular Custom or not? It shall be tried by Twelve Men, . . . So I crave and Request of this Honoured Court, the judgement of Twelve Men, my Peers of the Same Vicknaye, that may know something of this Matter.

Id. at 374-75. Mulford insisted that local standards, over time, became by prescription, the "law," and could not be abrogated by the governor, nor annulled by a judge. Mulford declared after the whale case: "So execution was issued out, and Distress made upon our Estates, for using an Antient Custom; because one Single judge was of Opinion, that they had not right by Prescription though they [the East Hampton residents] had by Law, but we know not what is Law." *Id.* at 378. This also shows, of course, the link between the freedom of township self-determination and freedom from economic restrictions imposed from outside the town itself. *See supra* note 28.

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highly valued white pine trees. There was a peculiar intensity to this preoccupation with naval stores—best appreciated, perhaps, by noting that in 1691 Matthew Hale, the great English judge and legal scholar, cited the existence of tar, hemp, and mastheads in the colonies as no less than proof of a divine creator.[191] As he explained, God had not only provided that people learn to navigate the waters of the world to trade their goods; He had also wonderfully provided the resources by which that magnificent design could be accomplished. Thus colonial naval stores were an important part of that perfect "Constitution" in nature, which in its ordered "economy" bore such a satisfying resemblance to the constitutional structure of England.[192]

Because of the significance attached to naval stores, clauses were written into land grants forbidding destruction of the valuable pine trees and allowing crown officials to enter for the sake of cutting and taking timber.[193] This was, of course, a dramatic form of concentrated resources—theoretically, every white pine tree in the colony belonged to the crown, available for productive use in a centrally managed, corporatist mercantile economy and legally protected from the irreversible diffusion of private burning. Moreover, the English expected those clauses to be strictly enforced as utterly crucial for the public good. Laws were passed in Parliament confirming them,[194] and when they were disobeyed the Board of Trade described the burning of pines as a barberous custom, of very great consequence to the king's service. Repeated cases of failure to abide by similar provisions in the Massachusetts Charter resulted in orders from the Privy Council.[195]

Nevertheless, this direct crown control over resources cut against the other express policy of the crown—rapid settlement. Governor Colden and John Tabor Kempe both pointed out that

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191. M. HALE, MAGNETISMUS MAGNUS; OR METAPHYSICAL AND DEVINE CONTEMPLATIONS ON THE MAGNET, OR LOADSTONE 47 (London 1695) (microfilm, Early English Books—1641-1700, reel no. 495). Governor Bellomont cited Bacon on the same subject, quoting from the essays on the plantations. *Letter from the Earl of Bellomont to the Lords of Trade,* Nov. 28, 1700, in 4 COL. DOCS., *supra* note 9, at 787.

192. M. HALE, *supra* note 191, at 130.

193. *See, e.g. Letter of Governor Bellomont to the Lords of Trade,* Apr. 17, 1699, in 4 COL. DOCS, *supra* note 9, at 506-07.

194. 9 Ann., ch. 17, 8 Geo., ch. 12; 2 Geo. 2, ch. 35.

195. J.H. SMITH, APPEALS TO THE PRIVY COUNCIL FOR THE AMERICAN PLANTATIONS 332 (1950). At issue was the appealability of a trespass action brought against an officer who had entered private land pursuant to the charter provision.

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the two conditions thus attached to crown grants—preservation of pine trees and cultivation—rendered each grant a contradiction in its own terms. As Colden explained, since the grantor must cultivate or forfeit his land,

> it will not be supposed that it is the intent of the Law to put a stop to cultivating the Land which however cannot be done without destroying the Timber that grows upon it. One . . . is ready to fear that the poor Planter is under a sad Dilemma—If he does not cultivate he cannot maintain his family and must lose his Land; if he does cultivate, he cuts down Trees, for which he is in danger of being undone by prosecutions fines—The inhabitants cannot build Houses without pine for boards. . . . It cannot surely be the intent of the Legislature to put the inhabitants under such extreme hardships.[196]

Those conflicting clauses potentially destroyed all notions of valid title based on crown grant, since a grantee, as a practical matter, could fulfill one condition of ownership only by violating the other, and was thereby always in the position of having forfeited title. That fact led to troublesome and recurring legal problems. The conflicting clauses also illustrated a sharp split in the crown's vision of economic development. Nobody doubted that the production of naval stores required a vast organization of capital, resources, and labor. Yet, as colonial leaders repeated so often, that mercantile goal could only be achieved at the expense of the image of the independent farmer settling his own land.

The parallel conflict between self-reliant farming and a productive, dependent work force was a continuing theme of colonial correspondence. As Colden reported to the Board of Trade, specifically in reference to the production of naval stores:

> Every one is able to procure a piece of Land at an inconsiderable rate and therefore is fond to set up for himself rather than work for hire. This makes labor continue very dear a common laborer usually earning 3 shillings by the day and consequently any undertaking which requires many hands must be undertaken at a far greater expence than in Europe & too often this charge only overballances all the advantages which the country naturally affords & is the hardest to overcome to make any commodity or Manufacture profitable. . . .[197]

For this reason, he advised the Board of Trade that the desired production of hemp and tar would never be undertaken directly by

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196. *Mr. Colden's Account of the Trade of New-York*, May 28, 1723, in 5 COL. DOCS., *supra* note 9, at 688. Forfeiture clauses relating to cultivation also varied in specific terms.

197. *Id.*

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the inhabitants themselves; even a merchant who had available capital would not "readily adventure his Stock in raising Hemp or making Tar"[198] when so little profit would remain "after he has deducted the charge of labor."[199]

Ironically, however, Colden also criticized the crown's alternative proposal—to engage directly in the production of mastheads—precisely because that production would lead to inefficient and oppressive central management rather than reliance on the voluntary initiative of the colonists: "The King in this Case must have a great many hands and overseers in constant pay—He must buy horses, Oxen & Carriages and maintain them or hire them after the most chargeable manner. . . ."[200] In fact, Colden linked the proposal to the general problem of liberty and self-determination, reminding the Board of the maxim that "free subjects are more useful to their Prince than Slaves."[201]

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198. *Id.*

199. *Id.*

200. *Id.* at 689.

201. *Id.* To add to the dilemma, development in other areas, when it was successful, threatened the naval stores' resources. Governor Bellomont reported, for example, that unregulated colonial sawmills were becoming *too* efficient, and that competition cut against the desired concentration of resources and centralization of management:

> [Four] saws are the most in New Hampshire that work in one mill, and here is a Dutchman lately come over who is an extraordinary artist in those mills. Mr. Livingston told me this last summer he had made him a mill that went with 12 saws. A few such mills will quickly destroy all the woods in the Province at a reasonable distance from them.

Letter from the Earl of Bellomont to the Lords of Trade, Jan. 2, 1700/1, in 4 COL. DOCS., *supra* note 9, at 825.

By the mid-eighteenth century the problem of expensive and/or unavailable labor became the key economic preoccupation. Repeatedly the statement was made that development would be stifled so long as settlers preferred to cultivate their own lands. As late as 1767, for example, the following description was sent back to England:

> [T]he Price of Labour is so great in this part of the World that it will always prove the greatest obstacle to any Manufactures attempted to be set up here, and the genius of the People in a Country where every one can have Land to work upon leads then so naturally into Agriculture, that it prevails over every other occupation.

Letter from Governor Moore to the Lords of Trade, Jan. 12, 1767, in 1 DOC. HIST., *supra* note 9 at 734.

Of course slaves provided some labor, and there were the predictable reports of cruel punishment and paranoid fear about conspiracies. Apparently, however, slaves were never a source of large profits. By the 1750s the Livingstons had already attempted to employ slave labor in the manor mines, but had abandoned the attempt as unsuccessful. William Livingston complained that only this "[w]ant of Workmen and the high Price of Labour" kept the mines from being productive. *The Consideration of the natural Advantages of New-York,*

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The problem of supplying a sufficient labor force became a lay

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resumed and concluded, No. LII, Nov. 22, 1753, in INDEPENDENT REFLECTOR, *supra* note 12, at 437-38. Robert Livingston earlier had stated that even slaves earned three times a soldier's salary just for "splitting of fire wood and carrying the hodd." *Letter from Mr. Robert Livingston to the Lords of Trade,* May 13, 1701, in 4 COL. DOCS., *supra* note 9, at 875.

Similarly, indentured servants were common but did not provide efficient labor. Control problems arose early. For example, the magistrates of one town passed an ordinance forbidding boatmen to transport "any Strainge person" who did not have a ticket from the magistrates. Otherwise, both debtors and indentured servants would cross the river to escape their obligations and "we shall not bee able to keepe any servant on this syde." *Letter from the Court at New-Castle to Governor Andros,* Feb. 8, 1677, in 12 COL. DOCS., *supra* note 9, at 591.

By the mid-eighteenth century, however, a more difficult problem was the servants' unwillingness to stay with their trade after terms of service had expired. Masters who had invested in shipping servants to New York found themselves deserted:

> [A]s soon as the time stipulated in their Indentures is Expired, they immediately quit their masters, and get a small tract of Land, in settling which for the first three or four years they lead miserable lives, and in the most abject Poverty; but all this is patiently borne and submitted to with the greatest cheerfulness, the satisfaction of being landholders smooths every difficulty. . . .

Letter from Governor Moore to the Lords of Trade, Jan. 12, 1767, in 1 DOC. HIST., *supra* note 9, at 735. Thus, a master of a glass house had "assured me [Moore] that his ruin was owning to no other cause than being deserted in this manner by the Servants, which he had Imported at a great expense." *Id.*

Efforts were made to enslave the Indians, but his practice was considered illegal. Although the legal status of the Indians was far from certain, especially with respect to land ownership, they were deemed the king's subjects and could not be made the property of white settlers. In 1679 the Governor in Council declared unequivocally that "all Indyans here, are free and not slaves, nor can be forct to be servants." *Council Minutes; Indians Declared Free and not Slaves,* Dec. 5, 1679, in 13 COL. DOCS., *supra* note 9, at 537. There was an exception, of course, for those brought from "foreign parts." *Id.* In the 1760s, attempts were made to train the Indians to be, if not slaves, at least willing workers. They were instructed, for example, that God testified his displeasure against those who will not work for a living. William Johnson, who worked closely with the Indians, explained with some admiration that most were too "Spartan" to accept fully such teachings, which they suspected would "enervate and divert them from that warfare on which they conceive their liberty and happiness depend." *Letter from William Johnson to Arthur Lee,* Feb. 28, 1771, in 4 DOC. HIST., *supra* note 9, at 435.

During the same decade, William Smith, Jr., John Scott, James Duane, and others established a subscription "Society for the Promotion of Arts," dedicated to considering "all Manner of proposals that may be for the Public Benefit in Arts, Manufactures, Agriculture, and Economy." *See Circular Of The Society For The Promotion Of Arts,* Dec. 10, 1764, in 4 DOC. HIST., *supra* note 9, at 345. The Society organized successfully some of the most destitute in New York City to work in a linen manufacturing establishment, which was meant to be a model for future organizations. *Letter from Governor Moore to the Lords of Trade,* Jan. 12, 1767, in 1 DOC. HIST., *supra* note 9, at 733.

Increasingly, however, discussion of the labor question was focused on immigration. By the middle of the eighteenth century there were already large numbers of immigrants in New York City, but this fact offered problems as well as advantages. The authors of the *Independent Reflector* pointed out that some immigrants were unable to support them-

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colonial preoccupation; not surprisingly, therefore, one of the most direct and important confrontations between title by occupancy and title by crown grant resulted from an early experiment with both immigrant labor and naval stores production. Since that confrontation draws together various strands of the economic development dilemma and its relation to provincial land law, the experiment is worth describing in some detail.

In 1708, an Order of Council was passed for transporting to New York between three and four thousand Lutheran Palatines, refugees from the war with France. The order stated that the Palatines would be "usefull" as settlers, serving as a military defense against the French (the potent image, again, of the stout-hearted republican farmer defending his township), and also as workers in the naval stores industry.[202] The third "use" was viewed, naively, as wholly compatible with the first two. Meanwhile, part of a tract of land released by the Vacating Act of 1698—named Schoharie—was set aside for Palatine settlement.[203]

Originally it was probably intended that the Palatines would first settle on their land and then enter into naval stores production. That was, at any rate, the understanding of the Palatines. Officials decided, however, that a more centrally organized enterprise was required. Therefore, after all those who could not work were left behind ("Widdows and other useless people"[204]—for in-

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selves for a variety of reasons, including illness, ignorance, and large families. A small pox epidemic had spread from poor immigrants to other citizens, including William Livingston's son. Nevertheless, the *Reflector* was firm in its resolve not to give way to the temptation of providing paternalistic philanthropy for those who lacked self-reliance: "Nor should we dispense our Bounties, with an unlimited Profusion, to the Poor, . . . we must often shut the Bowels of our Mercy, or injure the Community — that which is virtuous in Theory, becomes vicious in Practice." *On the Importation of Mendicant Foreigners*, No. V, Dec. 28, 1752, in INDEPENDENT REFLECTOR, *supra* note 12, at 85-86.

202. *Letter from Reverend Mr. Seabury to the Secretary*, Oct. 6, 1764, in 3 DOC. HIST., *supra* note 9, at 327.

203. *Order of Council for Naturalizing and Sending Certain Palatines to New York*, May 10, 1708, in 3 DOC. HIST., *supra* note 9, at 542-43. Actually, Bellomont had hoped to use soldiers, who could be made to work in the production of naval stores at a low soldier's salary (thereby solving the high cost of labor problem). After seven years of service as workers, they would be given plots of land and would be hearty cultivators as well. Some had predicted that too many would desert naval stores manufacture when they realized how low a soldier's salary was, compared to provincial wages. For an account of Bellomont's scheme, see *Letter from Governor Bellomont to the Lords of Trade*, June 22, 1700, in 4 COL. DOCS., *supra* note 9, at 669-679. Much of Bellomont's determination to break up the large grants stemmed from his desire to make lots available for soldiers under that scheme.

204. *Letter from Mr. du Pre to the Lords of Trade*, Dec. 6, 1711, in 5 COL. DOCS, *supra*

stance, those too ill from the long passage and children from families judged too large—who were left "at their own disposal" in New York City[205]), the roughly 1,800 remaining immigrants were taken to Livingston Manor. There, Robert Livingston and his overseers had jurisdiction to try workers who created disorder. Soldiers were later dispatched to provide enforcement.[206] Furthermore, Livingston, who was a successful merchant as well as landlord, entered into a victualling contract with the government according to which he would provide workers with supplies from his manor brewhouse, flour mill, and central storehouse. Critics objected that Livingston would "make a very good addition to his Estate"[207] from this contract. Similar contracts for supplying military troops had been notoriously profitable, but such centralized supply arrangements seemed essential if workers were to be provided with the necessary tools, food and management. Livingston also provided some of the necessary capital for initial investment. Such complex blends of public and private financings were typical of the period. Later, to ensure a religious outlook supportive of the enterprise, the Anglicans sent ministers to Livingston Manor whose mission was to preach submission to authority and quash a dangerous tendency towards radical pietism among the Palatines.[208]

The early expectations of great productivity were never quite realized. For at least two years the Palatines were kept working on the manor, and there were occasional reports of successful manufacture ("that noe hands may be idle, wee imployed the Boys and Girls in gathering knotts . . . out of which he has made about three score barrels of good Tarr"[209]). Nevertheless, all work was done "manifestly with repugnance, and merely temporarily,"[210] for the Palatines kept demanding the land in Schoharie that had been promised them. Even after overseers had learned to extract extra work by withholding food and other necessary supplies ("thus doth

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note 9, at 289.

