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It's Not About the Fox: The Untold History of Pierson v. Post

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IT'S NOT ABOUT THE FOX: THE UNTOLD HISTORY OF *PIERSON V. POST*

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ABSTRACT

For generations, Pierson v. Post, the famous fox case, has introduced students to the study of property law. Two hundred years after the case was decided, this Article examines the history of the case to show both how it fits into the American ideology of property, and how the facts behind the dispute challenge that ideology. Pierson is a canonical case because it replicates a central myth of American property law: that we start with a world in which no one has rights to anything, and the fundamental problem is how best to convert it to absolute individual ownership. The history behind the dispute, however, suggests that the heart of the conflict was a contest over which community would control the shared resources of the town and how those resources would be used.

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The historical record is far from complete, but this is what it shows. Pierson was among the "proprietors," those who had inherited from the town's original settlers special rights in the undivided lands where the fox was caught. The fox hunt occurred in the midst of a growing dispute over whether the proprietors or the town residents as a whole had rights in these common lands. Although Post does not appear to have had proprietors' rights, his father had become wealthy in the West India trade after the Revolutionary War, and his family flaunted this wealth from commerce. Post's elaborate fox hunt over the commons would have been perceived as another display of conspicuous wealth, inimical to the town's agricultural traditions. The Piersons, in contrast, descended from a long line of educated gentleman farmers and town leaders, and would have followed the town's traditions of puritan thrift. Pierson and Post's conflict over the fox, I believe, was not really about the fox, but was instead part of this growing conflict over who could regulate and use the common resources of the town, and over whether agricultural traditions or commerce and wealth would define its social organization.

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INTRODUCTION

Imagine you are a first year law student eager for initiation to the mystery and power, the nobility and heartbreak, of the law. You open your casebook to read your first assignment in property law and find . . . a centuries old dispute about a fox.¹ The story, in short, is that Lodowick Post is out with his horses and hounds chasing a fox "upon a certain wild and uninhabited, unpossessed and waste land, called

1. *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805).

the beach,”² Jesse Pierson jumps up out of nowhere and grabs the fox, and Lodowick is so upset that he litigates his right to the fox all the way to the New York Supreme Court.³ You sadly go to class, realizing that law school won’t be quite as you imagined it.⁴

Two hundred years after *Pierson v. Post* was decided, the case continues to horrify successive generations of law students with the thought that success in law school means understanding debates among nineteenth century judges regarding the relevance of sixth century treatises about the ownership of a dead fox.⁵ Scholars cite it to illustrate everything from discrimination against transgendered persons⁶ to rights in fugitive homerun balls.⁷ Outside the ivory tower,

2. *Id.* at 175. This “unpossessed and waste land” was Southampton, today some of the most valuable real estate in the country.

3. *Id.* Although the New York Supreme Court today is the trial level court in New York, at the time the Supreme Court of Judicature was the primary appeals court in New York State. See Jill P. Butler et al., *The Appellate Division of the Supreme Court of New York: An Empirical Study of its Powers and Functions as an Intermediate State Court*, 47 FORDHAM L. REV. 929, 932–33 (1979). The ultimate court of appeal was the Court of Impeachment and Correction of Errors, whose members included the members of the Supreme Court, the chancellor, and the members of the New York Senate. *Id.* at 933 n.20. Likely because of this odd composition, the Court of Impeachment seems to have been less important than the Supreme Court during this early period.

4. Of course this experience is not unique to property law. The vast constitutional exegesis on the failure to deliver commissions to justices of the peace that is *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the bewildering dispute over personal jurisdiction that is *Pennoyer v. Neff*, 95 U.S. 714 (1877), and the dazzling emergence of proximate cause from a box of dropped fireworks that is *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928), form similar rites of passage for the new law student. See, e.g., Linda Silberman, *Shaffer v. Heitner: The End of An Era*, 53 N.Y.U. L. REV. 33, 33–34 (1978) (recounting how a homeless man convinced a civil procedure professor that he was once a law student by correctly reciting the facts of *Pennoyer v. Neff*).

5. To illustrate the point: my first presentation of this piece, to a group of junior faculty, began and ended with confessions that the case elicited their suppressed memories of the horror of property law.

6. Richard F. Storrow, *Gender Typing in Stereo: The Transgender Dilemma in Employment Discrimination*, 55 ME. L. REV. 117, 133 (2003) (citing *Pierson* as an example of the tension between clear cut rules and flexible standards faced by students arguing a case in the face of a precedent denying Title VII action to transgendered persons).

7. See Paul Finkelman, *Fugitive Baseballs and Abandoned Property: Who Owns the Homerun Ball?*, 23 CARDOZO L. REV. 1609, 1629–31 (2002) (analogizing the question of the ownership of a baseball to that of a wild animal); Michael Pastrick, *When a Day at the Park Turns a “Can of Corn” into a Can of Worms: Popov v. Hayashi*, 51 BUFF. L. REV. 905, 920–27 (2003) (same).

courts and lawyers use it to argue for contested forms of property from groundwater aquifers⁸ to the America's Cup trophy.⁹

But no one really knows why there was such a fight about a fox. Some books, looking to the allegedly Dutch origins of the name "Lodowick"¹⁰ suggest that the dispute was rooted in hostilities between those with English and those with Dutch ancestry.¹¹ James Truslow Adams, in his 1962 *Memorials of Old Bridgehampton*, explains it away with the Bridgehampton community's "love of lawsuits."¹² Most readers likely assume something similar, taking the case as simply more evidence of the overly litigious nature of the American public, ignoring the reality that litigation is a rare response to disputes¹³ and one that has radically declined since the early days of the American colonies.¹⁴

This Article presents the most complete history yet published of the case.¹⁵ Given the paucity of the documentary record, this story lies

8. *City of San Marcos v. Tex. Comm'n on Envtl. Quality*, 128 S.W.3d 264, 270 (Tex. App. 2004) (citing *Pierson* to support ownership rights in water to the first person to drill a well and capture the water).

9. *Mercury Bay Boating Club, Inc. v. San Diego Yacht Club*, 545 N.Y.S.2d 693, 704 (N.Y. App. Div. 1989) (Rubin, J., concurring) (citing *Pierson* for the proposition that violation of the customs of the chase does not give rise to a legal claim).

10. In fact the name appears to be as likely Scottish or English, the nationalities of most of the original Southampton settlers, as Dutch. See LORI COOPER, 75,000+ BABY NAMES FOR THE 21ST CENTURY (2001) (listing "Ludwyck" as the Dutch spelling and Lodowick as a Scottish spelling).

11. See A. JAMES CASNER & W. BARTON LEACH, *CASES ON PROPERTY* 6 (rev. temp. ed. 1948) (calling the dispute a "petty squabble between country squires—the stubborn affronted Dutchman and the English-descended violator of the fox-hunter's code"); CHARLES DONAHUE, JR., THOMAS E. KAUPER & PETER W. MARTIN, *CASES AND MATERIALS ON PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION* 7 (3d ed. 1993) (asking whether it is relevant to the dispute that the Piersons were among the first settlers and were probably English and the Posts seemed to have come later and were probably Dutch).

12. JAMES TRUSLOW ADAMS, *MEMORIALS OF OLD BRIDGEHAMPTON* 166 (1962).

13. Marc Galanter, *Reading the Landscape of Disputes: What We Don't Know (and Think We Know) About Our Allegedly Litigious Society*, 31 UCLA L. REV. 4, 41 (1983). Galanter describes this mistaken belief as the "hyperlexis" of the American people. *Id.* at 6.

14. *Id.* at 41 (noting that studies of litigation rates in the colonies reveal one county in which 11 percent of the adult males had appeared in litigation in the past year, another in which the 24 percent of the population was involved in litigation in a one year period, and a third in which 11 percent of the adult male population had been involved in litigation five or more times over a seven year period); see also William Pelletreau, *Introduction to 1 RECORDS OF THE TOWN OF SOUTHAMPTON WITH OTHER ANCIENT DOCUMENTS OF HISTORIC VALUE*, at i, ii (William S. Pelletreau ed., 1874) [hereinafter *TOWN RECORDS*] (noting that in colonial Southampton "petty law suits were far more frequent than at present").

15. Almost every historical account of the case appears to come from the article written by prolific local historian Judge Henry Hedges in 1895. H. P. Hedges, *Pierson v. Post*, SAG

in linking together tantalizing clues rather than in flourishing the smoking gun. Although I offer my conclusions tentatively, these clues suggest that the core dispute wasn't really about the fox at all. Nor was it about the petty battles between stubborn neighbors in Southampton, or even about Lodowick's unfortunate first name. Instead it was about conflicts over land use and control of this Long Island community in the face of the rapid changes occurring in the decades after the Revolutionary War.

The case was decided as a contest between individuals over a wild animal caught on an "unpossessed and waste land," and has served as an initiation ritual for law students for almost a century because of a particularly American understanding of property law. As the economist on his desert island assumes a can opener,¹⁶ the classical theorist of property law assumes an original state in which no one has a superior right to anything. This tradition traces its origins at least to John Locke, whose influential chapter "Of Property" in his *Second Treatise of Civil Government* states, "in the beginning all the world was America,"¹⁷ and explains why this state of common ownership fails to serve human interests.¹⁸ Starting from these assumptions, the important question becomes what is the best rule for

HARBOR EXPRESS, Oct. 3, 1895. Hedges' account made it into the text of casebooks after it was excerpted in JAMES TRUSLOW ADAMS, *MEMORIALS OF OLD BRIDGEHAMPTON* 166 (1962). A 2002 article, however, discusses the historical status of fox hunting as part of a new economic analysis of the case. Dhammika Dharmapala & Rohan Pitchford, *An Economic Analysis of "Riding to the Hounds": Pierson v. Post Revisited*, 18 J.L. ECON. & ORG. 39 (2002). Professor Andrea McDowell is also working on an analysis of the rules of fox hunting as misunderstood by the judges in *Pierson v. Post*, see Andrea McDowell, *Legal Fictions in Pierson v. Post*, 105 MICH. L. REV. (forthcoming Feb. 2007) (on file with the *Duke Law Journal*), while Professor Angela Fernandez provides a more detailed history and theory of the manipulation of the case in the New York Supreme Court, see Angela Fernandez, *Legal Archaeology as an Antidote to the Case Method's Air of Unreality: A Pedagogical Theory of Pierson v. Post* (on file with the *Duke Law Journal*).

16. For those who don't know the joke: A physicist, an engineer, and an economist are stranded on a desert island, with no tools except a box of matches and nothing to eat but some cans of beans that washed ashore with them.

"I know what to do," says the physicist. "I'll light a fire underneath the beans, which will raise the temperature beyond the boiling point, exploding the can and yielding its contents!"

"Brilliant!" says the engineer. "I'll take some palm leaves and bamboo and create a device to capture the beans as they hurtle from the exploding can."

"No, no, you've got it all wrong," says the economist. "First, assume a can opener . . ."

17. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 121 (Ian Shapiro ed., Yale Univ. Press 2003) (1690).

18. *Id.* at 111–21.

converting unowned resources into individual property. Within this scheme, it is easy to see why *Pierson v. Post* became and remains a canonical case in the study of property law. *Pierson* is about Locke's America—the dispute concerns a wild fox (clearly no property rights in him) on wild land (in which there is an equal absence of rights), and is about which of two individuals has done the right thing to claim individual property rights in the fox.

The reality of the case sheds light on how this common understanding of property law falls short. Recent scholarship has noted the significant role of shared rights over property law, and has challenged both the descriptive and normative value of understanding property as a division between no rights and absolute individual rights.¹⁹ My account of *Pierson v. Post* and the Long Island community that generated the case contributes to this scholarship by suggesting that not only was there never an “America” as Locke pictured it, but also that property disputes are often about community control of shared resources rather than individual control of private resources. In Southampton, community rights to lands might be simultaneously claimed by the colonial settlers, the English crown, the Dutch government, the Shinnecock tribe, the Pequot and Narragansett tribes, the original settlers, the later town residents, and

19. See generally JAMES M. ACHESON, *THE LOBSTER GANGS OF MAINE* 142–52 (1988) (distinguishing between open access rights and rights shared by closed communities in the context of lobstering areas shared and enforced by “lobster gangs”); Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 *UCLA L. REV.* 1061, 1085–92, 1138–39 (2005) (discussing property rights for tribes in sacred places on land owned by the federal government); Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 *YALE L.J.* 549 (2001) (discussing difficulties arising from the overly individualistic orientation of American property law and developing a theory of a sustainable closed-property commons which permits exit); Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 *STAN. L. REV.* 623 (1986) (arguing that in Shasta County, disputes over the use of property are resolved by relations among neighbors enforcing community norms); Carol M. Rose, *Property in All the Wrong Places?*, 114 *YALE L.J.* 991 (2005) (reviewing MICHAEL F. BROWN, *WHO OWNS NATIVE CULTURE?* (2003) and KAREN R. MERRILL, *PUBLIC LANDS AND POLITICAL MEANING* (2002)) (challenging an anthropologist writing about native culture and an historian writing about land use in the West who each attack property rights based on the assumption that they are all about individual absolute rights); Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 *U. CHI. L. REV.* 711 (1986) [hereinafter Rose, *The Comedy of the Commons*] (showing the persistence and efficiency of shared property arrangements in American law); Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 *WIS. L. REV.* 975 (showing that property rights are not absolute but define continuing relations among people); Joan Williams, *The Rhetoric of Property*, 83 *IOWA L. REV.* 277 (1998) (showing that the continuing American rhetoric and practice of property law includes the concept of community property rights).

the State of New York. The dispute between the Piersons and the Posts, I argue, was part of this conflict, and was motivated by a dispute over who had the right to use the common lands of the community, and whether those lands would be used for the leisure activities of the wealthy or to support the agricultural pursuits of the town's original settlers.

Recognizing the importance of this conflict between communities for rights in property does not settle the question of who should have won the case. In fact, it only complicates the search for appropriate property rules in other contexts. But by providing a fuller picture of property disputes and the rules that emerge from them, it may help to illuminate what is important in those disputes, and what rules may better serve our needs.

Part I discusses the role of *Pierson v. Post* both in the American ideology of property law and in property casebooks. Part II discusses the history of conflicts over community control in Southampton, and the way those conflicts were expressed in disputes over use and regulation of property. Part III discusses the parties to the case, and how the dispute over the fox would have fit into the contemporary struggle over land use and economic and social organization in Southampton. Part IV discusses the litigation of the case, and the way the histories of the justices and the transformation of American law are reflected in the decision. In conclusion, I discuss the continuing relevance of the case to the understanding and teaching of property law.

I. THE ROLE OF *PIERSON V. POST* IN AMERICAN LEGAL EDUCATION AND PROPERTY LAW

In 1915, when the professors of Harvard Law School decided to write a new series of casebooks as part of a reform of its first-year courses, Professor Edward Warren placed *Pierson* first in his revised property casebook.²⁰ By 1948, James Casner and W. Barton Leach said of *Pierson*'s "wily quadruped²¹:" "[f]or more than a half century law students have teethed upon this particular mammal. He is to the

20. EDWARD H. WARREN, SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF PROPERTY (1915). Warren, known as "Bull" Warren for his manner in questioning students, was one of the models for Professor Kingsfield in *The Paper Chase*. Byron D. Cooper, *The Integration of Theory, Doctrine, and Practice in Legal Education*, 1 J. ASS'N LEGAL WRITING DIRS. 50, 55 n.26 (2002).

21. *Pierson v. Post*, 3 Cai. 175, 180 (N.Y. Sup. Ct. 1805) (Livingston, J., dissenting).

law of property what 'Omnis Gallia' is to Latin; it is conceivable that a student might start somewhere else, but it would hardly seem right."²² Although property casebooks have multiplied since then, in most, including the best-selling book by Jesse Dukemenier and James Krier, *Pierson v. Post* is still one of the first cases students will encounter.²³

This primacy in legal education is not reflected in legal practice. Although *Pierson* is cited among other cases regarding wild animals in property treatises, this subject makes up only a few pages in multi-volume compendiums that largely concern rights in land. And although one can apply *Pierson's* rule of capture to disputes over water, oil, and other fugitive resources, the resolution of such disputes owes more to the complex bodies of law specific to those fields. Why, then, have law schools spent a century training young lawyers how to resolve disputes about wild foxes?