205. *Id. See also Order for Apprentencing the Palatine Children*, June 20, 1710, in 3 Doc. Hist., *supra* note 9, at 553. The famous Peter Zenger was the son of a Palatine widow.

206. *Court Over The Palatines*, June 12, 1711, in 3 Doc. Hist., *supra* note 9, at 669.

207. *Letter from Earl Clarendon to Lord Dartmouth*, Mar. 8, 1710, in 5 Col. Docs., *supra* note 9, at 196.

208. *Council Minutes*, May 26, 1709, in 3 Doc. Hist., *supra* note 9, at 544.

209. *Letter from Mr. John Cast to Governor Hunter*, Mar. 27, 1711, in 5 Col. Docs., *supra* note 9, at 214.

210. *Id.*

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folly change with circumstances," they happily reported[211]), unrest continued. The arms which had initially been issued to the Palatines, as consistent with the image of the Spartan republican martial spirit, so useful against the French, were quickly removed lest those same arms be used against the overseers.[212]

After the second year the combination of public and private financing for the operation began to run out,[213] and the Palatines were told they would have to survive for a winter on their own. Between the fall of 1712 and spring of 1713, roughly 150 Palatine families made their way through the forests to Schoharie, where the Indians gave them deeds to land and helped them to make their winter settlements. Governor Hunter and Livingston, however, were determined to keep the Palatines as dependent workers, available for later labor. Thus, Hunter first forbade the Palatine settlement in Schoharie and then in 1714 officially granted the Schoharie land to some proprietors from Albany, who were authorized to claim the Palatines as mere tenants.[214] The hope was that if the immigrants had no valid claim of their own to Schoharie, they could be forced back into further naval stores work, having no pretense to possession of any lands.

Stubbornly, the Palatines refused either to become tenants of the Albany proprietors or to leave Schoharie. Preliminary efforts to enforce the Albany proprietors' claims were met with mob violence.[215] A confrontation finally occurred in 1717, when Governor Hunter and Livingston both appeared at Schoharie to order obedience. Instead of obedience, however, the Palatines offered Hunter and Livingston a relatively sophisticated legal argument. First, they asserted that they held the land in Schoharie under an equitable title based on their settlement, insisting they had incurred

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211. *Id.* at 215.

212. *Letter from Governor Lovelace to the Mayor of New York City*, Oct. 6, 1669, in 3 Doc. Hist., *supra* note 9, at 398.

213. *The Condition, Grievances and Oppressions of the Germans*, Aug. 20, 1722, in 3 Doc. Hist., *supra* note 9, at 709. The excuse was that there were no supplies from England, and Governor Hunter, who had expended much of his own credit for the sake of underwriting the project, had run short of funds. The financing scheme seems to have been a very complex combination of public and private investment, with no clear line between the two. That was typical of the period. *See, e.g., Letter from Governor Hunter to the Lords of Trade*, Oct. 31, 1712, in 5 Col. Docs., *supra* note 9, at 347.

214. *See Reverend Peter Peiret's Petition*, Dec. 10, 1702, in 3 Doc. Hist., *supra* note 9, at 412.

215. *Id.*

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"vast expense and labour"[216] and had "continu'd their settlement . . . in expectation of His Majesty's grace and His Excellency's favor"[217]—presumably a reference to the clear policy of encouraging settlement by recognizing labor as a source of right to title. Second, the Palatines claimed the Indians had, by giving them deeds to the land, in effect reconveyed their own "use" right over to the crown for the benefit of the Palatines.[218] They then concluded by declaring that "if they serv'd anybody, it must be the King, and not some private person."[219]

Hunter made no serious attempt to answer those arguments, merely hinting darkly that an order from the crown would be forthcoming and then conceding that the Palatines did, at least, have a claim to the full value of their improvements.[220] In fact, the legal questions raised by the Schoharie issue were so fraught with ambiguity that probably no coherent response was possible. The first problem was that the Schoharie land had been released in 1698 from a previous grant precisely because large grants of uncultivated land were said to impede settlement and therefore to be, by definition, a fraud against the crown. Ironically, Hunter had regranted the same land to the Albany proprietors for the specific purpose of impeding settlement. Yet the goal of impeding settlement was, in this instance, for the purpose of achieving that other clearly articulated but contradictory crown goal—production of naval stores. It would have been difficult to call promotion of that goal a fraud against the crown.

A second ambiguity related to the delicate question of Indian rights. In some colonies that question had long since been settled by simply assuming that Indians had no legal property rights. In Massachusetts Bay, for example, that position was elaborately defended as an inevitable deduction from the fact that a civil (as opposed to natural) right to land could be based only upon cultivation, not mere hunting and fishing—an explanation which led to no slight difficulty whenever New England lawyers attempted to ex-

216. *The Condition, Grievances and Oppressions of the Germans*, Aug. 20, 1722, in 3 Doc. Hist., *supra* note 9, at 712.

217. *Id.*

218. *Id.* at 712-13.

219. *Id.*

220. *Id.* at 713.

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plain the validity of crown grants of uncultivated land.[221]

In contrast, New Yorkers never doubted that the Indians had some variety of property right, an assumption reflected, for example, in the title requirement that all patents be accompanied by Indian deed. Despite a good deal of official effort to enforce such requirements (Indian cooperation was needed in the wars with France), Indians were routinely deceived, made drunk, or bribed for the sake of procuring deeds, so the right afforded them scant protection. Nevertheless, it was not without legal significance. As in the Palatine instance, there was some real question as to whether a grant unaccompanied by Indian deed was enough to defeat title based on cultivation and an Indian deed.

The answer to that question depended upon the precise relation between the crown's authority over land and the Indians'

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221. Eisinger, *Puritan's Justification for Taking Land*, in LXXXIV Essex Inst. Hist. Collection 131, 135 (1948). In Massachusetts, Indians were considered to have a merely "natural" right to the soil because they only hunted on the land they held in common, and had never cultivated it. In contrast, since white settlers improved the land, they procured for themselves a right which was sometimes described as "natural" but which was civil and legal as well. This right was legally superior to the rights of Indians. Winthrop carefully made the distinction:

> The first right was naturall when men held the earth in common every man soweing and feeding where he pleased; and then as men and the cattle increased they appropriated certaine Pcells of ground by enclosing, and peculiar manurance, and this in Tyme gave themn a Civil right.

Id. at 136. Similarly, John Cotton asserted that God "admitteth it as a Principle of Nature, that in a vacant soyle, hee that taketh possession of it, and bestoweth culture and husbandry upon it, his Right it is." *Id.* at 136.

This formulation left open, of course, the difficult question of what happened if labor and cultivation conflicted with "legal" title. Puritans were certain that it was unbridled natural liberty which led to disruptive disputes over land ownership. Without the civil power of magistrates, "*Might would bear down Right.* Men, like Dogs, would try their titles with their teeth; and all differences between *Meum* and *Tuum* would be abolished." P. Miller, The New England Mind: The Seventeenth Century 417 (1967). Presumably, a wanton tendency to settle on even the uncultivated land of others would be discouraged. Nevertheless, some New Englanders scrupulously followed out the logic of their position in relation to the Indians. Since they were basing their right to the soil upon the "Grand Covenant" to cultivate the earth, then that cultivation was a condition to all ownership. Title could not be sustained "without a faithful practicall care of the performance of this principall Condition of that Grand Covenant assigned vnto him: what pretence of Civell Right soeuer he may challenge vnto himselfe concerneing the same." Eisinger, *supra*, at 137 n.13. Labor on the land might therefore confer title superior *both* to abstract legal title and Indian hunting. Roger Williams was, typically, prepared to draw the extreme conclusion, describing the "*Sinne* of the *Pattents,*" wherein kings claimed to be authorized to "give away the Lands and Countries of other men." *Id.* (emphasis added). Williams argued that the land should be returned to the Indians.

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right, and on that subject lawyers tended to admit ignorance. As late as 1765, for example, John Tabor Kempe listed a number of possible interpretations, but was satisfied with none.[222] Indians might, he wrote, be treated simply as English subjects with equivalent property rights. This he thought probably wrong; but if Indians were not full subjects, then the "Indians are to be considered as States in Alliance"[223] and entirely outside the dominion of the king's laws, including common law rules respecting land. That, too, seemed wrong. Kempe concluded that the "policy of our Constitution warrnts the view"[224] that the land should be "considered the King's and held by him for the use of the Natives til they should part with this Right."[225] By the 1760s, this convenient trusteeship notion was probably the dominant view of the question,[226] but Kempe was by no means certain that it was incorrect (however startling) to suppose "that the Crown has no property in the Lands of the Natives, but that the Right of the Soil is in them."[227]

The whole issue might have been resolved at the time of the 1698 Vacating Act releasing Schoharie, for then there was some concern as to whether the released lands should revert to the crown, to the Indians, or to both. Some even dared to suggest that no right at all could revert to the crown since such a result "seizes into the King's hands lands that were never the possession of the Crown."[228] Nevertheless, a colonial correspondent explained to the Board of Trade that in 1698 both crown and Indians were simply said to have received back whatever rights they held before the grants were made—with, apparently, no clarification of exactly what those rights were.[229] Since the Indians publicly thanked the king for the return of the lands, it was obvious they received some right, but the nature of that right and its relation to crown author-

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222. *Letter from John Tabor Kempe to Sir William Johnson*, Sept. 23, 1765, in 11 SIR WILLIAM JOHNSON'S PAPERS 949 (M. Hamilton & A. Corey eds. 1953).

223. *Id.* at 950-51.

224. *Id.* at 951.

225. *Id.*

226. For Chief Justice Marshall's similar formulation, see Johnson of Graham's Lessee v. McIntosh, 21 U.S. (8 Wheat.) 543, 574-75 (1823).

227. *Letter from John Tabor Kempe to Sir William Johnson*, Sept. 23, 1765, in 11 SIR WILLIAM JOHNSON'S PAPERS, *supra* note 222, at 950.

228. *Answer of the Agent of New-York to a Memorial against the Act vacating certain Grants of Land*, Oct. 26, 1700, in 5 COL. DOCS., *supra* note 9, at 12.

229. *Id.* at 13.

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ity remained peculiarly undefined.[230]

In their informal confrontation with Hunter, the Palatines in effect claimed the "use" allowed them by the Indians, apparently assuming that possession was in the king as trustee and a beneficial use was in the Indians, which could be conveyed to others. They also claimed additional rights that flowed from actual settlement. Whether a governor could defeat that combination of cultivation plus Indian deed simply by crown grant unaccompanied by Indian deed was no easy question. Nor was it answered during the Palatine conflict, for the confrontation ended in a legal impasse. Both Palatine representatives and Hunter carried the dispute to London.[231] There, Hunter's influence with officials prevailed. In fact, the Palatine deputies arrived in such an impoverished state that they were imprisoned for debt when they reached London. Hunter's successor, Burnet, was ordered to resettle the recalcitrant Palatines on other land. At that point many of the Palatines simply left for Pennsylvania, where they were allowed secure titles.

The crown's protective policy toward settlers, which complicated the question of title in the Palatine case, masked rather than highlighted the single most fundamental question about colonial property: Whether the ultimate source of authority—and thus entitlement—derived from local usage or a centralized hierarchy. Even before the Palatine incident Governor Hunter was painfully familiar with the question, for during his administration church property cases had posed it with dramatic and troubling intensity. For example, in 1710 the inhabitants of Jamaica committed a "Riot or forceable Detainer of ye Church at Jamaica. . . ."[232] By force they seized the glebe, church and parsonage, which they had built originally for their own dissenting minister. The Anglican Society for the Propagation of the Gospel (SPG) in England had then sent over an Anglican minister to fill the Jamaican position. With the backing of the SPG and the Bishop of London, the Anglican minister, Reverend Poyer, claimed the church property for himself.[233]

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230. *Id.*

231. A. SNELL, PALATINES ALONG THE MOHAWK AND THEIR CHURCH IN THE WILDERNESS 20 (1948).

232. *Order of Council of Queens County*, Apr. 13, 1710, in 3 ECCL. RECS., *supra* note 9, at 1846.

233. *Id.*

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This was a property issue which went directly to the structuring of moral authority. If John Leydt's "true peace" could only be achieved through the unifying moral vision located at the top of all-inclusive, structured, static hierarchy, then the property belonged to the Anglicans. Conversely, if peace could only be achieved through a voluntarily expressed spirit of reconciliation (with God and community), by its very nature both local and participatory, then the property belonged to the inhabitants of Jamaica. At each moral extreme, virtue, authority, and property were unified; yet the extremes were irreconcilable.

Governor Hunter, forced to cope with that confrontation, announced that the Jamaica issue should be decided legally, not politically, as a "sure [matter] of property . . . [to] be determined by the ordinary course of the law."[234] He offered to help Poyer with the expenses of a lawsuit and even to guarantee that Anglicans rather than dissenters sit on the jury. He would not, however, simply invoke crown authority to enforce the Anglican claim.[235]

Notably, both Jamaicans and Anglicans initially resisted this appeal to a legal solution. The Jamaicans continued to hold their church by force, while the Anglicans manuevered in England for the removal of Hunter and the direct imposition of royal authority on their behalf. As both Anglicans and Jamaicans recognized, there really was no coherent middle ground of legal property right which could resolve their two fundamentally irreconcilable moral positions.

The disputes of the mid-century were increasingly focused upon the exact meaning of property "right"—a word often used but never explicitly defined. The problem faced by lawyers was the one Hunter recognized—finding a source of entitlement to property rooted neither in crown authority nor in local use; i.e., to formulate a conception of property abstracted from either of the two moral/political extremes. On the secular level, those extremes meant either direct crown control over land ownership and use, or, alternatively, the collapse of property into the chaos (as it was perceived) of local self-determination and the "robust" title by cultivation. John Tabor Kempe's tentative effort to formulate such a

234. *Letter from Colonel Morris to the Secretary of the Society for Propagating the Gospel*, Feb. 20, 1711, in 3 Doc. Hist., *supra* note 9, at 246.
235. *Id.*

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mediating conception is the subject of the next Section.

III. John Tabor Kempe and the Emergence of Property Right as a Legal Concept

The papers of John Tabor Kempe, which include the briefs, opinion letters, and memoranda of one of the most eminent lawyers in provincial New York, reflect the chaotic and uncertain nature of property rights. According to one of his students, Kempe was distinguished by "understanding, learning, generosity, sensibility, and courage."[236] As a lawyer, he was regarded by contemporaries as equal in both skill and integrity.[237] Kempe was the last attorney general of the Royal Province of New York, succeeding his father and serving from 1759 to 1782. During the same period he maintained a rather extensive private practice and also acquired more than 150,000 acres of land.[238] Because Kempe played that dual role in the province, as both attorney general and private practitioner, his papers provide a useful insight into the provincial definition of property. As attorney general, Kempe was asked to argue for the crown in title challenge cases brought against provincial proprietors, but as private attorney he often represented those same proprietors in their disputes with local settlers. Proprietors often sought to confirm or extend the boundaries of their vast holdings by ejectment proceedings, brought to challenge the title of farmers—and whole townships—that were settled near their estates. Because of fierce settler resistance, by the third quarter of the eighteenth century those local disputes had turned into riots which took over whole counties. In legal terms, they represented the stark confrontation between grant title and title by occupancy.

A few preliminary points should be noted at the outset. Kempe often used the word "right," but by right he did not mean a Lockean fence around a purely privitized individual. Instead, right in relation to property was bound up with legal title, and title was derived directly from the crown.[239] Although grants in fact

236. Crary, *The American Dream: John Tabor Kempe's Rise from Poverty to Riches*, in Courts and Law in Early New York 75, 84 (L. Hershkowitz & M. Klein eds. 1978). (Statement of William Rowles).

237. *Id.* The analysis that follows primarily is based upon a reading of the Papers of John Tabor Kempe, New York Historical Society Collection.

238. Crary, *supra* note 236, at 84.

239. *See, e.g.*, Reasons in Support of the Objection of the inhabitants of King's District

were issued by the governor or his Board, sometimes contrary to crown instructions, in theory the legitimacy of grant title still depended upon the feudal conception of the king as "fountain" of property as well as of justice. The legal right a grantee (owner) asserted against a squatter was the original feudal right of the crown, now vested by grant in the grantee.

This conception was elaborated with some intensity by New York lawyers. Even counsel representing squatting settlers conceded that their clients' land, if unpatented, was still vested in the crown; all they claimed was the recognition, within the colony, that sovereign authority had traditionally given to cultivation and labor. It was in this sense that they argued both equity and utility on behalf of their clients. As against the king himself, they made no claim.

The close link between crown right and legal title meant that title still suggested an extension of prerogative—a grant of royal authority by the crown to the manor lord. This was so despite the fact that actual *jurisdictional* authority, even when expressly conveyed in manor grants, had rarely been exercised in New York. Indeed, from the time of Dutch rule, one can trace a gradual conceptual separation of jurisdiction from property. Occasionally, for example, jurisdiction was reconveyed to the sovereign, while the land was retained. Nevertheless, proprietors of large tracts were still said in the colony to be exercising "prerogative" authority. This did not necessarily mean they conducted manor courts, but it did mean that the legal right they claimed was conceived as the same right which the king once held by virtue of his feudal lordship over the lands of his colonial dominion. This was the legal premise which provided legitimacy for title to land as asserted against "unlawful" occupiers.

A doctrinal structure based upon crown authority posed some theoretical dilemmas in the province. First, as discussed already, neither the crown nor provincial lawyers had determined what rights the king held vis-a-vis the Indians; the exact rights that either the crown or the Indians could convey remained uncertain. Another obvious problem was posed by the conditions of settle-

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and others against granting the confirmation petitioned for by the Propriety of Westenhook, Feb. 22, 1775, in Papers of John Tabor Kempe, N.Y. Hist. Soc. Box 5, Miscellaneous. [hereinafter cited as Papers],

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ment, quit rent, and pine tree reservation attached to all crown grants. Strictly speaking, most grants in the colony had reverted to the crown, and English policy still favored enforcement of such clauses. More subtly, restrictive common law rules still protected the prerogative interest in land. Crown grants were either to be forfeited or construed in favor of the crown in case of ambiguity in form or boundaries; yet most grants in the colony were deficient in either or both boundary description or legal formality. One might argue (as lawyers so often did) that the king should "in justice" refrain from employing legal technicalities to assert oppressive land claims against his subjects in the colonies. Once the legal category of title collapsed into that of royal (or judicial) discretion, however, the equity of liberal construction claimed by the proprietor was matched by a competing equity of cultivation in the settler. As both settlers and proprietors knew, the crown's express policy was to favor the settlers.

Underlying the doctrinal ambiguities, and surfacing repeatedly, was the problem of "utility." There was a utility which favored the security even of faulty title, as against the "confusion" which would result if the whole crown grant structure were allowed to crumble, and there was a utility which favored settler initiative and possession even at the expense of secured title. Clearly in the background were the two models outlined in Section I. Whenever the notion of legal right disintegrated into competing equities, those models came to the fore.

At certain key points, some of which are evident in the Kempe materials, the legal elite in the colony made decisions which protected proprietors against the crown's actual assertions of prerogative authority over land while also protecting them against the "robust" claim of rights based solely on cultivation and labor. Potentially, the claims of the king threatened an end to all secured legal title no less than did the "usurpatious" claims of settlers. In part through such choices, which in effect created a protective legal barrier between crown and colonial owner, the notion of legal title was abstracted from its base in either royal prerogative authority or republican community will. The result was to sever the theoretical connection between property and sovereignty and to assert a "right" that was absolute and unqualified. Notably, however, title as a legal category was still almost inconceivable in the colony without reference to crown authority. Therefore, the process of ab-

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straction was a halting one, and the meaning of ownership in the colony more elusive and precarious than one might suppose. The idea of property itself was still concrete and land-based, not yet the mysterious abstraction of a commercial economy. A legal *right* to property, however, was not nearly so concrete and easily identified.

The halting nature of the process described in this Section, however, should not obscure the significance of the conceptual direction in which Kempe and other members of the legal elite were moving. In part, of course, Kempe's arguments as outlined below were simply strategic responses to opposing argumentation—like all skilled lawyers, Kempe could generate arguments on both sides of any question. Yet there was also an inner, perhaps unwitting, genius in the net effect of those arguments when taken as a whole. That genius lay in Kempe's underlying perception that a new, mediating conceptual form would need to be created unless the whole doctrinal structure of property law were to collapse into an all too hopeless and evident contradiction. That new form—the notion of an abstract right to property—was achieved only by denying the validity of *both* the hierarchical and the voluntarist models in their purest form. Elements from each model were, however, destined to be retained in a dramatically new combination. From the hierarchical model Kempe borrowed the notion of formal legal title, secure from the disruptive claims based on actual occupancy, while from the voluntarist model Kempe borrowed the "bottom up" notion of property as freed from the imposition of hierarchical political controls—in the colony, specifically the direct exercise of crown authority. Using those two elements in novel combination, while at the same time denying, in their pure form, both the hierarchical and voluntarist models from which those elements were derived, Kempe and other colonial lawyers began to fashion our liberal conception of property "right."

This Section will illustrate the basic property conflict, and Kempe's response, in the context of specific and recurring legal disputes. The major issues that all too easily exposed the underlying dilemma were the condition of settlement clause, formal defects in grants, boundary problems, settler claims based on use and cultivation, Indian rights problems, and the relevance of mere possession to the question of title. Within the context of those often complex issues, and the sometimes violent disputes within which

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they arose, the liberal conception of "right" haltingly began to emerge.

A. *The Problem of Conditions*

No single issue potentially undercut the legitimacy of land titles more than the crown conditions still attached to grants. On that point alone the legal authority of most patent rights simply collapsed. Significantly, as late as the 1760s it was still impossible to procure a land grant free from the condition to settle and cultivate.[240] Even when Anglican King's College requested exemption, the request was flatly denied.[241] In that case, too, the condition to settle and cultivate was taken seriously, for soon after the exemption was denied, Kempe, Smith, Duane, Livingston, and Morris all met to plan the required settlement on the new grant to the college.[242] Indeed, pressure to ensure settlement had increased by the mid-century. The Board of Trade during the 1760s and 1770s announced that settlement was a "right to be preferred to others,"[243] warned against the effect of large grants, and proposed that authorities reduce the limit on individual holdings to 500 acres or make them exactly proportional to ability to settle.[244]

Kempe dealt specifically with forfeiture for want of settlement clauses both as attorney general and in ejectment suits directed against farmers. As one striking example, Kempe's own land in Princeton, held in common with James Duane and Walter Rutherford, carried with it the usual condition to settle. When Kempe and Duane brought ejectment suits against farmers who had settled in the area, the settlers' defense was based in part upon Kempe's failure to cultivate his land within the three year period stipulated by the grant clause.[245] The settlers claimed that the uncultivated land therefore had reverted to the crown after three years and was available for new settlement. In response, Kempe

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240. *See, e.g., Petition of Sir James Jay to the King,* July 17, 1764, in 7 COL. DOCS., *supra* note 9, at 643-45.

241. *Id.* The Board of Trade explicitly requested the exemption.

242. *Order of the Governors of the New York College for the Settlement of their Township of Kingsland,* Feb. 17, 1772, in 4 DOC. HIST., *supra* note 9, at 767.

243. *Letter from the Board of Trade to the Lords of the Privy Council,* June 6, 1771, in 4 DOC. HIST. *supra* note 9, at 437-39.

244. *Id.*

245. Jackson v. Stiles, in Papers, *supra* note 239, Unsorted Legal including Lawsuits V-Z (N.Y. Sup. Ct. 1769) (declaration in ejectment).

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successfully argued that the condition attached only in favor of the crown, and therefore the defending settlers "can take no advantage of this in a Suit, between us & them. If any advantage can be taken of this, it must be by the crown in a Suit brought on Purpose."[246]

Ironically, two years earlier, Kempe, as attorney general, was consulted about the legal status of the uncultivated Kayadesosus patent, and William Johnson had in fact suggested that the patent might be "forfeited for Breach of the Condition of Settlement."[247] Then, Kempe had replied that the grantees were no doubt "Liable" to the crown because there had been no settlement or improvement, but he cautiously advised that the point should not be argued on behalf of the crown: "I fear upon the same Principle almost every Estate in the province may be defeated and this would breed a dreadful Confusion—How far a proceeding on that Principle may be good in Policy is worth well considering."[248] Since the condition of cultivation was thus made unavailable to either settlers or the crown, the effect was simply to exclude voidness for want of settlement from the range of available argumentation, thus protecting (in fact and conceptually) the notion of property both from crown authority and from the claims of actual settlers.

On his own initiative Kempe wrote three memos to the governor and Council on the troublesome subject of conditions. He was concerned not only with the condition of settlement, but also the pine tree reservation clauses.[249] While the crown's own transcendent view of the public good still tended to focus upon active naval stores production as well as rapid settlement, Kempe pointed out that when conditions reserving all pine trees in the colony for the crown were combined with conditions of settlement, grants inevitably became "big with Contradictions and Inconsistencies"[250] since cultivation required the destruction of pine trees. Explanatory clauses had been added by some governors to the effect that preservation of pine trees should not be construed to hinder grantees

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246. Brief for Petitioner, Jackson v. Stiles, in Papers, *supra* note 239, Unsorted Legal including Lawsuits V-Z, at 8.

247. Letter from John Tabor Kempe to William Johnson, July 22, 1765, in Papers, *supra* note 239, Box 1, Letters A-Z, Jackson-Kuyser folder.

248. *Id.*

249. Papers, *supra* note 239, Box 3.

250. *Id.* On the issue of pine tree reservation clauses, see also Letter Concerning Grants of Land, Feb. 24, 1761, in Papers, *supra* note 239, Box 1, Letters A-Z.

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from "burning or cutting as shall be necessary and conducive to the clearing or effectively cultivating the Lands, or for their own use."[251] Kempe was nonetheless unsatisfied. By this explanatory clause, he maintained, the original clause which it was intended to elucidate "seems to be destroyed."[252] If use really were allowed, then the reservation of pine trees was meaningless. Kempe suggested amending the clauses, but he conscientiously added that "I dare not alter the Form until I know how far they have been inserted without Warrant."[253] Apparently he feared that if the specific language reserving pine trees had been stipulated by crown authority, there could be no amendment.

Governor Colden responded to the dilemma by insisting that the "reservation as to Pine Trees be in the words of his Majesty's Instructions,"[254] even while also, paradoxically, proposing more rigorous conditions of settlement. Meanwhile, on the disputed New Hampshire border, New York proprietors were being officially charged with the destruction of pine trees on their land—clearly an attempt, aided by New England, to challenge the proprietors' patent rights on behalf of the border settlers.[255]

William Smith, Jr., then chief justice, announced his own opinion that the pine tree reservation clauses should not be strictly construed:

> [I]t is for his Majesty's Service that his subjects meet with all Suitable Encouragement so as they may be induced to take up Settlement and improve the Lands of this Province . . . that Wood Land cannot be cleared without burning up the Woods and Brush to render it fit for Tillage and that his Majesty did not intend to prohibit such Burning of the Woods or Falling of the Trees as are necessary and conducive to the clearing and effectually Cultivating of the Lands or for the use of the Owner.[256]

Apparently, this became the prevailing view in New York courts. Notably, however, Smith did not go to the extreme of suggesting

251. Papers, *supra* note 239, Box 3.

252. *Id.*

253. *Id.*

254. Copy of Order of Council relative to the Forms of Grants of Lands & particularly of the Clause reserving the pine Trees, Mar. 25, 1761, in Papers, *supra* note 239, Box 5, Miscellaneous.

255. *Letter from Governor Wentworth to Governor Clinton*, June 22, 1750, in 4 Doc. Hist., *supra* note 9, at 333.

256. Copy or Order of Council relative to the Forms of Grants of Lands & particularly of the Clause reserving the pine Trees, Mar. 25, 1761, in Papers, *supra* note 239, Box 5, Miscellaneous.

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that the "encouragement" of settlement should mean favoring actual occupiers over proprietors, although there was no logical reason why the free use arguments proprietors used against the crown could not also be used by settlers against the crown's "patentees." Again, the effect was to insulate property from direct crown control by reference to "bottom up" claims, while never allowing the full voluntarist model to prevail.