The answer lies in a distinct vision of property law and its role in the American polis. The American ideology of property, along with the American ideology of liberty, was heavily influenced by John Locke's 1690 *Second Treatise of Government*.²⁴ Writing against assertions of royal control over property, Locke posited an original state in which all had equal initial rights to resources, and therefore equal rights to appropriate portions of those resources to themselves.²⁵ For him and for the Scottish Enlightenment scholars that followed, individual ownership of property was not only the foundation for individual liberty, but also the inevitable result of human progress.²⁶ In what has become a celebrated tradition in

22. CASNER & LEACH, *supra* note 11, at 2.

23. See, e.g., A. JAMES CASNER, W. BARTON LEACH, SUSAN FLETCHER FRENCH, GERALD KORNGOLD & LEA VANDERVELDE, *CASES AND TEXT ON PROPERTY* 34 (5th ed. 2004) (placing *Pierson* fourth after three cases on the right to exclude); CHARLES DONAHUE, THOMAS KAUPER & PETER MARTIN, *PROPERTY* 1 (1993) (placing *Pierson* first); JESSE DUKEMENIER & JAMES KRIER, *PROPERTY* 19 (5th ed. 2002) (placing *Pierson* second after *Johnson v. M'Intosh*); JOHN P. DWYER & PETER S. MENELL, *PROPERTY LAW AND POLICY* 94 (1998) (placing *Pierson* third in the second chapter after the first chapter presents several theoretical perspectives); SHELDON F. KURTZ & HERBERT HOVENKAMP, *CASES AND MATERIALS ON AMERICAN PROPERTY LAW* 8 (2d ed. 1993) (placing *Pierson* first after an article on the concept of individual and shared rights in property); JOSEPH WILLIAM SINGER, *PROPERTY LAW* 78 (3d ed. 2002) (placing *Pierson* eighth).

24. Thomas P. Peardon, *Introduction* to JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT*, at vii, xix-xx (Thomas P. Peardon ed., The Bobbs-Merrill Co. 1975) (1690).

25. LOCKE, *supra* note 17, at 111.

26. *Id.* at 111-21 (alleging that initially all property was held in common, but that as the population multiplied it was necessary to divide it into individual lots, which in turn led to

property theory,²⁷ Locke and his successors theorized an evolutionary development from common property, which was inefficient and unsuitable to concentrated populations, to individual ownership and management of land and its products.²⁸

William Blackstone, whose *Commentaries on the Laws of England* were America's central legal text for the decades after the American Revolution, not only continued this tradition,²⁹ but also made it the basis of positive law. Blackstone began his volume on property with a Lockean evolutionary and biblical story of individual property ownership. He concluded this story, however, by tying it to the blessing of English law: "[T]hus the legislature of England has universally promoted the grand ends of civil society, the peace and security of individuals, by steadily pursuing that wise and orderly maxim, of assigning to every thing capable of ownership a legal and determinate owner."³⁰

Blackstone intended his *Commentaries* to showcase the animating genius of the English common law as one of individual political liberty.³¹ But for the Americans, the *Commentaries* became yet another confirmation of American uniqueness and superiority.³² In translating these English ideas to their young nation, the founders saw America as the first site in which Blackstonian ideals could be realized.³³ For the new Americans, Locke's imagined world of ample, unpossessed territory would finally permit all to obtain and hold land. Whatever their ideological bent, the founders believed that individual property ownership would create the conditions for the world's first

greater wealth and prosperity); see GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY* 61–62 (1997) (discussing property theories of eighteenth century Scottish Enlightenment philosophers).

27. This approach gained new life in the modern study of property law through the work of Harold Deinsetz. Harold Deinsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

28. See LOCKE, *supra* note 17, at 114–18.

29. WILLIAM BLACKSTONE, 2 *COMMENTARIES* *2–6; ALEXANDER, *supra* note 26, at 47–48 (discussing the influence of Blackstone).

30. BLACKSTONE, *supra* note 29, at *15.

31. Stanley L. Katz, *Introduction* to WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND, A FACSIMILE OF THE FIRST EDITION OF 1765–1769*, at iii, v (Univ. Chi. Press 1979).

32. See, e.g., ALEXANDER, *supra* note 26, at 48–49 (describing how John Adams's *Dissertation on the Canon and Feudal Law* used Blackstone's arguments to define the American experience as "the point in time toward which all other moments aimed but never reached").

33. *Id.*

true democracy. For the Jeffersonians, working one's own plot of land would generate the civic virtue necessary to maintain a republican democracy.³⁴ The federalists, for their part, emphasized that individual ownership of land would provide the means to assert individual will, free from dependence on an overweening state.³⁵

The link between individual property ownership and democracy and virtue was not confined to constitutional philosophers. The preservation of individual dominion over property became an object of the public faith. Alexis de Tocqueville, for example, remarked that "[i]n no country in the world is the love of property more active and more anxious than in the United States; nowhere does the majority display less inclination for those principles which threaten to alter, in whatever manner, the laws of property."³⁶

Reverence for individual control of property has persisted throughout the various permutations of property theory. For Chancellor James Kent, whose *Commentaries on American Law* was the most influential American legal text of the mid-nineteenth century, individual property provided the means to achieve freedom through participation in the market economy.³⁷ For John Chipman Gray, famous advocate of the Rule Against Perpetuities, liberty meant guarding property against a freedom-sapping paternalism, private or public.³⁸ For law and economics scholars in the wake of Coase³⁹ and Demsetz,⁴⁰ individual property ownership reduces transaction costs and promotes placement of resources in the hands of those that value them most, thus ensuring sage use and conservation

34. *Id.* at 31–32.

35. *See id.* at 68, 80–82 (discussing federalist perspectives on the connection between property and liberty).

36. 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 256 (Knopf ed. 1946) (1835).

37. 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 265–67 (John M. Gould ed., Little, Brown & Co. 1896) (1827). *See* Fernandez, *supra* note 15, for an argument that Kent heavily engineered the *Pierson* decision.

38. ALEXANDER, *supra* note 26, at 285–302.

39. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (arguing that in a world without transaction costs, parties injured by each others' use of property would bargain to reach the most cost effective result). This article continues to be the "runaway citation champion" in legal scholarship, having been cited almost twice as much as any other article. Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 759 (1996).

40. Demsetz, *supra* note 27, at 348 ("A primary function of property rights is . . . to achieve a greater internalization of externalities.").

of property.⁴¹ And all of these themes—freedom, democracy, and efficiency—permeate the rhetoric of the modern property rights movement.⁴²

Of course this vision of universal and absolute ownership of individual property was always more of an ideal than a reality. Throughout the nineteenth and early twentieth centuries, vast segments of the population—married women,⁴³ African Americans,⁴⁴ disfavored immigrants like the Japanese⁴⁵—were largely excluded from property ownership. Market processes, combined with economic upheavals, resulted in a large landless white population and the concentration of property rights in the hands of a few individuals or entities.⁴⁶ Common rights in property have also been a persistent theme throughout American property law.⁴⁷ Even where there was

41. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 28–29 (2d ed. 1977).

42. See, e.g., J. David Breemer, *O Madison, Where Art Thou?*, *THE AM. SPECTATOR*, June 29, 2005, http://www.spectator.org/dsp_article.asp?art_id=8369# (“[A]ll personal liberties depend on security in property.”); Citizens for Constitutional Local Government, <http://pvtgov.org/pvtgov> (last visited Mar. 13, 2006) (observing that homeowners in a homeowners’ association surrender “their civil rights without any information that this was indeed what they had agreed to”); Homeowners Associations: A Nightmare, Not An American Dream, <http://www.ccfj.net/HOANCPets.html> (Mar. 13, 2002) (“You surrender your Civil Liberties when entering a common interest property, and who was to know!”); Mountain States Legal Foundation, <http://www.mountainstateslegal.org> (last visited Mar. 13, 2006) (describing the organization as “a nonprofit, public interest law firm dedicated to individual liberty” and “the right to own and use property”).

43. ALEXANDER, *supra* note 26, at 5; Jill Elaine Hasday, *The Cannon of Family Law*, 57 *STAN. L. REV.* 825, 842–48 (2004) (describing coverture laws and the exaggerated reports of their demise).

44. ALEXANDER, *supra* note 26, at 5; see also *Hinds v. Brazeale*, 3 Miss. (2 Howard) 837 (1838) (invalidating a will leaving property to testator’s son on grounds that the son was a slave, the contract emancipating him was invalid, and a slave could not take property).

45. See Keith Aoki, *No Right to Own? The Early Twentieth-Century “Alien Land Laws” as a Prelude to Internment*, 19 *B.C. THIRD WORLD L.J.* 37, 57–59 (1998) (discussing laws barring “aliens ineligible to citizenship” from owning land as an effort to curb land ownership by Japanese farmers). Although these alien land laws were specifically directed at Asian immigrants, common law and statutory disqualifications of all non-citizens from property ownership existed throughout the eighteenth and nineteenth century and continue to a limited extent even today. See Polly J. Price, *Alien Land Restrictions in the Nineteenth Century: Exploring the Relative Autonomy Paradigm*, 43 *AM. J. LEGAL HIST.* 152, 152–53 (1999).

46. This process was already occurring in the revolutionary era, resulting in divisions between rights of persons and of property. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1777*, at 503–04 (1998) (discussing division and quoting Madison as saying that, “[i]n future times . . . a great majority of the people will not only be without landed, but any other sort of, property”).

47. Rose, *The Comedy of the Commons*, *supra* note 19, at 713. Joan Williams, moreover, notes that in the area of covenants American property law has recognized more group

individual ownership, as Blackstone's *Commentaries* themselves show,⁴⁸ it never meant absolute dominion. Rather, as exemplified by doctrines such as nuisance, eminent domain, and adverse possession, the individual's dominion over property was always limited by correlative rights, privileges, and duties in other individuals and groups.⁴⁹ And the choice of whose rights and privileges the state would enforce has always had as much to do with which communities' interests were to be protected as with who had the abstract right to the property.⁵⁰

But like Blackstone, who called property a realm of "sole and despotic dominion" before launching into the web of shared "incorporeal hereditaments,"⁵¹ the modern study of property law starts with *Pierson v. Post* before entering the world of landlord-tenant, nuisance, and homeowners' associations. It thereby minimizes these shared rights by making the first and fundamental question who owns the property in the first place. Through the case, generation after generation of law students have returned to the fictional world of wholly unappropriated resources and debated the rules for converting that world into individual ownership.

Interestingly, it was not John Chipman Gray who organized the study of property law in this way. Gray, a disciple of Christopher Langdell, wrote the first property casebook in 1888.⁵² It is hard today to see the resulting six volume compendium, dominated by sixteenth and seventeenth century English cases excerpted without explanatory

limitations on individual use of property, with less legal basis, than even English law. Williams, *supra* note 19, at 331-36.

48. See Carol M. Rose, *Cannons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 603-04 (1998) (noting that Blackstone was well aware of the significant familial, feudal and other legal restrictions on individual property use in his era).

49. Wesley Hohfeld most famously conceptualized property not as defining the relationship between an individual and a thing, but instead as creating an enforceable series of rights, privileges and duties in the relations between human beings. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied to Legal Reasoning*, 23 YALE L.J. 16 (1913); see also Singer, *supra* note 19, at 986-94 (discussing the Hohfeldian concept and its implications).

50. One of the most famous examples of this is *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), which held that American Indians lacked the right to alienate their land to private individuals, relying largely on the interests of the United States in controlling purchases of such title.

51. Rose, *supra* note 48, at 609-10.

52. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 630 (2d ed. 1985). In 1871, Langdell wrote the first law school casebook, which was on contract law. *Id.* at 614. Until then students had learned from textbooks. *Id.* at 612.

notes or text, as initiating the modern era in legal education.⁵³ Gray did not include *Pierson v. Post* at all, and only touched on rights in wild animals in a case regarding oysters in a deeply buried section on public rights in water.⁵⁴

It was likely not until Gray retired from Harvard in 1913⁵⁵ that a new casebook was proposed. In 1914, Harvard's faculty decided to restructure the teaching of the first year classes and with it their casebooks.⁵⁶ Professor Edward Warren's resulting property casebook⁵⁷ would look more familiar to modern students. Although still lacking much in the way of explanatory notes, it is only one volume, the ancient reports of the Crown have lost pride of place, and *Pierson v. Post* appears on the first page.⁵⁸ This occurred in an era characterized neither by the passionate defense of individual property rights of the late nineteenth century, nor the legal realism that permeated law schools in the 1920s and 1930s. Rather, it was a period in which progressive scholars, the precursors to the realists, had begun to question the concept of law as a science divorced from policy, and in which some legislators were attempting to protect individual workers from the excesses of industrialization.⁵⁹

53. JOHN CHIPMAN GRAY, SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF PROPERTY (2d ed. 1905). It is equally hard to see in the text the man who argued passionately against private or public restrictions on the individual use of property. Volume two, for example, starts with a series of decisions by the Crown on the nonalienability of appendant rights of commonage. 2 *id.* at 1-4 (2d ed. 1906). A side note for property theory buffs: the copies of the text held in the Yale Law Library were presented to the library by Wesley Hohfeld, who was Southmayd Professor of Law there, and appear to include his handwritten notes on teaching the subject.

54. *Id.* at 494-95 (excerpting *Fleet v. Hegeman*, 14 Wend. 42 (N.Y. Sup. Ct. 1835)). Interestingly, this case also arises from a dispute about common property on Long Island, involving rights to oysters planted in Oyster Bay. *Id.*

55. See ALEXANDER, *supra* note 26, at 286 (stating that Gray was on the Harvard faculty from 1869-1913).

56. WARREN, *supra* note 20 (noting in the preface that "material changes" were made to most first-year courses). The decision to restructure their casebooks was likely in response to complaints that casebooks focused too much on general principles and not enough on the law applicable to particular American jurisdictions, Rosalind Parina, *The Origin, History and Compilation of the Case-book*, 14 LAW LIBR. J. 14, 18-19 (1921), as well as a new theoretical turn in the study of law in response to the "welter of decisions" that were at that time overwhelming the legal profession, Edward H. Warren, *The Welter of Decisions*, 10 ILL. L. REV. 472, 472-73 (1916).

57. WARREN, *supra* note 20.

58. *Id.* at 1.

59. See ALEXANDER, *supra* note 26, at 313-15, 318-19 (discussing the progressive era reform impulse and its impact on legal theory).

In this period of growing discomfort with absolute individual property rights, *Pierson v. Post* at once faces this unease and (perhaps) soothes it. The case faces head on what Carol Rose has called "Blackstone's Anxiety"⁶⁰; the question of how individuals can claim to own particular property.⁶¹ At the same time, the opinion (particularly as Warren presented it, without Livingston's dissent) eases that anxiety.⁶² In Justice Tompkins' opinion, we are reassured by both the distinguished pedigree and the wisdom of American rules allocating property: not only have authorities from Justinian to Puffendorf agreed that a wild animal goes to the first person to physically capture it, but this rule serves society by creating certainty, and preserves "peace and order" by avoiding this "fertile source of quarrels and litigation."⁶³ In addition, by starting with a wild animal, the case displaces rights in land as the true meaning of property, thus normalizing property rights in intangibles such as stock and fugitive resources such as oil in the face of the twentieth century transformation of the American economy.

Pierson became even more appropriate as law and economics began to dominate property theory. In early expressions of law and economics theory, as in *Pierson v. Post*, the value of the object is almost irrelevant, and the real question is which property rule will minimize transaction costs (either Tompkins' bright line rule⁶⁴ or Livingston's existing custom⁶⁵) and most effectively harness individual self interest (Livingston's sure reward for productive labor).⁶⁶ A host of contestants to the property casebook crown has arisen in the last decades, many of them challenging the law and economics bias and accordingly nudging *Pierson* further into the casebook.⁶⁷ But it is still there, and professors like me who were raised on it may even return the decision to its former stature in the course. On the two-hundredth

60. Rose, *supra* note 48, at 605.

61. As Rose points out, after stating the unwillingness of most to look into this question, Blackstone states that such a willingness would be "useless and even troublesome in common life." *Id.* at 605-06 (quoting BLACKSTONE, *supra* note 29, at *2).

62. WARREN, *supra* note 20, at 1, 3.

63. *Pierson v. Post*, 3 Cai. 175, 179 (N.Y. Sup. Ct. 1805).

64. *Id.*

65. *Id.* at 179-80 (Livingston, J., dissenting).

66. *Id.* at 180.

67. See sources cited *supra* note 23.

birthday of the decision, it is time to decipher where the case came from.⁶⁸

II. BEFORE THE FOX

In most casebooks, as in the traditional understanding of property law, the fox is the thing—the land on which it was caught and the individuals who are fighting to own it are irrelevant. As the next section shows, however, the land and the distinctive claims that the Piersons and the Posts had to the use of the land were central to the litigation that followed. This section discusses the history of that land, a history that highlights the importance of group rights in the land, and the political and social dimensions of the struggle for those rights.