B. *Defective Grants*

The problem posed by insufficiency of legal form was similar to the problem posed by conditions. Kempe complained often that during the infancy of the colony too little attention was paid to legal technicalities, which meant that many deeds and grants were formally defective. For example, some property located in Albany originally had been granted by the governor in his own name to the corporation of Albany.[257] The grant language specifying the governor as grantor then had been written into the Albany charter. Since theoretically lands could only be granted in the name of the crown, the grant was arguably invalid. Kempe was consulted by the governor on the legality of the grant, for the lands were desired for military purposes. Kempe first admitted his "reluctance" to give an opinion on the subject, since he did not want to be accused of oppressively asserting crown authority as against colonial proprietors who had come to resent any British interference with their property rights, acknowledging the "general feeling about himself and predecessors of waiting for an opportunity of taking all possible advantage against the subject"[258] on questions of property. He then advised that the grant was indeed defective "in strictures of Law"[259] since the governor "could not grant the Crown Lands in his own Name."[260] He felt that the governor should remember, however, that the grant was "as long ago as 1686, when the Legal Forms of Business were little known. . . . How far the Crown ought to take advantage of the Mistakes of its own officers, your Excellency is a very proper Judge it being a point of Honor."[261] He concluded by reminding the governor:

257. Papers, *supra* note 239, Unsorted Legal including Lawsuits, A-B.
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.*

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> It is further to be considered that if such advantage were to be taken the greatest Confusion might be introduced in the Province, many of the Oldest Titles to Land in the Province being founded on such Grants, made at times when the due Attention to Form was not observed . . . .
>
> Upon the Whole I think in strictness of law it is not good, but also I think Exception should not be taken to it merely for Want of Form. . . .[262]

The huge Van Rensselaer grant was plagued by a similar technical defect in title. When the Van Rensselaers had received British confirmation for their Dutch grant, the confirmation had been in the form of a conveyance to the crown followed by a new grant. Yet, as Kempe noted, since Van Rensselaer had held his lands in fee tail, he was, strictly speaking, unable to make the necessary conveyance to the crown in exchange for the confirmation.[263] Therefore, Kempe concluded in his notes, there was no "good consideration and doubtless all that Transaction with the crown is void."[264]

A Dutchess County action raised a similar technical problem, related directly to the problem of basing grants upon crown authority. Hardenbergh, a proprietor represented by Kempe, held land under a grant issued on the 28th of April 1701/2, in the name of King William. William had died on the 8th of March, forty-one days before Anne took the throne. The question was whether Hardenbergh could plead good title based on a grant from a dead monarch. Kempe, representing Hardenbergh, knew the problem might be awkward and hoped the court could be convinced to ignore it. Since the date was written in the "[m]ergin of the Thing"[265] rather than at the top of the grant, he initially hoped that the court might simply consider it a mistake.[266] Nevertheless, in order to plead title, Hardenbergh would have to plead a specific date, and there was apparently no evidence of an alternative date that could

262. *Id.*

263. Notes for Reply, Beby & Others v. Van Rensselaers 1759, in Papers, *supra* note 239, Unsorted Legal including Lawsuits, V-Z.

264. *Id.* Confirmation was a process, conceived as an exchange for consideration, by which a grantee surrendered an old claim for a new one. As a result of the exchange, land would revert in the crown and therefore be available for regranting. The technical definition of confirmation was not unimportant; as in Van Rensselaer's case, one could question the validity of a confirmation for which there had been no valuable consideration, *e.g.*, if the old claim itself were faulty. Thus, confirmation did not automatically give clear title.

265. Points of Law to be considered, Johannis Hardenbergh v. James Jackson ex dim, David Turbos & Others, 1764, in Papers, *supra* note 239, Unsorted Legal including Lawsuits, V-Z.

266. *Id.*

be pleaded. Finally, Kempe concluded that the court was bound to take judicial notice of the king's death. Since the issue could not be avoided, Kempe assumed that he would lose the case on that point alone:

> By the death of William the Right of the Crown Lands immediately vested in Queen Anne, and could not be granted in the name of King Wm—and this for a plain Reason a dead Person can grant nothing besides it was the Right of the Queen. . . . These Principles must take place here.[267]

At trial, Smith, Scott, Livingston and Kempe all debated the issue.[268] Livingston stated the chief difficulty: there were "Diverse patents in the same Situation," in the colony.[269] As Smith elaborated, there would be "Mischievious Consequences to what we allege."[270]

The case was complicated by the fact that in England a warrant issued to the chief justice in the name of the crown after the king's death was considered void.[271] It was argued that the governor had received no notice of the king's death; but according to Coke, where "noBody is obliged to *give Notice* — the party must take it at its peril."[272] Furthermore, in England, commissions given in the name of the crown during an interregnum were apparently void by statute.[273]

Nevertheless, the consequences of giving effect to the principle were obviously grave. Since legislatures in the colony required the governor's approval, it was suggested that even acts of Assembly passed during that period would be "bad on the principles of *Common Law*."[274] Therefore, in this case, "[n]ecessity obliges the giving way of the Rules of Common Law."[275] Coke was quoted as stating

267. *Id.*

268. *Id.* I could not tell who was/were judging the case. Notes on the trial were incomplete.

269. *Id.*

270. *Id.*

271. *Id.*

272. Points of Law to be considered, Johannis Hardenbergh v. James Jackson, ex dim, David Turbos & Others, in Papers, *supra* note 239, Unsorted Legal including Lawsuits, V-Z.

273. The argument was hard to follow here. Reception of English statutes in the province was made official by Act of the Assembly in 1768. Until then, their reception was "arbitrary and changeable." *Letter from Governor Moore to the Lords of Trade*, Feb. 26, 1768, in 8 COL. DOCS., *supra* note 9, at 14.

274. Points of Law to be considered, Johannis Hardenbergh v. James Jackson ex dim, David Turbos & Others, in Papers, *supra* note 239, Unsorted Legal including Lawsuits, V-Z.

275. *Id.*

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that "cases out of the words of a statute, if of equal Inconvenience should be included by equitable construction."[276] Similarly, Plowden was also quoted: "Not the words of a law, but the Integral sense of it"[277] should be followed. In the present case, it should be remembered that grants in the colonies were far removed from actual royal control. "Formerly England had no Foreign Dominion"[278] but now the "[c]ourt must take up a new principle,"[279] rather than rigidly adhering to common law technicalities.

The perceived difficulty of the question highlighted the problems inherent in basing a conception of right directly on crown authority, while at the same time defining that authority as a mere technical abstraction. There seemed an evident tension between crown right as taken literally and taken as a formality: legitimacy depended upon the former, but the stability of property ownership often depended upon the latter. The clear direction of colonial cases was to exclude claims based on actual crown authority, even while fiercely retaining the validity of title as formality. That posed an obvious problem of legitimacy, which would eventually be solved only by the creation of the abstracted, liberal notion of right. Kempe and the other lawyers moved at least tentatively in that direction.

C. *Uncertain Boundaries*

By traditional common law rules, grants with uncertain boundaries, like grants deficient in legal form, were to be construed in favor of the crown or simply declared void.[280] This argument, too, was more or less self-consciously excluded from the realm of acceptable legal discourse. Repeated suits brought by the crown against Van Rensselaer's huge estate made the problem of boundaries notorious. For example, one critical Van Rennsalaer boundary marker was a creek called Pattenhook,[281] yet in 1606 there were at least two streams and many creek branches given that name. As

276. *Id.*
277. *Id.*
278. *Id.*
279. *Id.*
280. *Letter from Governor Wentworth to Governor Clinton*, June 22, 1750, 4 Doc. Hist., *supra* note 9, at 333.
281. Notes for Reply to Beby & Others v. Van Rensselaer, 1759, in Papers, *supra* note 239, Unsorted Legal including Lawsuits, V-Z.

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Kempe wrote in his notes for the case *Beby v. Van Rensselaer*,[282] "[w]hat Course is it which way is it to stretch itself into the wood? The deed is silent! No-one can tell!"[283] Later testimony indicated that the Indians called "every fall of Water" Pattenhook.[284]

Another disputed Van Rensselaer boundary was indicated on the grant as marked by "Wawanaquasick," which Van Rensselaer claimed to be a particular stone Indian mound located on the boundary he claimed for himself.[285] He derived that claim somewhat vaguely from the fact that the Indian word wawanaquasick referred to "heap of stones."[286] Yet one witness testified that the word did not mean heap of stones at all, but rather referred to any landmark considered in some sense sacred: "There being nothing relative to stone in the words . . . such places have something sacred in them . . . whether made of stone, wood, Earth or any other matter."[287] The word had been compared to a heap of stones only because the Indians sometimes threw stones in front of them to make a sacred place before praying, but sacred areas might be marked by other materials as well.

In the decisive case of *King v. Van Rensselaer*,[288] Kempe had requested jury instructions specifically concerning the common law rules of grant construction. Kempe argued that in cases of uncertain boundaries, "[t]he Law is that where a Grant, of the crown for lands is doubtful and will admit of two constructions, such construction shall take place as will pass the least Land . . . and that the said Grant to Van Rennsalaer is void in Law for Uncertainty."[289] Chief Justice David James admitted Kempe's point as a matter of law, but he pointed to the fact that vague boundaries were the rule rather than the exception in the province. To adhere strictly to the law on that point would be to call into question most of the land grants in the colony:

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282. Papers, *supra* note 239, Unsorted Legal including Lawsuits, V-Z.

283. Notes for Reply to Beby & Others v. Van Rensselaer, 1759, in Papers, *supra* note 239, Unsorted Legal including Lawsuits, V-Z.

284. *Id.*

285. Notes of Argument for Westenhook and Van Rensselaer v. Beby & Others, Oct. 7, 1762, in Papers, *supra* note 239, Unsorted Legal including Lawsuits, V-Z.

286. Papers, *supra* note 239, Box 5, Miscellaneous.

287. *Id.*

288. *See* Reasons in support of the Objection of the inhabitants of King's District and others against granting the confirmation petitioned for by the Proprietor of Westenhook, Feb. 22, 1775, in Papers, *supra* note 239, Box 5, Miscellaneous.

289. *Id.*

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> As there are a number of Patents for lands in this Province, which are imperfect in their Description . . . the said justice could not adopt an opinion that such grants were Void for such Uncertainty in Description and gave the charge that tho by Law the King's grants are void for uncertainty and that to where the King's grants are capable of two Constructions, such Construction ought by law to prevail as will pass the least land to the subject yet in the present case is certainly enough.[290]

Smith, as counsel for Van Rensselaer, won the case by arguing the "heavy Arm of the Crown" in imposing an "[o]ppressive prosecution."[291] He also pointed to the fact that there were many grants "in like Circumstances,"[292] apparently meaning based on indeterminate boundaries and faulty Indian deed. This argument was persuasive, especially to the property-owning jurors.

During the trial Kempe had asked the justice to sign a bill of exception so that the denial of his own instructions as to voidness for indeterminate boundaries could be appealed. Although Kempe "strenuously requested"[293] the signature several times, after as well as during the trial, the chief justice delayed until the period for filing for appeal had lapsed. By such means, proprietor titles were protected from legal challenge and rendered more "secure," but only by further undermining (albeit by "prudential" rather than substantive ploys) the only legitimate source of title—crown authority—without yet offering any distinctly "legal" notion as a substitute.[294]

D. *The Collapse into Contradictory Arguments About Policy and Morality*

With no coherent basis for legal title in the crown, colonial lawyers commonly fell back on arguments based upon "equity" and "utility." When that happened, the two competing models outlined in Section I quickly emerged. For example, confronted by the numerous defects in the Van Rensselaer title in *Beby*, William Smith had argued for the family that if there were not a clear title there was at least an equitable claim.[295] This was so in part simply

290. *Id.*
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.*
295. *Id.*

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because of the position the Van Rensselaer family occupied in the province. Thus, obscure boundaries were construed generously, for the Van Rensselaers were "not considered as common planters,"[296] so that not a "small grant but a handsome grant was clearly intended."[297] Kempe, however, planned to use the competing equity argument, that any Van Rensselaer title based on equity was invalid since it so clearly could not include equity by settlement: "Settlement on the lands cannot be any Reason—for it does not appear he has settled any Person therein, it lies Waste for any settlers under him for ought appears."[298] Moreover, the Van Rensselaers already held "upwards of Eleven hundred square Miles surely enough for one Family."[299]

In *Beby*, Smith had also argued the "maxim" that it was contrary to good public policy to allow settlers to challenge legal title and then be rewarded by grant—if faulty title were discovered, the proprietor himself should receive the "right" rather than the settler, in order to secure title, discourage disruptive settlers, and generally promote the peace and harmony of an ordered, hierarchial society.[300] Kempe, however, had argued for the crown that "it seems to be right in policy to reward those who should discover any Injury of this kind . . . and as in this Country the settlement of the Lands being most for the publick Benefit, a grant of Part of the Lands seems to be the proper reward."[301] As Kempe understood, a pro-cultivation policy argument was always available to cut against the policy of securing title.

Ironically, Kempe's own arguments were turned against him in the important *Nobletown* and *New Canaan* cases, where Kempe represented Van Rensselaer in his claim against two "squatter" townships. No cases show more clearly the tendency of the concept "legal right" to disintegrate when subjected to serious attack and to turn into arguments about competing policies.

The *New Canaan* briefs were argued before the governor's Land Board, apparently a small administrative agency which re-

296. *Id.*
297. *Id.*
298. *Id.*
299. *Id.*
300. Notes for Reply, Beby & Others v. Van Rensselaers, 1759, in Papers, *supra* note 239, Unsorted Legal including Lawsuits, V-Z.
301. Papers, *supra* note 239, Box 5.

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ceived petitions for grants and heard legal arguments about conflicting claims.[302] The boilerplate language of the petitions addressed to it suggests the standards that the Board had generally applied. Routinely, petitioners stated an intent to "cultivate and improve the said Tract,"[303] "Settle himself and Family on such Lands,"[304] and so on. Also included were petitions from those who had actually settled, and then requested official title.[305] Petitioners generally referred to the particular tract they requested as "vacant."[306]

The definition of "vacant" posed two problems. First, there had been a crown proclamation stating that all land available for grants should have been purchased earlier directly by the crown from the Indian tribe, at public meeting. This was designed to prevent the "Frauds and Abuses"[307] which characterized land purchases from the Indians, and which were thought to "prejudice his Majesty's interest"[308] and to cause "great disatisfaction of the said Indians."[309] According to the proclamation, no private person could "presume to purchase of the Native Indian proprietors any lands not ceded to or purchased by his Majesty."[310] Therefore, in order for land to be "vacant," it could not be subject to Indian claims.

This requirement was evidently ignored more frequently than not. One petition, for example, stated an intent to "cultivate and improve" land[311] "Occupied by the Native Indian Proprietors thereof."[312] The petitioner then simply stated his assumption that

302. I have gathered this from the materials. I do not know exactly how broad was its scope of authority.

303. *E.g.*, *A Lycence Granted to Cornelius Van Bursum to Purchase Land of the Indians Back of the Highlands of the Hudson*, in 13 COL. DOCS., *supra* note 9, at 554.

304. *Id.*

305. *See Petition of Issac Truax and Others*, XXIV NEW YORK STATE INDORSED LAND PAPERS, 1643-1803, N.Y. State Archives Collection, 1 [hereinafter cited as LAND PAPERS].

306. "Your petitioners did discover a certain . . . Tract of vacant Land. . . ." *Petition of James Sacket and Others*, Apr. 2, 1770, in XXVII LAND PAPERS, *supra* note 305, at 6. Sometimes, petitioners added that the vacant land was "vested in the crown," or "vacant and unpatented." *Id.*

307. *Petition of Henry White and Associates*, July 16, 1767, in XXIV LAND PAPERS, *supra* note 305, at 5.

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

the royal proclamation was meant "Soley to prevent the Defrauding of the Indians in purchases made by Private Parties and not to inhibit purchases for the benefit of Private Persons if made in His Majesty's Name . . . and at the expense of such Private Persons. . . ."[313] This language became routine; despite crown intent, land was apparently considered "vacant" even if occupied by the Indians, and it could be privately purchased from them.[314] Nevertheless, the always complex problem of the relation of Indian deeds to crown title was by no means resolved, and the proclamation could in theory be used as authority for challenging titles.

A second problem was whether "vacant" land included land which was claimed by patent but which in fact remained uncultivated. This question arose when granted but uncultivated land was discovered by settlers and then improved by them. That posed the squatter question: Did cultivation lead to a better title than crown grant without cultivation?

The recurring Indian deed and squatter issues were both raised by the disputes between Van Rensselaer and the inhabitants of Nobletown and New Canaan, near the Claverack patent. The Nobletown inhabitants, in a petition to the Board, stated that they occupied lands that were vacant and almost destitute of inhabitants except for Indians when they first came to settle them.[315] The land was then purchased from the Indians and cultivated until 1759 when the inhabitants were "molested" by the claims of Van Rensselaer and Schuyler, under the 1743 patent for Claverack.

According to the Nobletown petitioners, the patent for Claverack contained, like many patents, an unintelligible description of boundaries.[316] Moreover, the patent was given upon the express condition that settlement and improvement should take place within a specific period of time, which had not been done.[317] Therefore, the petitioners concluded that the land they lived on

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313. *Id.*

314. *Id.*

315. They had received permission to settle from Massachusetts, when the land was still claimed as part of the colony. Since New York did not recognize the Massachusetts permission as a crown patent, however, it had no legal effect. This point was made several times during border disputes cases; a New England grant could go to the question of jurisdiction, but once it was conceded that New York had jurisdicton, no alternative source of title could be argued. This was expressly contrary to crown instruction—discussed below.

316. *Id.*

317. *Id.*

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was vested in the crown, and that the expense they had incurred in procuring title from the Indians along with the labor they had bestowed in improving the land at Nobletown would entitle them to a patent.[318]

A similar petition was presented by the town of New Canaan, where inhabitants had purchased land from the Indians and cultivated it. The land was then claimed by Van Rensselaer. When he attempted to survey it and when sheriffs later sought to enforce ejectment orders, riots had broken out and the inhabitants had refused to leave. The town had petitioned the Board for its own grant, to which Van Rensselaer had interposed objections. The Board, favoring Van Rensselaer, had denied the original New Canaan petition on the specific grounds that it did not appear with sufficient certainty whether the land was vacant or not.[319] The New Canaanites repeated their petition for a grant, claiming that the land could be shown to have been "vacant." Van Rensselaer had then petitioned the Board for a confirmation of his own patent so as to include New Canaan within the boundaries.[320]

In his presentation before the Board on behalf of Van Rensselaer, Kempe emphatically argued a clear conceptual distinction between legal title and squatter or Indian title. The whole notion of legal "right," he said, was incompatible with claims based either on Indian deed or cultivation. Allowing the latter led to the result he pointed to in *New Canaan*: Settlers who "manifested a daring Spirit of maintaining their usurpations by Force, in which Blood had more than once spilled."[321] On the question of Indian deed, Kempe argued that the New Canaanites had made the purchase "to give Colour to their Pretenses"[322] without the king's license and contrary to royal proclamation. Therefore, the purchase was "irregular, no Equity can be founded on it."[323] Instead, "[g]ood Policy requires such Purchases, instead of being cause of Favor

318. *Id.*

319. *Petition of John Burghart and Others*, Jan. 15, 1753, in XXXIII LAND PAPERS, *supra* note 305, at 4.

320. *Id.*

321. Notes on the Pretensions, to Suggestions of the Inhabitants of New Canaan, as set forth in their Case presented to Governor Tryon and read in Council [hereinafter cited as Notes], Jan. 20, 1773, in Papers, *supra* note 239, Box 6, New Hampshire Grants, 1763-1773.

322. *Id.*

323. *Id.*

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should be a Ground for the Refusal of a Grant."[324]

In response to New Canaan's claim that the land had been vacant, and considered so by the general "Sense of the Country,"[325] Kempe argued that the sense of the country could only be formed by the "Sense of Government,"[326] specifically, as articulated in the *King v. Van Rensselaer* trial, which Van Rensselaer had won, and in an earlier confirmation of Van Rensselaer's title. Alternatively, if the New Canaanites did believe the land to be vacant, then they must have intended an intrusion onto the king's land, for they knew they had no legal title. Either way, they must have understood they "had no Right."[327] Therefore, only the "Enterprising Spirit"[328] typical of their countrymen New Englanders induced them to "swarm" onto the land—not a belief in title.[329]

The settlers had attempted to compare themselves to Schuyler and the patentees of Kinderhooks; each was similarly involved in border disputes with Van Rensselaer. Kempe, however, carefully distinguished the New Canaan dispute from those other disputes, which were specifically about the boundaries contained in a *legal* title. Unlike Schuyler, the New Canaanites had no pretense to a legal claim: "Here it appears clearly that they do not pretend to any legal title . . . yet they have seized the Lands and hope to hold them agt. those that have."[330]

The New Canaanites had also invoked the equitable "maxim of favoring settlers (provided they were bona fide Settlers),"[331] and had appealed to the favor of a "Board distinguished *for the Equity of its Proceedings*."[332] Kempe argued that such an appeal expressed "very strange ideas of Government:"[333]

> What can they mean by *bona fide* settlers—they can only mean such Persons as like Crows settle down on the Lands to the Injury of the Proprietors . . . . they can't mean such as settle under a *legal Title*, or even an imaginary one, for they frankly confess they know they have none. . . . This *may be* settling

324. *Id.*
325. *Id.*
326. *Id.*
327. *Id.*
328. *Id.*
329. *Id.*
330. *Id.*
331. *Id.*
332. *Id.*
333. *Id.*

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> *bona fide* on their Ideas, but whence could they understand that this Government entertained the like *Strange Ideas*. . . .[334]

Although the New Canaanites had affirmed their loyalty to the sovereign king and to the "laws of this Province,"[335] according to Kempe that affirmation was controverted by "the General Perseverance of that Title even to Blood . . . and their frequent Riots"[336] when proprietors surveyed their land.

Similarly, the New Canaanites had stated their assumption that they would obtain a patent "*confirming* to them by a legal Title Title [sic] the fruit of many years *honest Industry*."[337] Kempe declared that this assumption was "of a piece with their ideas of what is meant by bona fide."[338] Honest industry in this case meant no more than "settling on Lands to which they pretend no Title,"[339] and "holding those lands against the consent of the proprietors"[340] in addition to "arming themselves and firing upon the commissioners."[341] Therefore, "[c]ommon principles of Equity and Justice"[342] required that such usurpations be quashed. The Board should help to "restore Peace to the County"[343] by denying the petition.[344]

The thrust of Kempe's argument was clear. Essentially, it was a repetition of the theory of property advanced in the *Independent Reflector*. In the chaotic state of nature each person seized and used what he could, but in an ordered society property could be conceived only as flowing from the sovereign. Unless chaos were to prevail, some conception of legal title would have to replace the "robust" title by occupancy and labor. Whatever the Board's discretionary policies might have been in the past, eventually the line would have to be drawn between a legal conception of property and the theory of property implicitly advanced by the rioters. For the sake of "peace," claiming under title would have to be clearly

334. *Id.*
335. *Id.*
336. *Id.*
337. *Id.*
338. *Id.*
339. *Id.*
340. *Id.*
341. *Id.*
342. *Id.*
343. *Id.*
344. *Id.*

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distinguished from settling "like a crow" on the property of others.

The brilliant and well-researched *New Canaan* argument, in reply to Kempe and in opposition to Van Rensselaer's petition for confirmation, was drawn in part from Kempe's earlier argument against Van Rensselaer. The counsel (whose name could not be found) did not simply argue the equity of title by labor as opposed to legal title. Instead, he carefully demonstrated Kempe's category of "legal" title to be one that could have no clear or coherent definition in the case; he then reduced the question to a choice between competing equitable principles, rather than a choice between title and occupancy.

The New Canaanites treated the Board's grounds for denying their petition (it "not appearing with sufficient certainty whether the Lands prayed for as Vacant were Vacant"[345]) as shedding a "great Light on this Controversy."[346] It meant, they said, that the question would not turn on the strength of their own title to the land. Their land, they admitted, was still vested in the crown. Rather, it would turn upon the weakness of their opponents' title.[347] In effect, the question was one of degree. Given the general equitable principle of favoring settlement, their claim would be good unless Van Rensselaer could clearly show a *better* one, i.e., could show that the land was not really "vacant, but his by Right."[348] This meant, in part, that the burden was shifted to Van Rensselaer to show a superior "right."

Discussing the nature of that alleged right, the New Canaanites' lawyer first considered the "[b]arren Subject of Boundaries,"[349] in which "we are left in the dark to find our way; by the help only of Indian Burying place, and a few Indian Names."[350] For example, one important boundary was the legendary Wawanaquasick, which was the Indian name either for any "heap of stones," or alternatively, for other burying places well inside the boundaries Van Rensselaer claimed for himself. Furthermore, the bounds Van Rensselaer now wanted confirmed exceeded by 300,000 acres the bounds previously claimed by the family.

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345. Papers, *supra* note 239, Box 5, Miscellaneous.
346. Notes, *supra* note 321, Box 6.
347. *Id.*
348. *Id.*
349. *Id.*
350. *Id.*

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While the general explanation was that the Van Rensselaers were a "good Nurtured family and [in the past had been] indifferent to their Interest,"[351] the *New Canaan* counsel suggested that "[i]ndifference about their *property* cannot be said to be one of their characteristics."[352] As he pointed out, the Van Rensselaers had quarrelled with the Livingstons over a much smaller area for over sixty years. In addition, he reminded the Board of the common law rule calling for indefinite boundaries to be construed in favor of the crown and reminded Kempe that the requested bill of exception on that point had never been prosecuted from *King v. Van Rensselear* for "reasons of which are too well known not only to the Counsil on the other side but also to this Honourable Board to make an Enquiry into them Necessary."[353]

The purpose of raising the boundary issue was not to dispute particular lines. Instead, the key point was that the decision to give legal effect to old patents, no less than the decision to give effect to cultivation, was based on equitable principles rather than on a strictly conceived legal right. It had been generally insisted that, given the indeterminacy of old patents, grants should be given a "liberal construction." The New Canaanites graciously accepted this principle: "We readily agree that old Patents granted in the Infancy of the Province ought to be considered with great Indulgence."[354] This principle was, however, no less discretionary than other equitable standards.

The Van Rensselaers had also frequently argued that they should be especially favored in patent construction because they were among the first settlers in the colony and because their family was of special (i.e., aristocratic) merit. The lawyer commented that it "must be a matter of surprise, that after all the Bounties of the Crown, this Meritt should be pleaded . . . for still further Favours."[355] The Van Rensselaers already had one of the most extensive tracts in the province. More importantly, counsel for New Canaan pointed out that to give effect to old and indeterminate patents was therefore simply to favor one form of merit over an-

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351. *Id.*
352. *Id.*
353. King v. Van Rensselaer, 1769, in Papers, *supra* note 239, Sorted Legal, B.S.W. 6
354. Notes, *supra* note 321, Box 6.
355. *Id.*

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other. The "high Prerogative Ideas of the Proprietors"[356] were generally favored over the alternative principle that a "[q]uestion of Right will be decided upon the Merits only without respect of Persons."[357] He then reminded the Board that the crown had always considered industrious settlers "Meritorious,"[358] and "in the granting of Lands, as well his Majesty, as this Honorable Board, has ever considered all his Majesty's Subjects, as such, upon an equal Footing, and that the Royal Bounty has ever been Extended to the Occupants of Vacant Land in preference to others."[359]

Thus, the question of whether to give effect to the Van Rensselaer claims was not simply a question of giving effect to a "right," but rather one of competing conceptions of merit. It was then further reduced to the question of whether

> [t]he *Favour* of Government should be extended to a Party who desires the Benefit of the Laborer and Improvements of others, Without offering any Compensation for them, and these Improvements much at the hazard of the Lives of the Occupants. . . . Is there either Justice or Equity, or since the Gentlemen have appealed to Maxims of Policy, has Experience shown that there is *Policy* in Granting away lands in the Actual Possession of others; Or has this contributed to establish Peace. . . .[360]

The New Canaanites then argued that "peace" was no less hindered by the equitable principle of title by cultivation than it was by the principle of liberally construing old patents. Under the latter principle, the "most Enormous Claims may be set up, and unbounded Scope of Contention and Litigation be introduced."[361] Since many old patents were no less indeterminate than Van Rensselaer's, others would make the "same pretentions, then mutually clash and interfere with each other."[362] The only standard for deciding among them was which was "more or less Absurd."[363]

Included on land claimed both by Van Rensselaer and Schuyler was a small town called Wawiginauk, which had obtained a pat-

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356. Reasons in Support of the Objection of the inhabitants of King's District and others against granting the confirmation petitioned for by the Proprietors of Westenhook, Feb. 22, 1775, in Papers, *supra* note 239, Box 5, Miscellaneous.