A. *Founding of Southampton*

Classical American property theory has focused on just two ownership options: property that individuals own; and property that no one owns but that is open to individual appropriation by all.⁶⁹ Locke,⁷⁰ Blackstone,⁷¹ Winthrop,⁷² and others all cited America as an example of the latter. The New York Supreme Court's opinion in *Pierson v. Post* follows this tradition, evoking an image of a wilderness in which no one had superior claims.⁷³ The records of

68. Samuel Isaacharoff notes the easy acceptance of the choice to litigate what seem to be pointless disputes in Samuel Isaacharoff, *The Content of Our Casebooks: Why Do Cases Get Litigated*, 29 FLA. ST. U. L. REV. 1265, 1265 (2002).

69. See ACHESON, *supra* note 19, 142–52 (discussing the dichotomy and presenting an example of a third possibility, shared property rights among a closed group).

70. LOCKE, *supra* note 17, at 115–16, 118.

71. BLACKSTONE, *supra* note 29, at *2–3.

72. John Winthrop, *Reasons to be Considered, and Objections with Answers*, in 2 WINTHROP PAPERS 138, 141 (Mass. Hist. Soc'y ed., 1931) (“As for the Natives in New England, they inclose noe Land neither have any settled habytation, nor any tame Cattle to improve the Land by, and soe have noe other but a Naturall Right to those Countries.”). Of course the Indian tribes they encountered did not share this vision, and the practices the Europeans and Americans developed in acquiring tribal land show that they too came to believe that the tribes possessed the land, however inconvenient this was for their colonizing ambitions. Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 43–47 (1947); see also FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 1 (4th prt. 1945) (“Most of the land in the United States, for example, was purchased from Indians, and therefore almost any title must depend for its ultimate validity upon issues of Indian law . . .”).

73. As Robert Williams points out, for Locke and many early Americans, the insistence that property rights required individual enclosure served European and American interests in denying Indian claims to the land. Robert A. Williams, Jr., *Documents of Barbarism: The*

Southampton make clear, however, that the town was not founded in the wilderness of unclaimed land waiting for individual enclosure that the theorists and the case describe. Before Europeans arrived and for hundreds of years thereafter, numerous groups claimed and struggled for community rights to the land on which Southampton was founded. The underlying conflict between the Piersons and the Posts was part of this ongoing battle over shared rather than individual property.

The first English settlers of Southampton came largely from the town of Lynn in the Massachusetts Bay Colony.⁷⁴ They were just one of six groups of settlers that fled the ill-fated town,⁷⁵ escaping a combination of natural disasters and political and religious oppression. Cases involving Lynn in the Bay Colony courts provide evidence of its struggles with the Massachusetts government over community control.⁷⁶ In 1639, for example, the General Court at Boston forbade the community to spread bass or codfish on lands to enrich the soil.⁷⁷ Other cases stemmed from battles over religious orthodoxy. In 1632, radical Puritan minister Stephen Batchellor fled religious persecution in England to settle in Lynn,⁷⁸ but found the colony under the governorship of John Winthrop no more friendly to religious dissenters.⁷⁹ The General Court called Batchellor before it for failing to have his church properly sanctioned by the Anglican Church of Boston and for other "irregularities" of conduct.⁸⁰

Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law, 31 ARIZ. L. REV. 237, 250–53 (1989).

74. FAREN R. SIMINOFF, *CROSSING THE SOUND* 98 (2004).

75. *Id.*

76. In Massachusetts Bay, as in most colonies, the General Court performed not only a judicial function but also made and enforced laws for the colony.

77. 1 ALONZO LEWIS & JAMES R. NEWHALL, *HISTORY OF LYNN, 1629–1864*, at 182 (1890).

78. *Id.* at 159–60.

79. The leaders of the colony were staunch members of the Church of England, which believed in a close connection between church and state. *See id.* at 164 (describing how Batchellor's opposition to the "incipient union of church and state" excited the "indignation" of the colony leaders). Batchellor was not the only religious refugee from the colony. Roger Williams was banished in 1636 for his heretical views and went on to found Rhode Island. Anne Hutchinson was exiled in 1637 after an order preventing the Boston meetings of a ladies social improvement group. *Id.* at 163. Winthrop had this telling comment on the order:

That though women might meet, some few together, to pray and edify one another, yet such a set assembly, where sixty or more did meet every week, and one woman in a prophetic way, by resolving questions of doctrine, and expounding scripture, took upon her the whole exercise, was agreed to be disorderly, and without rule.

Id. at 183.

80. *Id.* at 140, 160. In 1638, Batchellor left Lynn to found the town of Hampton, but did not find a permanent home there. *Id.* at 160. He initially found respect and was asked to serve as a

The town also had to contend with natural misfortunes. Although the town had ample land, much of it was unfit for farming.⁸¹ Even worse, earthquakes hit the town in 1638 and 1639.⁸² For some, the earthquakes were the final straw. In March 1639, a group of prominent citizens formed the Southampton Company and proposed to settle on Long Island.⁸³

Even then the land was not an unclaimed wilderness. Many entities were already asserting their own claims to authorize the Southampton Company to settle there. The British Royal Council in London believed that it had the right to dispose of lands in the new world, and had granted the Earl of Stirling a patent encompassing all

judge in an important land dispute, but then clashed with Timothy Dalton, the Church of England Pastor there. *Id.* He was soon sued for propositioning another man's wife, to which he reacted by filing a suit for slander, and then, according to town records, he confessed and was excommunicated, then his house burnt down, and finally, he was denied permission to divorce his wife although she had been convicted of adultery and ordered to wear a scarlet A. *Id.* at 160–61, 164. In 1651, he finally gave up and returned to England. *Id.* at 161.

81. SIMINOFF, *supra* note 74, at 99.

82. *Id.* at 99–100. Yes, earthquakes just outside Boston. The U.S. Geologic Service reports nineteen earthquakes in Massachusetts before 1973, including a magnitude seven quake in 1755. U.S. Geologic Service, Earthquake History of Massachusetts, <http://earthquake.usgs.gov/regional/states/massachusetts/history.php> (last visited Mar. 7, 2006); *see also* 1 LEWIS & NEWHALL, *supra* note 77, at 182, 209, 243, 252–53 (describing four earthquakes that affected Lynn between 1639 and 1663).

83. SIMINOFF, *supra* note 74, at 99. The name of the new settlement suggests religious affiliation with Batchellor, who hailed from Southampton, England, and called his new community to the north of Lynn, "Hampton." 1 LEWIS & NEWHALL, *supra* note 77, at 160. However many of the settlers were also from Southampton, *id.* at 193, and before leaving, the company contracted with Abraham Pierson, whom John Winthrop called a "godly learned man, and a member of the [Anglican] church of Boston," to join them as their pastor, JAMES TRUSLOW ADAMS, HISTORY OF SOUTHAMPTON 46 n.‡ (1962) (quoting John Winthrop, Journal Entry (June 5, 1640), in 2 THE HISTORY OF NEW ENGLAND, 1630 TO 1649, at 4, 6 (James Savage ed., 1829)). (Abraham Pierson was probably the brother of Henry Pierson, who was Jesse Pierson's great, great, great grandfather.) The selection of Pierson, however, may have been forced on them by Winthrop, who sought to regulate all colonization of the northeast. SIMINOFF, *supra* note 74, at 46. The Southampton settlers did not seem to share Pierson's views on the role of the church. In 1644, Abraham Pierson drafted a wildly harsh version of the Mosaic Code to govern the town, but the code does not seem to have ever been enforced. 1 TOWN RECORDS, *supra* note 14, at 19–21 (discussing and reprinting the code, which imposed the death penalty for nineteen crimes, including profaning the lord's day, incorrigibility by children, and adultery, but not for rape). Soon after, the town affiliated with the colony of Connecticut, refusing Abraham Pierson's wish that it affiliate with the colony of New Haven and permit only Anglican church members to select the members of the government. GEORGE ROGERS HOWELL, EARLY HISTORY OF SOUTHAMPTON, L.I., NEW YORK WITH GENEALOGIES 100 (2d ed. 1887). Abraham Pierson then left the community for Branford, Connecticut. *Id.* Interestingly, objection to the entanglement of church and state was also one of the causes of Batchellor's clash with Winthrop. 1 LEWIS & NEWHALL, *supra* note 77, at 164.

of Long Island.⁸⁴ At the same time the Dutch government, which had established a substantial settlement at New Amsterdam (now New York City), asserted its own entitlement to the area.⁸⁵

Non-European governments also had property claims to the land. Governor Winthrop in the Massachusetts Bay Colony was already challenging the authority of the far-off British Crown to dictate how and by whom the northeast would be settled.⁸⁶ Several Indian tribes claimed rights in the land as well. Although the land had long been occupied by the Shinnecock people, they had until recently been under the protection of and paid tribute to the powerful Pequot tribe of Connecticut.⁸⁷ Under this arrangement, the Pequots protected their right to the territory in exchange for control of their trade in wampum,⁸⁸ the shell-based currency on which both Indian and European commerce depended.⁸⁹ After the Pequots were defeated and enslaved by the British colonists in the Pequot War of 1637,⁹⁰ the Niantic and Narrangansett tribes began eyeing the land, hoping to claim both it and the wampum it produced.⁹¹

The Southampton settlers' efforts to placate these groups began a long tradition of community rights in land, in which the central disputes concerned not who could use particular property but rather which group could dictate how it could be used. The Southampton Company first purchased a patent from James Farrett, Lord Stirling's agent in America, for eight square miles on Long Island.⁹² Farrett, however, had already learned the necessity of placating Massachusetts Bay: the patent stipulated that it was made upon the advice and consent of John Winthrop, and that he had the authority to settle any disputes between the parties.⁹³ The patent also preserved Stirling's interest in monopolizing trade with the Indian community. While the Company could trade with the Indians for "victuals," they

84. SIMINOFF, *supra* note 74, at 48.

85. *Id.* at 10.

86. *Id.* at 88-91.

87. *Id.* at 4.

88. *Id.* at 3.

89. See *id.* at 5-6 ("[W]ampum became a universally accepted mechanism for propelling goods and peoples into and through the networks of the emerging Atlantic American world.").

90. *Id.* at 57.

91. *Id.* at 5-6.

92. 1 TOWN RECORDS, *supra* note 14, at 10.

93. *Id.* at 9, 10.

were prohibited from trading for wampum; that right was reserved to Stirling.⁹⁴

Patent in hand, the settlers set up camp on the western end of the island, brashly cut down the Dutch emblem they found there, and carved a fool's face in its place.⁹⁵ The settlers soon learned that there were at least two additional groups with claims to the land. Pentawits, sachem of the Manhasset tribe that allowed the Dutch to occupy the land, informed his Dutch allies of the settlers' presence, and the Dutch came and arrested eight of the Southampton Company.⁹⁶ They were released after they agreed to leave the area.⁹⁷ The Company received a new patent from Stirling,⁹⁸ traveled seventy miles to the eastern tip of Long Island, and settled again. This time they had learned their lesson and immediately obtained consent to their settlement from the Shinnecock tribe.⁹⁹ In exchange they promised the Shinnecoeks goods and, most importantly, a pledge that the "English shall defend us the sayed Indians from the unjust violence of whatever Indians shall illegally assaill us."¹⁰⁰

This did not resolve the conflict over who controlled the land and the community there. In 1664, the Dutch relinquished most of their North American claims to the British, and the Crown granted Long Island along with a vast swath of territory to the Duke of York.¹⁰¹ Richard Nicolls, appointed Deputy Governor of "New York," was determined to unify the region by stamping out the independent tendencies of the Long Island towns.¹⁰² As part of a broader campaign to centralize political power over the area, Nicolls demanded that the Long Island settlements purchase new patents for their land from the

94. *Id.* at 10.

95. ADAMS, *supra* note 12, at 48 (quoting 14 DOCUMENTS RELATING TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 28-29 (B. Fernow ed., Albany, N.Y., Weed, Parsons & Co. 1883)).

96. *Id.*

97. *Id.* at 49.

98. *Id.* at 50.

99. *Id.*

100. *Id.* This was clearly an effort by the Shinnecoeks to secure the English as their new protectors against the threatened invasion of the Narragansetts and Niantics. But the English settlers, as we will see later, ultimately proved an even greater threat. See *supra* notes 72-73 and *infra* text accompanying notes 116-18.

101. SUNG BOK KIM, LANDLORD AND TENANT IN COLONIAL NEW YORK 8 (1978).

102. See *id.* at 9.

Duke.¹⁰³ Southampton objected, writing to Governor General Lovelace that the town had

by right of equity & of law alsoe, many previlidges which many plantations on the Island hath not, as not only Indian Interest of or plantation but alsoe Pattent right therein, and whereas it seems to us as if wee were like to be deprived of those ovr privilidges which at great rate wee have procured with much dificulty and danger wee have soe many years possessed.¹⁰⁴

The New York government burned Southampton's letter of protest, calling it "scandalous, illegal, seditious."¹⁰⁵

Renewed Dutch claims to Long Island prevented New York from immediately pressing its claims.¹⁰⁶ In October of 1676, however, New York called Southampton before the General Court of Assizes for its refusal to obtain patents.¹⁰⁷ Again the residents recited their multiple claims to the land, making clear that not only the purchase price but their political liberty was at stake:

[T]he patents we have seen seem to bind persons and towns in matter of payment to the will and pleasure of their lord and his successors, and who can tell but in time to come those may succeed who through an avaricious distemper may come upon us with such heavy taxes as may make us or our poor posterity to groan like Israel in Egypt.¹⁰⁸

103. Nicolls also quickly promulgated laws requiring gubernatorial approval of town elections, and installing his appointees as justices of the peace for the towns. *Id.* at 9-10. According to Kim:

Nicolls considered these codes, which were "not contrived so Democratically" as those of other colonies, as an instrument to "revive the Memory of old England amongst us" and lay in the "foundations of Kingly Government in these parts so farre as is possible, which truly is grievous to some Republicans."

Id. at 10 (quoting Nicolls to earl of Clarendon (Apr. 7, 1666), N.Y. HIST. SOC., 2 COLLS. 119 (1869)).

104. 2 TOWN RECORDS, *supra* note 14, app. A at 350 (1877) (records of town meeting, Feb. 22, 1669).

105. ADAMS, *supra* note 12, at 54.

106. *Id.*

107. 2 TOWN RECORDS, *supra* note 14, at 65-66 (1877). The General Court of Assizes was established by Nicolls to be "the supreme judicial tribunal of the colony," 1 LEGAL AND JUDICIAL HISTORY OF NEW YORK 269 (Alden Chester ed., 1911), and held not only judicial but also legislative power, *id.* at 271.

108. William Pelletreau, *Town of Southampton*, in RICHARD MATHER BAYLES ET AL., HISTORY OF SUFFOLK COUNTY, NEW YORK 1, 11 (1882).

The court was not impressed. It informed the town residents that they had forfeited all their rights and privileges in their lands, and the lands would be forcibly taken from them unless they obtained a new patent by October 23.¹⁰⁹ Reluctantly, the town representatives signed a patent with Governor Andros.¹¹⁰

Community control, not payment for land use, was central in the patent. The quit rent for the patent was largely symbolic, consisting of only “one fatt Lamb” per year.¹¹¹ The town was already paying far more in taxes for the land. The manner in which the patentees held the land was more significant: under both patents their tenure would be “in free and Common Socage and by fealty only.”¹¹² Under socage tenure, a tenant held the lands by virtue of services to the lord.¹¹³ “Free and common socage” indicated that the services were honorable, not menial, and was the form under which knights held their land.¹¹⁴ The patent, therefore, was essentially an oath of fealty to the Duke of York and his agent the Governor.¹¹⁵

When Governor Dongan, Andros’ replacement, demanded new patents in 1686,¹¹⁶ the town did not protest. Perhaps this is because the town realized that accepting the authority of the Governor over their lands would provide valuable ammunition against another claimant to the lands: the Shinnecock Indians. The patent authorized the Governor to “finally determine the difference” with the tribe, which apparently claimed the town was using more rights and land than the tribe had bargained for.¹¹⁷ Not surprisingly, as there is no evidence that Indians presented their side of the dispute, the Governor found that the town had “lawfully purchased” the lands.¹¹⁸

109. 2 TOWN RECORDS, *supra* note 14, at 65–66 (1877).

110. ADAMS, *supra* note 12, at 55. The patent is reprinted in full in ADAMS, *supra* note 83, at 279–80.

111. ADAMS, *supra* note 83, at 280.

112. *Id.* at 280, 282.

113. See BLACKSTONE, *supra* note 29, at *78–79.

114. See *id.* at *79–81.

115. See ROY HIDEMICHI AKAGI, THE TOWN PROPRIETORS OF THE NEW ENGLAND COLONIES 115–24 (1924) for discussion of a similar conflict in response to Governor Andros’ demand for quit rents and patents of the New England townships. In New England, however, these demands were generally unsuccessful. *Id.* at 124.

116. ADAMS, *supra* note 12, at 55. The patent is reprinted in full in ADAMS, *supra* note 83, at 281–87.

117. *Id.* at 282–83.