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.*

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ent in 1743. That town would be split by conflicting proprietor claims: "Claimants (who hold the Rights of Property so sacred) have very decently *divided* this little Patent among Themselves."[364] Thus, "[p]roperty after being so well secured by every Sanction of Government . . . will again be set afloat."[365] Inevitably, therefore, the question was not "property," but whose property was to be protected: "Why then should Government be asked to interpose its aid, in Favor of one Party more than another?"[366]

Thus the New Canaanites challenged Kempe's easy categorization which pitted peace, security, and tranquility against "usurpation" and "rioting." An extensive claim was itself "pernicious and destructive, as it renders property precarious, unhinges other patents, and ouersels ancient possessors, and evidently tends to produce contention and Litigation in the County."[367] Therefore, the Board should construe Van Rensselaer's boundaries so as to exclude the New Canaanites—especially as that construction "coincides in the present case, with the benevolent Principle of Quieting and Securing Possession, both ancient and modern."[368]

Having reduced the question of "right" to one of *competing* principles of "peace," "Meritt," and secure property, the New Canaan counsel stressed again the fact that royal favor had generally been extended to settlers, both on grounds of equity and "public Utility":

> His Majesty has ever viewed the Condition of honest tho Ignorant Settlers with a more indulgent eye; and it is not from him, that we can think his Attorney General Kempe is authorized; to call the Settlers of his Majesty's Lands in America *Intruders*, holding as in the Present Case, not in Opposition to the Crown, but with an avowed *Recognition of the Royal Title*.[369]

This recognition included New Canaan's expressed willingness to pay quit rents, which the Van Rensselaers, like other proprietors, were notorious for evading. Similarly, New Canaan's lawyer quoted from an address in the Assembly, which had stated that lands should be given to "those who would *occupy them*; in such Case should any Patents interfere with the *Publick Utility*, such Part of

364. *Id.*
365. *Id.*
366. *Id.*
367. *Id.*
368. *Id.*
369. *Id.*

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them ought to be *Vacated*, the Person or Persons *settling* them Vested with a full and Legal *Title*. . . ."[370] He then concluded the argument by asserting that if, following Kempe's principles, no land had ever been settled except that which could be shown to be out of legal dispute, then we "might indeed have had more Lawyers, Casuists and Statesmen, but in the mean time . . . the Country had been left Waste and uncultivated its Population retarded."[371]

The *New Canaan* case highlights both the importance and fragility of Kempe's practical and conceptual efforts to accommodate the competing models of hierarchy and voluntarism. The goal was to affirm the hierarchial idea of formal title while ignoring the literal conditions that served to connect title to crown authority. Once severed from the terms that gave it legitimacy, however, the emerging concept of title quickly confronted a chaotic social legality where rebellious settlers demanded land claimed by absentee owners. As the *New Canaan* case shows, clever representatives of the people could easily seize upon the same rhetoric proprietors had employed to justify insulating their holdings from the actuality of crown control. Ultimately, by replacing a discredited crown with themselves as the source of sovereignty, the people threatened to seize the land in their own name. Their assertion, accompanied by actual social upheval, made the liberal, middle-position accommodation seem a compelling necessity.

E. *Indian Rights*

As the unclear definition of "vacant" suggested, the problem of Indian rights was almost as troublesome as the problem of indeterminate boundaries. As in the *New Canaan* cases, this was an issue which arose most frequently when settlers asserted Indian deeds and their own occupancy against a crown grant unaccompanied by Indian deed. Conceptually, the link between Indian rights and settler occupancy might seem appropriate, since both rights were "lower" rights, in contrast to the grant right, flowing from sovereign authority, at the top of the hierarchy. In practice, the combination stemmed from the fact that settlers could often produce Indian deeds, sometimes as a result of anti-proprietor cooper-

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370. *Id.*
371. *Id.*

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ation between settlers and Indians, as in the Palatine case.

In principle, the trustee formulation of the crown/Indian property relation left available the argument that the crown grant was, by definition, superior to any right based on the Indians' "use" right, since grants derived from the crown's supreme authority over land. As Kempe often in fact announced, a denial of the validity of a crown grant, on any grounds, could be construed as a denial of the king's right under the English Constitution to rule over his colonial dominions.

That clear conceptualization of the question was complicated, however, by the crown's own protective policy towards Indian rights. For example, the important Kayaderossus patent had come under challenge in 1765. Kempe was asked to investigate its legal status and discovered that it was accompanied by an Indian deed which did not, in boundry description, come close to matching the tract claimed under the patent. Typically, Kempe lamented that "[t]he Business in those Days [of early patents] was not done here with the greatest Regularity,"[372] but he thought that if a matching deed had existed it would have been registered. He admitted, "*I am really perplexed, and do not know what to think of it.*"[373] William Johnson wanted to attack the patent on behalf of the crown and Indians; the question was whether the patentee's failure to produce a matching Indian deed rendered the patent invalid. Advising Johnson, Kempe was uncertain of the answer—chiefly because the crown had obligated itself to honor the Indian right. As he explained:

> *[I]t is the Policy of our Constitution, that wheresoever [the] Kings Dominions extend, he is the Fountain of all Property in Lands,* and to deny that Right in the Crown in any Place is in Effect denying his Right to rule there—Hence it follows that in a legal Consideration the *King can grant lands within his Dominions here, as well without a previous Conveyance from the Indians as with.*[374]

Nevertheless, he added: "The Crown has thought fit by its Instructions to its Govt. here to direct them not to Grant lands before

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372. Letter from John Tabor Kempe to William Johnson, Aug. 12, 1765, in Papers, *supra* note 239, Box 1, Letters A-Z, Jackson-Kuyser folder.

373. Letter from John Tabor Kempe to William Johnson, Sept. 23, 1765, in Papers, *supra* note 239, Box 1, Letters A-Z, Jackson-Kuyser folder.

374. Letter from John Tabor Kempe to William Johnson, Aug. 12, 1765, in Papers, *supra* note 239, Box 1, Letters A-Z, Jackson-Kuyser folder.

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they were purchased from the Indians."[375]

He also pointed out that a purchase from the Indians was technically invalid if not made publicly from the chiefs, for "I understand no Individuals among these Indians had any Property in Lands but Occupancy, the Right of the Soil being in the Nation or Public."[376] This position, explicitly confirmed by the crown's proclamation, had been established at the request of the tribal leaders, since a few individual Indians often could be induced by bribes or liquor to convey the land of a whole tribe.

Kempe then discussed whether a grant contrary to crown instructions was invalid, or only grounds for exposing the governor to the "King's Displeasure."[377] According to Kempe, this point seemed to depend upon whether the governor was acting within the land grant authority expressly conveyed by his commission, and "of this I speak doubtfully, rather inclining to think there is a Clause in the [Commission that] would make [the grant] void."[378]

Kempe's doubts were not without dangerous potential. If Kempe were correct when he suggested that grants without Indian purchase were void by crown authority and that the rights of the soil could only be purchased from the whole tribe, then many of the land grants in the colony were void. An earlier case illustrates Kempe's possibly self-conscious effort to avoid such implications. In 1762 Kempe had been consulted by the Governor and by William Johnson concerning some purchases from the Canajoharie Indians. An unscrupulous speculator named Flock, who handled the purchase, had procured the deed by getting some Indians drunk and then inducing them to sign it. Johnson and the governor suggested that Kempe attack the patent by defending settlers who were being ejected by the new proprietors. Apparently the settlers had already purchased deeds from the Indians or would be allowed to do so, and a successful defense on their behalf would serve to defeat the patent claim. Kempe replied, however, that

> [William] Smith as well as myself is of opinion that in these Ejectments we must be . . . [deliberate] should We defend [against] them, as the plaintiffs will produce a Title by the King's Patent, against which no Indian Right can by the Policy of the Constitution be heard of in the King's Court, The King

375. *Id.*
376. *Id.*
377. *Id.*
378. *Id.*

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being Lord Paramount.[379]

Johnson pressured Kempe to take some action, and accused him of deliberately delaying. At one point Kempe claimed that he could not proceed because there were no funds available to pay the court costs, and said he was distressed by Johnson's insinuation. Chiefly, however, his response to Johnson was that the law simply provided no remedy, despite what he considered an obvious case of injustice:

> I could wish for the sake of doing the Indians that Justice they seem really entitled to, that we were in this Case [less] tied down to the Observance of these Rules, which tho in general are just and equitable, seem here something contrary to natural Justice and I fear the Indians not seeing it in its proper Light, will conceive the worst and persuade themselves they have Reason to think little of our Honesty & the Publick Faith.[380]

Three years later Kempe was ordered to press charges against Flock, as a common disturber of the peace, but the patent, so far as I could determine, was not disturbed.

The disruptive potential of the Indian deed problem was so great that more direct efforts were made to quash it. The case of Samuel Monroe provides a dramatic illustration. In that case the Wappinger Indians, led by Daniel Nimham, had challenged the Philipse Highland Patent because it had not been fairly purchased from the Indians. The Wappingers appointed as guardian Samuel Monroe, who convinced a number of settlers that Philipse did not have good title and that they could purchase deeds directly from the Indians. He then argued, before a special three day meeting of the Council, that the settlers' "equitable" claim based on Indian deed and possession should supersede Philipse's title without good Indian deed: "every Settler purchased his own particular Farm from the Indians and that all the improvable Lands were so purchased."[381]

The Board of Trade favored Monroe in this case,[382] but the

379. Letter from John Tabor Kempe to William Johnson, Sept. 13, 1762, in Papers, *supra* note 239, Box 5, Sorted Legal Manuscripts, Kings against George Klock folder.

380. *Id.* Another "rule" which prevented "justice" related to evidence: Indians were all considered interested parties in suits concerning Indian claims. Once Colden said their testimony was excluded altogether, but I am not sure that was really true. Kempe simply said it was "better" not to use Indian testimony. *Id.*

381. Letter from John Tabor Kempe to William Johnson, Mar. 17, 1767, in Papers, *supra* note 239, Box 1, Letters A-Z, Jackson-Kuyser folder.

382. *See Report of the Lords of Trade on the Petition of the Wappinger Indians*, Aug.

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Governor and Council found for Philipse. Moreover, they then decided to charge Monroe with maintenance (officious, unlawful interference with suits, so as to stir up controversy). Monroe, they said, had set up Indian titles as paramount to the king's "in Dishension of his Majesty, Dangerous to the Tranquillity and disordering the settlement and Improvement of the Colony,"[383] and had also read aloud the crown's proclamation concerning fraudulent purchases, "fixing it up to give colour to the Indian claim."[384] Here, both tranquility and settlement were clearly thought to depend upon secure title by crown grant.

When the Council sought Kempe's advice, as attorney general, his advice was oddly guarded. He acknowledged that to challenge a crown patent simply on the basis of Indian deeds would be a "high Crime. It amounts to a Denial of the King's Right to rule here, for wherever the King has a right to rule he is Lord Paramount."[385] On the other hand, Kempe pointed out that the legal questions were more complex than the Council supposed. The crown's proclamation concerning fraudulent purchases from the Indians had promised relief in cases where the Indians' land had been taken without consent and compensation. Therefore, Monroe's challenge to the patent was not so completely without foundation as to make him criminally liable. Kempe also pointed out that the proclamation was by its nature a public proclamation, declaratory of crown intent. Therefore, reading it aloud could not be construed as criminal. Finally, if Monroe were guilty of buying and selling "pretended Titles," then "so is every other person that has taken up Leases from the Indians, I suppose."[386]

Kempe's conclusion was that maintenance could not be charged simply on the grounds of challenging a title held by the "King's patentee."[387] Although patentees derived their property right from the crown, a challenge to that right was not, for purposes of criminal law, a challenge to the right of the king himself. There had to be an additional and more specific intent to "stir up"

30, 1766, in 7 Col. Docs., *supra* note 9, at 870.

383. *Id.*

384. *Id.*

385. Letter from John Tabor Kempe to Beverly Robinson, Mar. 21, 1765, Papers, *supra* note 239, Unsorted Legal including Lawsuits, V-Z.

386. *Id.*

387. *Id.*

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the tranquility of the province or challenge the king's authority.

Despite that opinion letter, Kempe was ordered to press charges against Monroe for "disposing of land under pretended rights and titles,"[388] and Monroe was jailed. The Board of Trade thought the Council had been unduly harsh, but was not certain how to proceed legally to help Monroe.[389] Once imprisoned, Monroe continued to argue his case by petition from the city jail. For example, he pointed to the fact that he had himself been in possession for thirty-two years of land purchased from the Indians; he had challenged Philipse's title partly to defend his own land from Philipse's claims. Quoting from Woods Institute ("But if any man hath an Interest in the thing in dispute he may Lawfully maintain his action Relating to it"[390]), he argued that his own possession plus an Indian deed gave him a sufficient "interest" to exempt him from charges.

Eventually, Monroe gave up petitioning and escaped from jail, where he had remained for at least two years.[391] Meanwhile, the complexities posed by crown-endorsed Indian rights continued to plague lawyers and remained stubbornly unresolved. By denying the legitimacy of Indian rights, however, lawyers were once again effectively suppressing the extreme implications of both voluntarist and hierarchical claims.

F. *Possession, Partition, and the Statute of Limitations*

Throughout the colonial period, actual occupation continued to play a role in establishing title although the clear thrust of legal decision-making was in the direction of establishing the validity of title over the essentially voluntarist claims based on occupations. Kempe stated in one argument that the common law clearly forbids grants or conveyances before "being in possession."[392] Notably, the reason was that "it tendeth to maintenance disturbing ancient possessions."[393] Therefore, before sale, one must have

388. *See Report of the Lords of Trade on the Petition of the Wappinger Indians*, Aug. 30, 1766, in 7 COL. DOCS., *supra* note 9, at 870.

389. *Id.*

390. *Id.*

391. *Id.*

392. Notes on Plimouth Colony Grant, in Papers, *supra* note 239, Unsorted Legal, B.S.W. 1.

393. *Id.*

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possession and not "[r]ight only."[394] This rule provided a standard technique for challenging title—in a long series of conveyances, if one could show that a party "never ent'd"[395] or that a deed was not "founded on possession," then the chain of conveyances was broken.

While the precise meaning of "possession"[396] was never fully clarified, it was evident that actual occupation had important legal force. When asked to inquire as to the legal status of any particular tract, Kempe would first determine who was in actual occupation, and for how long.[397] Similarly, Kempe's notes on trials indicated a considerable amount of testimony going to the question of occupation—ideally, a client, and his father before him, had both been in possession. In the notes for one trial, Kempe described testimony about the fact that the land was "still covered with Woods and witness does not know them to be in *any* Fence."[398] The word "any" was heavily underlined, perhaps some indication of the continuing importance of that old symbol of use. Kempe then concluded that particular set of notes with the statement that "[a]s to Possession . . . [the] Law favors ancient possession more than an ancient deed without possession . . . Possession Evidence of right."[399]

In one case where Kempe emphatically argued that a proprietor's title should supersede ancient possession (by the corporation of Kingston), he stressed in his notes the force of the opposition's ancient possession claim ("We must watch the Proof they give of such" and then argue that "if proved do not give a Right of the Crown."[400]). He intended to argue, as in *New Canaan*, that allowing the claim by possession would "establish a bad principle," but even then he pointed out that "[j]ustice would have to be due" to the "settlers for their improvements."[401] Similarly, the old standard of "first settlers" had not completely disappeared. As a defending lawyer asserted (although apparently without success),

394. *Id.*
395. *Id.*
396. *Id.*
397. Letter from John Tabor Kempe to W. George Clinton, Feb. 5, 1766, in Papers, *supra* note 239, Box 1, Letters A-Z, Caroll-Cuyler folder.
398. Notes on Trial, 1772, in Papers, *supra* note 239, Sorted Legal, B.S.W. 5.
399. *Id.*
400. Notes on Trial, in Papers, *supra* note 239, Sorted Legal, B.S.W. 5 (circa 1765).
401. *Id.*

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"they were first occupiers. Humanity requires they should have been preferred."[402]

In large part the question of actual possession was a question of the statute of limitations. At the Moot proceedings the assembled colonial lawyers solemnly and unanimously agreed with the statement: "[I]f A is deseized by B who continues in possession above 60 yr. A cannot recover, his entry being tolled by the Statute of Tenures."[403] Oddly, the sixty years acknowledged at the Moot was the period attached in England to the then obsolete writ of right, rarely brought in New York.[404] By parliamentary act in England, according to Blackstone, only twenty years possession tolled the statute in an ejectment action.[405] The difficult question in the colony, therefore, was whether less than sixty years was sufficient to base a suit. Kempe's notes on the subject are unclear: "If possession has continued 60 years the Right of Recovery is barred and if only for 20 years, it has of late been doubted whether an Ejectment will lie, 'tho in that Case there will be another Remedy."[406] Kempe did not specify the alternative remedy; ejectment was the

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402. *Id.*

403. Proceedings of the Moot, 1770-1774, N.Y. His. Soc. This society was designed to foster excellence in the profession through serious discussion of legal issues; younger lawyers attended for instruction.

404. Papers, *supra* note 239, Sorted Legal, B.S.W. 3. During this same period, there was a discussion at the Moot of the writ of right for knight service, which the lawyers thought would still lie in New York. Duane, Kempe, Benion, Jones, and Jay all agreed that substantial freeholders may be returned and serve, instead of knights. Proceedings of the Moot, 1770-1774, N. Y. His. Soc. It is hard not to see these discussions as part of an intellectual restructuring of the hierarchies of property relations, although it might also be simply a part of the eighteenth century colonial interest in legal formality. During this period there was also a considerable interest in the formality of legal dress:

> [T]he Court considering that it has been the usage of most of the civilized Nations in Europe to distinguish the different order of Men in the learned professions by their Dress: and the Judges in our Mother Country having from the most early Days been accustomed to appear to Westminster in Term Time in Robes and Bands and the Counsel in Bar gowns and Bands, . . . The Court Conceiving that the practice at Home stands upon good Reasons and that the Introduction of the like Usage in this province would be very proper and advance the Dignity, Authority, Solemnity and Decorum of the Court and have many useful Consequences. . . .

RULES OF SUPREME COURT NYHS (1764). Therefore there would be a contempt citation for failure to appear in proper dress.

405. 2 BLACKSTONE, *supra* note 17, at *263 n.1 (editor's note).

406. Points of Law to be considered, Johannis Hardenbergh v. James Jackson ex dim, David Turbos & Others, 1764, in Papers, *supra* note 239, Unsorted Legal including Lawsuits, V-Z.

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standard procedure for recovering possession. Kempe then continued by noting a jury tendency to favor actual possession:

> If the Line which the present Possessors claim is ancient, has been generally understood to be the Line of subdivision and the Possessions have gone accordingly, we conceive it will be very strong Evidence in Favor of the Possessors, and whatever is the true Construction of the Writ of Partition, we think a Jury will be inclined to favor the ancient Possessors.[407]

As Kempe indicated, partition was related to the statute of limitations and to the question of actual possession in complex ways. After the crown established a definite 2,000 acre limit to individual holdings, it became common for several proprietors to invest in land as tenants in common. Frequently, several family members of each proprietor would formally join in the purchase, so that huge tracts of uncultivated land remained concentrated in the hands of a few families. This practice effectively circumvented the official limit, which was meant to prevent exactly such speculative accumulation.[408]

With much land held in common, there was often difficulty determining who owned what land for purposes of sale, inheritance, or quit rent collection. A 1726/7 statute gave blanket approval to extrajudicial partition, even if based on surveys conducted by the proprietors themselves.[409] The danger of this statute

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407. *Id.*

408. *Id.* One ejectment suit, for example, was brought by "The Honorable Oliver DeLancey, The Honorable John Watts, John Van Cortlandt Esquire, The Right Honorable Willoughby Berke, the Earl of Abington and Dame Charlotte his Wife, The Honorable Charles Fitzroy and Ann his Wife, William Skinner and Suzannah his Wife, Jacobus Ver Planck, John Ver Planck, and Phillip Ver Planck." *Id.* Kempe stated:

> Oliver DeLancey's Mother and Phillip Livingston's Grandfather were own Cousins, Jons Watts and Jons Va Cortlandt are related in the same degree, William Skinner the Jns Married Oliver DeLancey's Sister-Jns Van Cortlandts Father was a Brother of Oliver DeLancey's Mother, and was an own Cousin to Phil. Livingston's Grandfather. Earl of Abington married a daughter of Capt. Warren and was granddaughter to Oliver DeLancey's Mother Fitzroy. The same William Skinner's Mother was a Sister to Oliver DeLancey's Mother. Jacobus Ver Planck's Father was an own Cousin to Phillip Livingston's Grandfather Jn Ver Planck, and Philip Ver Planck the same.

Id. There was a fierce political rivalry between the DeLanceys and Livingstons, but there was also an obvious underlying consolidation of interests. So too, the Van Rensselaers quarreled with the Livingstons over boundaries, but they were united against settlers. I do not think the intense infighting should obscure the degree to which these families were attempting to concentrate resources of the colony into their own hands.

409. The New York Act for the Partition of Lands in Common, 1726/7, described in *Memorial of Mr. Colden to the Lords of Trade against the New York act for the partition*

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was that it allowed patentees with indefinite boundaries (i.e., most of the proprietors in the colony) to claim land on the basis of their own surveys. When supposedly surveying for the sake of partitioning among themselves, patentees would also extend their claims. This was a danger recognized by Colden when the statute was passed. He had tried, but failed, to have inserted a clause which called for an initial determination of grant boundaries before allowing essentially private partition among the cotenants. Although the bounds proprietors claimed for themselves could be contested, the suits required to do so were burdensome. As Colden stated the problem:

> If the Patentees shall be allow'd to settle their boundarys at their own discretion I apprehended they would take an advantage of what was really a Defect in their Patents, to encroach upon the King's lands or the lands of his tenants holding small Tracts but paying considerable Rents, & some time ago many evidences were produced before the Council to prove an encroachment of near Seventy thousand Acres of land, made by the Patentees of some of these tracts. Tho it be true that such encroachment cannot give a legal title to the lands, it is the Duty of the Legislature to prevent Law suits, & not to encourage them. . . .[410]

Surveys on land settled by farmers generally led to proprietor claims and then ejectment suits. As a result, settlers frequently resisted surveyors with violence. Because survey commissioners were authorized by the legislature, however, information could be filed against those who prevented their entry, and a small body of procedural law developed around surveys and charges based on resistance. Notice of a survey was required in advance, for example, and a farmer could not be criminally charged unless he broke the surveyor's lines. Settlers near the New Hampshire border learned to harass commissioners without actually breaking their survey cords.[411]

I think this procedural protection merely obscured the legal bind in which the settlers were placed. Of course most farmers could not afford to defend themselves in a complex suit, yet, unless legally contested, the surveyor's determinations were considered strong evidence of boundaries. Farmers often simply defaulted

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of lands in common, Dec. 12, 1726, in 5 COL. DOCS., *supra* note 9, at 808.

410. *Id.*

411. *See, e.g., Proclamation of the gov't of New York, for seizing James Brakenridge, and others, for riotously obstructing the Partition of Wallumschack Patent*, Dec. 12, 1769, in 4 DOC. HIST., *supra* note 9, at 379.

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rather than offering a defense to an ejectment suit, and the sheriff was then authorized to execute the ejectment order.

The easiest defense available to a farmer was based on the statute of limitations. Notably, during the Moot proceedings it was determined (although not unanimously) that any tenant in common could receive the benefit of the possession of another tenant in common in order to prevent the tolling of the statute.[412] In suits brought after partition surveys, that rule apparently meant that possession by any one of the original proprietors precluded a statute of limitations defense. Furthermore, if farmers had resisted surveyors, that fact could be argued by the proprietor as a valid reason why he had not earlier settled the land in order to fulfill the terms of the grant or in order to establish his own possession. For example, the New Canaan townspeople had forced surveyors off the land when Van Rensselaer and Schuyler attempted to have it surveyed under the Partition Act, to settle boundary disputes between themselves and also to include New Canaan in the claim. This rioting, Van Rensselaer said, had prevented his own efforts to occupy the patent, therefore his failure to settle could not be argued against him.[413] Thus, despite all of the ambiguities inherent

412. Proceedings of the Moot, 1770-1774, N.Y. His. Soc.

413. I *think* that this is the way the various factors related to each other. I could not find a case which brought all the issues together. Reports of farmers either defaulting or rioting against surveys were frequent in both the Kempe materials and the documents. *See generally New Hampshire Grants*, in 4 Doc. Hist., *supra* note 9, at 329-639.

The early Partition Act was replaced by a statute in 1762 called An Act for the More Effectual Collecting of His Majesty's Quit Rents and For Petition of Lands in Order Thereto. The claim was that the Act was to assess quit rent payment. This was probably true, but the Act's most common function was to extend boundaries.

A fairly complex question which I have not addressed concerns the fairly protective body of common law which surrounded tenancy, especially with respect to rent collection. Because rents were in the form of perishable wheat, the tenant whose rent was overdue could claim he was ready with the wheat but the landlord did not collect it. He was not bound to hold perishable goods. That put the burden on the landlord to collect, and meant that one could not sue for several years of overdue rents. The same restriction then attached to bonds accompanying leases; overdue rent did not mean that the bond could be sued upon, absent other specific agreements. Those restrictions did not seem to apply to mortgages with bonds, and there was considerable mortgaging rather than renting by mid-century. Under a forfeited mortgage, an owner could also recover improvements, the value of which he received only in part after the expiration of a lease. Mortgagors were also easier to find than tenants because the relationship *implied* independence, although a bill was passed during the same period prohibiting mortgagors from voting.

It was tempting to see in that transition from renting to mortgaging some interaction between legal rules, a "market" conception of land, and an abstraction of the notion of title. I have my doubts about all of that, however; I am also not sure how effective the common

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in their legal claim to title, as a practical matter proprietors were placed in essentially a "no-lose" position in their legal disputes with settlers.

G. *Trespass*

The increasing legal priority given to grant title over actual occupation in determining ownership seems to be paralleled by a similar change in trespass rules. In the seventeenth century it had been clear that unfenced land could be used by all for wood, lime, etc. The change which had taken place by the mid-eighteenth century is reflected in an opinion letter to Colonel Bradstreet, who was charged with repeatedly entering an unused pasture for the sake of taking wood for boat construction.[414] Kempe advised that if title were proved and if the acts of trespass had been performed, as alleged, then "your defense must consist entirely in endeavoring to mitigate the Damages."[415] Plaintiff needed to show only title, not fence. Nevertheless, actual use continued to retain at least some of its force. When the court considered the question of remedy, a defendant could offer to show that damages were minimal by proving that "at the time it was used and long before the pasture was without Fence and open to every Thing."[416] Similarly, Bradstreet could show that the part of the pasture he used "might at a small expense have been fenced in . . . if they had thought fit and they might have kept all the rest of the Pasture to themselves if they had thought fit to inclose it."[417] Consequently, the plaintiff "could sustain little or no real damage" and the "litigiousness of the suit" would be obvious.[418]

A letter from Kempe to one of the claimants of the much disputed Oblong patent suggests some relation between the new tres-

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law protection was. Distraint was an available remedy, although accompained by procedural safeguards—all outlined by Kempe. Moreover, the assembly passed an act allowing quit rent collections against *tenants*, who then had only a remedy in the court of Common Pleas against their landlords. Even Kempe found this potentially oppressive (and a hinderance to settlement) although it was not clear how often officers resorted to it.

414. Letter from John Tabor Kempe to Col. Bradstreet, Sept. 9, 1765, in Papers, *supra* note 239, Lawsuits A-B.

415. *Id.*

416. *Id.*

417. *Id.*

418. *Id.*

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pass rules and title disputes.[419] Kempe's client, Mr. Farquharson, wanted to retain his claim to a part of the Oblong. Competing proprietors, including James Alexander and William Smith, sought to establish possession by forcing tenants of other landlords, as well as all other possessors, off the land. As Kempe reported:

> There were formerly some families of poor people that had settled on some of the fruitful spots of the equivalent Land . . . these the New York Patenters drove off by Violence, and then many of them went and settled on here and there a spot which they picked out . . . expecting they should there have been quiet, as the New York patenters had then no claim to these Lands, but since their Modern patent, they have endeavored to dispossess them there likewise and have drove off many of them. . . .[420]

In order to maintain the claim of his client, Kempe convinced these families to remain in the area as his client's tenants, promising to defend them in any ejectment suits that arose as a result. Since the New York proprietors did not want to engage Kempe's client in a law suit, they instead charged the possessing families with trespass under a law (apparently a statute) which held any trespasser who cut trees on the lands of another liable for fines of between six and twenty shillings per tree. According to Kempe:

> Upon this Law they have proceeded before the Justices of the peace, who here are for ye most part of the lower kind of people an Alehousekeeper perhaps or some such person, Creatures of the New York patentees who are ye people in power here, [against] the people who have consented to hold their possession . . . for cutting the Brush and Underwood to clear their lands, and have condemned them in the penalty of this act. . . .[421]

Their only defense to the trespass penalty was Kempe's client's good title, but Kempe did not think it worthwhile to defend them against the charges; at least he did not want to be troubled with the matter himself, and reminded his client that he still had not been paid for past services. Mentioning another suit, he added: "Now if you should think fit to make me a Grant of these lands . . . ,"[422] he would accept that as full payment but would not undertake a defense to the troublesome trespass charges. The inhabitants were left with the penalties, despite Kempe's evident view

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419. Letter from John Tabor Kempe to Mr. Farquharson, in Papers, *supra* note 239, Box 6, Westchester County, (circa 1765).

420. *Id.*

421. *Id.*

422. *Id.*

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that they had been treated unfairly.[423]

H. *The Doctrinal Reassertion of Crown Authority*

Kempe's easy complacency in the face of what he clearly considered "injustice" both to settlers and (as described earlier) to Indians, is too commonplace to be startling. Perhaps slightly more surprising is the peculiar combination of honestly conscientious concern for "legality" mixed with outright refusal to raise those arguments which threatened to undercut the whole conceptual structure of property law in the colony. Yet that juxtaposition, too, is not uncommon, and can be understood within the tradition of common law thought. A lawyer like Kempe would find it hard to imagine that rules were ever meant to lead to a complete breakdown of existing structures of order and security: so great an "Inconvenience" could surely be considered alien to the spirit of legality and the grand tradition of the common law. An early realist like the lawyer for New Canaan might point out that the concept of legal "right" then dissolves into competing moral and political arguments, but Kempe has not been alone in preferring to ignore the implications of that insight.

A more striking juxtaposition in Kempe's papers is the intense preoccupation with legal analysis coupled with reports of mob violence. By the 1760s, the outcome of land disputes tended to hinge, not on the cogency of legal argumentation, but on whether proprietors could muster enough force to quash local uprisings. Thus, the legal result of a case might well be irrelevant.

Land rioters, often blending political utopianism with a religious radicalism intensified by the Great Awakening, directed their attacks specifically against provincial courts and lawyers, as well as proprietors. Thus their enemies included "[James] Duane and [John Tabor] Kempe," who strove to set "[t]he Lord's annointed against his people, falsely accusing them before the Court of Great Britain."[424] Rioters set up committees that took over all government functions, and court houses were used for popular anti-proprietor trials.