118. *Id.*

With the patent came a new form of government. Dongan's patent made of the town "one body Corporate and Politique in Deed and name by the name of the trustees of the ffreeholders & comonalty of the towne of Southampton."¹¹⁹ These trustees, moreover, could hold a public meeting only upon a public summons to be requested from one of the majesty's justices of the peace.¹²⁰

Throughout the period before the Revolutionary War, property and political rights were fully entangled. The right to authorize settlement of the land was not a simple transfer of ownership rights. Rather, it included the right to dictate how it could be used and to whom its people would owe allegiance. Over a century later, this theme would repeat in *Pierson v. Post*, when a battle over community control was waged through the medium of a lawsuit ostensibly about a fox.

B. Allocation of Property Rights Among Town Members

In the Southampton community as well, property rights did not fall into the individual ownership/open-access dichotomy, but reflected a continuum of shared property rights among varying groups. The groups sharing those rights ranged from the investors in the initial settlement, to those that purchased land within the first decade of settlement, to the Shinnecock tribe that reserved rights in the lands, to all of the residents of the town. The fox did not make its famous dash over unclaimed land, in other words, but over land that had defined the residents' social and economic status for over a century. *Pierson v. Post* arose in the midst of an escalating conflict over that land's ownership and control.

The initial agreements regarding property rights were made in Lynn in 1639 by the "undertakers"¹²¹; those who had each contributed eighty pounds toward the venture of founding a new settlement.¹²² The undertakers' early documents (which share elements of both commercial contracts and town charters) show several kinds of shared property rights.¹²³ First, the parties to the agreement had rights to the common lands of the town: "what is layed out for commons shall continue commons and noe man shall presume to Incroach upon it

119. *Id.* at 284.

120. *Id.* at 285.

121. ADAMS, *supra* note 12, at 44, 45.

122. ADAMS, *supra* note 83, at 257.

123. These are reprinted in *id.* at 256-59.

not so much as A handes breadth” without the agreement of the undertakers, or their executors, administrators or assigns.¹²⁴ Second, the town had rights in use of this individual property: each settler was entitled to a house lot, a planting lot, and a meadow lot, but the planting lots could never become house lots so as not to “over charge[] . . . [the] Commons and . . . Impoverish[] . . . the towne.”¹²⁵ Finally, some rights belonged to the public generally, and could never be claimed by any individual or group: “ffurthermore noe person . . . whasoever shall challenge or claime any proper Interest in seas, rivers, creekes, or brooks howsoever bounding or passing through his grounds but ffreedom of fishing, fowling and navigation shall be common to all within the bankes of the said waters whatsoever.”¹²⁶

Where did this emphasis on shared rights come from? In part, the agreement reflects land-holding practices in England. English agricultural areas had for centuries recognized elaborate rights of commonage.¹²⁷ These rights arose by long use, by virtue of land holding in the village, or through direct grant.¹²⁸ The idea of common rights in land, therefore, would have been very familiar to these emigrants from England.

But there were important differences in the commons developed in Southampton. English law defined commons rights as rights in land owned by another.¹²⁹ As the owner of the land was typically the lord of the manor, and the commons rights belonged to commoners without fee simple title,¹³⁰ the English right of commonage enshrined the status differences of English society. In addition, certain use rights in the commons land remained exclusively with the lord, including the right of “mast,” or the fruits of the trees on the land, or the right of

124. *Id.* at 258.

125. *Id.* at 257–58.

126. *Id.* at 258.

127. The most important of these was the common of pasturage. E.C.K. GONNER, *COMMON LAND AND INCLOSURE* 8 (2d ed. 1966). Other rights included the common of estover (the right to collect timber), the common of turbary (the right to cut peat for fuel), and even the delicately termed common of foldage (the right to the manure left by animals on the commons). *Id.* at 14–15.

128. Some rights of common of pasture were “universally assumed in the case of all original manors,” *id.* at 8, while others “originate[d] . . . by grant or by peaceful, uninterrupted and known usage, and could be proved either by deed or by prescription,” *id.* at 10.

129. *See id.* at 7 (“Common is ‘a right which one or more persons have to take or use some portion of that which another’s soil produces.’”).

130. *See id.*

"foldage," the right to the manure from the animals pastured there.¹³¹ In Southampton, which would have rejected the idea of noble privilege, the land was owned by those with common rights to it, and only their joint action could limit or expand those rights.¹³²

The vehemence of the undertakers' language regarding the commons is also interesting given the status of the commons in England at the time. Beginning in the sixteenth century, a succession of writers had advocated the agricultural benefits of individual enclosure.¹³³ The century before the settlers left England was one of pressure for enclosure of the commons, resulting in a significant reduction in common lands by the time the settlers left England.¹³⁴ This in turn resulted in vehement protests on behalf of the peasants displaced from their lands. The Southampton settlers' insistence on common rights, then, may indicate a resistance to the enclosure trend, and its antidemocratic overtones, rather than a replication of English practices.

The settlers also believed that assigning shared ownership rights in the commons would contribute to the prosperity of the community. They declared that "the delayinge to lay out the bounds of townes and all such land within the said bowndes hath bene generally the ruin of townes in this country, therefore wee the said undertakers have thought good to take upon us the dispose of all landes within our said boundes."¹³⁵ Maintenance of pasture in common may also have been less expensive and have resulted in fewer disputes than enclosing land. Enclosing land meant fencing it, fencing took time and resources, and failure to fence gave rise to bitter arguments. Residents brought successful lawsuits against those who "hath not made his proportion of fence as hee ought to have done."¹³⁶

131. *Id.* at 14.

132. *See* ADAMS, *supra* note 83, at 258-59 ("[Y]e disposal of the [commons] shall be at the will and pleasure of us, the undertakers, or executors, administrators and assigns.").

133. *See* GONNER, *supra* note 127, at 121 ("From Fritz Herbert on there is a constant succession of writers advocating inclosure from the farming point of view.").

134. *Id.* at 134-41 & apps. C & D (showing maps of England without common lands at the end of the sixteenth and seventeenth centuries); *see also* DAVID THOMAS KONIG, LAW AND SOCIETY IN PURITAN MASSACHUSETTS: ESSEX COUNTY, 1629-1692, at 4 (1979) (stating that in the century in which the English came to the Massachusetts Bay Colony, "the enclosure of the common fields had dispossessed thousands and produced a population of menacing 'sturdy Beggars' who streamed into London or wandered about the countryside").

135. ADAMS, *supra* note 83, at 257.

136. 2 TOWN RECORDS, *supra* note 14, at 1 (1877).

Throughout its first two hundred years the town appointed official "fence viewers" to make sure each maintained their proportion.¹³⁷

Maintenance of the commons was also necessary to abide by agreements with the Shinnecock tribe. In numerous agreements made between 1640 and 1712, the tribe had reserved rights in the lands it ceded. They reserved the right to "breake up ground" in certain areas for their use, to "cut flags, bulrushes, and such grass as they usually make their mats and houses of and to dig ground nuts," as well as the privilege of "fishing fowling hunting or gathering of berrys or any other thing for our use."¹³⁸ In return, both the town and the tribe promised not to enclose the lands in which their respective members had usufructuary rights.¹³⁹ From a combination of politics, practicality, and necessity, then, common rights in land were engrained in the community's practice.

Although the original undertakers had the rights to control the common lands under the agreements made in Lynn, many of them never came to Southampton at all, and others left soon after.¹⁴⁰ In 1648, the town voted that rights to the common lands would be shared among all those owning property in the town by that date.¹⁴¹ After this time, rights to the commons were not acquired

137. David Pierson, father of Jesse Pierson the fox catcher, was repeatedly elected as a fence viewer. See *infra* note 199 and accompanying text.

138. In the deed of 1640, the Indians reserved "the libertie to breake up ground for their use to the westward of the creek afore mentioned on the west side of Shinnecock plaine," 1 TOWN RECORDS, *supra* note 14, at 13–14, and in 1659, the settlers promised that if "the said Indians should leave their places within these bounds whereupon they have permission to plant or dwell, that then the Said land or any parcell thereof shall not be imppriated to or by any peson what soever in pticuler," but would remain to the use of the town in common, 2 *id.* at 207 (1877). In 1659, Wyandanch, sachem of the Shinnecoeks, deeded other lands with the agreement that they would "keepe [their] privildges of fishing fowling hunting or gathering of berrys or any other thing for [their] use." *Id.* app. D at 354–55. In 1665, the Montauk Indians at Shelter Island sold Hogs Neck to Southampton, reserving again the privileges of hunting, fishing and fowling in the town. *Id.* app. E at 356. And in 1703, the tribe sold the right to farm certain lands to the town, reserving the right to "cut Flags, Bullrushes and such grass as they usually make their mats and houses of, and to dig ground nuts, mowing land excepted, any where in the bounds of the township of Southampton." 3 *id.* at 372–73 (1878). At least while the Indians were troublesome enough to ensure compliance with these agreements and wealthy enough not to sell these reserved rights, the town would have prevented fencing or allotting a significant portion of the lands to individual residents.

139. 2 *id.* at 206–07 (1877) ("Said land" where the Shinnecoeks had rights "or any parcel thereof shall not be apprpriated to or by any person what soever in pticuler").

140. ADAMS, *supra* note 83, at 47.

141. 1 TOWN RECORDS, *supra* note 14, at 50–51.

automatically by new residents to the town. Rather they were sold,¹⁴² devised,¹⁴³ and occasionally promised to useful people as an inducement to join the town.¹⁴⁴ As portions of the common lands were divided, they would be allotted to those with a share in the commons.¹⁴⁵

Those with this "privilege of commonage," who came to be called the "proprieters," also had special rights in the lands while they remained undivided. In 1679, for example, the town trustees ordered that all "lotters" had the right to take timber from any of the newly divided lands "while they lye unfenced."¹⁴⁶ In 1695 the town trustees declared:

Whereas great damage is daylie sustained in the undivided lands of the Towne, by reason that sundry persons who have no right unto the said undivided lands . . . turne their jades, Cattle, Sheepe, and swine into the same, but also cut fire wood and timber, gather stones and dig clay in and upon ye same, to the grievous damage of the proprietors of the said undivided lands [such activities were prohibited without the permission of the trustees]. . . . All wayes Provided that it shall and may be lawfull for all such persons that have right [of a share in the commons] . . . to turne out into the said undivided lands, their own horses, cattle sheepe and swine. . . . [and] also to cutt timber and firewood, gather stones and dig clay, for their owne particular uses¹⁴⁷

Then in 1711, the freeholders of the town voted to appoint a committee to "enquire into the Rights that each propriety holds in the undivided Lands," and that those that did not prove such a right

142. See, e.g., 2 *id.* at 48 (1877) (recording 1665 and 1666 sales of shares of commonage); *id.* at 60 (recording several sales of commonage at Northsea, including one reserving the right to pasture a cow there).

143. *Id.* at 61 (recording that Samuel Clark had devised his son a share of commonage in all future divisions); *id.* at 70 (recording that James Herrik had devised a fifty-pound commonage throughout the bounds of the town to his widow for life then to his son).

144. *Id.* at 104-05 (recording an agreement that John Pinny was to be the town smith for reasonable rates and in exchange he would get a home lot, twelve acres of woodland, and "accidental comonage for his creatures, upon the comons, with his neighbors which Land is so granted upon the condition of His supplying the town" so long as he stayed in the town, and permanently if he remained longer than five years).

145. Similar rights in undivided land were provided to the original town settlers throughout New England. See AKAGI, *supra* note 115, at 3.

146. *Id.* at 75-76.

147. 5 TOWN RECORDS, *supra* note 14, at 150-51 (order of trustees, June 11, 1695).

“shall have no Liberty to Pasture any creature in the common field.”¹⁴⁸

Between 1663 and 1782, much of the common land was allotted and divided among the proprietors. As the proprietors sold the newly allotted lands to new migrants to the town, the balance between proprietors and nonproprietors began to shift. Those with rights in the commons, who had once been a majority of town residents, gradually became a minority.¹⁴⁹ At the same time, the proprietors reserved to themselves increasingly burdensome rights in the lands once they were sold to others. In the 1763 division of the Quogue area, for example, the proprietors reserved to themselves “free liberty at all times hereafter to dig clay in any of the above said lots for their own use” as well as the right to use a stream passing through the land and dig to let the stream pass into a nearby pond.¹⁵⁰ In laying out the Little South division that same year, the proprietors reserved a section of common land where they alone could dig clay and burn brick.¹⁵¹

This rapid development and enclosure of the commons also disadvantaged those without the means to own property. In the Little South division, for example, it was agreed that with respect to the “Indian or Mulatto houses that stand upon any of the above lots or amendments, the owners of them shall have liberty to move them off if they cant agree with the owners of the land.”¹⁵² This “liberty” was probably not regarded as much of a privilege by those that now had to find a new home site and somehow transport their homes there.

The Revolutionary War added severe economic stress to the land use struggles. The Southampton residents were fervent revolutionaries. All but one of the town residents signed an oath of

148. 2 *id.* at 147 (1877). Those with rights to the commons were expected to respect others' rights in them. For example, town members brought court actions against John Topping for fencing off a portion of the commons for his individual use, *id.* at 18, and against Zerobbabel Phillips and his wife for the death of a cow after they allegedly “had trespassed by digging in the common & thereby the cow lost her life,” *id.* at 32–33.

149. William S. Pelletreau, *The Rights of the Proprietors to the Bottoms of the Bays in the Town of Southampton*, THE SEA-SIDE TIMES (Feb. 23, 1883), in George R. Howell, Southampton Historical Pamphlets 94 (1947) (unpublished compilation of documents in the possession of the New York Historical Society).

150. 3 TOWN RECORDS, *supra* note 14, at 199 (1878).

151. *Id.* at 227.

152. *Id.* at 228.

loyalty to the Continental Congress in May of 1775,¹⁵³ and the town raised two companies of militia to join the revolutionary forces in February 1776.¹⁵⁴ But after the American defeat in the disastrous Battle of Long Island, the British occupied the Island, using the crops and herds of the rebellious eastern towns as their larder. Ships sent from Connecticut to join the battle instead helped the Island's residents to escape,¹⁵⁵ and the Continental Congress soon ordered the residents to remove themselves and as much of their stock as possible.¹⁵⁶ While some residents used their whaling ships and knowledge of the coast to harass the British,¹⁵⁷ many spent the six years of war in Connecticut in a "destitute and helpless condition,"¹⁵⁸ largely forbidden to return home for supplies, and often plundered by British and American privateers when they did.¹⁵⁹ Those that returned to Southampton after the war found the town impoverished and ravaged by the British troops.¹⁶⁰

153. This was essentially the case in all of Suffolk County. See FREDERIC GREGORY MATHER, *THE REFUGEES OF 1776 FROM LONG ISLAND TO CONNECTICUT 1055-65* (1913) (reprinting lists of signers of the Oath of Association). This was in stark contrast to the Queens and Kings Counties, which lay between Suffolk and mainland New York. Queens County issued declarations insisting on its desire to remain at peace with Great Britain and not fight on either side, *id.* at 1050-54, while after the Battle of Long Island, the residents of Kings County signed an effusive declaration proclaiming their loyalty and ardent affection to the King, *id.* at 1050-51.

154. *Id.* at 994-1003 (reprinting the membership of the militia of Suffolk County). It is not clear whether these companies actually participated in the Battle of Long Island, or were intercepted on their march to join the battle by news of the disastrous defeat there. *Id.* at 40-41. Compare William Pelletreau, *Introduction* to 3 TOWN RECORDS, *supra* note 14, at i, vi (1878) (saying that the companies were intercepted), with ADAMS, *supra* note 12, at 128 (saying that the companies merged into Colonel Smith's regiment and participated in the Battle).

155. 15 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT (J. Hammond Trumbull and Charles J. Hoadly eds., AMS Press and Johnson Reprint Corp. reprint 1968), available at <http://www.colonialct.uconn.edu/ViewPageByPageNew.cfm?v=15&p=511&c=4> (reports of Sept. 1, 1776).

156. MATHER, *supra* note 153, at 695 (minutes of Continental Congress, Aug. 29, 1776 & Sept. 3, 1776).

157. Pelletreau, *supra* note 154, at vii.

158. THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, *supra* note 155, at 522, available at <http://www.colonialct.uconn.edu/ViewPageByPageNew.cfm?v=15&p=522&c=4> (report of Sept. 18, 1776).

159. *Id.* at 201-03; see also ADAMS, *supra* note 12, at 135 ("This was . . . largely to reduce the supplies which otherwise would serve to support the British . . . , and it was this unfortunate situation . . . [which] caused them to be harried by friend as well as foe.").