Scattered throughout Kempe's papers are depositions describing those takeovers. In Cumberland County, for example, it was

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423. *Id.*
424. E. COUNTRYMAN, *supra* note 9, at 54.

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reported that a mob of three hundred had seized the court house, ordered surveyors to desist, and "do hold town meetings . . . do execute magisterial powers."[425] Proprietor representatives were tied to trees and whipped. Similarly, in Dutchess County, one deponent testified that "upwards of 500 persons in this County have confederated and conspired together . . . to prevent the due Execution of the Laws, and the Officers of Justice as the same respects certain recoverys in Ejectment . . . they engaged to stand by each other with Force."[426] Near New Hampshire settlers declared a "Last Day of Judgment" against proprietors, and in many areas authorities lost control completely. One deponent described the skirmishing which took place when British troops were finally sent to Dutchess County to restore order: When the regulars came upon the settlers, hidden in bushes,

> [o]ne of the Mob called out "damn them don't run from them turn and fire." One of the mob fired off his piece immediately thereupon the Deponents heard an officer of the regular Troops call to his men saying Now they have fired in us fire And thereupon a firing ensued.[427]

I do not know how grave Kempe considered these threats to be, but he complained vigorously when local sheriffs did not act against the rioting near Cortland Manor: "It is absolutely necessary for the public peace and the Safety of the King's subjects that such Enormities be punished as an Example to Others." His papers also include descriptions of the much-feared revolutionary Prendergast group and of the New York trial which sentenced Prendergast to death—with John Morin Scott as judge.[428]

As against that threat of direct popular seizure, the crown's feudal authority over land still provided the single source of title legitimacy. The Kempe materials indicate how pressing the need to assert that doctrinal authority was perceived to be. An important and illustrative provincial case on the subject was *King v. Lydius*,[429] for which there were over sixty-five pages of briefs in the

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425. Papers, *supra* note 239, Box 6, New Hampshire Grants Folder.

426. Papers, *supra* note 239, Unsorted Legal including Lawsuits, V-Z.

427. Deposition of Gideon Prindle, July 28, 1766, in Papers, *supra* note 239, Sorted Legal, B.S.W. 5.

428. *See* Mark & Handlen, *Land Cases in Colonial New York 1765-1767, The King v. William Prendergast*, 19 N.Y.U.L.Q. Rev. 165 (1941-42).

429. New York Supreme Court, July Term 1764, in Papers, *supra* note 239, Box 5, Sorted Legal Manuscripts.

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Kempe materials. Lydius was an Albany speculator with a long history of obtaining Indian deeds by getting Indians drunk. When Lydius, with Massachusetts backing, sold land in the Green Mountains to settlers, his land deals became incongruously linked to Ethan Allen's more idealistic struggles with New York proprietors over land and border claims. The settlements on land purchased from Lydius were challenged by New York proprietors, with the backing of the provincial government,[430] and Lydius was charged by information with intrusion upon the king's land. Unlike Van Rensselaer, facing the same charges, Lydius claimed actual possession and an Indian deed, but held no crown grant issued under a New York governor.

Briefly, Kempe based his argument against Lydius on the "General Principle of Law, that the Crown by the Policy of our Constitution, is the Original Proprietor of all the Lands within the King's Dominions, and that there can be no Right to any Lands within the King's Dominions not derived from the Crown."[431] This principle, he stated, "is sufficient in the first instance to prove the King's Original Property, and the Right of the Lands must be presumed to be in the Crown, unless the Defendant can show the Crown has disposed of them and this disposal of them must be under the Great Seal or is illegal and not binding."[432] Kempe carefully cited five authorities for that general principle.

Three objections were raised by Lydius. First, he argued that whereas that principle held good as to lands in England, it could not be applied to lands in the province. Here, he said:

> The Native Indians are the Original Proprietors and not the King of England, and consequently the King can have no Right to the Lands of the Indians unless by Conquest-Surrender or Sale — neither of which is the present Case. It therefore is not shown on the part of the Crown, that the King has a Title from the Native Indians the real Original Proprietors, it must be presumed the Right to [Possession] was in them at the Time the Defendant en-

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430. It is perhaps some evidence of the importance attached to the case that Dr. Thomas Young, a well-known New York revolutionary, wrote his first radical political tract in support of Lydius and against New York officials and proprietors. He argued that land belonged neither to the crown nor to the "gentlemen in the province of New York" who stood in Lydius' way. E. COUNTRYMAN, *supra* note 9, at 158. New York proprietors obstructed settlers and cultivation, he claimed, for the sake of their own capital gains.

431. Brief for Petitioner, King v. Lydius, in Papers, *supra* note 239, Box 3, Sorted Legal Manuscripts.

432. *Id.*

tered on the lands.[433]

The defendant therefore could not be charged with trespassing on the crown's lands, since it was the Indians who held the possessory right.

Kempe's answer was simply and emphatically that "[t]he Court cannot hear of an Indian Title paramount to the Crown's within the King's Dominions it being contrary to the policy of the Constitution. . . ."[434] Therefore, the Indians' deed could convey "no Title" to the plaintiff, but could only be "introduced as explanatory [evidence] of the Land's" ambiguous boundaries.[435]

The second objection was procedural. Kempe sought a special verdict based upon the fact of actual entry upon the lands, and upon defendant's failure to plead good title (by crown grant). Once entry was shown, the burden, he said, was on the defendant to show title. In England, however, by statute, when the king was out of possession for twenty years he could not bring information for intrusion except upon a showing of his own good title—proved by office or record.[436] Kempe dealt with this point by once again stressing the crown's unlimited power over his colonial dominions. Kempe noted that this shift in the burden of proof Lydius pointed to in England was considered a gracious premission of prerogative powers assumed to exist ("the King's most excellent Majesty out of his gracious Disposition to his loving Subjects", etc.)[437] and then argued that this remission was not conceived to extend to the dominions. In England there was no waste land, and the act was meant chiefly to apply to lands escheating to the king from long dormant titles. In this case, however, the judge was bound to take judicial notice of the king's presumed possession of all lands, and to place the burden of showing that the king had surrendered possession onto the defendant.

The third objection raised the most complex set of issues, all related to the long-standing border disputes between New York and the New England colonies. Lydius had objected that he had good evidence of crown surrender of the Green Mountains when he received permission from Massachusetts to settle the area: a grant

433. *Id.*
434. *Id.*
435. *Id.*
436. *Id.*
437. *Id.*

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from any colonial government carried with it a presumption of crown surrender.[438] This, Kempe insisted, should have been pleaded in abatement, to challenge jurisdiction.[439] By pleading "not guilty" Lydius had accepted jurisdiction and therefore was bound to assume that all lands not granted under the Great Seal and through the New York governor, were in the possession of the crown, irrespective of official grants from other colonies.[440]

In cases involving border disputes, it is difficult to separate the issue of legal title from the issue of jurisdiction. The two were related in complex ways, both socially and in doctrine. New England settlers had been a part of New York history since the time of the Dutch, and they represented to most New Yorkers both the advantages and dangers of a voluntarist model of political, religious, and economic organization. Thus, the accounts of border disputes between New York proprietors and radical New England settlers are simply a continuation of old themes.

Moreover, as in so many other instances, the crown had favored the voluntarist model represented by the New Englanders. The Board of Trade, after attempting to resolve conflicts by setting definite boundaries between New York and the New England colonies, had explicitly instructed the New York governor to favor the property "rights" of those who either held land under New England governments or who could show "industrious" cultivation and use. The Board also prohibited New York officials from issuing grants along the disputed New England borders. It was, of course, New York's violation of exactly those instructions which led to conflicts like the one with Lydius.

Once again, however, there was an evident tension between actual crown policy and the somewhat abstracted legal conception of crown authority as the paramount source of authority in the colony. The latter was as crucial to the question of jurisdiction as it was to the conception of title and provided the only answer to Lydius' third objection. Kempe argued that in property disputes after boundary determination, neither the competing colony nor the private landowner could claim rights or jurisdiction based on previous boundary assumptions. This was so because it was the

438. *Id.*
439. *Id.*
440. *Id.*

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king who officially settled these disputes, and as feudal lord he alone had authority to determine what were (however whimsically, as in the case of New York boundaries) supposed to be ancient and preexisting jurisdictional rights. Those crown decisions represented the royal adjudication of "Ancient right, his Majesty in his Privy Council exercising original jurisdiction on the principles of Feudal Sovereignty when Questions of this kind arise."[441]

Even within the province the crown's authority was considered necessary to settle jurisdictional disputes. "Very warm Disputes between many People . . . for several years"[442] had prevented the Assembly from reaching a firm determination of county boundaries. Since grants sometimes contained reference to county lines, property interests were at stake. In 1733 the king in Council had set the boundary lines, which had been considered valid until challenged in a dispute concerning the bounds of Albany and of Ten Broeck's patent. It was then alleged that the king had no authority to set boundaries *within* the province, but Kempe clearly perceived the king's jurisdictional authority as essential to prevent "confusion":

> No jurisdiction, No crimes punishable, Jurisdiction as uncertain as ever-Absurd! . . . Counties in general have been so considered—jurisdiction so exercised—In Trespass Ejectment Crime . . . What confusion if all this should be new thought wrong. . . . The ordinance has ever been received as valid By Government, in the Grants By the Judges on the Bench By the Practices of the Law. If not supported All Grants in any of the Counties since the year 1601 are void.[443]

In this argument, the crown once again embodied that ultimate authority, the unity of jurisdiction and property, upon which the coherence of Kempe's doctrinal structure depended.

As I have tried to show, however, the "confusion" resulting from a denial of that authority was matched by the confusion which would follow if that authority were always to be taken literally—if, in other words, the king could enforce the conditions he attached to grants, could vest legal rights to the soil in Indians as well as in patentees, or could resume the land he granted when he was, in fact, dead. Smith could argue the heavy hand of the crown in such instances and could invoke the policy of free use and set-

441. *Id.*
442. *Id.*
443. *Id.*

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tlement against oppressive grant conditions; but it was never quite explained why the settlers of vacant land could not argue the same principles against the king's "patentees."

CONCLUSION

What emerged from the doctrinal incoherence in the provincial concept of right to property—from the inability to either reject or fully assert the crown's ultimate authority without jeopardizing the entire structure of property ownership—was an early, tentative step in the formation of a safe middle ground of "right." That middle ground was protected by the decisions of Kempe and others like him in the provincial legal system. The selective assertion of crown right and crown policy began, at least partially, to secure title from the claims of both the republican vision of property as an extension of the "robust" will of an independent people and the hierarchical vision of property as the direct extension of royal prerogative. Nevertheless, as Kempe foresaw, however unwittingly in his practice, a concept rooted in nothing more substantive than "selective assertion" was necessarily fragile. In a world where morality and politics were inseparable, to deny the claims of crown-based hierarchy might unleash the same union of virtue and authority steming from a source completely free of hierarchical control—i.e., from the free will of a republican community. Categories like God and king at the top, with their legitimacy so obviously rooted in morality, held open the possibility that people would see in those categories the potential for their own soveriegnty and immediate spirituality. Thus, while Kempe and his colleagues sought to retain elements of both hierarchy and voluntarism within their notion of property rights, their rudimentary efforts were for a time inadequate. By the time of the Revolution, that most radical potential was realized and the connection between people and crown was dissolved—many settlers then declared that the "people out-of-doors" were the only true sovereign, concretely embodying within their own local republican communities a new unity of the ancient categories of custom, virtue, and authority. They found themselves saying "Damn the King" as they set up their own local courts, designed to protect the freedom of their labor on the land.

Despite the logical and political force of that radical vision of sovereignty and property, a much less threatening middle position ultimately prevailed. Through a number of elaborate conceptual

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ploys, the strategy of the middle position simultaneously assimilated and denied the extremes of hierarchy and voluntarism. The end product was the formation of what we have come to know as the liberal conception of private, individualized rights in stark confrontation with a potentially oppressive sovereign power—the model which by the end of the nineteenth century had attained the gothic elegance of classical legalism.

In the years shortly after the Revolution, one can see the emergence of the elements from which that elegant structure was later fashioned. First, "the sovereignty of the people" was lifted out of the local, concrete community that was central to the authentic republican vision. The will of the people became only an abstract idea, embodied in a written constitution, the interpretation of which was divorced from the direct will of the people who ostensibly created it—and from the will of *any* concrete people at any particular time. In effect, "the people" became that vaguely mystical body which stepped onto the political stage only once, distributed its sovereignty within the spheres delineated by the constitution, and was never seen again.

Similarly, the notion of property was lifted out of the community of voluntary labor and active participation from which it had once derived its meaning. Rather than an expression of popular will, property as an abstract constitutional right was conceptually insulated from the will of the people—standing as a right in opposition to participation. Moreover, after the Revolution the link between property and liberty was asserted, ironically, not on behalf of republican communitarianism, but most often on behalf of hierarchical power relations—yet without hierarchy's traditional ethical claims.

This process of abstraction, so crucial to the liberal model of rights and sovereignty, required dramatically new configurations of elements which were once located within either the republican or hierarchical models; in particular, the new deployment of private/public distinctions. The first and most important of these, of course, was the wedge driven between state (public) and civil (private) society, around which were organized all of the other distributions. That initial wedge served to break apart the old unity of religion, economics, politics, and law. The first two were transformed into negative private rights to be protected from the third; and law, which now alone lay claim to reason and objectivity (even

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while renouncing its old link to morality), became the crucial barrier between rights and politics. The virtue of the republic came to be defined, especially in legal rhetoric, not by the active moral vigor of the participatory community, but by the strength of that legal barrier.

This new configuration, in turn, borrowed from both the Anglican and sectarian models, placing elements of each in dramatically new combinations. For example, from the voluntarist tradition of sectarian independence came the notion of diversity implicit in the "free exercise of religion;" yet from Anglicanism came the notion that the religious experience (redemption) is, at its core, so personal, private, and subjective as to pose no threat to existing structures of economic hierarchy and political authority. The result was the transformation of the religious experience into a civil right which was both tolerated and harmless.

In a parallel move, from the hierarchical model of property came the notion of formal title and protected inequality, from which property as the protection of free labor and independence within republicanism came the rhetoric which described property as a sphere of autonomy and freedom protected from state imposition. Yet that same rhetoric was invoked consistently to justify rather than condemn the hierarchical exploitation of labor for "private" gain, serving the needs of capital accumulation. The public, communitarian potential within the ideal of free labor had been stripped away. Labor was then treated as no more than a private contract right, an object of "free" exchange on a market. Ironically, the only continuing invocation of labor as participation emerges in time of war, when the old republican martial spirit helps to mobilize the people. Otherwise, all that remains of the public side of property is the assumption that "people" have willed its protection, a protection which is no more than a negative immunization of hierarchical property relations from the old claims that *both* the hierarchical and the voluntarist models once made in the name of morality and justice.

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