160. Pelletreau, *supra* note 154, at vii-viii. A 1790 petition that records the effect of the war on John Foster of Sag Harbor is reprinted in MATHER, *supra* note 153, app. B at 719. Writing from debtors' prison, Foster records how he was elected as a representative to the Continental Congress, and during the war shipped military stores for the revolutionary army, because by so doing he made himself "particularly obnoxious to the enemy." *Id.* The British burnt Foster's

Other factors cast further doubt on Lodowick Post's declaration that he started the fox on "unpossessed and waste land." Socioeconomic changes instead were placing significant pressure on all town lands. The population of the town exploded in the postwar period. After increasing by only 50 percent between 1698 and the start of war, the town's population quadrupled between 1776 and 1800.¹⁶¹ In addition, the town records reflect increasing pressure from population growth and economic distress. From the earliest years, there had been references to the poor of Southhampton: a 1661 will devised five pounds to the poor of the town,¹⁶² and a 1662 will devised a mare foal to their benefit.¹⁶³ But in the years after the Revolutionary War the status of the poor became a pressing concern of the town as a whole. For the first time, the town set aside funds specifically for the support of the poor, starting at 100 pounds in 1786, and rising as high as 400 pounds in 1797. In the 1786 town meeting, the residents voted that the overseers of the poor were "impowered to bind out to apprentice all such children whose parents they shall judge unable to maintain them," and that "when they shall see any idle persons who has no means of gaining an honest livelihood, be impowered to take up such person & put him to labor."¹⁶⁴

These harsh measures apparently did not work. Starting in 1799, the orders were accompanied by a vote ordering "that the overseers of the poor meet with the Trustees on the 3d Tuesday of April instant to devise some cheaper or better plan for the support of the poor."¹⁶⁵ Similar meetings were ordered in each of the next three years,¹⁶⁶ and

ship, his home, his outbuildings, and plundered his books and goods—a loss of 2,000 pounds. *Id.* Foster found himself unable to pay debts incurred while supporting his large family in Connecticut, and so pled with the State Treasurer to sign as a creditor for the discharge of his bonds. Happily, the petition was marked "granted." *Id.*

161. From a population of 738 white and 84 black residents in 1698, *see* 1698 Inhabitants of Southhampton, Suffolk County, New York, <http://olivetreegenealogy.com/nn/census/inhabsouthhamp.shtml> (reprinting 1 EDMUND B. O'CALLAGHAN, THE DOCUMENTARY HISTORY OF THE STATE OF NEW YORK, 437–47 (Albany, Weed, Parsons & Co. 1849)), the population only increased by 50 percent to 1227, by 1776, just before the war, *see* MATHER, *supra* note 153 apps. A53, A54, but quadrupled to 3,672 by the taking of the 1800 census, *see* 1800 Census—New York, <http://www.census-online.com/links/NY/1800.html> (last visited June 25, 2005).

162. 2 TOWN RECORDS, *supra* note 14, at 9 (1877).

163. *Id.* at 25.

164. 3 *id.* at 311 (1878) (recording an April 4, 1786 meeting).

165. *Id.* at 357 (reporting an April 2, 1799 meeting).

166. *Id.* at 358, 359, 361 (reporting the 1800 meeting, the 1801 meeting, and the 1802 meeting).

the minutes of the 1802 town meeting suggest impatience with their lack of success: the overseers were ordered to meet with the trustees "to consult about keeping the poor as usual."¹⁶⁷

The position of slaves and free blacks in the community was also changing. The closing of the commons had displaced both African Americans and American Indians who had built their homes on this land, and would have generally disadvantaged those without formal property rights.¹⁶⁸ Although a number of slave manumissions are recorded in the postwar period, under a 1785 law, before a slave could be freed the overseers of the poor had to certify that the individual was "under 50 years of age and able to provide for himself."¹⁶⁹ This law suggests town resistance to the growth of a free black community, or at least the poverty facing those with freedom but no property and little opportunity.¹⁷⁰

Like many communities in the wake of the Revolutionary War, Southampton was also burdened by taxes levied to pay the war debt. Although Long Island had suffered approximately \$500,000 in property loss during the war, it was taxed \$37,000 by the state for its failure to take an active role in the war.¹⁷¹ In 1788, town residents anxiously authorized the trustees to find some way to raise money for the state taxes, and do something to ease the burden for the following year.¹⁷²

167. *Id.* at 361 (reporting an April 6, 1802 meeting).

168. *See, e.g., id.* at 228 (reprinting report of surveyors of the 1763 enclosure that "the Indian or Mulatto houses that stand upon any of the above lots or amendments, the owners of them shall have liberty to move them off if they cant agree with the owners of the land").

169. *Id.* at 319, 327.

170. There do appear to have been some, albeit inferior, educational opportunities for this population: there were at least three schools educating African Americans in Southampton, as indicated by names like "Rufus Negro" and "Silas Negro" on attendance lists of schools at which the teachers received substantially less than those at other schools. *See 5 id.* at 136-38 (recording 1796 attendance lists for North Sea, Quogue, and Ketchabonak schools, at which teacher salaries were about ten pounds per quarter, while teachers at other schools received between sixteen and eighteen pounds per quarter).

171. ADAMS, *supra* note 12, at 140-41.

172. 3 TOWN RECORDS, *supra* note 14, at 325 (1878) (reporting a December 30, 1788 town meeting).

III. OF PIERSONS AND POSTS, FOXES AND COMMONS

The lawsuit between the Piersons and the Posts arose at the turn of the nineteenth century,¹⁷³ in the midst of this economic and political turmoil. The townspeople had not recovered from their losses after the war, and the soil was depleted, making farming more difficult. The poor of the town, including the African Americans and Indians displaced with the enclosure of the commons, were a more visible and pressing problem. A few individuals, however, had experienced new wealth in the growing postwar whaling industry and West India trade. The population of the town was also changing, with new residents asserting equal rights in the common lands that the original settlers had long claimed for their own. The Piersons and the Posts were both leaders in this community, but the Piersons' position came from the town's traditional source of prestige and rights, while the Posts' came from the new sources of economic success. Their dispute, I believe, arose out of the clash between these different conceptions of the appropriate rights and uses of property.

The first place that the historical record conflicts with the case as reported is in its description of the land on which Jesse Pierson caught the fox. All of the facts relied on by the New York Supreme Court came from Lodowick Post's declaration in filing the case.¹⁷⁴ According to these facts, Post did

“upon a certain wild and uninhabited, unpossessed and waste land, called the beach, find and start one of those noxious beasts called a

173. As the records of the case have been destroyed, it is not clear exactly when the dispute arose. One historian, writing in 1935, estimated that the dispute arose in 1796. WILLIAM DONALDSON HALSEY, *SKETCHES FROM LOCAL HISTORY* 131 (1935). If an 1895 writer is correct that Jesse Pierson was walking home from teaching school at the time, then this is too early, as Jesse was only fifteen and still in school himself. See 5 *id.* at 129–30 (listing Jesse Pierson among the students at Bridghampton School in 1796). It also probably occurred well before October 1803, when Nathan Post, Lodowick's father, died, see Adams, *supra* note 12 at 222, as his insistence seemed to have been a significant factor in the prosecution of the case, see Hedges, *supra* note 15 (“Capt. Post declared Lodowick should have the fox. Capt. David Pierson declared, with equal decision, his son Jesse should have it. . . . Pierson carried the fox home. Post sued him . . .”). A safe guess is that the famous fox hunt took place sometime between 1800 and 1803.

174. See *Pierson v. Post*, 3 Cai. 175, 175 (N.Y. Sup. Ct. 1805) (“A verdict having been rendered for the plaintiff below, the defendant there sued out a *certiorari*, and now assigned for error, that the declaration and the matters therein contained were not sufficient in law to maintain an action.”); Charles Donahue, Jr., *Animalia ferae naturae: Rome, Bologna, Leyden, and Queens County, N.Y.*, in *STUDIES IN ROMAN LAW IN MEMORY OF A. ARTHUR SCHILLER*, 39, 43 n.15 (Roger S. Bagnall & William V. Harris eds., 1986) (“When a declaration is challenged as insufficient in law, the factual allegations in the declaration are taken as true.”).

fox," and whilst there hunting, chasing and pursuing the same with his dogs and hounds, and when in view thereof, Pierson, well knowing the fox was so hunted and pursued, did, in the sight of Post, to prevent his catching the same, kill and carry it off.¹⁷⁵

For generations of law students, these words have evoked a wind-swept wilderness. But Judge Henry Hedges, a prolific local historian writing in 1895, wrote that the fox

found refuge in an old shoal well near Peter's pond, not far from the ocean shore Jesse, who had been teaching school at Amagansett, on his way home saw the fox fleeing from his pursuers and run into the hiding place as a refuge. In a moment, with a broken rail, he was at the well's mouth and killed the fox¹⁷⁶

Hedges' report suggests that the Piersons had a particular claim to the land on which the fox was caught. Peter's Pond lay in the undivided lands just before the portion of Sagg Street on which both David and Jesse Pierson's home and the homes of a half-dozen other Piersons were located.¹⁷⁷ The Piersons were a farming family, and would have used the land to pasture their stock. In England, farmers resented the damage caused by English gentry chasing game over their common fields.¹⁷⁸ Lodowick, riding across the pasture closest to

175. *Pierson*, 3 Cai. at 175.

176. Hedges, *supra* note 15. Hedges did not move to Southampton until 1854, after both Lodowick and Jesse had died, but moved at age fourteen to East Hampton, and was a friend of Jesse's son David Pierson, Jr. Hedges had met Jesse and Lodowick when he was a young man, but does not seem to have discussed the case with the parties personally. See ADAMS, *supra* note 12, at 166 (noting Hedges moved to East Hampton in 1831, when he was 14, and moved to Southampton in 1854); Hedges, *supra* note 15 (stating Hedges knew Jesse and Lodowick himself). Hedges states for example, that he could not discover whether the Sanford listed as Pierson's attorney was Nathan Sanford. *Id.* His account, therefore, provides some helpful details but not a complete story.

177. HALSEY, *supra* note 173, at 200 (providing a map extending from Water Mill to Wainscott from about the year 1800 showing Peter's Pond and Sagg Street with locations of Pierson homes).

178. E.P. Thompson, for example, quotes the following farmer's protests against the protests that permitted gentry to hunt while common people were forbidden:

[I]f a keeper or game-keeper, that wears his master's livery, may come into my grounds, break down my hedges, trample over my corn with impunity, while I that am the sufferer dare not be known to have a bird in my house, I know both how to resent and how to revenge it, which every farmer knows too, as well as I

E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT* 100 (1975). Anthony Trollope, mid-nineteenth century chronicler of English hunting, wrote that hunting was only possible because the farmers themselves hunted and so were willing to tolerate the damage it caused, and that American farmers would never tolerate this imposition:

the Piersons' home with his dogs and hounds would not have been much more welcome.

Equally important, the location indicates that the fox was not caught on truly unclaimed land, but on some of the last common land in the community, over which the members in the town were in a bitter fight for ownership and control. The commons were still crucial to Southampton's agricultural economy. The sheep pastured there were looked after by a common shepherd, and families competed for the right to the "fertilizer" they left behind.¹⁷⁹ The economic and population pressure in the wake of the Revolutionary War had created increasing competition for the common land and resources of the town.¹⁸⁰ In 1796 the town residents voted that hogs be taken off the common, and that "the trustees do everything in their power by making laws to prevent the oysters being taken away."¹⁸¹ In 1798, hogs were again voted off the commons, and the trustees were further authorized to regulate the taking of seaweed.¹⁸²

The town also began to turn to the common land as a resource to commodify and sell for the benefit of the town.¹⁸³ In 1801, the trustees sold eight individuals the "sole privilege" to take fish from Great

Let him talk to the American farmer of English hunting, and explain to that independent, but somewhat prosaic husbandman, that in England two or three hundred men claim the right of access to every man's land during the whole period of the winter months! The French countryman cannot be made to understand it. You cannot induce him to believe that if he held land in England, looking to make his rent from tender young grass-fields and patches of sprouting corn, he would be powerless to keep out intruders, if those intruders came in the shape of a rushing squadron of cavalry, and called themselves a hunt. . . . Nor would the English farmer put up with the invasion, if the English farmer were not himself a hunting man.

ANTHONY TROLLOPE, *HUNTING SKETCHES, ILLUSTRATED AND WITH AN INTRODUCTION BY LIONEL EDWARDS* 80 (1952).

179. ADAMS, *supra* note 12, at 158.

180. This pressure increased in the following decades, to the point that in 1821, the Bridgehampton inhabitants wrote a petition protesting that land the town had set apart as a burial ground was now being "enclosed for ploughing or pasture . . . [and] although the remains of the deceased are not injured, as they are alike insensible to all terrestrial affairs, yet common decency requires that we your petitioners should remonstrate to your honorable body." 5 TOWN RECORDS, *supra* note 14, at 123.

181. 3 *id.* at 349 (1878) (reporting an April 5, 1796 election meeting).

182. *Id.* at 354 (reporting an April 3, 1798 election meeting).

183. Earlier measures had given individuals special privileges in the waters, but these had generally been given in exchange for services of value to the whole town. So in 1686, the town voted that Obadiah Rogers could have the privilege of a stream for a mill, provided he built the mill and provided the town with cloth at reasonable rates. 2 *id.* at 106 (1877). And in 1786, the town voted that three individuals could have the privilege to the otter pond to dig through to the salt water to create a fish pond provided they built and maintained a bridge at least twelve feet wide. 3 *id.* at 306-07 (1878).

Fresh Pond and the adjoining creek, along with the right to obtain a ten dollar penalty from anyone else who fished with nets there.¹⁸⁴ In 1804, the Suffolk Gazette advertised that by order of the trustees, the seine fisheries in "all the bays and waters belonging to the town of Southamptton" would be hired out between December and the following April.¹⁸⁵ In April of the same year, the town complained of the encroachments made by individuals enclosing the common lands, voting that the trustees should order these individuals to "throw it out or pay for it, as the trustees may think proper."¹⁸⁶

New demands on the commons led to bitter conflict between the proprietors and the rest of the town residents.¹⁸⁷ The proprietors would have believed that justice was on their side. As they had argued to Governor Andros a century before, their rights were based on the risks they incurred in settling the town, their long residence, as well as the authorization they had purchased from Lord Stirling, the Shinnecock Tribe, and Governors Andros and Dongan. At the same time, town residents without rights in the commons would have seen such claims as inimical to the spirit of the American Revolution: why should time, inheritance, or English patent give any town resident a superior right to acquire and use property? The resulting disputes were "very injurious to the peace and harmony of said inhabitants."¹⁸⁸ In the decade after *Pierson v. Post*, the proprietors would push their demands even further, claiming exclusive rights even in the products of the town's waters.¹⁸⁹ During this period, "the word Proprietor was another name for grasping, unscrupulous avarice."¹⁹⁰

By 1816, each side acknowledged the need to resolve the conflict, and after much discussion, agreed that the town would cede all its

184. *Id.* at 359-60 (reporting an Oct. 13, 1801 order). The price was listed as "\$7.50 pearly," which probably should be yearly. *Id.*

185. *The Seine Fisheries*, 1 SUFFOLK GAZETTE, no. 43, Dec. 10, 1804, at 4.

186. 3 TOWN RECORDS, *supra* note 14, at 367 (1878) (reporting an April 3, 1804 town meeting).

187. In New England, similar conflicts had arisen in the previous century as nonproprietors began to outnumber proprietors in those towns. AKAGI, *supra* note 115, at 124-34; *see also* KONIG, *supra* note 134, at 50 (discussing conflicts over shares in commons in Massachusetts after 1660 when General Court limited creation of new commonage shares).

188. NEW YORK LEGISLATURE, JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW YORK at 535 (entry on Mar. 21, 1818).

189. *See* Pelletreau, *supra* note 14, at ix ("[I]t was not until they began to lay claim to all lands under water, and attempted to control the fishing privileges, that any serious controversy arose.").

190. *Id.*

claims to the common lands in favor of the proprietors, and the proprietors in turn would cede their claims to the products of the waters.¹⁹¹ The new property division required a new division of governmental power. The proprietors elected their own trustees—the Trustees of the Proprietors—to administer their rights.¹⁹² In 1818, the New York legislature enacted this resolution as state law.¹⁹³ Even after this resolution, the town and proprietors continued to fight over their rights in the resources. One historian, writing in 1962, declared:

I have myself . . . heard the claim made for them that the fee [in the highway] is still theirs, and that if the town abandoned any highway . . . on which the Proprietors had originally allotted land on either side only, that the road bed of the highway so abandoned would revert to the representatives of the Proprietors and not to the abutting property owners.¹⁹⁴

No proprietor with a stake in this struggle would have called the land where the fox was caught, as Lodowick Post's declaration did, an "unpossessed and waste land." To a proprietor it might not have been individually divided but it was certainly possessed—by the proprietors.

David Pierson and his first-born son Jesse were clearly among the proprietors to the common lands. Both were descendants of Henry Pierson, one of the original settlers of Southampton.¹⁹⁵ The wife of one of the original undertakers had sued Henry in 1664, challenging his right to a share in the common lands, but a jury rejected her claims.¹⁹⁶ After this point the Pierson descendants were consistently listed among those eligible to draw for each division of lands, and David Pierson appears on this list for the 1782 division.¹⁹⁷ The Piersons also appear to have been among those that continued to

191. ADAMS, *supra* note 12, at 59.

192. *Id.* at 59–60.

193. An Act relative to the common and undivided lands and marshes in Southampton, in the county of Suffolk, Act of Apr. 15, 1818, ch. CLV, 1818 N.Y. Laws 140–41, 41st sess., 140–41.

194. ADAMS, *supra* note 12, at 227.

195. Henry was probably the brother of Abraham Pierson, the town's short-lived first minister. Pelletreau, *supra* note 14, at vi. Henry first appears in the town records in 1643, and served as town clerk for many years; the archivists of the town records are thankful for his fine hand. He served on the committees negotiating with the Shinnecock tribe and Governor Andros. Henry's son, also Henry Pierson, negotiated with Governor Dongan and was the town's first delegate to the colonial New York Assembly in 1695.

196. 2 TOWN RECORDS, *supra* note 14, at 41–42 (1877).

197. 3 *id.* at 291–301 (1878).

press the claims of the proprietors after the 1816 compromise. David Pierson Jr., Jesse's son and David's grandson, was one of the defendants in the "famous Sagg Mill Cause" of 1839, in which several proprietors set up two windmills in the undivided lands claiming (unsuccessfully) they had obtained a legal right to do so from the trustees of the proprietors.¹⁹⁸

David Pierson Sr. was also an avid enforcer of community property norms. Starting in 1771, when he was just twenty, David was elected at least thirteen times either as a town "fence viewer," charged with ensuring that individuals maintained their portion of fence against straying animals and did not fence in land that was not their own, or as a commissioner of highways, charged with enforcing the public rights-of-way and compensating landowners for new roads on their land.¹⁹⁹ David was a town leader in other ways as well: he was three times elected as town trustee, once as commissioner of schools, and once as a tax collector.²⁰⁰ He served on the committee charged with bringing a new minister, Reverend Aaron Woolworth, to the town in 1787,²⁰¹ and was elected captain of Bridgehampton's first company of Minute and Militia Men in February 1776.²⁰² David was known as a strict Calvinist,²⁰³ and his gravestone reads, "He was

198. HALSEY, *supra* note 173, at 126-28; *see also* ADAMS, *supra* note 12, at 227.

199. 5 TOWN RECORDS, *supra* note 14, at 105-06 (listing his 1771 selection as commissioner of highways); *id.* at 106-07 (listing his 1772 selection as commissioner of highways); *id.* at 107-08 (listing his 1774 selection as trustee); *id.* at 112-13 (listing his 1784 selection as trustee and commissioner of highways); 3 *id.* at 321 (1878) (listing the 1788 selection as commissioner of highways); *id.* at 326 (listing his 1789 election as commissioner of highways); *id.* at 330 (listing him in 1790 as commissioner of highways); *id.* at 331 (listing his 1790 selection as fence viewer); *id.* at 333 (listing his 1791 selection as fence viewer and commissioner of highways); *id.* at 334-35 (listing his 1792 selection as fence viewer and commissioner of highways); *id.* at 337 (listing his 1793 election as fence viewer); *id.* at 344-45 (listing his 1795 election as tax collector, fence viewer and overseer of highways); *id.* at 348 (listing his 1796 election as fence viewer and trustee); *id.* at 354 (listing his 1798 selection as fence viewer); *id.* at 357 (listing his 1799 selection as fence viewer and commissioner of schools).

200. *Id.* at 107-08 (listing his 1774 selection as trustee); *id.* at 112-13 (listing his 1784 selection as trustee); 3 *id.* at 344-45 (1878) (listing his 1795 election as tax collector, fence viewer and overseer of highways); *id.* at 348 (listing his 1796 selection as trustee); *id.* at 357 (listing his 1799 selection as fence viewer and commissioner of schools).

201. *See* ADAMS, *supra* note 12, at 193-94 (reprinting an agreement between Reverend Woolworth and the town).

202. *Id.* at 126-27. Although Captain Pierson and his family were forced to flee to Connecticut after the Battle of Long Island, Pierson reenlisted there, and had achieved the rank of corporal by 1781. *See* MATHER, *supra* note 153, at 505, 1035 (listing David Pierson among refugees from Long Island to Connecticut and his service in the Connecticut militia).

203. Hedges, *supra* note 15.

distinguished for strong mental power firmness of character & strict integrity.”²⁰⁴ Jesse Pierson, David’s son, was born in 1780²⁰⁵ during the Piersons’ refuge in Connecticut during the Revolutionary War, and he went on to serve as a schoolmaster in Sag Harbor for many years.²⁰⁶ The Piersons seem to have been central members of the local community, and adherents, perhaps to the point of rigidity, to its traditions.

Where were the Posts in this picture? Although one genealogy records Nathan Post as among the descendants of Lieutenant Richard Post, who immigrated to Southampton from Lynn in the 1640s and whose descendants had a share in the commons,²⁰⁷ another does not.²⁰⁸ If the first genealogy is correct, Nathan was unusually alienated from his family. He is never recorded as living in the same area as his alleged father or brothers, and as an adult he lived in the hamlet of Bridgehampton rather than in town of Southampton where they were located.²⁰⁹ Nathan is not listed as an executor in his alleged brothers’ wills, although they list each other as executors.²¹⁰ Similarly, Nathan listed only his young son and his friends as his executors.²¹¹ Nathan is also not listed among the lotters for the 1782 division of the

204. ADAMS, *supra* note 12, at 319.

205. *Id.*

206. HALSEY, *supra* note 173, at 131.

207. HOWELL, *supra* note 83, at 353–54.

208. See LONG ISLAND GENEALOGIES 263–65 (Mary Powell Bunker compiler, Joel Munsell’s Sons 1895) (listing Richard Post’s descendants; Nathan Post is not among them).

209. See 3 TOWN RECORDS, *supra* note 14 (1878) (listing many Posts on map of Main Street, Southampton at the beginning of the volume); HALSEY, *supra* note 173, at 199 (showing Nathan and Lodowick Post on map extending from Water Mill to Wainscott about the year 1800). Neither Nathan nor Lodowick ever appears near the names of any other Posts on the various censuses of the period, providing more evidence that they lived in different areas. Compare 3 TOWN RECORDS, *supra* note 14, at 392 (1878), with *id.* at 396 (reprinting the 1776 census in which Nathan Post is east of Water Mill and is not listed with the other Posts who are west of Water Mill).

210. In 1790, Henry Post appointed his wife and “my two brothers Stephen Post & Jeremiah Post” joint executors of his estate. Will of Henry Post (written 1790, probated 1791), in Suffolk County Surrogate’s Court, Liber A at 240 (on file with the author). After Henry died in 1791, Stephen wrote his own will, designating his brother Jeremiah and his son Samuel his executors. Will of Stephen Post (written 1791, probated 1831), in Suffolk County Surrogate’s Court, file 2251 (on file with the author).

211. In making a will in 1798 Nathan designated his twenty-one-year-old son Lodowick and his friends Lemuel Pierson and Thomas Gelston as executors of his estate, rather than Stephen or Jeremiah, who were both living at the time. Will of Nathan Post (written 1798, probated 1804), in Suffolk County Surrogate’s Court, Liber B, at 272 (on file with the author).

commons.²¹² He appears either not to have been descended from the original settlers of the town, or not to have inherited a right to the common lands. In either case, the contest over the fox would have added significance to both sides. For the Piersons, it would have been a fight for the hard-earned right for privileges in the common lands, while for the Posts, it would have been a fight for equal status within the community.

The record also suggests another reason for the division between the families. The Piersons appear to have been educated gentleman farmers. The Posts, however, were newly wealthy and eager to display it, and their wealth came not from agriculture but from commerce and profit from the War. For them, the land was not a resource for the thrifty farmer, but a site of recreational hunting. The conflict between the families thus concerned not only use of land, but also how status in the community would be defined.

Nathan Post had the misfortune of having the most detailed description of him appear in the memoirs of Stephen Burroughs, who was a schoolmaster at Bridgehampton in 1793 and 1794. Burroughs clashed with Bridgehampton minister Reverend Aaron Woolworth over the choice of books for a new town library.²¹³ Burroughs was eventually forced to leave the town (not a unique experience for him—Burroughs seems to have been too nonconformist for his own

212. 3 TOWN RECORDS, *supra* note 14, at 294–301 (1878) (listing lotters for 1782 division). There are two minor pieces of evidence that Nathan came to America from Scotland in the early 1770s. First, the family bible, in which the births, deaths, and marriages starting with the births of Nathan and his wife are recorded, was printed in Edinburgh, Scotland in 1769. Bible Records of the Post Family (Southampton Colony Chapter of the Daughters of the American Revolution, compiler, 1949) (East Hampton Library, The Pennypacker Long Island Collection, East Hampton, New York). Second, the name Lodowick, which the couple named their first born son, is of Scottish origin. COOPER, *supra* note 10. These facts, however, are far from conclusive, especially because Nathan appears already to have been a man of property by 1776, and because immigrants adopted many different name spellings once they reached the new world.

213. See 2 STEPHEN BURROUGHS, MEMOIRS OF STEPHEN BURROUGHS 59 (B.D. Packard 1811) (“[T]he clamor still increased against the books which I had offered for the library. Mr. Woolworth and Judge Hurlbut were in a state of great activity on this subject, and their perpetual cry was, that I was endeavoring to over throw all religion, morality and order in the place; was introducing corrupt books into the library, and adopting the most fatal measures to over throw all the *good old establishments*.”). The library books that generated the controversy highlight the difference between our time and theirs: they included Plutarch’s lives, Voltaire’s Histories, and Hume’s history, *id.* at 59–60, all of which seem to have been too racy for some of the parish.

good),²¹⁴ and his memoirs dwell on his own irreproachable conduct in the affair and the villainy of all who persecuted him.

Nathan Post was one of Reverend Woolworth's three strongest supporters in the library affair,²¹⁵ and Burroughs paints him—like the other supporters²¹⁶—as dishonest and of little intelligence. He describes Nathan's captaincy during the War as one of cowardice toward the enemy and cruelty toward his men,²¹⁷ and portrays his war profits as the result of cheating his officers of their full share.²¹⁸ After he used his war prizes to purchase a one-third share in a ship in the West India trade, Burroughs claims, Post mysteriously grew rich, acquiring "a considerable farm, and the most elegant building of any in the county," while his two partners suffered loss and ultimate bankruptcy.²¹⁹ Burroughs tells us that

Capt. Post descended from parentage extremely low and poor; accordingly his education was rough and uncouth. Yet he possessed a strong desire to be thought a man of information and importance. This frequently led him to tell large, pompous stories, of which himself was ever the hero. He was a great swaggerer over those whom he found calculated to bear it; but to others he was supple, cringing, and mean.²²⁰

How much of this should we credit? Nathan's gravestone (not surprisingly) presents a very different picture, stating that "He was a respectable Magistrate, a kind relation, a good Patriot and an honest man. The memory of the just is blessed. This corruptible shall put on incorruption and this mortal immortality."²²¹ The reality is probably somewhere between the two accounts. Service on a privateer, for example, was perhaps not the war service most demanding of courage or self-sacrifice, consisting of running from warships with more fire

214. See *id.* at 89–90 ("Judge Hurlbut and Henry Pierson, Justices of the Peace, granted a warrant for the removal of me, my wife and children."); *id.* at 102 ("I LEFT Long Island.").

215. See *id.* at 40–41 (listing Captain Post as a "most intimate companion[] with whom Mr. Woolworth perpetually associated").

216. See, e.g., *id.* at 40 ("[Justice Hurlbut] likewise was a person of very moderate abilities, full of religious Professions, but not so careful to commend himself to the consciences of others for his dishonesty.").

217. *Id.* at 41.

218. See *id.* ("[S]ome small prizes fell into his hands; . . . besides some small *donations* from the private property of the officers who fell under his power.").

219. *Id.*

220. *Id.*

221. Transcribed in ADAMS, *supra* note 12, at 334.

power, capturing unarmed merchant vessels, and profiting from the capture.²²² In addition, unlike other men of his age, Nathan did not sign up for the militia before the Long Islanders had to flee to Connecticut in 1776.²²³ But it seems unlikely that Nathan would have been promoted from first lieutenant to captain²²⁴ had his courage and honesty been as little as Burroughs would have us believe. It is also unlikely that Nathan would have been elected a town trustee soon after Burroughs knew him²²⁵ had he been known to have abused his men, cheated his officers, and defrauded his partners.²²⁶

But Nathan's livelihood as a merchant mariner in the West India trade and the opulence of his home are both corroborated by other writers.²²⁷ Contemporary maps show the house in the very center of

222. See 8 NAVAL DOCUMENTS OF THE AMERICAN REVOLUTION (William James Morgan ed., 1979) [hereinafter NAVAL DOCUMENTS] at 12, 130–31 (1980) (reprinting journal accounts of Post's ship the *Revenge*); 9 *id.* at 857, 963, 967 (1986) (reprinting journal and newspaper accounts of the *Revenge*). Of course, the fans of Patrick O'Brien's *Master and Commander* series might disagree.

223. MATHER, *supra* note 153, 994–97 (reprinting lists of Suffolk County militia).

224. When the *Revenge* was originally commissioned in 1777, Joseph Conkling was captain and Post was first lieutenant, 7 NAVAL DOCUMENTS, *supra* note 222, at 995–96 (1976) (reprinting the shipping articles of the *Revenge*), but by 1779 Post is listed as Captain. 2 PUBLIC RECORDS OF THE STATE OF CONNECTICUT 346 (1895) (reprinting a 1779 record referring to Post as Captain of the *Revenge*).

225. 3 TOWN RECORDS, *supra* note 14, at 348 (1878) (recording his 1796 selection as trustee).

226. Similarly Nathan's will designates his "friend Lemuel Pierson" as one of his executors. Will of Nathan Post (written 1798, probated 1804), in Suffolk County Surrogate's Court, Liber B, at 272 (on file with the author). Lemuel was an elder (a lay leader of the Presbyterian Church) and would hardly have claimed friendship with a man of the character Burroughs describes. Gravestone transcribed in ADAMS, *supra* note 12 at 320 ("[Lemuel] was many year an Elder in the Presbyterian Church in this place & adorned his profession by a life of exemplay piety.").

227. Hedges writes of Post:

Engaged in the West India trade, he had been sufficiently successful to own a large farm, build a capacious dwelling, decorate its walls, wainscot its rooms, and finish his house in what then was thought a superior style. He owned slaves, and in the kitchen of the dwelling, he fixed, for their correction, a whipping-post

Hedges, *supra* note 15. Adams wrote of the house in 1962 as still being one of the notable homes of Southampton, although by then it was known as the Sayre House. ADAMS, *supra* note 12, at 222. Further testament to Nathan's wealth is that in a time when few individuals left monetary bequests in their wills (most bequests consisted of furniture, clothing, and livestock, which Nathan left as well), Nathan left his son Nathan Jr. five hundred pounds, and his daughter Peggy one hundred pounds, in addition to the rest of his estate which went to Lodowick. Will of Nathan Post (written 1798, probated 1804), in Suffolk County Surrogate's Court, Liber B, at 272 (on file with the author).

town, on the triangular commons that formed its hub.²²⁸ His lack of education is substantiated as well. In the 1777 agreement to commission the privateer *Revenge*, Nathan was one of only three in a crew of forty-eight to sign with an X, the sign of illiteracy.²²⁹ There may also be hints of the desire to appear important that Burroughs portrays. His gravestone designates him "Esquire,"²³⁰ formerly a designation for a knight or gentleman or landowner, but in the contemporary documents of the town usually used to indicate that someone was an attorney. Nathan's bequest of his "riding chair" to his wife also evokes images of a country squire elevating his height and status as he rode about the town.²³¹ It also may suggest desire to curry favor with the powerful for an uneducated man to so actively oppose the purchase of history books for the town library.

We can also make some guesses at how Nathan Post and his wealth would have been perceived in Bridgehampton. The people of the town were primarily agricultural, and were not, as a rule, given to displays of wealth. Burroughs wrote of Bridgehampton that

Economy was practiced here, upon the closest system, by far, of any with which I was ever acquainted. . . . The people were so extremely attached to their own modes and customs, that it produced a fondness for their own society and disrelish to other customs, beyond parallel; hence emigration from their internal population was less frequent here, than in places elsewhere. Therefore the country had become populous, and the soil so exhausted, as not to be luxuriant. The land was generally divided into small parcels amongst the proprietors, from forty to ten acres. Under these circumstances, rather than emigrate into those parts where land was in greater plenty, they contented themselves with living close, poor, and careful²³²

Yale president Timothy Dwight, who toured Long Island in 1804, also remarked on the adherence to custom on Eastern Long Island

228. HALSEY, *supra* note 173, at 200 (map extending from Water Mill to Wainscott from about the year 1800).

229. See 7 NAVAL DOCUMENTS, *supra* note 222, at 996 (Jan. 19, 1777 agreement). By 1787 he had learned to sign his name, signing the Woolworth agreement with his own name rather than the X used by one subscriber, Stephen Stambro. ADAMS, *supra* note 12, at 191–94 (reprinting the "Woolworth Agreement" of July 2, 1787).

230. *Id.* at 334.

231. Will of Nathan Post (written 1798, probated 1804), in Suffolk County Surrogate's Court, Liber B, at 272 (on file with the author).

232. BURROUGHS, *supra* note 213, at 42–43.

generally, the dominance of agriculture in Bridgehampton, as well as the appearance of decline in Southampton.²³³ The only wealth Dwight noted was among those who, like Captain Post, had grown wealthy in commerce and shipping in the wake of the war.²³⁴ Nathan, who flourished in commerce while his neighbors struggled to farm and flaunted his wealth while they followed an ethic of thrift, might not have been widely admired by his neighbors.

Lodowick Post's fox hunting would not have helped this reputation.²³⁵ Justice Livingston declared the fox "*hostem humani generis*," the enemy of all the world, one whose "depredations on farmers and on barn yards, have not been forgotten; and to put him to death wherever found, is allowed to be meritorious, and of public benefit."²³⁶ There is indeed some evidence that the death of this "saucy intruder" would have been welcome in the town. First, chicken keeping was apparently a universal local occupation, inspiring the following lines by a visiting poetess:

They couldn't change the subject I'm sure if they were hired,
They talked of hens and chickens till my very soul was tired,
And fed me on young roosters for breakfast, dinner, and tea,
Until I dreamed pin feathers sprouted out all over me.²³⁷

In this chicken keeping community, foxes were a minor menace. On April 5, 1791, the town agreed on a fee of four shillings to be provided for every fox killed between March 20 and June 20.²³⁸ There is also evidence that this bounty was enough to induce some to chicanery in claiming it; the law provided that to claim the reward individuals

[S]hall first carry them before the nearest magistrate being yet green and unstuffed, and shall satisfy the said magistrate that the said fox or foxes were taken within the time afore limited, and the said magistrate shall cut off the tip of the nose of said fox and forward a

233. 3 TIMOTHY DWIGHT, TRAVELS IN NEW ENGLAND AND NEW YORK 219-20, 222-23 (Barbara Miller Solomon ed., Harvard Univ. Press 1969) (1822).

234. *Id.*

235. For a comprehensive and convincing discussion of the status of fox hunting as a recreational activity rather than a means of reducing the fox population, see McDowell, *supra* note 15.

236. *Pierson v. Post*, 3 Cai. 175, 180 (N.Y. Sup. Ct. 1805) (Livingston, J., dissenting).

237. ADAMS, *supra* note 12, at 160 (reprinting Hannah Elliston, Bridgehampton Chickens).

238. 3 TOWN RECORDS, *supra* note 14, at 332-33 (1878).

certificate by the bearer of said fox to the Town Clerk that he is satisfied in respect to the time when the fox was taken.²³⁹

But Lodowick's hunt with his horses and hounds might have been perceived as pretension, even nuisance, instead of community service. In England, hunting was a flashpoint for struggles over the use and regulation of land and broader political struggles.²⁴⁰ Hunting was considered a royal prerogative, and only men of property could legally hunt game such as deer and rabbits.²⁴¹ These laws were explicitly justified by class distinctions. The eighteenth century *A New Abridgement of the Law* stated that the common law had not placed restrictions on who could hunt, but that

as by this toleration [of the common law] persons of quality and distinction were deprived of their recreations and amusements, and idle and indigent people, by their loss of time and pains in such pursuits, were mightily injured, it was thought necessary to make laws for preserving the game from the latter.²⁴²

Although hunting for vermin like fox was legally open to anyone,²⁴³ in practice preserving the hunt became the concern and occupation of the gentry.²⁴⁴ The ethos of hunting, moreover, was specifically that it not be functional; English gentry scorned as "poachers" those who, regardless of whether they were legally allowed to hunt, hunted to kill or sell their prey.²⁴⁵

At the time of Lodowick's hunt, foxhunting was not instrumental, but was established as a leisure activity of wealthy men.²⁴⁶ In fact, the goal of the hunt in America was not even

239. *Id.* at 333–34.

240. As early as 1389, there are reports of illegal hunting parties "under . . . colour" of which the peasants "make their assemblies, conferences, and conspiracies for to rise and disobey their allegiance." P.B. MUNSCHÉ, *GENTLEMEN AND POACHERS* 11 (1981). E.P. Thompson's *Whigs and Hunters: The Origin of the Black Act*, provides a lovely history of how both illegal hunting and the suppression of it in the 1720s were the expression of battles between elites over governmental control and patronage. Thompson, *supra* note 178.

241. See MUNSCHÉ, *supra* note 240, at 8–10.

242. 4 MATTHEW BACON, *A NEW ABRIDGEMENT OF THE LAW* 5 (Sir Henry Gwillim ed., 7th ed. 1832) (1736).

243. MUNSCHÉ, *supra* note 240, at 3–4.

244. See *id.* at 143.

245. *Id.* at 52–54.

246. Caroline Jones, *Fox Hunting in America*, 24 AM. HERITAGE 62, 65 (Oct. 1973) ("A pack of hounds became as integral a part of a gentleman's assets as his 'horses, slaves and guns.'").

necessarily to kill the fox, as a previously hunted fox might lead a better chase.²⁴⁷ Fox hunting required substantial investment in the acquisition and upkeep of foxhounds and horses.²⁴⁸ It was pursued, moreover, in the English style. An Englishman had introduced the sport to Long Island in 1768, and imported his dogs, horses, and huntsmen from England for the purpose.²⁴⁹ There were of course no property qualifications for the hunt in America, and George Washington, icon of American democracy, himself was an avid fox hunter.²⁵⁰ But Washington was a product of the vast plantations of Virginia where fox hunting flourished.²⁵¹ In the eastern Long Island community Dwight and Burroughs described, with its small parcels of land and traditional, thrifty farmers, fox hunting as Lodowick practiced it signaled aspiration to a foreign and scorned lifestyle: the use of the land and its resources for recreation rather than sustenance.²⁵²

Lodowick Post, storming through this land with his company of men, dogs, and horses, and denying Jesse Pierson the profits of his quick action, would have inspired an ire similar to that raised by the English gentry trampling through the common pastures. This resentment would be doubled by Lodowick's demand for the profits of the common land in which the Piersons were fighting to preserve their special rights.²⁵³ To Nathan and Lodowick Post, however, Jesse

247. *Id.* at 62, 64.

248. *Id.* at 65–67.

249. *Id.* at 68.

250. *Id.* at 67. Washington's introduction to the sport highlights its elite nature. Lord Thomas Fairfax, who held grants to the vast swath of land that is now Shenandoah National Park, introduced Washington to fox hunting when the future president was a land surveyor helping Fairfax with the legal disputes over the land. *Id.*; JOSEPH J. ELLIS, *HIS EXCELLENCY, GEORGE WASHINGTON* 10 (2004) (discussing the surveying job and the Fairfax land holdings). Ellis describes the Fairfaxes as one of the two greatest influences on young Washington, describing them as "a living remnant of European feudalism and English-style aristocracy, firmly imbedded within Virginia's more provincial version of country gentlemen. As such, they were the supreme example of privileged bloodlines, royal patronage, and what one Washington biographer has called 'the assiduous courting of the great.'" *Id.* at 10. Lord Fairfax's avid foxhunting was part of this English gentility.

251. Jones, *supra* note 246, at 66–67.

252. In fact fox hunting was much slower to catch on in New England, whose puritan ethos was more similar to that of the eastern tip of Long Island, than it was in New York City and the states further south. *Id.* at 68.

253. Indeed in England, conflict between the working class that wants to use common access rights to ramble in the country and the upper class that wants to use them for fox hunting has continued into the 21st century. See Alan Cowell, *Just rambling like a fox; Some private land*

Pierson's rude violation of the traditions of the hunt would have been a denial of the status they felt they had earned in the community. Their anger would also have been compounded by the conflict over the commons, with Jesse's refusal to return the fox taken as a statement that they were not equal members of the town. For both sides, it would not have been about the fox, but about the distribution of status and resources within the community.²⁵⁴

IV. THE FOX IN COURT

It is unlikely that the parties really spent a thousand pounds prosecuting the case as local lore claimed by 1895.²⁵⁵ But they do seem to have retained the very best of attorneys for their cause.²⁵⁶ The Colden listed as Post's lawyer may have been David Cadwallader Colden. The grandson of the former lieutenant governor and scholar Cadwallader Colden, David was appointed the U.S. District Attorney for New York City in 1798, was also a leading practitioner of commercial law, and later served as a U.S. Representative and Mayor

open to English walkers, INT'L HERALD TRIB., Sept. 20, 2004, at I (describing class tensions that contribute to a modern day dispute between hunters and walkers).

254. E.P. Thompson argues that this kind of conflict was also at the heart of the Black Act, the infamous 1723 law that created fifty capital offenses associated with poaching game. THOMPSON, *supra* note 178, at 21–22 (describing the Black Act). Thompson writes,

What was at issue was not land use but *who* used the available land: that is, power and property-right. . . . The forest officialdom, by enlarging and reviving feudal claims to forest land use—essentially claims for the priority of the deer's economy over that of the inhabitants—were using the deer as a screen behind which to advance their own interests.

Id. at 99.

255. Hedges, *supra* note 15. The highest annual salary of a schoolteacher, for example, was only forty pounds, and the average salary was only about eighteen. 5 TOWN RECORDS, *supra* note 14, at 126–31 (printing attendance lists and teacher salaries in Southampton in 1796). Nathan Post's entire bequest to his second born son in 1798 was only 500 pounds, and to his daughter 100. Will of Nathan Post (written 1798, probated 1804), in Suffolk County Surrogate's Court, Liber B, at 272 (on file with the author). By 1935 another writer had multiplied the figure to \$10,000 each. HALSEY, *supra* note 173, at 118. In a case that involved no discovery, almost no documents, and only two arguments, these crippling lawyer fees are probably more the product of the inflation of the imagination than the truth.

256. In a very interesting recent paper, Angela Fernandez argues that in the New York Supreme Court the case may have been regarded as a kind of judicial pedagogical exercise, a chance for Chancellor Kent to run his associate justices (several of them former students), through their jurisprudential paces. Fernandez, *supra* note 15. Professor Fernandez suggests that the preeminence of the lawyers might be explained by the apparent orchestration of a high-toned debate before the court. *Id.* at 57.

of New York.²⁵⁷ The Sanford listed as arguing for the Piersons would almost certainly have been Nathan Sanford, who insisted on the one-d spelling that appears in the opinion (most of the family spelled it "Sandford").²⁵⁸ Sanford had been born in Bridgehampton, and was very much the local boy made good. He was the child of uneducated parents, but with the encouragement of the Piersons was able to attend the prestigious Hayground Academy.²⁵⁹ He went on to Yale in 1796, earned admission to the New York bar in 1799, and was appointed U.S. Commissioner of Bankruptcy in 1802 and U.S. District Attorney for New York by 1803.²⁶⁰

Colden would later publish a book on the Steamboat Act,²⁶¹ and Sanford was known for his ability with languages.²⁶² The presence of two such accomplished attorneys would explain their facility with classical sources.²⁶³ It might also explain the odd fact that the case was first heard by the Justice Court in Queens County²⁶⁴ although the incident had occurred in Suffolk County. This may have been a concession to the Posts' New York-based and Queens-born attorney, an effort to avoid any local bias in favor of the Piersons, or even an attempt to overcome local knowledge that the land was not truly unpossessed as Post claimed. Whatever the strategy, it worked: Lodowick won the first round.²⁶⁵

257. 5 AMERICAN NATIONAL BIOGRAPHY 500 (John A. Garraty & Mark C. Carnes eds., 1999).

258. Nathan is reputed to have said that he didn't have time for more than one "d." Conversation with Ann Sandford, in Southampton, Long Island, N.Y. (Aug. 16, 2005).

259. *Id.*

260. 9 THE TWENTIETH CENTURY BIOGRAPHICAL DICTIONARY OF NOTABLE AMERICANS (Rossiter Johnson & John Howard Brown eds., 1904) (entry under "Sanford, Nathan"). Sanford would later become a U.S. Senator and then Chancellor of the State of New York. *Id.* Not satisfied with professional success, Sanford married three times. *Id.* The third time was at the White House to the daughter of a signer of the Constitution and near relative of John Quincy Adams. *Id.* Sanford also built a marble adorned mansion in Flushing, Queens, in which he died in 1838. *Id.*

261. DAVID CADWALLADER COLDEN, A VINDICATION OF THE STEAM BOAT RIGHT GRANTED BY THE STATE OF NEW-YORK IN THE FORM OF AN ANSWER TO THE LETTER OF MR. DUER (1818).

262. Hedges, *supra* note 15.

263. Sanford's retort to Colden's use of Barbeyrac that "[t]he only authority relied on is that of an annotator," *Pierson v. Post*, 3 Cai. 175, 176 (N.Y. Sup. Ct. 1805), in particular, shows an impressive facility with the sources and priority of classical law. Charles Donahue, however, claims that neither side appropriately interpreted the Roman law. Donahue, *supra* note 174, at 39-40.

264. *Pierson*, 3 Cai. at 176.

265. *Id.*

The parties probably had little to do with the argument of the case in the New York Supreme Court. The case was heard in the August term of the court, and so would have been argued in Albany, a distance of over two hundred miles and many days from the parties' homes. Nathan Post, moreover, died in October 1803, two years before the case was decided. In addition, the jurisdiction of the court at the time, moreover, was strictly limited to questions of law,²⁶⁶ and the sole source of facts was Post's original declaration.²⁶⁷ Finally, although Pierson had presented six potential grounds for appeal, the New York Supreme Court considered only one.²⁶⁸ By this time the case reflected a different agenda, that of one of the nation's leading courts working to forge an American legal tradition.²⁶⁹ For the justices, the apparently meaningless dispute about the fox, combined with the scholarly arguments of the attorneys, presented an opportunity to test legal reasoning on a "novel and nice question."²⁷⁰

The appellate court reversed the lower court's decision and awarded the fox to Pierson. In an opinion by Associate Justice Daniel Tompkins, the court held that possession of a wild animal went to the one who first captured him. Today, the long quotations in Latin, the reliance on a sixth century Roman treatise, and the careful discussion of the medieval and enlightenment commentaries on the treatise, all smack of a legal system hopelessly caught in the past. At the time, however, the choice of sources was revolutionary.

First, neither opinion cited Blackstone's *Commentaries on the Law*. This is a surprising omission: Blackstone stated the principle of possession of wild animals by occupancy,²⁷¹ had been cited to the court by the parties,²⁷² and probably provided the attorneys with many of the citations to the ancient treatises that they relied on. Equally telling is the majority's quick conclusion that "[l]ittle satisfactory aid can, therefore, be derived from the *English* reporters."²⁷³ Blackstone

266. Butler et al., *supra* note 3, at 933–34.

267. See Donahue, *supra* note 174, at 43 & n.15 (noting that procedural rules of time required that the declaration of the losing party be taken as true).

268. Pierson, 3 Cai. at 180 (Livingston, J., dissenting).

269. For an argument that this judicial agenda was even more pointed, and included an effort by Chancellor Kent to use the case as a pedagogical exercise, see Fernandez, *supra* note 15.

270. *Id.* at 179–80 (Livingston, J., dissenting).

271. BLACKSTONE, *supra* note 29, at *391–92, *403.

272. Pierson, 3 Cai. at 176.

273. *Id.* at 178.

was the dominant legal text of the day,²⁷⁴ and New York like most of the colonies had adopted the English common law by statute, claiming its principles as the privilege of an independent people.²⁷⁵ But at the turn of the century, state courts, with New York often in the lead, began to reject reliance on English law in favor of principles designed to serve the new republic.²⁷⁶ Indeed St. George Tucker, in his introduction to the 1803 edition of Blackstone, attacked the applicability of English law to the states and used the inapplicability of English property law as a particular example.²⁷⁷ In declining to discuss the English authorities, and relying on ancient Roman law on the one hand and Enlightenment era philosophers on the other, the court at once rejected England as the source of all legal rules and tied American law to the universal principles these sources implied.²⁷⁸

Judges at this time were not only rejecting English law as a core source of authority, but were also beginning to see themselves as makers of the law, deciding cases based on policy as well as precedent.²⁷⁹ *Pierson v. Post* reflects this trend. In writing the majority opinion, Justice Tompkins is not content to rely unquestioningly on the Roman sources, but also affirms their wisdom as a matter of

274. ALEXANDER, *supra* note 26, at 47.

275. MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860*, at 4-6 (1977). The perceived "privilege" of the common law stemmed in part from Calvin's Case, an English case stating that infidels in a conquered country were not subject to English law until it was adopted by positive enactment, while English citizens carried their own law with them. *Id.* at 17. In receiving the common law, the colonies declared themselves independent, with all the rights of Englishmen, and not a conquered people. *Id.*

276. *Id.* at 20-27.

277. ST. GEORGE TUCKER, *BLACKSTONE'S COMMENTARIES*, at iii-iv (Rothman reprint 1969) (1803). Although Tucker admitted that before the *Commentaries* students of law "were almost destitute of any scientific guide to conduct their studies," since its publication, "the student who had read the COMMENTARIES three or four times over, was lead to believe that he was a thorough proficient in the law, without further labour, or assistance," a phenomenon with "effects almost as pernicious" as the former. *Id.* The American Revolution, he wrote, had "produced a corresponding revolution not only in the principles of our government, but in the laws which relate to property, and in a variety of other cases, equally contradictory to the law, and irreconcilable to the principles contained in the Commentaries." *Id.* at iv-v; see also HORWITZ, *supra* note 275, at 11 (discussing the Tucker edition).

278. In searching for an identity separate from their largely English roots, the founders likened their society to the ancient democracies of Rome and Greece, learning from their wisdom and mistakes. See WOOD, *supra* note 46, at 5-8, 50 (discussing the colonists' attempt to decipher the political philosophy of the age through pamphlets, letters, articles, and sermons); see also Donahue, *supra* note 174, at 40 (stating that the use of roman law was "not so odd as it would have been 30 years before or 30 years after. The Founding Fathers were Romanophiles").

279. See HORWITZ, *supra* note 275, at 22-23.

policy. If property rights are to be acquired simply by pursuit without physical possession, he claims, more than one individual could claim to have pursued the property and arguments would arise about who pursued it first. "[P]reserving peace and order in society" requires a rule that will provide "certainty," and thereby avoid "this fertile source of quarrels and litigation."²⁸⁰

Justice Livingston in dissent takes the instrumental trend even further, scornfully rejecting reliance on scholarly authority. He asserted that the dispute "should have been submitted to the arbitration of sportsmen," which would have quickly disposed of it, "interfering with no usage or custom which the experience of ages has sanctioned."²⁸¹ This claim reflects the growing opinion that the common law reflected neither natural law nor the wisdom of the ages; justice, rather, was to be found in the customs of the people.²⁸² Justice Livingston further argues that that no one would put in the investment necessary to catch the fox if "a saucy intruder, who had not shared in the honours or labours of the chase, were permitted to come in at the death, and bear away in triumph the object of pursuit."²⁸³ This line of reasoning is even more in line with the trend of the times. It shows not only an understanding of judges as lawmakers, but also the growing belief that that law should be made so as to facilitate economic development.²⁸⁴

Thus far, the opinions accord well with the American conceit of property law. Both in land and in commerce, the new nation offered ample unpossessed resources for individuals to claim and use. The only question was what rule would be chosen as the means for

280. *Pierson v. Post*, 3 Cai. 175, 179 (N.Y. Sup. Ct. 1805). The very fact that the case made it to the court undermines this argument, suggesting either the lack of awareness or the lack of satisfaction with the rule as being sufficient to preserve the peace. But this argument echoes one made by Blackstone himself as a justification for permanent property by occupancy, BLACKSTONE, *supra* note 29, at *3-4, again suggesting consultation, if not citation of Blackstone.

281. *Pierson*, 3 Cai. at 180 (Livingston, J., dissenting).

282. See HORWITZ, *supra* note 275, at 19-21.

283. *Pierson*, 3 Cai. at 180-81 (Livingston, J., dissenting).

284. That same year, Livingston would exemplify this trend in his opinion in *Palmer v. Mulligan*, 3 Cai. 308 (N.Y. Sup. Ct. 1805). In his concurrence in *Palmer*, Livingston stated that the English common law principle that individuals must use their property so as not to interfere with the prior use by others of their property, must be limited to cases of very serious harm, because otherwise "the public, whose advantage is always to be regarded, would be deprived of the benefit which always attends competition and rivalry." 3 Cai. at 314 (Livingston, J., concurring).

possessing those resources, balancing the advantages of certainty, industry custom, and reward for labor. But look into the biographies of the justices, and we might question the neutrality with which they weighed these factors.

Neither broad political affiliations nor professional status divided the justices. Both Daniel Tompkins and Henry Brockholst Livingston were at the very top of the nation's legal and political elite. Tompkins had graduated first in his class at Columbia, served as a delegate to the state's constitutional convention in 1801, was appointed Associate Justice of the New York Supreme Court in 1804 when he was just 30, served as governor of New York between 1807 and 1817, and as Vice President of the United States from 1817 to 1825.²⁸⁵ Livingston was the son of the Governor of New Jersey, had been elected to the state assembly in 1786, and was appointed to the United States Supreme Court in 1806.²⁸⁶ Both were also leaders of the antifederalist movement that backed Jefferson in his bitter and successful fight for the presidency in 1800.²⁸⁷

But the two came from very different communities. Livingston's family was one of the two largest landholders in the state.²⁸⁸ Under a Royal British patent, the Livingstons owned half of a million acres in upstate New York, which they rented to thousands of tenant farmers in an American version of English manorial society.²⁸⁹ This quasi-feudal structure would not fall apart until the Anti-Rent Wars of the 1840s, but the democratic rhetoric of the American Revolution and economic stress in the wake of the war were already placing stress on the system.²⁹⁰ Tompkins' parents, on the other hand, had been among the tenant farmers occupying one of these great manorial estates.²⁹¹ Although they had moved to Scarsdale before Tompkins' birth,²⁹² this background clearly influenced his politics. As a young man organizing voters for the Tammany party, Tompkins encouraged the poor to pool their resources to buy property so that they could qualify as

285. 21 AMERICAN NATIONAL BIOGRAPHY, *supra* note 257, at 738–39.

286. 13 *id.* at 764–65.

287. *Id.* at 765; 21 *id.* at 738.

288. REEVE HUSTON, LAND AND FREEDOM 15 (2000).

289. *Id.* at 19–20.

290. *Id.* at 5, 33.

291. RAY W. IRWIN, DANIEL D. TOMPKINS: GOVERNOR OF NEW YORK AND VICE PRESIDENT OF THE UNITED STATES 1–2 (1968).

292. *Id.* at 3–4.

freeholders and vote.²⁹³ Two years after *Pierson v. Post* was decided, he was elected governor after running a campaign as a “humble farm boy,” in which he declared, “[t]here’s not a drop of aristocratical or oligarchical blood in my veins.”²⁹⁴

For Livingston, Jesse Pierson’s seizure of the object of the hunt would have invaded the prerogatives of the “gentleman” and violated the norms which the “experience of the ages has sanctioned” by according the reward to one who had not shared in the “honours” of the chase.²⁹⁵ He betrays this aristocratic sensibility by advocating the position of Barbeyrac, who distinguished between one who pursued “with large dogs and hounds,” to whom the fox should be accorded, and one who pursued “with beagles only,” against whom the chance captor would have superior rights.²⁹⁶ Livingston thought that because in this case the fox was pursued by “hounds of imperial stature,” Post should have triumphed.²⁹⁷

Tompkins less clearly betrays class bias in his opinion, unless it is his impatience with the argument that the “uncourteous” nature of Pierson’s behavior is relevant to his legal rights.²⁹⁸ But it is easy to imagine Tompkins seeing Pierson as a “humble farm boy” like himself, braving the displeasure of the local lord by disregarding the norms of the leisure pursuits of the gentleman. The one that actually got the job done, not the one with historical or custom-based claims to priority, should succeed.

Knowledge of the real community conflict within Southampton might have affected or even reversed Tompkins’ and Livingston’s positions on the dispute. While Jesse Pierson was a schoolteacher rather than a manor holder,²⁹⁹ his family had historic claims to the commons similar to those the Livingstons sought to defend against the more recent immigrants who desired the land. Similarly, Nathan and Lodowick Post’s claim was not based on historic patents, but on the rights of those who had invested and succeeded in the same way

293. *Id.* at 44; Junto Society, United States Vice Presidents, <http://www.juntosociety.com/vp/thomkins.html> (last visited Apr. 11, 2006).

294. United States Vice Presidents, *supra* note 293 (internal quotation marks omitted).

295. *Pierson v. Post*, 3 Cai. 175, 180–81 (N.Y. Sup. Ct. 1805) (Livingston, J., dissenting).

296. *Id.* at 182.

297. *Id.*

298. *Id.* at 179.

299. Compare *supra* note 176 and accompanying text (noting that Jesse Pierson was on his way home from teaching at the time of the incident), with 13 AMERICAN NATIONAL BIOGRAPHY, *supra* note 257, at 764–65.

that Tompkins' family had invested their labor in land owned by another and benefited from the mobility of early American society.³⁰⁰

I do not mean to reduce judicial decisionmaking to mere personal politics. Both justices were committed to forging a law that would contribute to the economic development of the new nation, and to an economic philosophy that encouraged quick and sure appropriation and use of the country's resources. For the justices, the community the fox ran through may have been less important than that the fox was caught, skinned, and sold to the highest bidder. But each justice's sense of the propriety of the parties' means of catching it may have been influenced, however unconsciously, by the communities with which each identified.

CONCLUSION: W(H)ITHER *PIERSON V. POST*?

From our vantage point two hundred years later it appears that the Piersons may have won the battle but the Posts have won the war. A world in which Manolo Blahnik stilettos and cashmere wraps are the appropriate attire for a weekend in the Hamptons is closer to the tastes of Nathan and Lodowick Post than those of David and Jesse Pierson. It is true that outside its upscale clubs, the Hamptons retain traces of the Piersons' world. Peter's Pond, where Jesse caught the fox, may even be one such trace. Although it is no longer a public commons ("no trespassing" signs mark the way there), it is only accessible down a dirt and sand road flanked by a cornfield.³⁰¹ But in much of Southampton, the principle of opening property to individual appropriation by all has contributed to a world in which most are excluded from appropriating any property. The average price of a house in the Hamptons was about \$1.3 million in 2005;³⁰² the Shinnecocks fight for a share of land on which to sustain their tribe;³⁰³

300. *Id.*

301. The houses bordering the road are mostly attractive but not opulent, and a couple of them would not look out of place next to a trailer park. These, however, have Mercedes and BMWs parked outside, suggesting that they are in fact high priced rentals for wealthy outsiders willing to stay anywhere to be near the beach.

302. Michael F. Daly, *The State of the Hamptons Real Estate—Spring 2006* (Mar. 27, 2006), <http://www.hamptonsview.com/detail.ihtml?id=771&apid=1415&sid=26&cid=31&hm=0&iv=0>.

303. See *New York v. Shinnecock Indian Nation*, 400 F. Supp. 2d 486, 488 (E.D.N.Y. 2005) (describing a conflict between the state and the tribe regarding the status of land owned by the tribe).

and Latin American immigrants live dozens to a house for the privilege of waiting on street corners for work.³⁰⁴

None of this was decided by who got the fox. As I have suggested, the legal and rhetorical stress on limitless individual acquisition of property owes much to the American ideals of democracy and equality. The claims of both the Piersons and the Posts to the fox were rooted in assertions of equal opportunity, whether those claims are understood as the court did or understood in the context of the community struggle that animated the dispute. And proprietors like the Piersons were no better at preserving common rights to land than the nonproprietors, using their ownership rights to push the Shinnecocks off all but a tiny corner of their land and sell the remaining common lands to the highest bidder. Both sides in the case actively pursued a conception of property law in which individual ownership is all, and common shared resources are but a transitional stage.

The fight over the fox, as imagined and resolved by the nineteenth century judges and the twentieth century law students that debate their opinions, has been part of this dominant conception of property law. In the myth of *Pierson*, we have the fictional world of nonownership, in which all that remains is the philosophical question of how that nonownership becomes individual ownership. In the untold history of *Pierson* we have many layers of communities claiming ownership. In that world, the questions become which group can decide how the property is to be used, and which community will survive. These questions lie close beneath the surface of many disputes phrased as ones of individual ownership.³⁰⁵ Property scholars,

304. See Robert D. McFadden, *At Rally, Suffolk Residents Protest Illegal Immigration*, N.Y. TIMES, Oct. 15, 2000, § 1, at 42 (discussing the local animosity toward the immigrant population).

305. This is particularly clear in disputes regarding Native American property rights. See, e.g., *Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2004) (involving conflict between a tribe trying to reclaim historic reservation and a non-Indian municipality seeking to collect tax revenue); *Lyng v. Nw. Indian Cemetery Protective Assoc.*, 485 U.S. 439 (1988) (holding that the United States could build a road and harvest the timber on land central to the religious ceremonies of three tribes); *United States ex rel. Zuni Tribe v. Platt*, 730 F. Supp. 318 (D.N.M. 1990) (granting the Zuni tribe a prescriptive easement for religious pilgrimage over a non-Indian's land). With slight prodding, many other cases can be conceptualized in this manner. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (involving developers versus South Carolina coastal dwellers); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987) (involving beachfront property owners versus the beach-going public); *Elliff v. Texon Oil Corp.*, 210 S.W.2d 558 (Tex. 1948) (involving the ranching community versus oil developers); *Acton v. Blundell*, 152 Eng. Rep. 1223 (Exch. 1843) (involving established mill owners versus enterprising coal miners). And

moreover, increasingly recognize the importance of time, community, and shared rights in property disputes.³⁰⁶ The property casebooks reflect this shift as well, displacing *Pierson* in favor of cases about the conflict between migrant itinerant farm workers and farm owners, and disputes regarding American Indian property and sovereignty rights.³⁰⁷

Should *Pierson*, then, be excluded from the pedagogical pantheon? I would hate to see it happen. Where else can you find a justice writing “*de mortuis nil nisi bonum*,” (speak no ill of the dead) of a fox,³⁰⁸ or, more seriously, find a case that presents so succinctly the opposing arguments one can make in justifying rules for the acquisition of property?³⁰⁹

More important, the case has not captured the legal imagination for so long because of some kind of conspiracy of legal scholars, but rather because it ties so well into a particular intuitive sense of property we have in the United States. The dominant rhetoric of property is that the important question is which individual owns the property, and that this ownership decides all future questions.³¹⁰ The flawed presentation and reception of *Pierson v. Post* is simply a product, not the cause, and excising the case will not alter the perceptions that produced it. The point then is not to ignore that intuitive sense of property, but to recognize and grapple with it.

Pierson v. Post, supplemented by its history, can aid in this process by helping future lawyers perceive both the common understanding of property rules and its limitations. Complemented by its history, this is what *Pierson* teaches. First, there rarely is property without ownership claims, be it Locke's America, or *Pierson's* “unpossessed and waste land.” Rather, each resource is almost always subject to overlapping claims, whether those claims are based on

of course the recent case of *Kelo v. City of New London*, 125 S. Ct. 2655 (2005), places the question of whether the interests of the established and functioning Fort Trumbull community could be demolished for the sake of the larger, but depressed, New London community.

306. See *supra* note 19 and accompanying text.

307. See *supra* note 23.

308. *Pierson v. Post*, 3 Cai. 175, 180 (N.Y. Sup. Ct. 1805) (Livingston, J., dissenting).

309. For an excellent summary of the competing theories one could argue in claiming the fox, see Jeremy Paul, *The Politics of Legal Semiotics*, 69 TEX. L. REV. 1779, 1795–96 (1991).

310. See, e.g., Williams, *supra* note 19, at 283 (“Most people, including most specialists in their unprofessional moments, conceive of property as things that are owned by persons. To own property is to have exclusive control of something—to be able to use it as one wishes, to sell it, give it away, leave it idle, or destroy it.”).

time, labor, purchase, or residence. Second, these claims are often as much claims of communities as they are of individuals. They are contests over the right to define the communal way of life, not simply absolute control over a thing. Their resolution thus decides not only which individual can claim property, but also which community will be chosen, and what it will mean. Ultimately, the story of *Pierson v. Post* helps to reveal the mesh through which other property disputes are filtered and misrepresented, the shared patterns of omission created by our intuitive but incomplete understanding of property. Understanding this is an important step in creating a new lens—one that is better equipped to serve our common interests.
